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Professional Trade Names: Unprotected Commercial Speech: *Friedman v. Rogers*, 440 U.S. 1 (1979)

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Professional Trade Names: Unprotected Commercial Speech

Friedman v. Rogers, 440 U.S. 1 (1979).

I. INTRODUCTION

The first amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press."¹ This mandate applies with equal force to the states through operation of the fourteenth amendment.² Although this regulatory restriction appears on its face to be an absolute prohibition, the Supreme Court has always considered some regulation of speech necessary and desirable.³ For instance, speech is not protected when it consists of fighting words,⁴ or when it is obscene,⁵ libelous,⁶ or part of the commission of an illegal act.⁷ Commercial speech, or speech that does "no more than propose a commercial transaction,"⁸ was also considered unprotected at one time,⁹ but recent Supreme Court decisions indicate a change in attitude, reinforcing the opinion that some first amendment protections extend to the "free flow of commercial information."¹⁰

In *Friedman v. Rogers*,¹¹ the Supreme Court was again presented with an opportunity to address the issue of commercial

1. U.S. CONST. amend. I.

2. *E.g.*, *Bigelow v. Virginia*, 421 U.S. 809, 811 (1975); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

3. *Konigsberg v. State Bar*, 366 U.S. 36, 49-50 (1961); Hunter, *Prescription Drugs and Open Housing: More on Commercial Speech*, 25 EMORY L.J. 815, 818 (1976).

4. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

5. *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

6. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

7. *Schenck v. United States*, 249 U.S. 47 (1919).

8. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

9. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

10. *Bates v. State Bar*, 433 U.S. 350, 364 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

11. 440 U.S. 1 (1979).

speech. A Texas statute prohibiting optometrists from practicing under trade names¹² was challenged as an unconstitutional abridgment of the freedom of speech. Employing a first amendment analysis focusing on the elements of commercial speech, the Court upheld the restriction on trade name¹³ usage, finding that the Texas statute was a constitutionally permissible state regulation in furtherance of protecting the public from possible deceptive and misleading trade practices.¹⁴ This note will address the first

12. The statute under scrutiny by the Court, a portion of the Texas Optometry Act of 1969, provides that "[n]o optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas" TEX. REV. CIV. STAT. ANN. art. 4552 § 5.13(d) (Vernon 1976).

Twenty-two other states have codified similar restriction on the practice of optometry. ALA. CODE § 22-23(11) (1977); ARIZ. REV. STAT. ANN. § 32-1755 (1976); HAWAII REV. STAT. § 459-9(9) (1976); IDAHO CODE § 54-1510(2) (1979); ILL. ANN. STAT. ch. 111, § 3814(f) (Smith-Hurd Supp. 1979); IOWA CODE ANN. § 154.4 (West 1972); KAN. STAT. ANN. § 65-1510(a) (Supp. 1979); KY. REV. STAT. ANN. § 320.300(5) (Baldwin 1977); MASS. GEN. LAWS ANN. ch. 112, § 72 (West 1971); MO. ANN. STAT. § 336.110(6) (Vernon Supp. 1979); MONT. REV. CODES ANN. § 66-1302(f) (Supp. 1977); NEV. REV. STAT. § 636.350 (1975); N.M. STAT. ANN. § 67-1-11(D) (1974); N.C. GEN. STAT. § 90-125 (1975); OKLA. STAT. ANN. tit. 59, § 585(e) (West Supp. 1979-80); OR. REV. STAT. § 683.180(5) (1977); TENN. CODE ANN. § 63-822(f) (Supp. 1979); UTAH CODE ANN. § 58-16-14(6) (1974); VT. STAT. ANN. tit. 26, § 1695(a) (1975); VA. CODE § 54-388(A)(2)(g) (Supp. 1979); WASH. REV. CODE ANN. § 18.53.140(5) (1978); W. VA. CODE § 30-8-8 (1976). See also CAL. BUS. & PROF. CODE § 3125 (West Supp. 1979); DEL. CODE ANN. tit. 24 § 2113(a)(7)(f) (Supp. 1978); N.J. STAT. ANN. § 45: 12-11(i)(2) (West 1978). The State of Nebraska places no such restrictions on the practice of optometry. NEB. REV. STAT. §§ 71-1,133 to -1,136.08 (Reissue 1976 & Cum. Supp. 1979).

13. A trade name is any designation which
- (a) is adopted and used by a person to denominate goods which he markets or services which he renders or a business which he conducts, or has come to be so used by others, and
 - (b) through its association with such goods, services or business, has acquired a special significance as the name thereof, and
 - (c) the use of which for the purpose stated in Clause (a) is prohibited neither by a legislative enactment nor by an otherwise defined public policy.

RESTATEMENT OF TORTS § 716 (1938). This definition has been adopted, at least in part, by several courts. See, e.g., *In re Oldtowne Legal Clinic, P.A.*, 285 Md. 132, —, 400 A.2d 1111, 1114 (1979); *Walters v. Building Maintenance Serv., Inc.*, 291 S.W.2d 377, 382 (Tex. Civ. App. 1956).

A trade name should not be confused with a trademark. Generally, the following distinction has been made: "A 'trade-name' relates to the business and its good will as contrasted with a 'trademark' which attaches to a vendible commodity or service as a guaranty of quality." *Balesteri v. Holler*, 87 Cal. App. 3d 717, 721, 151 Cal. Rptr. 229, 232 (1978). *Accord*, *American Steel Foundries v. Robertson*, 269 U.S. 372, 380 (1926).

14. The Court also unanimously upheld another section of the Texas statutes under an equal protection analysis. That section provides that "[a]t all times there shall be a minimum of two thirds of the [Texas Optometry] [B]oard

amendment issues raised in *Friedman*, trace the development of commercial speech protection and examine the justifications offered by the Court for its holding that optometrical trade names are unprotected commercial speech.

II. THE FACTS

The dispute in *Friedman* grew out of a difference of opinion between "professional" and "commercial" optometrists.¹⁵ In Texas, as throughout much of the nation, those who refer to themselves as "professional" optometrists oppose the use of any advertising or promotional practices in optometry. "Commercial" optometrists, on the other hand, favor a more businesslike approach to the practice of optometry and advocate the use of trade names, advertising and similar practice. The Texas Optometry Act,¹⁶ enacted in 1969, was a legislative effort to resolve the controversy between these conflicting viewpoints.¹⁷ A six-member Texas Optometry Board

who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association." TEX. REV. CIV. STAT. ANN. art. 4552 § 2.02 (Vernon 1976). The code of ethics of the American Optometric Association and its Texas affiliate, the Texas Optometric Association, prohibits the use of trade names by their members. "Commercial optometrists," or optometrists who employ commercial practices including the use of trade names, are ineligible for membership in these "professional" optometric organizations, and are therefore precluded by section 2.02 from obtaining four of the six positions on the Texas Optometry Board.

The basis of the commercial optometrists' claim was that section 2.02 deprived them of equal protection because they were regulated by a board controlled by a faction of the profession to which they did not belong. The Court rejected this argument, holding that since section 2.02 is "related reasonably to the State's legitimate purpose of securing a Board that will administer the [Texas Optometry] Act faithfully," 440 U.S. at 17, it does not violate the equal protection rights of commercial optometrists.

15. Optometrists are licensed practitioners who specialize in problems of human vision. They perform eye examinations and are able to prescribe and adapt lenses or or [*sic*] other optical aids to preserve or restore maximum visual efficiency. They are trained to detect eye diseases, but are not permitted to make definite diagnoses, perform surgery or prescribe drugs.

43 Fed. Reg. 23,992 to 23,993 (1978) (footnote omitted).

The differences between optometrists, ophthalmologists and opticians have often caused confusion. The Supreme Court, in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 486 (1955), distinguished them in the following manner:

An ophthalmologist is a duly licensed physician who specializes in the care of the eyes. An optometrist examines eyes for refractive error, recognizes (but does not treat) diseases of the eye, and fills prescriptions for eyeglasses. The optician is an artisan qualified to grind lenses, fill prescriptions, and fit frames.

16. TEX. REV. CIV. STAT. ANN. art. 4552 §§ 1.01-6.04 (Vernon 1976).

17. No matter which of these business methods an optometrist chooses to adopt,

was created to administer the Act.¹⁸ The Act prescribes the qualifications and responsibilities for Board members and imposes numerous regulations on the practice and business aspects of optometry in Texas.¹⁹

Friedman addressed the first amendment issues arising from Texas' prohibition of the use of trade names in the practice of optometry.²⁰ Dr. N. Jay Rogers, an advocate of the commercial practice of optometry and a member of the Texas Optometry Board,²¹ was a leading spokesman for the over 100 commercial optometry offices in Texas. Offices affiliated with Rogers' organization operated under the trade name "Texas State Optical," or "TSO."²² Rogers owned some Texas State Optical offices; in others he was merely a partner. Furthermore, in other offices he had no financial interest other than licensing the Texas State Optical trade name and selling optical supplies and services to the associated optometrist.²³ In 1975, he commenced an action against the other five members of the Board seeking relief against restrictions on the use of a trade name under section 5.13(d) of the Act.²⁴

The district court used two closely related arguments to justify the inclusion of trade names within the protection of the first amendment.²⁵ First, the court held that because a trade name calls public attention to a product or service, it is "advertising," and

the standards for licensing and practice in Texas are uniformly high. *See id.* §§ 3.02, .05, 4.01B.

18. *Id.* § 2.01.

19. *Id.* §§ 2.02, 4.04, 5.01, .04, .06, 5.09 to .16.

20. *Id.* § 5.13(d). Prior to the enactment of the Texas Optometry Act, a prohibition against the use of trade names had been adopted by the Texas State Board of Examiners in Optometry in 1959, as part of that Board's "Professional Responsibility Rule." With only minor changes, this Professional Responsibility Rule was incorporated into the 1969 Texas Optometry Act as section 5.13(a)-(k). The stated purpose of section 5.13(a)-(k) is "to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship." TEX. REV. CIV. STAT. ANN. art. 4552 § 5.13(a) (Vernon 1976).

21. Rogers had been a licensed optometrist in Texas since 1939 and a member of the Texas Optometry Board since 1955. Brief for Appellee at 5, *Friedman v. Rogers*, 440 U.S. 1 (1979).

22. A grandfather provision in the Texas Optometry Act permitted the temporary use of trade names by some offices after 1969. TEX. REV. CIV. STAT. ANN. art. 4552 § 5.13(k) (Vernon 1976).

23. 440 U.S. at 21 n.2 (Blackmun, J., dissenting). Although Rogers may not have been in financial control of an office, the use of the Texas State Optical trade name was conditioned by a contract which specified that the office would be operated in accord with Texas State Optical policy and all optical materials would be purchased from the Rogers Brothers Laboratory. *See* Record at 71, *Friedman v. Rogers*, 440 U.S. 1 (1979) (McGuire contract).

24. *See* note 12 *supra*.

25. *Rogers v. Friedman*, 438 F. Supp. 428 (E.D. Tex. 1977).

comes within the rationale which gives advertising by professionals first amendment protection. Second, the court stated that even if a trade name is not considered advertising per se, a first amendment right exists to use such a name as part of the consuming public's right to valuable information. Relying almost exclusively on the rationale of the Supreme Court's recent advertising cases,²⁶ the district court then applied a first amendment balancing of interests and held that the state's "blanket suppression of the use of trade names results in unwarranted restriction of the free flow of commercial information and therefore represents an unconstitutional violation of the first amendment."²⁷ The Supreme Court granted certiorari and reversed.

The Supreme Court differed fundamentally from the district court's view that a trade name is not deceptive in nature. The Court believed that because the associations of a trade name with the price and quality of the services and products it represents were ill-defined, a significant possibility existed that trade names could be used to mislead the public. Therefore, section 5.13(d) was upheld as a constitutionally permissible state regulation of deceptive and misleading commercial speech.

III. COMMERCIAL SPEECH AND THE SUPREME COURT²⁸

Until recently, it had been widely accepted that commercial

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

27. 438 F. Supp. at 431 (footnote omitted). The court noted, with a general reference to *Bates*, that it was specifically rejecting the contention that the Texas State Optical name misleads the public as to who is the responsible optometrist.

The district court also addressed the constitutionality of other sections of the Texas Optometry Act. Section 5.09(a), prohibiting price advertising of ophthalmic services and products by optometrists, was held violative of the first amendment in light of the recent Supreme Court advertising decisions. Section 5.15(e), regulating the referral of patients by optometrists to opticians, was upheld since its effect was found to encourage the free flow of commercial speech to consumers. Section 2.02, requiring that two-thirds of the Texas Optometry Board be members of a state optometric association affiliated with the American Optometric Association, was upheld as a local economic regulation rationally related to a legitimate state interest. The decision respecting section 2.02 was appealed and affirmed. See note 14 *supra*.

28. While a brief discussion of several of the Supreme Court's commercial speech cases serves as a background for a study of the *Friedman* decision, a comprehensive analysis of the commercial speech doctrine is beyond the scope of this note. The doctrine has been the subject of much criticism elsewhere. See, e.g., Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979); Gardner, *Free Speech in Public Places*, 36 B.U. L. REV. 239 (1956); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV.

speech, misleading or otherwise, was outside the scope of first amendment protection.²⁹ This notion, known as the "commercial speech doctrine," is attributable to the Supreme Court opinion in *Valentine v. Chrestensen*,³⁰ a 1942 case. Chrestensen, who had printed a handbill with a commercial advertisement on one side and a political protest on the other, was restrained from handing it out because New York City prohibited distribution of commercial handbills on public streets. The Supreme Court unanimously upheld the regulation,³¹ stating that although the states cannot unduly burden communication of information or opinion in the streets, "the Constitution imposes no such restraint on government as respects purely commercial advertising."³² The Court gave no reason for the decision except that when commercial speech is involved, regulation is for legislative, not judicial determination.³³ Despite its failure to provide a clear definition of "purely commercial advertising," or to supply either rationale or authority to support its decision, the Court did imply that commercial advertising, *i.e.*, commercial speech, does not communicate information or ideas that the first amendment protects.

Supreme Court decisions after *Chrestensen* show that the principle is not an inflexible doctrine, but a distinction allowing greater regulation of commercial speech. Courts made every effort to avoid categorizing speech as purely commercial. For instance, in *New York Times Co. v. Sullivan*,³⁴ the Supreme Court determined

429 (1971); Roberts, *Toward a General Theory of Commercial Speech and the First Amendment*, 40 OHIO ST. L.J. 115 (1979); Comment, *The New Commercial Speech Doctrine and Broadcast Advertising*, 14 HARV. C.R.-C.L. L. REV. 385 (1979); Note, *The Commercial Speech Doctrine: The First Amendment at a Discount*, 41 BROOKLYN L. REV. 60 (1974).

29. See, e.g., *Breard v. City of Alexandria*, 341 U.S. 622 (1951); *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972); *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027 (1967).

30. 316 U.S. 52 (1942). For a discussion of the Court's treatment of commercial speech prior to *Chrestensen*, see Bayus, *The Constitutional Status of Commercial Expression*, 3 HASTINGS CONST. L.Q. 761, 765-68 (1976); Gardner, *supra* note 28, at 241-47.

31. The New York City ordinance held valid in *Chrestensen* was later found to be an unconstitutional violation of the first amendment as an unreasonable regulation of protected commercial speech in *People v. Remeny*, 40 N.Y.2d 527, 355 N.E.2d 375, 387 N.Y.S.2d 415 (1976) (decided after *Virginia Bd. of Pharmacy*).

32. 316 U.S. at 54.

33. One member of the *Chrestensen* Court, Mr. Justice Douglas, later commented that the "ruling was casual, almost offhand. And it has not survived reflection." *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas J., concurring). The decision has also been described as "one of those curious judicial judgments which so often illustrate the psychology which accompanies war." Gardner, *supra* note 28, at 239 (footnote omitted).

34. 376 U.S. 254, 265-66 (1964).

that speech is not rendered commercial merely because it relates to an advertisement. In fact, since 1951,³⁵ the Court has never denied first amendment protection on the ground that the expression involved was purely commercial speech.³⁶

The simplistic approach of *Chrestensen* was also avoided by the Court in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.³⁷ In a five-four decision, the Court upheld an ordinance prohibiting newspapers from listing employment advertisements in columns according to whether male or female applicants were sought. Though describing the advertisements as "classic examples of commercial speech,"³⁸ the Court found that the restriction imposed was permissible because the proposed discriminatory hirings were themselves illegal. The Court suggested that regulation of the advertising of legitimate commercial activity should be assessed by balancing "[a]ny First Amendment interests which might be served by advertising an ordinary commercial proposal" against "the governmental interest supporting the regulation."³⁹ Although this suggested analysis is dictum, it clearly rejects the view that all commercial speech is per se unprotected.

Two years after *Pittsburgh Press*, the Court again considered the constitutional status of commercial speech, and moved even further away from the distinction made in *Chrestensen*. *Bigelow v. Virginia*⁴⁰ held that a Virginia statute prohibiting the publication or circulation of abortion advertisements was unconstitutional as applied to a publisher who had advertised the availability of legal abortions in another state. The advertisement was protected because it "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest'."⁴¹ The protection to be afforded misleading or deceptive commercial speech was not discussed in *Bigelow*, but the Court noted that even if the advertisement had been claimed to be deceptive or fraudulent,

35. *Breard v. City of Alexandria*, 341 U.S. 622 (1951) (ordinance banning door-to-door solicitation for purposes of sales upheld as applied to solicitors of magazine subscriptions).

36. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 759.

37. 413 U.S. 376 (1973).

38. *Id.* at 385.

39. *Id.* at 389.

40. 421 U.S. 809 (1975).

41. *Id.* at 822. In dictum, the *Bigelow* Court narrowly limited the *Chrestensen* approach of resolving first amendment claims merely by categorizing the speech as commercial: "Regardless of the particular label asserted by the State . . . 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." *Id.* at 826.

such a contention would have been unsupported by the record.⁴²

Many commentators consider the Court's opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*⁴³ to have completed the demise of the commercial speech exception from first amendment protection.⁴⁴ In this 1976 case, the Court invalidated a Virginia statute which prohibited the advertisement of prescription drug prices. After recognizing that "[p]urely factual matter of public interest may claim [first amendment] protection,"⁴⁵ the Court focused on the individual consumer's interest in the free flow of commercial information and noted this "interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."⁴⁶ The Court then observed that "society also may have a strong interest in the free flow of commercial information,"⁴⁷ and "[e]ven an individual advertisement, though entirely 'commercial,' may be of general public interest."⁴⁸

The Court, applying a first amendment balancing approach, weighed these individual and societal interests against the proffered justifications for the advertising ban⁴⁹ and determined that the commercial speech in this case was not "wholly outside the protection of the First Amendment."⁵⁰ The Court's opinion indicates that purely commercial speech can no longer be summarily dismissed as undeserving of first amendment protection; it is entitled to the same balancing approach as noncommercial speech.

The decision in *Virginia Board of Pharmacy*, however, was not without caveats. The Court noted that certain "commonsense dif-

42. *Id.* at 828.

43. 425 U.S. 748 (1976).

44. See, e.g., Comment, *Commercial Speech and the Limits of Legal Advertising*, 58 OR. L. REV. 193, 193 (1979); Note, *A Step Forward for the Consumer: A Constitutional Right-to-Know in Prescription Drug Price Advertising*, 13 URB. L. ANN. 179, 185 & n.37 (1977); Note, *The Demise of the Commercial Speech Doctrine and the Regulation of Professional's Advertising: The Virginia Pharmacy Case*, 34 WASH. & LEE L. REV. 245, 245 (1977); 8 SETON HALL L. REV. 67, 88 (1976); 9 TEX. TECH. L. REV. 295, 306 (1977-78). See also *People v. Remeny*, *supra* note 31.

45. 425 U.S. at 762.

46. *Id.* at 763.

47. *Id.* at 764.

48. *Id.*

49. The justifications offered for upholding the advertising ban were based principally on the necessity of maintaining a high degree of professionalism on the part of licensed pharmacists. *Id.* at 766-69.

50. *Id.* at 761. The Court felt that to uphold the advertising restriction would be a "highly paternalistic approach," *id.* at 770, not in the best interests of the individual or society. "[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them." *Id.*

ferences"⁵¹ between commercial and other varieties of speech might suggest that a different degree of protection be accorded commercial speech. Because commercial speech is the *sine qua non* of commercial profits, and therefore extremely durable, and because it is also particularly susceptible to verification by its disseminator, it may be less necessary to tolerate inaccurate statements for fear of silencing the speaker.⁵² Furthermore, it may be appropriate to require additional messages, warnings or disclaimers so as to prevent deception.⁵³ The Court also cautioned that only truthful commercial speech is protected; a state is free to suppress false and misleading advertisements.⁵⁴ Finally, the Court warned that it had considered only product advertising and that the advertising of professional services might require special consideration.⁵⁵

Bates v. State Bar,⁵⁶ decided only one year after *Virginia Board of Pharmacy*, quickly brought the distinctions between professional services and product advertising squarely before the Court. In *Bates*, the Court held that a ban on newspaper advertisements containing information about the availability and costs of routine legal services violated the first amendment guarantee of free speech.⁵⁷ The Court rejected the contention that the advertising of attorneys' services was inherently misleading,⁵⁸ and specifically

51. *Id.* at 771 n.24.

52. *Id.*

53. *Id.*

54. *Id.* at 771-72. The Court stated:

Untruthful speech, commercial or otherwise, has never been protected for its own sake. . . . Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

Id. (citations omitted) (footnote omitted). In a separate opinion, Mr. Justice Stewart further emphasized that the first amendment does not protect false or deceptive commercial speech. *Id.* at 777-81 (Stewart, J., concurring). For a violent disagreement with the Court's position, see Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 39-40 (1979).

The Court also noted that ordinances which suppress advertisements proposing illegal activities, and reasonable restrictions on time, place and manner of speech which were enacted without regard to advertising content would be constitutional. 425 U.S. at 771-73.

55. 425 U.S. at 773 n.25. *Accord, id.* at 773-75 (Burger, C.J., concurring).

56. 433 U.S. 350 (1977).

57. *Id.* at 384.

58. *Id.* at 372-75. The Arizona State Bar offered three reasons for this contention. First, Arizona argued that legal services are not sufficiently standardized to allow informed comparison. The Court acknowledged that many legal services are unique in nature, but added that "it is doubtful that any attorney

stated that it was not addressing advertising claims relating to the *quality* of such services.⁵⁹ While again holding that commercial speech, which "serves individual and societal interests in assuring informed and reliable decision-making,"⁶⁰ is entitled to some first amendment protection, the Court also repeated the same caveats to its holding on commercial speech that it stated in *Virginia Board of Pharmacy*.⁶¹ Regarding advertising that is claimed to be deceptive or misleading, the Court recognized that "many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved."⁶² These hazy boundary lines were drawn into focus by the Court's opinion in *Friedman*, where the issues of deceptive commercial speech were directly before the Court.

IV. THE *FRIEDMAN* DECISION

The Court had little trouble categorizing the use of trade names in optometry as a form of commercial speech,⁶³ though the Court

would or could advertise fixed prices for services of that type." *Id.* at 372 (footnote omitted). In the Court's opinion, only routine legal services, such as those advertised by Bates, would lend themselves readily to advertising, and such advertisements would not be misleading as long as the necessary work is done at the advertised price. *Id.* at 372-73. Second, Arizona argued that attorney advertisements would be misleading because clients would not know in advance just what services they required. The Court rejected this contention by stating that the client would at least be able to "identify the service he [desired] at the level of generality to which advertising lends itself." *Id.* at 374. Third, Arizona argued that advertising would mislead the public by focusing on factors other than ability. The Court admitted that this contention had some merit, but it concluded that the public should not be denied available information merely because that information is incomplete. *Id.* at 374-75. The Court also relied on *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 769-70, for the proposition that the Court should "view as dubious any justification that is based on the benefits of public ignorance." 433 U.S. at 375 (1977).

59. *Id.* at 383-84.

60. *Id.* at 364.

61. *Id.* at 383-84. See notes 51-55 & accompanying text *supra*. Since *Bates*, the Court has continued to stress the notion that there are "commonsense differences" between commercial speech and other forms of speech by observing that commercial speech occupies a "subordinate position in the scale of First Amendment values." *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (lawyer's freedom of speech not violated by state bar disciplinary action resulting from his in-person solicitation of clients). This statement apparently applies even to truthful commercial speech.

62. 433 U.S. at 384.

63. 440 U.S. at 11. The Court noted that the use of a trade name should be distinguished from the free discussion of governmental affairs and speech that does more than simply propose a commercial transaction: "Such speech is categorically different from the mere solicitation of patronage implicit in a trade name." *Id.* at 11-12 n.10.

did determine that the district court's reliance on *Bates* and *Virginia Board of Pharmacy* was misplaced⁶⁴ since trade names are a significantly different form of commercial speech than the speech considered in those cases.⁶⁵ The difference, the Court explained, was that trade names are a form of commercial speech possessing "no intrinsic meaning."⁶⁶ The Court supported this finding with the following assertions:

A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public.⁶⁷

Stating that the possibilities for deception of the public were numerous, the Court offered three examples:

[1] The trade name of an optometrical practice can remain unchanged despite changes in the staff of optometrists upon whose skill and care the public depends when it patronizes the practice. Thus, the public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice. [2] A trade name frees an optometrist from dependence on his personal reputation to attract clients, and even allows him to assume a new trade name if negligence or misconduct casts a shadow over the old one. [3] By using different trade names at shops under his common ownership, an optometrist can give the public the false impression of competition among the shops.⁶⁸

The Court also observed that a state may rationally wish to discourage large-scale commercial practices in optometry while not prohibiting the practice of commercial optometry altogether. A trade name ban seeks to advance this state interest by hampering the ease with which such establishments advertise.⁶⁹

The above-mentioned deceptive and misleading trade name practices were not based on speculation, said the Court, but on actual experiences with which the Texas legislature was familiar when it enacted section 5.13(d).⁷⁰ The Court then referred to the facts and opinion of a 1967 Texas Supreme Court decision, *Texas*

64. *Id.* at 8. Reviewing its decisions in *Virginia Bd. of Pharmacy* and *Bates*, the Court reiterated the individual and societal interests in the free flow of truthful commercial information. *Id.* at 8-9. The Court then emphasized that in those decisions it had specified certain permissible regulations on such speech, including restrictions on deceptive and misleading commercial speech. *Id.* at 9.

65. *Id.* at 12.

66. *Id.* The Court indicated that the protected commercial speech in *Virginia Board of Pharmacy* and *Bates* was "self-contained and self-explanatory." *Id.*

67. *Id.* at 12-13 (footnote omitted).

68. *Id.* at 13.

69. *Id.*

70. *Id.*

State Board of Examiners in Optometry v. Carp,⁷¹ as dispositive of the fact that optometrical trade names previously had been used to deceive and mislead the public in Texas.⁷² The Court believed that even if Rogers' use of his trade name was not in fact misleading to the public, it was an example of the use of a trade name to facilitate the large-scale commercialization which enhances the opportunity for misleading practices.⁷³

The Court concluded that the state's interest in protecting the public from the deceptive and misleading use of optometrical trade names was "substantial and well-demonstrated."⁷⁴ In holding that section 5.13(d) was a "constitutionally permissible state regulation in furtherance of [that] interest,"⁷⁵ the Court emphasized that its holding had "only the most incidental effect on the content of the commercial speech of Texas optometrists,"⁷⁶ and that rather than stifling commercial speech, section 5.13(d) ensures that commercial information concerning optometrical services will "appear in such a form . . . as [is] necessary to prevent its being deceptive."⁷⁷

71. 412 S.W.2d 307 (Tex.), *appeal dismissed and cert. denied*, 389 U.S. 52 (1967). Carp, a commercial optometrist, operated 71 optometry offices in Texas under at least 10 different trade names. From time to time, the trade name at a particular office was changed, although the licensed optometrists employed in that office remained the same. Carp purchased the practices of other optometrists and continued to operate these practices under their names, even though they were no longer associated with the respective offices in any manner. In several instances, different trade names were used on offices in close proximity to one another which dispensed identical optical goods and services. These offices were under a common supervisor and had a common staff of optometrists, but the use of different trade names facilitated advertising that gave the impression of competition among the offices. In light of this evidence, the Texas Supreme Court found that Carp had used trade names to give a misleading impression of competitive ownership and management of his shops. *Id.* at 311-13.

The district court in *Rogers v. Friedman* distinguished *Carp* on three grounds: (1) it did not deal with a constitutional question, (2) the trade names in *Carp* were different in nature, and (3) *Carp* was decided prior to *Virginia Bd. of Pharmacy* and *Bates*. 438 F. Supp. at 430.

72. 440 U.S. at 14.

73. *Id.* at 15.

74. *Id.* (footnote omitted).

75. *Id.*

76. *Id.* at 16. Since the factual information associated with a trade name may be freely advertised by Texas optometrists, *see* note 27 *supra*, the Court reasoned that the trade name ban would not greatly hinder the practice of commercial optometry. 440 U.S. at 16.

77. *Id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771 n.24) (bracketed portion added by the Court).

V. ANALYSIS

A. The Underlying Assumptions

The *Friedman* decision actually breaks little new first amendment ground. The Supreme Court merely followed and applied its previously formulated model for commercial speech⁷⁸ by filling in the gaps left by prior cases. As with the other commercial speech cases decided by the Court, *Friedman* should be read as a rather narrow decision.⁷⁹ Justice Powell recognized this fact in a footnote to the opinion, referring to commercial speech as a "yet uncharted area."⁸⁰

The Court's decision was reached in a fairly straightforward manner. It first recognized that commercial speech is entitled to some measure of first amendment protection⁸¹ and then deter-

78. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 770-73. *Accord*, Comment, *supra* note 28, at 390 n.31.

79. *Accord*, Farber, *supra* note 28, at 399.

80. 440 U.S. at 10-11 n.9. Justice Powell also stated: "When dealing with restrictions on commercial speech we frame our decisions narrowly." *Id.*

81. The exact extent to which commercial speech is protected by the first amendment is uncertain since the concept of "freedom of commercial speech" is just now emerging. The Court has stated that because of the peculiar hardness of commercial speech, regulations to insure truthfulness, to prevent deception and to better inform the public will be permitted. The Court spoke on the hardy nature of commercial speech in *Virginia Bd. of Pharmacy*, where it said:

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

425 U.S. at 771 n.24. This rationale was also approved in *Bates*, 433 U.S. at 383, and *Friedman*, 440 U.S. at 10.

Another reason for the lower level of protection afforded commercial speech was suggested by the Court in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). The Court stated:

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [first] Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devaluation, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Id. at 456.

There is general disagreement as to whether commercial speech deserves the protection of the first amendment. Some commentators advocate full or increased protection for commercial speech, Gardner, *supra* note 28, at 250;

mined that the use of trade names in connection with the practice of optometry is a form of such speech. In determining the amount of first amendment protection to be extended in *Friedman*, the key finding was that trade names, as a form of commercial speech, may be misleading.⁸² Once that finding was made, the Court merely cited its ruling in *Virginia Board of Pharmacy* that misleading, false or deceptive commercial speech may be regulated by the state,⁸³ noted that the state's interest in protecting the public from deceptive and misleading optometrical trade names was substantial and well-demonstrated, and upheld the constitutionality of section 5.13(d). The Court stopped short of applying a first amendment balancing of interests, since it believed that the misleading nature of trade names removed them from the ambit of first amendment protection. The dissent, noting that the Court has not yet determined the degree of scrutiny required in such cases, was highly critical of the Court for not balancing interests in *Friedman*.⁸⁴

The Court admitted that commercial speech is not entitled to the full measure of first amendment protection.⁸⁵ Indeed, there appears to exist a presumption that once speech is recognized as commercial, the "commonsense differences" between such speech and fully protected speech justifies a variety of differences in treatment.⁸⁶ This subtle "presumption" is the fundamental error in the Court's recently adopted approach to commercial speech. As a matter of constitutional law, the underlying presumption should be that the *highest* standard ought to apply. At the outset of any

Note, *Yes, FTC, There is a Virginia: The Impact of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. on the Federal Trade Commission's Regulation of Misleading Advertising*, 57 B.U. L. REV. 833, 862 (1977); while others would afford such speech no protection at all, Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 352-55 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27-28 (1971).

82. 440 U.S. at 12-15.

83. *Id.* at 16.

84. *Id.* at 20. The dissent was written by Mr. Justice Blackmun (who authored the *Virginia Board of Pharmacy* and *Bates* decisions), with whom Mr. Justice Marshall joined. In Blackmun's opinion, the justifications offered by the majority did not support a statute so sweeping as section 5.13(d). He considered trade names a "vital form of commercial speech," *id.* at 22 n.3, and stated that "the First Amendment forbids the choice which Texas has made to shut off entirely the flow of commercial information to consumers." *Id.* at 28.

85. *Id.* at 10 n.9.

86. The differences in treatment include denial of protection to misleading or deceptive commercial speech and a refusal to apply the overbreadth doctrine in the commercial speech area. *Bates v. State Bar*, 433 U.S. 350, 380-81 (1977).

analysis, commercial speech should be presumed to deserve the protection available to all favored speech.⁸⁷ Less than complete first amendment protection should be tolerated only when commercial speech is determined to be of a sufficiently deceptive or misleading nature. Although certainly not a desired approach, the employment of different levels of first amendment protection in the area of commercial speech may be painfully necessary because of the unfortunate circumstances surrounding the historical development of such speech by the Court.

Short of granting all commercial speech the same level of protection as political expression, any method of judicial analysis by necessity includes the determination of whether the speech in question is commercial in nature.⁸⁸ The Court has been justly criticized for failing to provide either a standard of review or a working definition for commercial speech.⁸⁹ *Friedman* will do little to quiet such criticism, since the Court did not attempt to define commercial speech but merely applied one of the commercial speech protection exceptions outlined in *Virginia Board of Pharmacy*.⁹⁰ Supreme Court commentators have proposed several definitions

87. "Every expression is entitled to the same presumption that its regulation is invalid." Comment, *supra* note 28, at 409.

88. In some instances, it is of great importance whether the speech in question is found to be commercial or noncommercial. Speech which may contain false statements would be afforded a quite different degree of first amendment protection depending on this determination. Noncommercial speech, even when false, is generally entitled to substantial first amendment protection. The Supreme Court has stated, when speaking in terms of noncommercial speech, that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). False commercial speech, however, has only been granted limited first amendment protection and may be subject to proper regulation.

89. See Canby & Gellhorn, *Physician Advertising: The First Amendment and the Sherman Act*, 1978 DUKE L.J. 543, 552-54; Comment, *Prior Restraints and Restrictions on Advertising After Virginia Pharmacy Board: The Commercial Speech Doctrine Reformulated*, 43 MO. L. REV. 64, 71-83 (1978); Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 205, 222-36 (1976); 9 TEX. TECH. L. REV. 295, 307-11 (1977-78). Cf. Canby & Gellhorn, *supra*, at 558-60 (difficulties stem from lack of standards for misleading or deceptive advertisements); Knapp, *Commercial Speech, the Federal Trade Commission and the First Amendment*, 9 MEM. ST. U. L. REV. 1, 28-29 (1978) (importance of definition of false and misleading commercial speech). But see Jackson & Jeffries, *supra* note 54, at 1 (definition of commercial speech is reasonably settled).

90. See notes 51-55 & accompanying text *supra*. Justice Rehnquist, dissenting in *Virginia Board of Pharmacy*, was quite critical of the majority for its job of line drawing with respect to false and misleading speech. He believed the distinction between truthful commercial speech and false and misleading commercial speech to be unmanageable. 425 U.S. at 787. See also Jackson & Jeffries, *supra* note 54, at 38-40.

for commercial speech, but perhaps the most viable is a scheme of definition based on the contractual functions of such speech.⁹¹ Apparently, since the Court did not provide a definition of commercial speech in *Friedman*, it will continue to employ a case-by-case analysis of commercial speech regulations.⁹² If the Court were to adopt a concrete definitional scheme for commercial speech analyses, it would be a welcome relief to the *ad hoc* approach presently employed.⁹³

A particularly disturbing aspect of the Court's opinion is the casual agreement of all nine justices that trade names, in particular the words "Texas State Optical," have "no intrinsic meaning."⁹⁴ The Court states that initially, a trade name conveys no information about the kind of services offered. Only after a trade name has been in use for some period of time, and associations between the trade name and some standard of price or quality have formed in the minds of the public, does the Court consider it to convey information.⁹⁵ Yet certainly even a new consumer in Texas who knows nothing about the Texas State Optical organization will find some

91. Farber, *supra* note 28, at 386-91. The critical factor in this approach is whether a state rule regulating commercial speech is based on the informative function or the contractual function of the language. As long as a regulation relates to the contractual function of the utterance, the regulation should not be subjected to the intensive scrutiny required when a regulation directly implicates the informative, first amendment function of language. The test proposed by Farber to distinguish between regulations involving the informative aspect of advertising and those involving its contractual aspect is the test offered by the Court in *United States v. O'Brien*, 391 U.S. 367 (1968), for cases in which "speech" and "nonspeech" elements are combined in the same course of conduct:

[A] 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.

Id. at 377.

Section 5.13(d), viewed in a contractual function framework, seems to be directed at limiting the possibilities of misrepresentation. The *Friedman* opinion indicates that the Court would be satisfied that the first two criteria of the *O'Brien* test have been met, see 440 U.S. at 15-16, but the third criteria is equally important, and the Court's analysis gave cursory attention to finding a less restrictive means of regulating optometrist's trade names than the complete prohibition of section 5.13(d). See 440 U.S. at 12 n.11.

92. See *id.* at 10 n.9.

93. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 158-61 (Supp. 1979-80).

94. 440 U.S. at 12, 24.

95. This general proposition, that words are meaningless until they become associated with concepts or things, is supported by linguistic authority. See A. GARDNER, THE THEORY OF SPEECH AND LANGUAGE § 13, at 38 (2d ed. 1963); R. HARRIS & J. JARRETT, LANGUAGE AND INFORMED LOGIC 87 (1958).

meaning in the words "Texas State Optical." These words may not trigger any specific price or quality associations, but they will connote a commercial organization operating in the State of Texas and dealing in some manner with optical lenses or eyewear. The Court's blanket statement that a trade name is "a form of commercial speech that has no intrinsic meaning"⁹⁶ is too broad. Perhaps the Court recognized this when it immediately qualified the statement by observing that over time, a trade name does acquire some meaning.⁹⁷ Although the *Friedman* Court was speaking only in terms of professional trade names, it would be possible for a court, keying on certain statements in the opinion, to extend the holding to non-professional trade name usage. The "no intrinsic meaning" statement by the Court should be viewed in a narrow sense and cautiously approached as the standard for regulating the use of trade names in future instances.⁹⁸

B. Trade Names May Mislead: The Court's Justifications

To support its declaration that there is a significant possibility that trade names may be used to mislead the public, the Court supplied several illustrations of such deception. Relying upon the dangers of deception, the Court found that the state's interest in trade names was substantial and well-demonstrated. These illustrations, or rather justifications, for the holding were in the form of hypothetical misuses of trade names by optometrists and the relating of the facts and holding of a 1967 Texas Supreme Court case.⁹⁹

Although stating that the possibilities for deception were numerous, the Court provided only three examples of how such deception could occur.¹⁰⁰ First, it was proposed that since a trade name does not tell the public the names of the practicing optometrists in an office, changes in the staff may occur without the public's knowledge. Therefore the Court reasoned, the public may be

96. 440 U.S. at 12.

97. *Id.* In the law of trademarks and trade names, this concept is referred to as "secondary meaning." See 87 C.J.S. *Trade-marks, Trade-names, and Unfair Competition* § 90 (1954).

98. See note 80 *supra*. The *Friedman* ruling merely allows regulation of the use of professional trade names in the face of substantial and well-demonstrated state interests. In professions where a code of ethics is not promulgated by a "professional" association and many years of training and education are not required for licensing, the state may have a more difficult time finding substantial and well-demonstrated interests to justify such regulation. On the other hand, with the demise of the emphasis on *caveat emptor* and increasing consumer protection programs, the state may have little trouble supplying such justifications.

99. *Texas State Bd. of Examiners in Optometry v. Carp*, 412 S.W.2d 307 (Tex.), *appeal dismissed and cert. denied*, 389 U.S. 52 (1967).

100. See note 68 & accompanying text *supra*.

attracted by a trade name that reflects the reputation of an optometrist no longer associated with that office.¹⁰¹ The dissent pointed out, however, that any misleading of the public based on that justification could be readily remedied by merely requiring that the optometrist's name be disclosed along with the trade name.¹⁰² If the Court had held in such a manner, however, it undoubtedly would have been widely criticized for judicial legislation. Modification of section 5.13(d) to require simultaneous disclosure of an optometrist's name with the trade name would surely be a less drastic means of discouraging deception, but such a determination is for the Texas legislature to make.¹⁰³ Because such an approach would certainly reduce the misleading nature of optometrical trade names, a first amendment challenge to such a statute might at least entitle commercial optometrists to a balancing of interests.

The second justification proposed for the determination that trade names may be deceptive was that they serve to free an optometrist from dependence on personal reputation. Allowing the use of trade names, the Court reasoned, would permit a commercial optometrist to assume a new trade name if negligence or misconduct cast a shadow over a former trade name. This approach is unrealistic. States should be encouraged to deal firmly with members of professions who are negligent or engage in misconduct. The Court cavalierly implies that the identity of a misbehaving optometrist could be successfully hidden behind a trade name, both from the public and the Texas Optometry Board, which is empowered by the Texas Optometry Act to suspend optometrists for misconduct and negligence.¹⁰⁴ It is surprising to find that the Court assumes that an optometrist who has been negligent or engaged in

101. Rogers argued that even if section 5.13(d) was to be considered a valid means to prevent such deception, it was still unconstitutional as a violation of equal protection because it did not apply to ophthalmologists and osteopaths. Brief for Appellee at 33-35. The Court dismissed this contention by observing that Rogers failed to produce any evidence to support it. 440 U.S. at 16 n.17. *Cf. id.* at 15 n.14 (no proof that deception occurs under optometrical partnerships).

102. By disclosing his individual name along with his trade name, the commercial optometrist acts in the spirit of our First Amendment jurisprudence, where traditionally "the remedy to be applied is more speech, not enforced silence." *Linmark Associates, Inc. v. Wil-lingboro*, 431 U.S., at 97, quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

440 U.S. at 25 (Blackmun, J., dissenting) (footnote omitted).

103. See generally Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

104. TEX. REV. CIV. STAT. ANN. art. 4552 § 4.04(a)(2), (3) (Vernon 1976) provides:
(a) The board may, in its discretion, refuse to issue a license to any applicant and may cancel, revoke or suspend the operation of any license if it finds that:

(2) the applicant or licensee is guilty of any fraud, deceit, dishon-

misconduct would still be practicing optometry under any name.¹⁰⁵

The third justification offered was that trade name usage allows the false impression of competition by optometrical offices under common ownership. This reasoning fails to stand up to a practical analysis. It would be relatively easy for a common owner of several optometrical offices (where the optometrists do not practice under a trade name but under their own names as licensed) to portray to the public a sense of competitiveness between such offices. Trade names have nothing to do with the implication of competition. The public could be led to believe that the office of Dr. Smith is in competition with the office of Dr. Jones without the use of trade names, even though this impression of competition is erroneous. Even a statute requiring an optometrist to simultaneously disclose his or her licensed name along with the trade name would not alleviate this problem. Only a more conscientious policing of a profession by its governing body (in this case the Texas Optometry Board) will reveal such deceptive conduct.

The Court found support for these three justifications in the facts of *Carp* and the depositions provided the district court in *Rogers v. Friedman*.¹⁰⁶ The effect of the Court's justifications are severely weakened, however, by a requirement that optometrists simultaneously disclose their licensed names with their trade names. The Court could have ordered such affirmative disclosures and allowed section 5.13(d) to stand, but because the statute operated to "absolutely [prohibit] the dissemination of truthful information about . . . wholly legal commercial conduct to consumers and a public who have a strong interest in hearing it,"¹⁰⁷ a more judicious approach would have been to find section 5.13(d) unconstitutional and allow the Texas legislature the opportunity to modify it.¹⁰⁸ This approach to commercial speech regulation was

esty, or misrepresentation in the practice of optometry or in his seeking admission to such practice;

(3) the applicant or licensee is unfit or incompetent by reasons of negligence.

105. Advertising Age, March 19, 1979, p. 16, col. 2. Cf. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 768-69 (any pharmacist guilty of misconduct would surely lose his license).

106. See 440 U.S. at 13-15 & 15 n.13.

107. *Id.* at 28 (Blackmun, J., dissenting). See Comment, HARV. C.R.-C.L. L. REV., *supra* note 28, at 398-99 n.71.

108. "[D]eceptive or false advertising can be regulated by a state, but the state must employ the least intrusive alternative." Roberts, *supra* note 28, at 148. *Friedman* implies that the Court will not consider such an alternative respecting commercial speech, but prior appellate decisions indicate that in advertising cases such consideration is a necessity. See *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Beneficial Corp. v. FTC*, 542 F.2d 611, 619 (3d Cir. 1976), *cert. denied*, 430 U.S. 938 (1977). In *Encyclopaedia Britannica, Inc. v. FTC*, 605 F.2d 964, 972

approved in *Virginia Board of Pharmacy*, when the Court stated that it may be "appropriate to require that a commercial message appear in such a form, or *include such additional information . . .* as [is] necessary to prevent its being deceptive."¹⁰⁹

C. The Paternalistic Approach

The Court also advanced a fourth justification for upholding the trade name prohibition: the state may wish to discourage large-scale commercial practices in optometry while not prohibiting the practice of commercial optometry altogether. The Court reasoned that because trade names facilitate the advertising essential to such commercial practices, the state may regulate their use. At the heart of this concept is the notion that a state may act to protect its citizens from the possibility of being misled by commercial speech from such state-wide organizations. Critical of this approach and its "highly paternalistic" nature, the dissent pointed out¹¹⁰ that the Court had recently rejected it in *First National Bank v. Bellotti*.¹¹¹

Friedman also seems out of the mainstream with regard to the recent national movement aimed at increasing consumer awareness in the marketplace.¹¹² Since the stated purpose of section 5.13(d) is to "better enable members of the public to fix professional responsibility,"¹¹³ it seems rather contradictory to prohibit the use of trade names, thus preventing the public from quickly ascertaining whether an optometry office employs commercial methods of practice.¹¹⁴ The Court directly confronted this aspect of commercial speech regulation in *Virginia Board of Pharmacy* when it stated:

(7th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3310 (U.S. Oct. 31, 1979) (No. 79-697), the court stated: "A remedy for deceptive advertising which is broader than is necessary to prevent future deception . . . is impermissible under the First Amendment."

109. 425 U.S. at 771 n.24 (emphasis added).

110. 440 U.S. at 26.

111. 435 U.S. 765 (1978) (state statute prohibiting bank from publicizing its view on the merits of a proposed state constitutional amendment held unconstitutional).

112. *E.g.*, 16 C.F.R. § 456 (1979) (rule preempting state laws which prohibit or burden the advertising of prescription eyewear or eye examinations); 16 C.F.R. § 409.1 (1979) (rule designating affirmative disclosures designed to give consumers information about the durability of light bulbs). *Contra*, 15 U.S.C. § 1335 (1976) (prohibition on the advertising of cigarettes or little cigars on any medium of electronic communication).

113. TEX. REV. CIV. STAT. ANN. art. 4552 § 5.13(a) (Vernon 1976).

114. Appellant State of Texas concedes that "[t]he practice of optometry in Texas under a trade name is more than just a means of identification, it connotes an entire manner of practicing optometry." Brief for Appellant State of Texas at 18.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.¹¹⁵

If the Court's presumption that trade names are misleading in nature must be accepted, perhaps a balancing of interests would be appropriate to determine a less restrictive alternative than the complete suppression of section 5.13(d).¹¹⁶ Trade names by their very nature simplify, and any simplification contains an element of potential deception. A trade name should not be condemned per se merely because it is capable of deceiving someone. That is but one segment of the scale; it may or may not outweigh the interest of other individuals in receiving the information contained in the trade name—an interest that should be thrown into the balance as well. But in *Friedman* no interests are weighed. The balancing approach was not needed once the Court decided optometrical trade names had the possibility of being misleading and deceptive.

Even before the Court took commercial speech into the first amendment's protective fold, governmental remedies for deceptive trade name usage were invalidated if found to go further than necessary to eliminate the deception.¹¹⁷ *FTC v. Royal Milling Co.*¹¹⁸ illustrates this point. At issue was the validity of FTC orders forbidding the use of certain trade names the agency had found deceptive. Although it sustained the Commission's findings that the names in question were misleading, the Supreme Court nevertheless held that the remedial orders were improper. The Court stated:

[T]he commission went too far in ordering what amounts to a suppression of the trade names. These names have long been in use. . . . They constitute valuable business assets in the nature of good will, the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result. The orders should go no further than is reasonably necessary to correct the evil . . . and this can be done . . . by requiring proper qualifying words to be used in immediate connection with the [trade] names.¹¹⁹

115. 425 U.S. at 770.

116. See Comment, *supra* note 28, at 395; Comment, *The Commercial Speech Doctrine and the First Amendment*, 12 TULSA L. REV. 699, 722-23 (1977). But cf. Gard, *The Absoluteness of the First Amendment*, 58 NEB. L. REV. 1053, 1054-55 (1979) ("balancing" not a proper test for fundamental analyses involving the first amendment).

117. *Jacob Siegal Co. v. FTC*, 327 U.S. 608 (1946); *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933). Cf. *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) (FTC cannot prescribe a remedy that goes further than is necessary in order to eliminate deceptive advertising).

118. 288 U.S. 212 (1933).

119. *Id.* at 217.

The majority in *Friedman* casually distinguished *Royal Milling* because it arose from a fifth amendment property interest dispute and not the first amendment,¹²⁰ but the Court offered no policy justification for such a distinction.¹²¹

The effect of upholding the constitutionality of section 5.13(d) is to prevent the public from immediately perceiving the commercial nature of an optometry practice, a factor which may be important to some consumers. The Court discussed no alternatives to the complete suppression of the use of optometrical trade names, since it was believed that they were unprotected misleading commercial speech. In evaluating regulations upon commercial

120. The Court stated:

[A] property interest in a means of communication does not enlarge or diminish the First Amendment protection of that communication. Accordingly, there is no First Amendment rule, comparable to the limitation on [the FTC], requiring a State to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication.

440 U.S. at 12 n.11.

121. See *id.* at 25 n.6 (Blackmun, J., dissenting). The Court apparently believed there was no need to consider the issue, since Rogers made no claim that he was being deprived of his property without due process of law. *Id.* at 12 n.11.

One commentator was extremely critical of the Court's comparison of property and speech rights in *Friedman*. Comment, *supra* note 28, at 477 n.401. It was stated that the lack of a first amendment rule comparable to that applied to the Federal Trade Commission was

plainly a *non sequitur*. At minimum, *Jacob Siegel* and *Royal Milling* stand for the proposition that commercial speech, even without a first amendment interest, should be subjected to narrowly drawn regulation only. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), recognized the first amendment interest that the Court so blithely ignored in footnote [eleven] of *Friedman*. The Court must therefore explain how *Virginia Pharmacy*, by conferring a first amendment interest, resulted in less protection for trade names.

Id.

This constitutional clash between property and speech rights had been the subject of a federal district court case decided just three weeks prior to *Friedman*. In *Sambo's of Ohio, Inc. v. City Council*, 466 F. Supp. 177 (N.D. Ohio 1979), the city of Toledo attempted to prohibit the use of the trade name "Sambo's" (a registered trademark) on the basis that it was offensive. The court stated that the facts clearly "do not bring [this case] within those exceptions to the First Amendment guarantees such as . . . fraudulent or deceptive statements," *id.* at 179, and held that *Sambo's* was entitled to declaratory and injunctive relief insuring its freedom to use its trade name/trademark.

This case may be distinguished from *Friedman* by recognizing that in *Sambo's*, the court was dealing with a registered trademark rather than a trade name. See note 13 *supra*. The district judge's opinion in *Sambo's* also illustrates the confusion that can occur when the same words are employed by a firm as both a trademark and a trade name.

speech, the Court will apparently continue to employ the all-or-nothing approach adopted in *Virginia Board of Pharmacy*: "the choice among . . . alternative approaches is not ours to make or the [legislature's]. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."¹²²

D. The *Friedman* Impact

The range of state and self-imposed regulation permitted professionals is currently undergoing reexamination. In light of past restrictive practices that prevented virtually all professional advertising under the guise of protecting the public—even though the restraint also clearly protected monopoly interests and prevented effective competition—this reconsideration is long overdue. The effect of the *Friedman* decision is to give legitimacy to state and professional codes of responsibility that prohibit the use of assumed names, corporate names or trade names by professionals. The advertising of the price and availability of routine services by professionals is still allowable of course, but if such advertising is potentially deceptive or misleading, it may be regulated or prohibited.

After the *Friedman* decision, lawyers were immediately apprehensive that the ruling would apply to those attorneys practicing under a trade name.¹²³ These concerns proved to be well-founded in at least one state. Less than three months after the Court's deci-

122. 425 U.S. at 770.

123. See 65 A.B.A.J. 514 (1979); Klement, *Lawyers Wary of Bar To Trade-Name Use*, NAT'L L.J., March 5, 1979, at 2, col. 3.

A disciplinary rule promulgated by the American Bar Association provides:

A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that . . . , if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, DR 2-102(B) (as amended 1976) (footnote omitted).

By allowing the continued use of deceased or retired attorney's names in firm names, the rule seems to contradict its original command, but the ABA justified this anomaly in a 1945 opinion. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 267 (1945). The opinion explained that over time, the combined efforts of law firm partners contribute to the goodwill of their firm name, and "[i]n the case of a firm having widespread connections, this goodwill is disturbed by a change in firm name every time a name partner dies." *Id.* at 555. This change results in some loss of goodwill to the surviving part-

sion, the Court of Appeals of Maryland relied directly on the *Friedman* rationale in *In re Oldtowne Legal Clinic, P.A.*¹²⁴ to uphold a prohibition on the use of trade names by lawyers. The trade name ban contained in the Maryland State Bar Code of Professional Responsibility¹²⁵ was held to be a permissible restriction on potentially deceptive and misleading commercial speech. The court rejected an argument that physicians were under no similar restraints regarding the use of trade names by concluding that the equal protection clause does not require that different professions be treated in the same manner since different ethical considerations govern law and medicine.¹²⁶ Although *Oldtowne* extends *Friedman* to encompass attorneys, the use of ethical considerations as a distinction by the court should serve to limit the scope of application of *Friedman* to other professions.¹²⁷ *Friedman* arose on peculiar facts, and its implications should be drawn as narrowly as possible.

VI. CONCLUSION

Friedman indicates that the protection exception for possibly deceptive or misleading commercial speech is now firmly entrenched in the Supreme Court's model of the first amendment. In fact, the decision has already been cited approvingly in several federal courts for that proposition.¹²⁸ Also indicative of this notion is

ners, who had helped to build it up over the years. To avoid this goodwill loss, the opinion stated that the old firm name should be allowed to continue.

This reasoning appears directly contrary to the *Friedman* rationale. The potential for deception is just as great for a prospective client seeking legal services from a firm whose name partners have departed the firm by death or retirement as for a prospective customer seeking optometry services from an optometry office using a trade name.

124. 285 Md. 132, 400 A.2d 1111 (1979).

125. The Maryland Bar trade name ban is identical to DR 2-102(B). See note 123 *supra*.

126. Historical and functional differences between professions have also been recognized as important considerations in extending commercial speech holdings inter-professionally. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 773 n.25.

An indication that physicians were also concerned about the implications of the possible extension of *Friedman* to other professions is illustrated by the attention afforded *Friedman* and *Oldtowne* in THE CITATION, a publication of the American Medical Association. 39 THE CITATION 37 (1979); 40 THE CITATION 14 (1979).

127. By noting that the ethical consideration governing a profession are an important factor in any extension of the *Friedman* rationale, the Maryland court has certainly offered firm justification for the complete exemption of non-professionals from a *Friedman*-type ruling. But see notes 98 & 101 *supra*.

128. *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1252 (2d Cir. 1979), *petition for cert. denied*, 100 S. Ct. 481 (1979); *In re Airport Car Rental Antitrust Litigation*, 474 F.

the Court's memorandum decision in *Century 21 Real Estate Corp. v. Nevada Real Estate Advisory Commission*¹²⁹ announced shortly after *Friedman*. In *Century 21*, the Court affirmed the holding of the district court that a regulation requiring franchised real estate brokers to display their names as prominently as their franchisors' in all advertisements did not violate the first amendment in view of the state's substantial interest in keeping false or misleading advertising from consumers.¹³⁰

It is conceded that the government has the power to regulate misleading or deceptive commercial speech, but a determination that trade names fall within those categories should be reexamined. Trade names provide information to the consumer, and the state has a moral duty to encourage the free flow of such information. The justifications offered by the *Friedman* Court for upholding the statutory prohibition of the use of trade names in optometry simply do not stand up under a practical analysis. As Mr. Justice Blackmun noted in dissent, "[a] trade name will deceive only if it is used in a misleading context."¹³¹ The majority's ruling in *Friedman* however, results in the presumption that trade names are deceptive or misleading.

The Court's effort in *Friedman* to preserve the status quo in the professions represents a setback to other branches of government which had been seeking more efficient methods for delivering costly services to consumers. It should be noted however, that the Court in *Friedman* was merely holding that states or professional associations are not precluded by the federal Constitution from imposing trade name restrictions. There is nothing in the Court's decision that would *require* a state or association to impose the restriction on trade name usage.¹³²

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Supp. 1072, 1085 (N.D. Cal. 1979); *Wall & Ochs, Inc. v. Hicks*, 469 F. Supp. 873, 880 (E.D.N.C. 1979).

129. 440 U.S. 941 (1979).

130. In reaching its decision, the court stated: "We cannot agree that a least restrictive alternative applies to regulations which are designed to combat misleading or deceptive practices and which in no way threaten the commercial message with complete or total suppression." 448 F. Supp. 1237, 1240 (D. Nev. 1978) (footnote omitted).

131. 440 U.S. at 24 (Blackmun, J., dissenting).

132. 65 A.B.A.J. 514 (1979).