MAKING SENSE OF HYBRID SPEECH:  
A NEW MODEL FOR COMMERCIAL SPEECH AND EXPRESSIVE CONDUCT

Under First Amendment doctrine, many types of speech receive the most stringent level of constitutional protection, whereas other types receive no protection at all. For example, some categories of speech, such as political speech, are viewed as being at the core of the First Amendment. Restrictions on these forms of speech receive strict scrutiny and consequently are rarely upheld. Other categories of speech, such as obscenity, receive no protection under the First Amendment, and restrictions on such speech are subject only to rational basis review under the due process clause.

But not all speech fits neatly within this dichotomy. Commercial speech and expressive conduct are prominent categories of speech that can receive an intermediate level of First Amendment protection. In United States v. O'Brien, the Supreme Court held that incidental restraints on expressive conduct are evaluated under a four-factor intermediate scrutiny test. Within a decade, the Court held, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., that restrictions on commercial speech are also subject to intermediate scrutiny. Four years later, in Central Hudson Gas & Electric Corp. v.
Public Service Commission, the Court formalized its analysis of commercial speech by adopting a four-factor test that closely parallels the one created in O'Brien.

Recognizing these similarities, this Note proposes a new framework for understanding commercial speech and expressive conduct by examining their different purposes and mechanisms of expression. Part I describes how commercial speech and expressive conduct are different forms of hybrid speech — each has a different mixture of protected elements that merit a heightened level of First Amendment scrutiny and of regulable elements that deserve only rational basis review. More specifically, this Part asserts that while expressive conduct generally has a protected purpose but a regulable method of expression, commercial speech typically has a regulable purpose but a protected method of expression.

Part II explores how the hybrid nature of commercial speech and expressive conduct affected the development of those doctrines. This Part explains how the Court’s general expansion of the First Amendment’s scope and its increased deference to government regulation during the twentieth century came into tension in the context of hybrid speech. Part II suggests that the Court resolved this tension by adopting intermediate scrutiny for restrictions on commercial speech and incidental restraints on expressive conduct.

Part III further develops the framework for analyzing commercial speech and expressive conduct by exploring their similarities with non-speech sales activities, which are defined here as actions designed to increase consumer demand that do not operate linguistically or use a conventional form of media to communicate. Focusing on the exterior designs of products as a prominent example of nonspeech sales activities, Part III demonstrates that such designs share a regulable purpose with commercial speech: to sell products by making them more attractive to consumers. This Part then illustrates how exterior product designs also share a regulable method of operation with expressive conduct, in that neither form of expression uses spoken or written words. Finally, this Part explores why product designs do not receive First Amendment protection and how this distinction clarifies the framework within which commercial speech and expressive conduct both fit.

Part IV examines how the type of governmental regulation at issue affects the level of review by exploring how the framework that this Note establishes helps to explain why content-based restrictions receive strict scrutiny in the expressive conduct context but not in the commercial speech context.

7 447 U.S. 557 (1980).
8 See id. at 566; see also infra p. 2845.
Finally, Part V of the Note examines why, although commercial speech and expressive conduct are both hybrid speech evaluated under similar four-part intermediate scrutiny tests, the actual levels of review applied to restrictions on these types of speech have diverged in recent years, with protection for commercial speech moving toward strict scrutiny and protection for expressive conduct drifting toward rational basis review. This Part suggests two possible reasons for this shift: the current Court’s affinity for bright-line rules rather than standards, and a perception that modern commercial speech contains more expressive content than in the past. This Part also describes problems that may result if either form of hybrid speech is removed from the realm of intermediate scrutiny.

I. CLARIFYING THE HYBRID NATURE OF COMMERCIAL SPEECH AND EXPRESSIVE CONDUCT

Although commercial speech and expressive conduct are both forms of hybrid speech, they contain different protected and regulable elements. To understand this difference, it is important to analyze separately the purpose of the expression and the method by which the expression occurs. The primary purpose of commercial speech is to persuade consumers to buy goods.\(^9\) After the fall of _Lochner_, laws burdening commercial activities became subject to mere rational basis review, and the government accordingly gained the power to regulate most activities directed toward a commercial purpose.\(^10\) Thus, the government can, to a large extent, regulate particular goods or services

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\(^9\) One example is a newspaper advertisement that describes a product and provides its price. Commercial speech can also exist in more mixed forms and have other purposes, such as artistic or political goals. Music videos are an example of mixed commercial speech having both artistic and commercial purposes. _See_ Alex Kozinski & Stuart Banner, _Who’s Afraid of Commercial Speech?_, 76 VA. L. REV. 627, 638–42 (1990). Regulation of this type of commercial speech seems problematic, but to the extent that a commercial purpose remains, the analysis in this Part still applies. A discussion of mixed commercial speech would be largely speculative because the Supreme Court has not specified the kind of review that such speech would receive. In _Nike, Inc. v. Kasky_, 123 S. Ct. 2554 (2003), the Court dismissed certiorari as improvidently granted on a case that arguably included a form of mixed commercial speech. _See id._ at 2554–55 (Stevens, J., concurring) (noting that the case involved an unfair and deceptive practices suit against Nike, which had sent out press releases and letters to refute allegations that it was mistreating its foreign employees).

\(^10\) _See_ United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (“[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”).
without violating the Constitution, and the Court has held that this power justifies some regulation of commercial speech. The Court has also recognized the regulable purpose of commercial speech by holding that “[s]ince advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.”

Even though commercial speech might have a regulable purpose, the method by which most commercial speech is communicated is presumptively protected. Most commercial speech uses some form of the spoken or written word, or equivalent symbolism. Although some uses of words are not covered under the First Amendment, this method of communication generally receives heightened First Amendment protection. Moreover, commercial speech is usually voiced through media that also convey speech that is protected by the First Amendment, such as newspapers, magazines, radio, television or billboards. Thus, for most commercial speech, the purpose of expression is regulable but the mechanism of expression is protected.

Expressive conduct, by contrast, works in precisely the opposite way. The purpose of expression for most recognized forms of expressive conduct is often political or social — purposes that lie at the core

11 Of course, rational basis review still applies to such regulations, but in practice, almost any government action will meet this level of scrutiny. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 490–91 (1955) (applying rational basis review to uphold a restriction on advertising).

12 See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996) (plurality opinion); Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 345–46 (1986) (noting in an opinion by then-Justice Rehnquist that “the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling”).


14 For example, a magazine advertisement consisting only of the Nike “Swoosh” logo presumably would still be commercial speech.

15 In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the Court explained that “fighting words” — “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace,” id. at 572 — are not protected by the First Amendment. The Court more generally noted: “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words . . . .” Id. at 571–72.

16 See R.H. Coase, Advertising and Free Speech, 6 J. LEGAL STUD. 1, 15 (1977) (“Advertising is in a curious position. On the one hand, it takes the form of speech or writing and one would expect therefore to find it protected by the First Amendment. It involves ‘expression’ rather than ‘action’ . . . . But, of course, advertising is connected with the market for goods, the domain of the businessman, which is treated as ‘action.’”). A lay understanding of the First Amendment would also seem to reflect this view.

of the First Amendment and that typically receive the highest levels of protection. Despite these privileged goals, the method by which symbolic speech occurs — via conduct rather than words — is presumptively regulable by the state under its police power.\(^\text{18}\) Thus, for most expressive conduct, the purpose of expression is protected but the method of expression is regulable.

Although both of these types of hybrid speech have different protected and regulable elements, restrictions on commercial speech and incidental restraints on expressive conduct both receive some form of intermediate scrutiny under the First Amendment. As demonstrated below, the adoption of intermediate scrutiny for these types of restrictions can best be described as a compromise between the competing interests in the regulable and protected elements.

II. THE EVOLUTION OF INTERMEDIATE SCRUTINY FOR HYBRID SPEECH

The development of the intermediate scrutiny standard for commercial speech and expressive conduct can be clarified by exploring two competing trends in the Supreme Court’s twentieth-century jurisprudence. First, the Court generally expanded constitutional protection of individual liberty interests.\(^\text{19}\) The Court also held that the Constitution provides new procedural rights for criminal defendants\(^\text{20}\) and that substantive due process protects personal privacy and inti-

\(^{18}\) See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (plurality opinion) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation."); see also id. at 571 (upholding public indecency statute as not suppressing free expression and as within the state’s police power).

\(^{19}\) See, e.g., Calvin Massey, The New Formalism: Requiem for Tiered Scrutiny?, 6 U. PA. J. CONST. L. 945, 948 (2004) ("The twentieth century became the historical moment in which the constitutional law of individual liberties, like the cosmos, seemed to be an ever-expanding universe."). Of course, this statement reflects only a general trend; the Court limited or reduced individual liberty interests in some cases during the twentieth century. Compare, e.g., Sherbert v. Verner, 374 U.S. 398, 402–04 (1963) (requiring creation of an exemption to a generally applicable law because of the Free Exercise Clause), with Employment Div. v. Smith, 494 U.S. 872, 879–82 (1990) (establishing that the Free Exercise Clause does not mandate the creation of an exception to a facially neutral, generally applicable law).

\(^{20}\) See, e.g., Miranda v. Arizona, 384 U.S. 436, 467–70 (1966); Massiah v. United States, 377 U.S. 201, 206 (1964); Mapp v. Ohio, 367 U.S. 643, 655 (1961). Some of these liberty interests have been cut back in the last few decades, at least to some extent. See Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 MICH. L. REV. 2466, 2470 (1996) ("The Burger and Rehnquist Courts have accepted to a significant extent the Warren Court’s definitions of constitutional ‘rights’ while waging counter-revolutionary war against the Warren Court’s constitutional ‘remedies’ of evidentiary exclusion and its federal review and reversal of convictions.").
mate relationships. Most germane to this Note, the Court also expanded the protection of speech under the First Amendment.

Second, after the death of Lochner in 1937, the Court became relatively deferential toward federal and state laws that regulated economic and property interests. Moreover, during this period the Court continued to recognize that the state retained the ability to regulate many forms of conduct under its police power.

These two jurisprudential trends came into conflict in the context of hybrid speech because of its combination of protected and regulable elements. Thus, when confronted with cases involving direct restrictions on commercial speech or incidental restraints on expressive conduct, the Court was faced with the choice of following the trend of expanding First Amendment coverage or instead deferring to government’s power to regulate. The Court chose intermediate scrutiny as a compromise for these types of restrictions, allowing government to retain significant power to regulate in these areas but acknowledging that the First Amendment still provides some protection.


23 See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37–41 (1937) (upholding the National Labor Relations Act against a substantive due process challenge and as within Congress’s interstate commerce power).

24 See, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (upholding under the interstate commerce power a federal statute prohibiting the interstate shipment of “filled” milk). Even though this deferential view toward such regulations arguably has been tempered in recent years, see, e.g., United States v. Morrison, 529 U.S. 598, 601–02 (2000) (invalidating certain sections of the Violence Against Women Act as beyond Congress’s interstate commerce power), the federal government still has much more power to regulate industry than it had one hundred years ago.

25 See, e.g., Barsky v. Bd. of Regents of the Univ. of the State of N.Y., 444 U.S. 444, 449 (1954) (“It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state’s police power.”).

26 See Nat Stern, In Defense of the Imprecise Definition of Commercial Speech, 58 Md. L. REV. 55, 146 (1999) (“The Supreme Court’s inability to encase commercial speech within unwavering definitional boundaries is not the product of ineptitude, but rather the unavoidable incident of commercial speech’s position at the blurry crossroads of expressive and economic activity.”); cf. Kathleen M. Sullivan, Post-Liberal Judging: The Roles of Categorization and Balancing, 63 U. COLO. L. REV. 293, 297 (1992) (arguing that intermediate scrutiny is used by the Court in cases
A. Incidental Restraints on Expressive Conduct and the O’Brien Test

In United States v. O’Brien,27 the Supreme Court established an intermediate scrutiny test for determining whether an incidental restraint on expressive conduct violates the First Amendment.28 The case involved a Vietnam War protester who was convicted of breaking a federal law that proscribed the destruction of draft cards.29 Although the statute created only an incidental restraint on the protester’s expressive conduct, the Court recognized that a balance had to be struck between the government’s power to regulate and an individual’s right to free speech: “When ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”30 The Court then set forth a four-factor test for determining whether a law that incidentally burdens expressive conduct is constitutional:

[A] governmental regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.31

Applying this test, the Court upheld the protester’s conviction.32

In avoiding the extremes of either rational basis review or strict scrutiny, the Court chose a middle path for incidental restrictions on expressive conduct that “reflects an effort to avoid endless inquiries into incidental effect while at the same time invalidating those restrictions that most seriously threaten free expression.”33 This “uneasy but not unprincipled compromise”34 thus respected both the protected purpose of symbolic speech and the regulable mechanism by which

that create “a crisis in analogical reasoning” and “that just can’t be steered readily onto the strict scrutiny or the rationality track”).

28 See id. at 377.
29 See id. at 376.
30 Id. at 376; see also Ely, supra note 4, at 1496 (“Burning a draft card to express one’s opposition to the draft is an undifferentiated whole, 100% action and 100% expression, and to outlaw the act is therefore necessarily to regulate both elements.”); Keith Werhan, The O’Briening of Free Speech Methodology, 19 ARIZ. ST. L.J. 635, 636 (1987) (“Laboring under the weight of the speech-conduct distinction, the Justices could not fully accept the idea of expressive conduct implicated by O’Brien’s silent burning . . . Yet, the Court could not bring itself to rule that O’Brien’s burning wholly lacked expressive value or that Congress’s anti-destruction law was incapable of serving as a tool of repression.” (footnote omitted)).
31 See O’Brien, 391 U.S. at 377.
32 See id. at 372.
34 Id.
such speech is expressed. O’Brien’s intermediate scrutiny test remains the law governing incidental restraints on expressive conduct, though it has been considerably weakened in its application, as Part V describes.

**B. Restraints on Commercial Speech and the Central Hudson Test**

For some time, commercial speech received no protection under the First Amendment, and it was thoroughly regulable by the government. For instance, shortly after *Lochner* was put to rest, the Court in *Valentine v. Chrestensen*\(^{35}\) upheld a New York statute that prohibited the distribution of advertising materials and handbills on the street.\(^{36}\) The Court viewed advertising not as a form of protected speech, but rather as merely another regulable activity, declaring that there was “no [First Amendment] restraint on government as respects purely commercial advertising.”\(^{37}\)

In the 1960s, the Court’s attitude toward commercial speech began to change. In *New York Times Co. v. Sullivan*,\(^{38}\) the Court held that a paid advertisement describing the struggle for civil rights in Alabama was protected by the First Amendment despite being published for profit.\(^{39}\) It noted that the fact that “the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.”\(^{40}\) In 1975, the Court inched closer to providing First Amendment protection for commercial speech in *BigeLOW v. VIRGINIA*,\(^{41}\) holding that Virginia could not criminalize advertisements in its newspapers for abortions in New York.\(^{42}\)

Finally, in the 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,\(^{43}\) the Court expressly held that the First Amendment provides some protection for commercial

\(^{35}\) 316 U.S. 52 (1942).

\(^{36}\) See id. at 54–55.

\(^{37}\) Id. at 54. The Court’s dismissive attitude toward commercial speech was further evidenced by its concession that the statute would have violated the First Amendment had it banned non-commercial speech. See id. The Court reaffirmed the *Valentine* holding in *Breard v. Alexandria*, 341 U.S. 622 (1951), when it upheld a town ordinance that proscribed the door-to-door solicitation of magazine subscriptions. See id. at 644–45.

\(^{38}\) 376 U.S. 254 (1964).

\(^{39}\) See id. at 265–66; see also Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 389 (1973) (upholding regulation of advertisements that aided an unlawful employment practice while suggesting that advertising for legal commercial activity might receive some First Amendment protection); Ginzburg v. United States, 383 U.S. 463, 474 (1966) (“[C]ommercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.”).

\(^{40}\) *Sullivan*, 376 U.S. at 266.

\(^{41}\) 421 U.S. 809 (1975).

\(^{42}\) See id. at 829.

\(^{43}\) 425 U.S. 748 (1976).
speech, which it defined to include “speech which does ‘no more than propose a commercial transaction.’” The Court invalidated a statute that prohibited Virginia pharmacists from advertising the prices of prescription drugs, holding that the government may not “completely suppress the dissemination of conceded truthful information about entirely lawful activity, fearful of that information’s effect upon its disseminators and its recipients.” The Court, however, understood the hybrid nature of commercial speech, and noted that although it “is protected, we of course do not hold that it can never be regulated in any way.” In particular, the Court observed that “false or misleading” commercial speech could be proscribed, and it disclaimed any suggestion that its holding prevented states from outlawing advertisements for illegal transactions.

In 1980, the Court in *Central Hudson* again acknowledged the hybrid status of commercial speech, holding that “[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.” The case involved a ban, intended to prevent an increase in demand for electricity, on certain promotional advertising by electric utilities. In a manner reminiscent of its approach to expressive conduct, the Court formalized its commercial speech analysis by establishing a four-factor test:

[1] We must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [3] we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

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44 Id. at 762 (quoting *Pittsburgh Press*, 413 U.S. at 385). Later, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court slightly clarified the boundary between core and commercial speech. The Court noted three factors that in combination were sufficient to determine that speech was commercial rather than core: that the expression was “conceded to be [an] advertisement[,]” that it had a “reference to a specific product,” and that the speaker “ha[d] an economic motivation.” Id. at 66–67.


46 Id. at 770.

47 See id. at 771–72.

48 See id. at 772. The Court further stated that time, place, and manner restrictions on price advertising can be constitutional. See id. at 771.


50 Id. at 562–63 (citation omitted). The Court also noted: “[O]ur decisions have recognized ‘the ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” Id. at 562 (quoting *Ohradik v. Ohio State Bar Ass’n*, 436 U.S. 447, 453–56 (1978)).

51 See id. at 568.

52 Id. at 566. The Court characterized these four factors as having developed in prior commercial speech cases. See id.
The Court then applied this test to the advertising ban, holding that the restriction was invalid because it failed the fourth prong.53

In creating the test for commercial speech, the Court followed in the footsteps of *O'Brien*.54 The *Central Hudson* test has many textual similarities to the *O'Brien* test: they are both four-factor, intermediate scrutiny tests that turn heavily on the asserted government interest in regulating the speech and on the scope of the government regulation.55 Furthermore, the *Central Hudson* test, like the *O'Brien* test, reflects a compromise between the competing regulable and protected elements that constitute hybrid speech.56

Despite *Central Hudson*'s continuing vitality, the fundamental tension in this area — between an individual's right to free speech and the state's power to regulate — has not been resolved, and commercial speech remains a fault line in constitutional law. Some judges and scholars have favored broad latitude for the government to enact economic regulations, and therefore have sought to remove constitutional protection for commercial speech.57 Some of these scholars have argued that recognition of commercial speech rights is a throwback to the *Lochner* era.58 Others (including an increasingly vocal group on

53 See id. at 569–72. The Court later clarified that the fourth prong requires “a fit that is not necessarily perfect, but reasonable.” Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

54 See Stern, supra note 26, at 142 (suggesting that “the O'Brien standard and prevailing commercial speech doctrine roughly converge”); Werhan, supra note 30, at 666 (“The ‘critical inquiry’ of Central Hudson rings familiar to those accustomed to the O'Brien methodology . . . .”); id. at 668 (“Seeking to fill the gap between full and no protection, the Court reached for compromise, and O'Brien was there.”).


56 See Werhan, supra note 30, at 673 (“The Court’s frequent resort to O'Brien is the result of a perceived need to compromise seemingly intractable first amendment problems. This was most apparent in the Court’s use of O'Brien balancing to calibrate intermediate scrutiny for commercial speech.”).

57 See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 787 (1976) (Rehnquist, J., dissenting) (“It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment.”); Vincent Blasi, The Pathological Perspective and the First Amendment, 85 COLUM. L. REV. 449, 488 (1985) (suggesting that there is “reason to exclude commercial advertising from the protection of the first amendment”).

58 See Thomas H. Jackson & John Calvin Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 VA. L. REV. 1, 30–31 (1979) (“One might have thought, as the Court has so often proclaimed, that demanding judicial review of economic legislation was a concern of the past. . . . Instead, economic due process is resurrected, clothed in the ill-fitting garb of the first amendment . . . . In short, the Supreme Court has reconstituted the values of Lochner v. New York as components of freedom of speech.” (footnotes omitted)); see also Charles Fried, The Supreme Court, 1994 Term—Foreword: Resolutions?, 109 HARV. L. REV. 13, 33 n.105 (1995)
the Supreme Court)\(^59\) have argued that the distinctions between commercial speech and traditionally protected speech are not justifiable, either in principle or in practice.\(^60\) Some of these scholars and judges would elevate protection for commercial speech to the level received by core First Amendment expression. As Part V discusses, commercial speech doctrine seems to be following this second trend, as the Court has in recent years strengthened protection for commercial speech.

### III. NONSPEECH SALES ACTIVITIES AND HYBRID SPEECH

Commercial speech and expressive conduct can be better understood by noting their similarities to nonspeech sales activities, which are defined here as actions that increase consumer demand for a product or service, but which do not operate linguistically or use a conventional form of media to communicate.\(^61\) To illustrate these similarities more clearly, this Part focuses on the exterior designs of products as examples of nonspeech sales activities.\(^62\) As will be shown, exterior product designs share a regulable purpose and effect with commercial speech. Additionally, exterior product designs are similar to expressive conduct because they operate via regulable, nonlinguistic mechanisms. This Part concludes by situating exterior product designs within the overall speech framework, thereby clarifying why intermediate scrutiny is applied to restrictions on commercial speech and incidental restraints on expressive conduct.\(^63\)

\(^{59}\) Justices Stevens and Thomas, not known for occupying the same side of the political spectrum, are among the strongest advocates for increased First Amendment protection for commercial speech. See sources cited infra note 92 and accompanying text.


\(^{61}\) For example, nonspeech sales activities do not communicate via newspapers, flyers, billboards, television, radio, or magazines.

\(^{62}\) Other examples of nonspeech sales activities are the layout of a store or the uniform of a person providing a service.

\(^{63}\) Professor Daniel Farber has identified a different connection between commercial speech and expressive conduct. Recognizing “the intuitive belief that commercial speech is somehow more akin to conduct than are other forms of speech,” he has proposed a bifurcated approach to dealing with commercial speech. Farber, supra note 60, at 389. He suggests that the O'Brien test should be applied to restrictions pertaining to “the contractual aspects of the speech,” whereas content-neutrality should be required when government regulates the other aspects of commercial speech. Id. at 388; cf. Edward J. Eberle, Practical Reason: The Commercial Speech Paradigm, 42 CASE W. RES. L. REV. 411, 462 (1992) (“Subjugating commercial speech to a secondary status might arguably be justified on the ground that commercial speech involves speech-plus-conduct . . . . Commercial speech can be construed as a form of speech-plus-conduct because of the
A. Commercial Speech and Exterior Product Designs Share a Regulable Purpose and Effect

Although commercial speech may take a variety of forms, its primary purpose and effect are similar to those of exterior product designs. First, from the perspective of the speaker’s intent, commercial speech always, at least to some degree, has a regulable purpose: to sell goods or services to a consumer. Exterior product designs share this regulable purpose. Companies design advertisements, products, and packaging with the goal of making a product more attractive and thereby increasing sales revenue. Whether through an attractive shape, a cool structure, an eye-catching package, or a soothing color scheme, the exterior design of a product can persuade a consumer to purchase an item. Although companies might consider a host of other factors when deciding how a product looks, creating a pleasing appearance for consumers remains an important priority.

Second, from the perspective of their effect on audiences, both commercial speech and exterior product designs often rely on noncognitive responses to achieve their goal of increasing consumer demand. Rather than persuading a person to act based on reason, modern advertising often communicates by appealing to emotion. Whether an advertisement features Britney Spears drinking Pepsi, “regular guys” having Budweisers while watching football, or euphoric Claritin users dancing in a pastoral landscape, commercial speech often tries to create emotional attachments between consumers and products. Philosopher Roger Shiner has commented on this phenomenon of “lifestyle advertising”:

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64 Consider one of the definitions of “advertise”: “to call public attention to especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 31 (1986). To the extent advertising is successful, it also has a regulable effect: it causes consumers to buy goods or services.

65 See Jay Dratler, Jr., Trademark Protection for Industrial Designs, 1988 U. ILL. L. REV. 887, 890 (“Certainly a major goal of industrial design is to make products look good, to provide an attractive appearance that makes consumers want to buy and use them”), Gerard N. Magliocca, Ornamental Design and Incremental Innovation, 86 MARQ. L. REV. 845, 845 (2003) (noting that “sleek styles undoubtedly add value to many consumer goods”).

66 See Dratler, supra note 65, at 890 (“[In addition to making products look good,] designers have other equally important goals. A good industrial designer also wants to make products easy (and perhaps even fun) to use, safe to have and to operate, easy and cheap to manufacture, and simple to repair.”).

67 See, e.g., Scot Silverglate, Comment, Subliminal Perception and the First Amendment: Yelling Fire in a Crowded Mind?, 44 U. MIAMI L. REV. 1243, 1262 (1990) (“Clever advertising executives appeal to a consumer’s emotional or psychological needs and seem to promise, either explicitly or implicitly, that their product will fill these needs.”).
A great deal — perhaps even almost all — of corporate advertising expression does not have anything at all to do with the transmission of information. It has rather to do with the creation of emotional associations, especially associations that will help induce a favourable, and even a desirous, attitude towards the product in question.\(^{68}\)

Shiner contends that “[t]he paradigm examples of persuasive advertising are . . . advertisements whose content is primarily not informative but symbolic, portraying ways of living in acts of endorsement or advocacy that do not involve discursive promotion of a product.”\(^{69}\)

Similarly, exterior product designs rely on emotional responses to sell products. The external design of products often acts seductively on a consumer by tugging at his emotions (and with any luck, his wallet). Consumers often purchase items impulsively, with factors such as packaging and exterior design playing an important role in their purchasing decisions.\(^{70}\) Thus, exterior product designs are similar to commercial speech in the responses that they evoke from consumers.\(^{71}\)

### B. Expressive Conduct and Exterior Product Designs

**Share a Regulable Method of Expression**

In a different sense, exterior product designs are also similar to expressive conduct: neither type of activity relies on conventional forms of media or uses spoken or written words to convey its messages. On the surface, the design of the latest iPod and the burning draft card in O’Brien have little in common — certainly both forms of “expression”

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\(^{68}\) ROGER A. SHINER, FREEDOM OF COMMERCIAL EXPRESSION 308 (2003). Shiner acknowledges that some advertising may be purely informational, such as a flyer that says “I will sell you X product at Y price.” *Id.* He also notes that some commercial expression might mix informational and persuasive advertising. *See id.* at 309.

\(^{69}\) *Id.* at 309; see also Sarah C. Haan, Note, The “Persuasion Route” of the Law: Advertising and Legal Persuasion, 100 COLUM. L. REV. 1281, 1281 (2000) (“[A]dvertising research shows that consumers do not seek out or use product information contained in advertisements, and that less-informative advertising may actually be more persuasive than advertising containing a lot of information.”). The primarily noncognitive effect of commercial speech might distinguish it from other speech that operates via rational persuasion and receives greater First Amendment protection under theories that privilege “the marketplace of ideas” or the importance of democratic self-governance. *See GEOFREY R. STONE ET AL., THE FIRST AMENDMENT 9–14 (2d ed. 2003).* Of course, some highly protected speech, such as art, may operate primarily via emotion, so this observation does not totally explain why commercial speech receives less protection than core speech.

\(^{70}\) See Silverglate, supra note 67, at 1261 n.153 (“[I]n the buying situation the consumer generally acts emotionally and compulsively, unconsciously reacting to the images and designs which in the subconscious are associated with the product.” (quoting VANCE PACKARD, THE HIDDEN PERSUADERS 7–8 (1957) (quoting Louis Cheskin, Market Researcher))).

\(^{71}\) Even if certain types of advertising and exterior product designs have important noncommercial purposes or do not rely on creating emotional responses in consumers, the analysis in this section is not necessarily affected. Rather, the main point here is that as long as advertising and exterior product designs have similar purpose and effect — regardless of what that purpose and effect are — they are, to a large extent, functionally similar.
serve different purposes and have different effects on their audiences. Despite these obvious differences, these activities are similar in that they both communicate primarily through nonlinguistic means. Accordingly, because their mechanisms of communication generally do not fall into the category of behavior conventionally called “speech,” exterior product designs and expressive conduct can generally be regulated. To some extent, external product designs, and nonspeech sales activities in general, can be considered a form of expressive conduct with a commercial purpose, which shares a regulable mechanism of communication with expressive conduct and a regulable purpose with commercial speech.

C. Purposes and Methods: The First Amendment Framework

Despite their expressive characteristics and similarities to both commercial speech and expressive conduct, exterior product designs currently do not receive any First Amendment protection.\textsuperscript{72} This lack of protection might be attributable to two causes. First, any action has some expressive quality; in order to count as expressive conduct, the expressive content of the action must reach a certain threshold of significance.\textsuperscript{73} Although the availability of design patent and trade dress protection for exterior product designs indicates that they do have some expressive content,\textsuperscript{74} the lack of First Amendment protection implies that these commercial acts are not viewed as having as much expressive content as traditional forms of speech.

More importantly, the lack of protection for exterior product designs supports the framework of purpose and mechanism established for commercial speech and expressive conduct in Part I. As demonstrated above, the commonalities that exterior product designs (and nonspeech sales activities in general) share with commercial speech and expressive conduct are generally regulable ones. Like commercial speech, exterior product designs have the regulable purpose and effect of persuading consumers to buy a product or service. Like expressive conduct, these commercial activities employ the regulable method of nonlinguistic communication. Thus, exterior product designs receive rational basis protection because they share only regulable characteristics with forms of speech that receive intermediate scrutiny. Addition-

\textsuperscript{72} Searches through Westlaw and LEXIS did not unearth any cases in which First Amendment protection had been granted or even claimed for an exterior product design.

\textsuperscript{73} \textit{See} United States v. O'Brien, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

\textsuperscript{74} Design patents encourage this form of expression by allowing companies to obtain property rights only in external industrial designs that are primarily “ornamental” rather than functional in nature. \textit{See} Magliocca, \textit{supra} note 65, at 845, 855; \textit{see also id.} at 850 (“Design patents are the primary tool for encouraging the development of commercial art in the United States.”).
ally, the relationships that commercial speech and expressive conduct have with exterior product designs illustrate the regulable aspects of these hybrid forms of speech. Figure 1 summarizes a framework of purpose and method that relates core First Amendment speech, commercial speech, expressive conduct, and exterior product designs.

**FIGURE 1. PURPOSE AND METHOD FRAMEWORK**

![Diagram showing the relationship between purpose and method of expression with different levels of scrutiny.]

**IV. THE NATURE OF GOVERNMENT REGULATION**

As demonstrated above, commercial speech and expressive conduct have received a baseline level of intermediate scrutiny because both are forms of hybrid speech with a combination of protected and regulable elements. This Part discusses what role the purpose of the government regulation at issue plays in determining the standard of review. Much of First Amendment jurisprudence focuses on this factor rather than on the purpose or mechanism of the speech.

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75 A more comprehensive diagram would include a third dimension: the purpose of governmental restriction. In this dimension, the diagram would indicate that content-based restrictions on expressive conduct receive strict scrutiny, whereas content-neutral restrictions (that is, incidental restraints) receive intermediate scrutiny. *See infra* Part IV, pp. 2850–51. The indifference curves in this diagram are intended solely for illustrative purposes, and no conclusions should be drawn from their particular shape.

76 *See, e.g.*, Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 777 (2001) (exploring why “the distinction between ‘content-based’ and ‘content-neutral’ regulations is so important to First Amendment law”).
The purpose of government regulation plays different roles in the expressive conduct and commercial speech contexts. For expressive conduct, the purpose of regulation can determine the standard of review. Under *O'Brien*, incidental restraints on expressive conduct — that is, content-neutral restrictions — receive intermediate scrutiny. Restraints targeting the expressive content of symbolic speech — content-based restrictions — receive strict scrutiny. In contrast, under *Central Hudson*, commercial speech receives intermediate scrutiny regardless of the purpose of the governmental restriction at issue.

The framework developed in this Note helps explain why content bias matters in the expressive conduct context but not with regard to commercial speech. As discussed earlier, the purpose of expressive conduct generally is protected and is at the core of the First Amendment. Hence, content-based regulations target expressive conduct on the axis in which it is similar to core political speech; accordingly, such restrictions receive strict scrutiny. In contrast, the purpose of commercial speech generally is regulable. Hence, content-based restrictions that target this regulable purpose receive intermediate scrutiny because they restrict commercial speech along a regulable axis. Thus, the difference in purposes of expression between these two types of hybrid speech explains why content bias produces different levels of scrutiny.

V. THE FRAMEWORK SHIFTS: RECENT CHANGES IN THE EXPRESSIVE CONDUCT AND COMMERCIAL SPEECH DOCTRINES

The analysis in Parts I and II demonstrates how expressive conduct and commercial speech are analytically similar, as they are both forms of hybrid speech governed by four-factor intermediate scrutiny tests that are textually similar. Despite these structural similarities, the Court has increasingly applied a more relaxed form of intermediate scrutiny to incidental restraints on expressive conduct while applying a

77 See, e.g., *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (holding that a law proscribing flag burning was content-based and therefore unconstitutional).

78 See id. at 406 (“The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, prescribe particular conduct because it has expressive elements.” (citations omitted)).

79 Additionally, this analysis explains why content-neutral regulations that target symbolic speech along its regulable axis of method of expression receive only intermediate scrutiny. Justice Scalia has suggested that even a lower standard — rational basis review — might be appropriate for such content-neutral restrictions. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring in the judgment) (“Since the [regulation at issue] is a general law not specifically targeted at expressive conduct, its application to such conduct does not in my view implicate the First Amendment.”). This approach differs from the one provided in this Note, which asserts that even incidental restraints on expressive conduct merit intermediate scrutiny because of the hybrid nature of the speech.
stricter form of intermediate scrutiny to restrictions on commercial speech. This Part explores how an altered societal conception of commercial speech and the Court’s preference for bright-line rules help explain this shift. This Part also examines how a complete shift to rational basis review or strict scrutiny is problematic for either expressive conduct or commercial speech.

A. Expressive Conduct Receives Diminished First Amendment Protection in Practice

Although the *O'Brien* test remains good law, the Court has never used it to invalidate laws that incidentally burden expressive conduct. In fact, the Court has created a waivable presumption that such laws do not violate the First Amendment. One scholar has noted that, “[b]y the 1990s . . . *O'Brien* intermediate scrutiny provided little First Amendment protection against a government regulation that could be said to advance a content-neutral goal, regardless of the law’s actual motivation towards application on or effects on free speech.”

The Court’s hesitation to apply *O'Brien* expansively may stem from a concern that this course of action would force courts to review almost every governmental action for First Amendment violations, because almost every law is bound to have an incidental effect on some form of expressive conduct. Additionally, over the years, *O'Brien* may have become diluted because the Court has applied it to a wider

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80 See Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart, 1996* SUP. CT. REV. 123, 148 n.93 (“Although the *Central Hudson* test closely resembles the equally canonical *O'Brien* test for review of content-neutral regulations, . . . the Court rarely invalidates a content-neutral regulation of noncommercial speech, but has found a number of commercial speech regulations wanting.”).  
81 See Stone, supra note 33, at 52 n.23 (“The Court has applied . . . the *O'Brien* test . . . to five content-neutral restrictions and upheld them all.”); see also Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289, 292 (1984) (upholding a ban on overnight sleeping in a public park against an expressive conduct challenge); id. at 293 (“[R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”).  
82 See Stone, supra note 33, at 114 (“The general presumption is that incidental restrictions do not raise a question of first amendment review. The presumption is waived, however, whenever an incidental restriction either has a highly disproportionate impact on free expression or directly penalizes expressive activity. And the latter exception is applied quite liberally whenever the challenged restriction significantly limits the opportunities for free expression.”).  
83 Ross, supra note 55, at 725.  
84 The *O'Brien* Court itself was aware of this problem. See United States v. *O'Brien*, 391 U.S. 367, 376 (1968); see also Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 784 (1985) (“Virtually every government decision is likely to have some incidental effect on some constitutionally protected value.”).
variety of contexts. Moreover, the actual O'Brien test — particularly its content neutrality and narrow-tailoring requirements — also may have been weakened during this time period. Whatever the reason, O'Brien's intermediate scrutiny test does not provide the level of intermediate scrutiny for incidental restraints on expressive conduct that the test's language suggests.

B. Commercial Speech Marches Toward Strict Scrutiny

Like O'Brien, Central Hudson remains good law. But unlike in the expressive conduct context, in which the actual level of First Amendment protection seems weaker than the O'Brien test would suggest, scrutiny in the commercial speech arena seems to be rising, with more protection offered to commercial speech than Central Hudson seems to require. In 44 Liquormart, Inc. v. Rhode Island, the Court struck down a statute that prohibited any advertising of prices of alcoholic beverages except "for price tags or signs displayed with the merchandise within licensed premises and not visible from the street." The Court noted that "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." Furthermore, the Court has continued to invalidate laws regulating commercial speech, including even provisions pertaining to traditionally highly regulated activities such as food and drug law. Justices Stevens and Thomas have joined many scholars in calling for the highest level of protection for certain types of

85 See Ross, supra note 55, at 730 (observing that although O'Brien was originally confined to symbolic speech, the Court has applied or referenced it more than one hundred times in a variety of other contexts).

86 See id. at 733-34 (arguing that the Court interpreted the content-neutrality prong to be triggered only when the government disagreed with the message conveyed and determined that the narrow-tailoring prong did not require the government to use the least restrictive or intrusive means).


89 Id. at 489.

90 Id. at 501. But see Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 331-32, 344 (1986) (upholding Puerto Rican statute that legalized certain casino gambling but prohibited advertising of casino gambling directed toward Puerto Rican residents).

commercial speech.\textsuperscript{92} Thus, the trend in recent years has been toward a stronger commercial speech doctrine, with a possible shift to full First Amendment protection coming in the future.

C. Preference for Bright-Line Rules Explains the Shift Away from Intermediate Scrutiny

One reason why the levels of review for commercial speech and expressive conduct are moving away from intermediate scrutiny may be that at least four current Supreme Court Justices favor bright-line rules over multifactor standards.\textsuperscript{93} Unlike strict scrutiny, which is often fatal in fact, and rational basis review, under which very few laws are held unconstitutional, intermediate scrutiny is the level of review that provides judges with the most discretion in assessing the constitutionality of a law. Critics assert that by giving this discretion to unelected judges, intermediate scrutiny is undemocratic.\textsuperscript{94} Supporters urge that intermediate scrutiny provides judges with the flexibility that they need to decide difficult cases correctly, and that by not forcing rigid decisionmaking, intermediate scrutiny actually facilitates democratic deliberation.\textsuperscript{95}

For better or for worse, the Court seems to have adopted a less charitable view toward balancing modes of analysis like intermediate scrutiny, and it has been pushing for a jurisprudence more centered on bright-line rules. Justice Scalia is one of the most prominent advocates of this approach. He has urged that “[balancing] modes of analysis be

\textsuperscript{92} See \textit{44 Liquormart,} 517 U.S. at 503 (1996) (plurality opinion) (“The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products . . . .”); id. at 518 (Thomas, J., concurring in part and concurring in the judgment) (“In cases . . . in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in \textit{Central Hudson} . . . should not be applied . . . . Rather, such an ‘interest’ is \textit{per se} illegitimate . . . .” (citation omitted)); \textit{see also} Kozinski & Banner, \textit{supra} note 9, at 628 (arguing that “the commercial/noncommercial distinction makes no sense”); Redish, \textit{supra} note 60, at 431.


\textsuperscript{94} See, e.g., George C. Hlavac, \textit{Interpretation of the Equal Protection Clause: A Constitutional Shell Game,} 61 GEO. WASH. L. REV. 1349, 1375 (1993) (“The Court should abolish the intermediate-scrutiny test . . . because the Court leaves open the door for the creation of even more shells for judges to hide the ball under . . . .”).

\textsuperscript{95} See, e.g., Jay D. Wexler, \textit{Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism,} 66 GEO. WASH. L. REV. 298, 303 (1998) (“Intermediate scrutiny can be a form of judicial minimalism that can appropriately resolve [analogue] crises over time because it invites democratic deliberation, allows for moral evolution, promotes societal education, and provides judges with greater opportunities to consider the details . . . .”).
avoided where possible” and “that the Rule of Law, the law of rules, be extended as far as the nature of the question allows.” 96 In Employment Division v. Smith, 97 Justice Scalia imported this form of analysis into the free exercise context, 98 and he has indicated a willingness to import it into the expressive conduct context as well. 99 In particular, the Court’s trend may be toward applying rational basis review for all content-neutral regulations (which would include incidental restraints on expressive conduct) 100 and strict scrutiny for all content-based regulations (which would include commercial speech regulations). 101 Although some Justices may not share a distaste for the balancing mode of analysis, some of the shift away from intermediate scrutiny in the commercial speech and expressive conduct contexts likely reflects this jurisprudential approach.

D. Changed Perception of Advertising Shifts Protection of Commercial Speech Toward Strict Scrutiny

Another possible reason why the Court has increased commercial speech’s First Amendment protection is that the boundary between commercial and noncommercial purposes is blurring. Advertising, more than ever before, is integrated into other forms of entertainment. For example, the music video is a type of speech whose commercial and noncommercial aspects seem inextricably intertwined. 102 Product placement in movies is another example of blended commercial speech. As advertising becomes more lifestyle-oriented and focuses on eliciting an emotional response from consumers, it begins to look more like a form of art. Thus, because advertising is becoming more akin to core speech in its methods of communication — even though it retains a

98 See id. at 884–85; see also Sullivan, supra note 26, at 303 (“Smith is not the United States v. O’Brien of religion law; that case established heightened . . . scrutiny for facially content-neutral laws that incidentally impair the free exercise of speech. O’Brien would have been a natural analogue to turn to. Justice Scalia’s failure to do so suggests an antipathy towards balancing and a preference for the categorical tendencies of a two-tier tracking system.” (footnote omitted)).
99 See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991) (Scalia, J., concurring in the judgment) (“The challenged regulation must be upheld, not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.”).
100 See id.
101 Cf. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (plurality opinion) (“Our commercial speech cases have recognized the dangers that attend governmental attempts to single out certain messages for suppression.”); Farber, supra note 60, at 374 (noting that “[m]ost regulation of advertising blatantly violates” the First Amendment principle of content neutrality).
102 See Kozinski & Banner, supra note 9, at 641 (“Music videos serve one overriding purpose: to promote record sales. But they are nevertheless a form of expression we instinctively think of as deserving as much protection as full-length films.”).
primarily commercial purpose — the Court may increasingly view it as a form of core First Amendment speech.

E. Potential Problems with Shifting to Strict Scrutiny or Rational Basis Review

Despite the current drift of commercial speech doctrine toward strict scrutiny and expressive conduct toward rational basis review, the Court will face difficulties if it shifts the doctrines to either extreme. As described earlier, intermediate scrutiny was adopted for these types of speech because the Court recognized that they were hybrid in nature. Accordingly, a shift to rational basis review or strict scrutiny would create a tension between the legal doctrine and the characteristics of these types of speech.

In the expressive conduct context, a move to rational basis review would establish a simpler test, but it would leave vulnerable some forms of speech that probably deserve First Amendment protection. Although the Court has never used O'Brien to invalidate a law creating an incidental restraint on expressive conduct, the test still provides the Court with that power, which it could exercise in egregious circumstances. In addition, the shadow of O'Brien may deter legislatures from passing such laws. A shift to rational basis review would minimize or possibly even eliminate these beneficial effects.

A move all the way to strict scrutiny in the commercial speech context would be problematic for other reasons. First, it would prevent legislatures and agencies from regulating advertising in potentially beneficial ways. Second, it might result in First Amendment protection for “speech” normally thought to be outside of the Amendment entirely. Some forms of unprotected “speech” — such as speech currently regulated under securities or antitrust law — lurk just outside the current boundaries of the First Amendment, and they are difficult to distinguish in principle from commercial speech. If commercial speech receives core First Amendment protection, this tenuous distinction will come under even more strain. In other words, putting commercial expression in the category of “clearly protected” speech may merely spur courts to provide a new category of speech with quasi-protected status.

103 See, e.g., Stone, supra note 33, at 107 (“The potential restrictive effect of such laws [that incidentally burden expressive conduct] is simply too great to disregard them entirely.”).

104 See Blasi, supra note 57, at 488 (“Were courts to grant commercial speech the same high level of protection now accorded political speech, regulatory objectives long considered important and legitimate would be frustrated, engendering in all probability a weakening of public respect for the first amendment quite a bit more severe than that now caused by the Court’s middle-of-the-road approach.”).

105 See Schauer, supra note 2, at 1777–82; id. at 1780 (noting that “claims that the entire scheme of securities regulation needed to be tested against First Amendment standards became more common” after the creation of the commercial speech doctrine).
To the extent that one feels the First Amendment should not apply in areas such as antitrust or securities law, this “upward pull” of First Amendment doctrine would be disconcerting. On this view, intermediate scrutiny for commercial speech represents a buffer, preventing a sharp dropoff between the more extreme doctrines of rational basis review and strict scrutiny and preventing other types of marginal speech from falling into the wrong category of protection.

CONCLUSION

This Note develops a framework for analyzing commercial speech and expressive conduct as hybrid forms of expression. It uses this framework to identify speech currently outside the domain of First Amendment protection — such as exterior product design — that shares regulable characteristics with hybrid speech. But the Court’s diverging analysis of hybrid speech in recent years threatens both this framework and the traditional boundaries between protected and unprotected speech. On the one hand, as scrutiny of incidental restraints on expressive conduct falls toward rational basis review, political activity once thought to implicate core constitutional values now falls out of the First Amendment’s ambit. On the other hand, speech that is widely agreed to be wholly outside the Amendment’s protection, such as speech regulated by securities law, may be pulled in as protection for commercial speech continues to grow. Should this happen, the sole benefit of the Court’s new approach — analytical clarity — would be threatened because emptying intermediate scrutiny of its current occupants would create a vacuum that other speech would fill. Despite the shortcomings of intermediate scrutiny, it should remain the standard of review for commercial speech and expressive conduct because it best reflects the hybrid nature of both types of speech.