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Restrictions on Electric Utility Advertising

In response to the 1973 oil embargo, the New York Public Service Commission (PSC) took steps to minimize consumption of electricity.[1] Among other restraints, the PSC ordered electric utilities to discontinue "promoting the use of electricity through advertising, subsidy payments . . . or employee incentives."[2] Although the crisis has passed, the ban persists, to further a policy of energy conservation decreed by the New York state legislature.[3] Two New York public utilities — Central Hudson Gas and Electric Company (Central Hudson) and Long Island Lighting Company (LILCO) — have challenged the ban,[4] citing recent Supreme Court opinions that extended first amendment protection to "speech which does no more than propose a commercial transaction."[5] Unfortunately, the Court

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1. Notice of Proposal to Issue Order Restricting Certain Uses of Electric Energy, 13 N.Y. PSC 2074-76 (issued Dec. 5, 1973). The Commission soberly observed the effects of the embargo: "the demands for electric energy in this state cannot be met for the foreseeable future without significant reductions in usage in view of the lack of sufficient fuels to generate electricity." *Id.* at 2072.

2. *Id.* at 2076.

3. N.Y. ENERGY LAW § 3-101 (McKinney 1979). In July 1976, the Public Service Commission solicited "comments on the subjects of advertising by utilities and promotion of electricity sales." Statement of Policy on Advertising and Promotional Practices of Public Utilities, 17 N.Y. PSC 1-R (issued Feb. 25, 1977) [hereinafter cited as Statement]. Proponents of advertising responded that generating facilities were underused during the winter and that increased off-peak consumption would spread the burden of fixed costs, possibly lowering rates. *See id.* at 2-R. Despite these arguments, the PSC reaffirmed the ban in February 1977, *id.* at 2-R, 3-R, explaining that the "increased requirement for fuel oil to serve the incremental off-peak load would . . . frustrate rather than encourage conservation efforts." *Id.* at 2-R.

The Commission expressly allowed time-of-day rate advertising as "informational":

> It is reasonable to believe that a continued proscription of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales.
>
> . . . We recognize, however, that as we move toward more and more widespread adoption of time-of-day rates, it may be highly desirable for companies to publicize those rates, and point out the various ways in which customers may take advantage of them. While this advertising may better be described as informational, we wish to make clear, in any case, that it is our desire to permit advertising of this kind, provided it has the exclusive, or at least preponderant effect of encouraging *shifts* of consumption from peak to off-peak and little or no effect of increasing aggregate sales.

Id. at 2-R, 3-R (emphasis original).

4. The companies first filed petitions for rehearing which were denied. Order Denying Petition for Rehearing, 17 N.Y. PSC 17-R, 22-R (issued July 14, 1977) [hereinafter cited as Order]. Central Hudson took its grievance to state court and lost. Consolidated Edison Co. v. New York Pub. Serv. Commn., 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978), *affd.*, 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30, *prob. juris. noted sub nom.* Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 100 S. Ct. 446 (1979). LILCO went to federal district court and won. Long Island Lighting Co. v. New York Pub. Serv. Commn., [1979] 5 MEDIA L. REP. (CCH) 1241 (E.D.N.Y.), *cert. denied*, 100 S. Ct. 702 (1980).

5. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Human Relations Commn., 413 U.S.

has not defined the limits of that protection,[6] and the lack of definition has spawned contradictory decisions by the courts that have considered the New York utility challenges. The New York Court of Appeals sustained the ban,[7] while a federal district court struck it down.[8] Both courts agreed that the advertising ban was directed at commercial speech, but they differed over the extent to which the first amendment protects such speech.

This Note reconsiders the constitutionality of New York's restriction on advertising by electric utilities. Section I explains how and why the Supreme Court's current analysis of the first amendment distinguishes commercial speech from other forms of speech. Section II looks at what protection is due commercial speech and weighs the competing interests in the specific context of utility advertising.

376, 385 (1973)). The Court struck down a state statute prohibiting drug price advertising; it rejected the state's argument that such advertising would lead to unprofessional conduct by pharmacists. The Court denied that commercial advertising "is so removed from any 'exposition of ideas' and from ' "truth, science, morality and the arts in general, in its diffusion of liberal sentiments" ' that it lacks all protection." 425 U.S. at 762 (citations omitted). The Court thus put to rest the theory, prevalent since Valentine v. Chrestensen, 316 U.S. 52 (1942), that commercial speech was not covered by the guarantees of the first amendment.

In *Chrestensen*, the Court had unanimously upheld a local ordinance forbidding "distribution in the streets of commercial and business advertising matter." 316 U.S. at 53.

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.

316 U.S. at 54.

The demise of the *Chrestensen* view was foreshadowed in Bigelow v. Virginia, 421 U.S. 809 (1975), where the Court reversed the conviction of a Virginia newspaper editor who had advertised the availability of abortions in New York. The Court observed that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." 421 U.S. at 826. The *Bigelow* Court concluded: "Regardless of the particular label, . . . a court may not escape the task of assessing the First Amendment interest at stake by weighing it against the public interest allegedly served by the regulation." 421 U.S. at 826.

The *Bigelow* advertisement, however, "did more than simply propose a commercial transaction." 421 U.S. at 822. It communicated information on a controversial subject of "public interest." 421 U.S. at 822. A "fragment of hope for the continuing validity of a 'commercial speech' exception," 425 U.S. at 760, remained until *Virginia Board of Pharmacy* extended first amendment protection to speech that does "no more than propose a commercial transaction." 425 U.S. at 762.

6. In Friedman v. Rogers, 440 U.S. 1 (1979), the Supreme Court recognized that the perimeters of commercial speech protection are still uncertain:

> Because of the special character of commercial speech and the relative novelty of First Amendment protection for such speech, we act with caution in confronting First Amendment challenges to economic legislation that serves legitimate regulatory interests. Our decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area. . . . When dealing with restrictions on commercial speech we frame our decisions narrowly. . . .

440 U.S. at 11 n.9.

7. Consolidated Edison Co. v. New York Pub. Serv. Commn., 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30 (1979), *affg.* 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978).

8. Long Island Lighting Co. v. New York Pub. Serv. Commn., [1979] 5 MEDIA L. REP. (CCH) 1241 (E.D.N.Y.).

The Note concludes that states may restrict utility advertising to encourage energy conservation.

I. The Supreme Court's Parsing of Commercial Speech

The Supreme Court moved very slowly toward protecting commercial speech, which it once held completely outside the purview of the first amendment.[9] Until 1975, the Court divided all expression into "protected speech," which could be regulated only when necessary to prevent imminent lawless action,[10] and "unprotected speech," which could be regulated in any manner that met the basic requirements of due process and equal protection. Then, in *Bigelow v. Virginia*[11] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[12] the Court decided that the first amendment's protections do extend to commercial speech. But in more recent cases, different forms of commercial speech seem to have received different degrees of protection. Some forms are fully protected — they may be regulated only for exigent reasons.[13] But most commercial speech falls into an intermediate category of somewhat regulable commercial speech.[14] Given the novelty of the holding that commercial speech is protected at all, the Court has only been able to hint at why regulable commercial speech should be distinguished from fully protected speech (which may be commercial or ideological) and how much protection regulable commercial speech deserves. This Section attempts to infer answers to those questions.

The Court has often referred to the "commonsense differences"[15] between speech that does "no more than propose a commercial transaction"[16] and other varieties of speech. Nonetheless, the Court has subtly and gradually shifted its interpretation of those commonsense differences and their implications for how to determine what protection a particular type of speech deserves. In *Virginia Board of*

9. *See* note 5 *supra*.

10. Brandenburg v. Ohio, 394 U.S. 444, 447 (1969).

11. 421 U.S. 809 (1975).

12. 425 U.S. 748 (1976).

13. *See* Carey v. Population Servs. Intl., 431 U.S. 678 (1977) (contraceptive advertising); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977) ("For Sale" signs advertising residential property); Bigelow v. Virginia, 421 U.S. 809 (1975) (abortion advertising). *See also* note 29 *infra*.

14. *See* Friedman v. Rogers, 440 U.S. 1 (1979) (optometrists' trademarks); Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978) (in-person solicitation by attorneys); Bates v. State Bar, 433 U.S. 350 (1977) (newspaper advertisement of attorney fees); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (prescription drug advertising).

15. Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-56 (1978); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 98 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976).

16. 425 U.S. at 762.

Pharmacy, for example, the Court announced that subject matter alone is not the basis of the distinction. Rather, the Court emphasized that commercial speech is more "easily verifiable by its disseminator" and more "durable" than other speech because it is essential to business profits. In theory, commercial speech would be less easily chilled and thus need less protection.[17]

Yet profit-motivation cannot alone differentiate commercial speech from other speech. Ideological speech may be both motivated by profit and easily verified, while business advertising may pursue goals beyond profit and may include unverifiable claims.[18] In 1978, however, the Supreme Court offered other, more enduring reasons to distinguish regulable commercial speech from fully protected speech.[19] Commercial speech partakes of both speech and economic activity: it is expression that seeks to influence the conduct of buyers and sellers in the market more than ideological speech. As a form of market activity, the proposal of a commercial transaction "occurs in an area traditionally subject to government regulation."[20] What makes commercial speech regulable is its role in economic activity ordinarily regulable by the state.[21] The state should not "lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."[22]

Therefore, the Court does not accord full first amendment protection to commercial speech affecting regulable economic activity. Indeed, the Court has pointed out that if it *were* to give full protection to all commercial speech, it might endanger ideological speech: "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 amendment's guarantee with respect to the latter kind of speech."[23]

Yet knowing what determines the proper level of first amendment scrutiny is not enough to make that determination easy in all cases. Speech relating to commerce within the legitimate scope of government regulation may also be tinged with ideological concerns that implicate more traditional first amendment values; the line between fully protected speech and regulable commercial speech may

17. 425 U.S. at 761-62, 771 n.24.

18. *See* Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 382-86 (1979).

19. *See* Ohralik v. Ohio State Bar Assn., 436 U. S. 447 (1978); *In re* Primus, 436 U.S. 412 (1978). The cases are discussed in text at notes 24-27 *infra*.

20. 436 U.S. at 456.

21. *See* Farber, *supra* note 18, at 386-87; Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 1-2 (1979).

22. 436 U.S. at 456.

23. 436 U.S. at 456.

be fine indeed. The Court's willingness to draw that line is apparent from its recent treatment of companion cases.

In *Ohralik v. Ohio State Bar Association*,[24] an attorney personally solicited contingent fee agreements from two young accident victims.[25] *In re Primus*[26] involved an ACLU attorney who informed an indigent woman that free legal representation was available to press a claim of coerced sterilization. Both attorneys faced disciplinary action for unprofessional conduct. The Court held that the conduct of the ACLU attorney deserved full first amendment safeguards; Ohralik's conduct, in contrast, deserved less protection. *Primus* distinguished the commercial speech in *Ohralik* by examining the motive of the speaker and the content of the speech:

> Normally the purpose or motive of the speaker is not central to First Amendment protection, but it does bear on the distinction between conduct that is "an associational aspect of 'expression' " . . . and other activity subject to plenary regulation by government. . . . In Ohralik v. Ohio State Bar Assn., . . . the lawyer was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests. The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw, . . . but that is no reason for avoiding the undertaking.[27]

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24. 436 U.S. 447 (1978).

25. The Court described Ohralik's conduct:

> He approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests. He solicited Carol McClintock in a hospital room where she lay in traction and sought out Wanda Lou Holbert on the day she came home from the hospital, knowing from his prior inquiries that she had just been released. Appellant urged his services upon the young women and used the information he had obtained from the McClintocks, and the fact of his agreement with Carol, to induce Wanda to say "O.K." in response to his solicitation. He employed a concealed tape recorder, seemingly to assure that he would have evidence of Wanda's oral assent to the representation. He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistable offer. He refused to withdraw when Mrs. Holbert requested him to do so only a day after the initial meeting between appellant and Wanda Lou and continued to represent himself to the insurance company as Wanda Holbert's lawyer.

436 U.S. at 467.

26. 436 U.S. 412 (1978).

27. 436 U.S. at 438 n.32. This test dissatisfied Justice Rehnquist. He treated the conceptual basis for the commercial speech distinction and the practical means of identifying commercial speech as one issue:

> [T]o the extent that this "common-sense" distinction focuses on the content of the speech, it is at least suspect under many of this Court's First Amendment cases, and to the extent it focuses on the motive of the speaker, it is subject to manipulation by clever practitioners. . . . [W]e may be sure that the next lawyer in Ohralik's shoes who is disciplined for similar conduct will come here cloaked in the prescribed mantle of "political association" to assure that insurance companies do not take unfair advantage of policy holders.
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> . . . .
>
> . . . I believe that constitutional inquiry must focus on the character of the conduct which the State seeks to regulate, and not on the motives of the individual lawyers or the nature of the particular litigation involved.

436 U.S. at 442-43 (Rehnquist, J., dissenting). In defining commercial speech and deciding to accord it lesser protection, the Court *has* focused on the "character of the conduct which the

It should be stressed that this test does not reduce the protection given all speech that is commercial and nonideological. Reduced protection attaches only to speech concerning regulable commercial activity. Some commercial activity, like political activity, is not subject to plenary regulation by government. It may, for example, relate to the exercise of fundamental rights, like the right to travel or the right of privacy, which the state may not infringe without a "compelling" interest.[28] Where commercial speech affects such activity, the Court has extended traditional first amendment protection,[29] and permitted regulation only of speech that is likely to incite lawless action.[30] In sum, speech that affects regulable commercial activity is entitled to less protection than ideological speech or speech affecting an activity beyond the legitimate scope of government regulation.

The specific forms of speech subject to the New York PSC ban are clear examples of regulable commercial speech. The advertisements contemplated by the utilities are not ideological; LILCO, for example, wanted only to encourage the use of electric space heating.[31] The ban does not prohibit the sorts of political advertisements

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State seeks to regulate." *See* text at notes 20-21 *supra.* But the *Primus* majority treated as a separate issue the means of identifying speech that bears the requisite relationship to regulable activity. In determining whether speech is likely, in fact, to affect regulable activity, the majority inquired (1) whether the speaker is attempting to affect economic, as opposed to political, activity; and (2) whether the communication is in the nature of a solicitation or provision of information.

28. *See* Roe v. Wade, 410 U.S. 113, 155 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

29. *See, e.g.*, Carey v. Population Servs. Intl., 431 U.S. 678 (1977); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977); Bigelow v. Virginia, 421 U.S. 809 (1975).

In *Carey*, the Court struck down a statute that restricted advertisement of contraceptives. The Court found the advertising related to the exercise of the individual's right of privacy, and held that the advertising was not directed to producing illicit sexual conduct.

In *Linmark*, the Court invalidated an ordinance prohibiting display of "For Sale" signs on residential property. The township sought to curtail panic selling and promote racial integration in the community. The court held that citizens "have a right to decide where to live and raise their families." 431 U.S at 96. The Court distinguished *Linmark* from Barrick Realty, Inc. v. City of Gary, 491 F.2d 161 (7th Cir. 1974), where the Seventh Circuit upheld a prohibition on "For Sale" signs. The Court expressed "no view," 431 U.S. at 95, as to whether *Barrick Realty* is still good law; *Barrick Realty* may survive on the ground that the state may have had a compelling interest in regulating real estate sales.

In *Bigelow*, the Court struck down a Virginia statute prohibiting advertisements of abortion services that were available in New York. "[T]he advertisement related to activity with which, at least in some respects, the State could not interfere." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S 748, 760 (1976). Virginia lacked authority to prevent its residents from traveling to New York to obtain an abortion, "could not prosecute them for going there, and could not regulate the services provided in New York." Farber, *supra* note 18, at 378. Striking down the statute against abortion advertising, the *Bigelow* Court noted, "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit." 421 U.S. at 825.

30. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

31. Long Island Lighting Co. v. New York Pub. Serv. Commn., [1979] 5 MEDIA L. REP. (CCH) 1241, 1241 (E.D.N.Y.), *cert. denied*, 100 S. Ct. 702 (1980).

(such as an advertisement calling for an end to the ban itself) that advance "beliefs and ideas" and are therefore entitled to full protection. Nor do the advertisements serve any fundamental rights: the Supreme Court has expressly denied that there is any fundamental right to shelter,[32] the most important interest whose exercise is facilitated by electric utility services. Promotional advertising by electric utilities is a component of economic activity — the production and sale of electricity — that has long been regulated by the government. States have enjoyed extensive powers to regulate public utilities, which are natural monopolies affected with a public interest.[33] The advertisements banned by New York's Public Service Commission are thus commercial speech that a state may regulate more than ideological speech, but less than commercial activity involving no speech at all. The next Section of this Note will develop the Court's standard for measuring the permissible scope of regulations that inhibit regulable commercial speech. It will then apply that standard to the PSC ban.

II. The Supreme Court's Balance of Competing Interests

In its decisions concerning regulable commercial speech, the Supreme Court has not explicitly set forth the characteristics of a valid limitation on regulable commercial speech. Nevertheless, the decisions reveal a consistent effort to balance the interests in unrestrained commercial expression against the particular goal a state hopes to serve by regulation. Ever since *Virginia Board of Pharmacy*, the Court has recognized that commercial speech may contain valuable information for public and private economic decisions,[34] and that not every state interest is enough to override that value.[35] A regulation that survives the scrutiny of the due process and equal

32. *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972). Even if a fundamental right to shelter were found, New York could still abridge that right if its interest in energy conservation were compelling. *See also* note 81 *infra* and accompanying text.

33. *See, e.g.*, Cantor v. Detroit Edison, 428 U.S. 579, 595-96 (1976). *Cf.* Munn v. Illinois, 94 U S. 113, 126 (1876) (recognizing state authority to regulate industry "affected with a public interest").

34. Friedman v. Rogers, 440 U.S. 1, 8-15 (1979); Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-59 (1978); Bates v. State Bar, 433 U.S. 350, 368-82 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762-64 (1976).

35. The Court has "weighed" those interests in its decisions. Friedman v. Rogers, 440 U.S. 1, 9 (1979). The LILCO court relied on language in *Virginia Board of Pharmacy* that suggested truthful commercial advertising of legal activity is categorically immune from government regulation. The Supreme Court's decisions since *Virginia Board of Pharmacy*, however, have not relied on such a categorical rule. The cases have tended to be one-sided — either the speech restriction was only remotely connected to a state interest, *see* Bates v. State Bar, 433 U.S. 350, 368-79 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 769 (1976), or the particular form of the advertising tended to obstruct, rather than facilitate, informed decision, *see* Friedman v. Rogers, 440 U.S. 1, 12-16 (1979); Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 457-58 (1978), but they have all examined the relative weights of the competing interests.

protection clauses may be inadequate to justify an abridgement of commercial speech interests.[36] More recent cases, however, have acknowledged that states need to regulate the conduct of business.[37] The Court has assessed the interests in regulation by asking whether the restriction on speech promotes a substantial state purpose and by demanding that the restriction and the regulable activity be closely connected.[38]

The PSC ban is founded in a well-articulated concern for pre-

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36. *See* 425 U.S. at 769. The Virginia statute prohibiting drug price advertising had survived the former challenge, *see* Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969), but fell as a violation of freedom of speech, even though the Court identified a strong state interest in maintaining high professional standards for pharmacists. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

Traditionally, a state can regulate virtually any economic activity it chooses as long as it does not do so capriciously or arbitrarily. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297 (1976). Recently, however, the Court has inquired more searchingly into such regulation. Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (plurality opinion), and Trimble v. Gordon, 430 U.S. 762 (1977), suggest that indirect regulatory means may invite close inspection similar to that of commercial speech regulation, which may also be indirect. In *Moore*, an ordinance aimed at "preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system," 431 U.S. at 499-500, defined which categories of relatives "could occupy a single dwelling unit." 431 U.S. at 498. The city prosecuted a woman for living with her grandson, and the Supreme Court reversed the conviction because the ordinance violated due process. Justice Powell's plurality opinion found the section defining "family" to exclude certain relatives had "but a tenuous relation to alleviation of the conditions mentioned by the city." 431 U.S. at 500. In *Trimble*, an equal protection case, the Court invalidated an Illinois statute permitting "illegitimate children to inherit by intestate succession only from their mothers." 430 U.S. at 763. Justice Powell, writing for the majority, observed that the statute bore "only the most attenuated relationship to the asserted goal" of promoting legitimate family relationships. 430 U.S. at 768.

37. *See* Ohralik v. Ohio State Bar Assn., 436 U S. 447 (1978); Friedman v. Rogers, 440 U.S. 1 (1979). *Ohralik* discussed the importance of regulating the professional conduct of lawyers and upheld a Bar Association rule against in-person solicitation of clients under which state courts had disciplined Ohralik. The Court found it likely that in-person solicitation would injure consumers although no harm was shown in this case. *See* text at notes 24-27 *supra*. *Friedman* upheld a ban against use of trade names by optometrists as a practice that may mislead the public regarding the source and quality of optometry services. The Court emphasized, however, "that the restriction on the use of trade names has only the most incidental effect on the content of the commercial speech of . . . optometrists." 440 U.S. at 15-16.

38. Friedman v. Rogers, 440 U.S. 1, 13-15 (1979); Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 460-72 (1978); Bates v. State Bar, 433 U.S. 350, 368-79 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 766-70 (1976). In *Virginia Board of Pharmacy* the Court found the restriction an unreasonable method to pursue the state interest because there was an inadequate causal connection between the advertisement of drug prices and deterioration of professional standards among licensed pharmacists.

> The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined.

425 U.S. at 769. In addition, the restriction tended "to discourage consumers from purchasing the drugs prescribed for them, an intent which, presumably, was not that of the Virginia legislature." Brief of Appellee at 30, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). In *Bates*, the Court considered the constitutionality of a bar association rule against price advertising by attorneys. Reserving the question of the status of attorney advertisement of the quality of legal services, the Court extended first amendment protection to newspaper "advertisement concerning the availability and terms of routine legal services." 433 U.S. at 384. The Court asserted that this was valuable information for consum-

serving scarce resources by discouraging unnecessary consumption. The commercial speech interests in allowing utilities to broadcast promotional advertisements are largely economic; those that are not economic are burdened only slightly by the ban. Closer study of these elements in the balance will reveal that the ban should withstand first amendment scrutiny.

A. *The State's Interest in Continuing the Advertising Ban*

The state must show a higher interest in regulating utility advertising than it would have to show to regulate other commerce.[39] The Court does not, however, treat commercial advertising as "speech which our Constitution has immunized from government control."[40] In other contexts, the Court has noted that the "scope and nature of the economic activities of incorporated organizations . . . demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective."[41] In assessing the strength of the state's interest in restrictions like the utility advertising ban, the Court has considered (1) the importance to the state of regulating the underlying economic activity, and (2) the reasonableness of advertising restrictions as a means to promote the state's regulatory purpose. By these criteria, the PSC ban fares quite well. New York seeks to discourage increased electricity consumption to minimize the state's dependence on foreign oil and to keep down the cost of energy. The advertising ban prevents companies from stimulating consumption that undermines these ends.

1. *The Substantiality of the State's Interest*

In each case evaluating restrictions on regulable commercial speech, the Supreme Court has commented on the substantiality of the state's regulatory interest.[42] Conceivably, the Court might find an interest substantial only if it met some independent standards of importance. Yet the Court has never invalidated a speech restriction because the state's interest was insubstantial; the Court will probably conclude that any interest the state considers significant enough to promote through regulation is substantial. The Court has not even demanded that the interests served by advertising restrictions be

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ers, and that such advertising was only remotely related to unprofessional conduct among lawyers.

39. The Court submits advertising restrictions to "close inspection," Bates v. State Bar, 433 U.S. 350, 365 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 769 (1976).

40. 395 U.S. at 448.

41. Bellis v. United States, 417 U.S. 85, 90-91 (1974) (denying member of partnership right to invoke privilege against self-incrimination regarding production of business records he held in his capacity as partner) (quoting United States v. White, 322 U.S. 694, 700 (1944)).

42. *See* note 37 *supra*.

among the state's most important goals. Admittedly, the *Ohralik* Court referred to the state's "particularly strong"[43] interest in regulating attorneys, who "are essential to the primary governmental function of administering justice."[44] But Justice Powell did not limit valid advertising restrictions to those that advance a "primary" state purpose. Indeed, his use of the term "important"[45] suggests that he also had broader purposes in mind.

New York's interest in promoting energy conservation falls within the class that the Court has regarded as substantial. Both the *LILCO* and *Consolidated Edison* courts agreed on the importance of New York's interest in conserving energy. In *LILCO*, the federal district court recognized that "the public interests to be served by the PSC are important."[46] In *Consolidated Edison*, the New York Court of Appeals observed: "Conserving diminishing resources is a matter of vital state concern."[47] The Supreme Court itself has acknowledged that "energy conservation . . . and environmental protection are goals that are important and of legitimate state concern."[48] The crippling effects of the 1973 oil embargo, the unpredictability of the OPEC nations, and the general national interest in energy conservation underscore the urgency of New York's interest in conservation.

New York, furthermore, takes conservation seriously enough to express its concern in legislation. The New York Energy Law[49] and the New York Public Service Law[50] establish energy conservation as a policy of the state and mandate educational programs, product regulation, a master energy plan, and other measures to encourage conservation.[51] Moreover, New York's energy policy serves goals beyond simply reducing the consumption of energy. The state seeks to

> maintain an adequate and continuous supply of safe, dependable, and economical energy for the people of the state . . . all in order to promote the state's economic growth, to create employment within the

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43. 436 U.S. at 460.

44. 436 U.S. at 460 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)).

45. 436 U.S. at 462.

46. [1979] 5 MEDIA L. REP. (CCH) 1241, 1245.

47. 47 N.Y.2d at 110, 390 N.E.2d at 758, 417 N.Y.S.2d at 39.

48. United States Trust Co. v. New Jersey, 431 U.S. 1, 28 (1977).

49. *See* N.Y. ENERGY LAW § 1-101 note (McKinney 1979):

> The legislature hereby finds and declares that the people of New York state have suffered shortages of all forms of energy; that such shortages are likely to recur; that New York is overly dependent on sources of energy outside the state; and such shortages and high costs have been inimical to health, safety, and welfare of the people.
>
> The state must therefore take steps to meet these shortages and high costs by cutting energy waste and reducing energy consumption. . . . It must do so by minimizing the risks to human health and the environment; and by maximizing the benefits to New York labor, business and industry. . . .

50. *See* N.Y. PUB. SERV. LAW § 5 (McKinney Supp. 1979).

51. *See, e.g.*, N.Y. ENERGY LAW §§ 5-107(1), (3); 5-110; 9 (McKinney 1979).

> state, to protect its environmental values, to husband its resources for future generations, and to promote the health and welfare of its people . . . .[52]

An energy shortage, as this policy recognizes, dries out the entire economic and social system of the state. At the same time, a radical shift from existing technologies could exact a heavy environmental and human toll.[53] New York's policy, therefore, reconciles competing vital interests[54] — interests comparable to the state interest in regulating solicitation by lawyers, which the *Ohralik* Court upheld.

2. *The Reasonableness of the PSC Ban*

Under the Court's analysis, a regulation limiting commercial speech must not only further a substantial interest but also further that interest in a reasonable way. In early cases, the Court looked to the link between the harm the state sought to regulate and the commercial speech it wanted to prohibit. Where the link was "severely strained," the Court did not uphold the regulation;[55] conversely, where the connection between advertising and harmful activity was strong, the Court hesitated to overturn legislative judgment and administrative expertise.[56] In one case, the Court phrased this requirement of a reasonable means as a suggestion that the state may not limit advertising if other, less inhibitive, regulation is feasible.[57]

The harm that New York seeks to avoid is the waste of fuel that attends unnecessary increases in the use of electricity. Converting fossil fuels to electricity is relatively inefficient.[58] Energy is lost because of "poor conversion efficiency at the powerplant and the significant transmission line losses."[59] One PSC study showed that "private home space conditioning by electricity consumes from 20 to 144 percent more source energy than other heating modes under dif-

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52. N.Y. ENERGY LAW § 3-101(1) (McKinney 1979).

53. *See, e.g.*, Opinion and Order on Energy Conservation Measures, 14 N.Y. PSC 1215, 1225. "[U]se of electricity makes a positive contribution to the air quality in New York [City], when compared with on-site oil-fired boilers. This is due primarily to the low level releases of on-site boilers and the high level stack releases of power plants."

54. *See* N.Y. PUB. SERV. LAW §§ 4, 5, 65, 66 (McKinney Supp. 1979); Consolidated Edison Co. v. New York Pub. Serv. Commn., 47 N.Y.2d at 102-03, 390 N.E.2d at 753, 417 N.Y.S.2d at 34, *prob. juris. noted sub nom.* Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 100 S. Ct. 446 (1979).

55. *See* Bates v. State Bar, 433 U.S. 350, 368 (1977).

56. Friedman v. Rogers, 440 U.S. 1 (1979); Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978).

57. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, 425 U.S. 748, 786 (1976). The Court coupled this observation, however, with a note on the lack of connection between the advertising and the object of regulation.

58. Order, *supra* note 4, at 18-R.

59. *See* U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENERGY AND THE ENVIRONMENT: ELECTRIC POWER 29 (1973) [hereinafter cited as ENERGY AND THE ENVIRONMENT].

fering conditions."[60] Moreover, increased off-peak consumption of electricity would require the use of oil-fired generators, rather than coal-burning or nuclear generators,[61] while one of the goals of the state's energy policy is to reduce oil use.[62]

Thus, promoting the use of electricity causes a harm that New York has taken several legislative steps to prevent. The connection is direct: promotional activities by utilities are intended to increase consumption of electricity. Banning that advertising, therefore, would further the state's policy of not increasing consumption. The connection is as direct as in other cases where the Court has upheld advertising restrictions. Although the *Ohralik* Court, for example, noted that attorney solicitation directly invaded privacy, it rested its holding more squarely on indirect dangers: undue influence on consumer decisions and temptation to unprofessional conduct.[63] In *Friedman v. Rogers*,[64] the Court found no direct harm, but held that optometrical trademarks indirectly tended to mislead the public and promote commercial optometry.

To be sure, New York could reduce total consumption of electricity more directly by "fixing rates . . . or by allocating quantities of energy production."[65] Indeed, the federal district court found the PSC ban unconstitutional because "increased usage of electric heat may be regulated by means that are not only more direct but also less restrictive of LILCO's first amendment rights . . . ."[66] While superficially true, this statement misconceives the interests that the ban serves. Through the ban, the PSC seeks to prevent unnecessary and artificially induced consumption of electricity. It does so in a way that it hopes will have the fewest undesirable side effects. Fixing rates — an admittedly less restrictive alternative — would modify the existing consumption patterns of electricity users and would have secondary economic effects on new users, who might have no choice about their needs to consume. Fixing rates might even waste energy resources by encouraging users to shift away from technologies in which they have already invested substantially. In choosing the policy it did, the PSC was concerned with such consequences.[67]

60. *See* Opinion and Order on Energy Conservation Measures, 14 N.Y. PSC 1215, 1224 (1974). Electric water heating and cooking also consume approximately twice the source fuel as other methods. *See* ENERGY AND THE ENVIRONMENT, *supra* note 59, at 29.

61. Statement, *supra* note 3, at 2-R.

62. *See* notes 1-3 *supra*.

63. 436 U.S. at 462.

64. 440 U.S. 1 (1979).

65. [1979] 5 MEDIA L. REP. (CCH) 1246.

66. [1979] 5 MEDIA L. REP. (CCH) 1237.

67. *See* notes 53-60 *supra* and accompanying text; 14 N.Y. PSC at 1228. The New York legislature has authorized the PSC to select methods of energy conservation, N.Y. PUB. SERV. LAW §§ 4, 5, 65, 66; Consolidated Edison v. New York Pub. Serv. Commn., 47 N.Y.2d 94 at

As the Supreme Court itself has noted:

> Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.[68]

For almost any regulation of commercial speech, a court could probably find broad motivation that would be fulfilled more directly by an alternative that restricts speech less. A state might, for example, more directly prevent attorneys from overreaching by having the Court appoint counsel and set the fee in every case than by prohibiting in-person solicitation. A pure "least restrictive alternative" test would effectively elevate commercial speech to the same level of protection as ideological speech, eliminating all legislative discretion. In its decisions, the Court seems to have chosen another path. The PSC ban is sufficiently linked to the harms caused by promotional advertising to allow the state's substantial interests to be weighed in the first amendment balance.

B. *The Informational Value of Promotional Advertising*

Against New York's interest in restricting utility advertising must be weighed the advertisements' contribution to the public welfare. If the information conveyed by commercial speech is important enough to outweigh the state's interest in regulation, the speech may not be prohibited. The commercial speech cases have held that advertising advances three interests: (1) the advertiser's interest in profit, (2) the consumer's interest in information on which to base consumption choices, and (3) society's interest in the free flow of important information.[69] The first two are relatively weak and cannot counterbalance the strong state interest in limiting electricity use. The third is more compelling, but under the Court's present standards, the state interest should prevail.

1. *The Advertiser's Interest in Profit*

The *LILCO* opinion echoed *Virginia Board of Pharmacy*'s declaration that the interest of the commercial advertiser is "purely eco-

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102-03, 390 N.E.2d 749 at 753, 147 N.Y.S.2d 30 at 34, *prob. juris. noted sub nom.* Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 100 S. Ct. 446 (1979).

68. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (footnote omitted).

69. Friedman v. Rogers, 440 U.S. 1, 8-9 (1979); Bates v. State Bar, 433 U.S. 350, 364 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762-65 (1976).

nomic."[70] But economic interests are freely regulable within the "broad limits"[71] of due process, which precludes only arbitrary and capricious government action. As the Court's opinions in *Ohralik* and *Friedman* confirm, the advertiser's economic interests cannot alone bar reasonable commercial speech regulation. In *Ohralik*, the Court viewed a "lawyer's procurement of remunerative employment [as] a subject only marginally affected with First Amendment concerns."[72] In *Friedman*, the Court barely acknowledged optometrists' interest in using trade names except to refer to its "economic nature."[73] Advertising will always mean profits for advertisers. According those profits more weight than any other economic interest would maim government authority to regulate commerce.[74] Therefore, as long as the New York ban is not arbitrary or capricious — and this carefully considered policy could hardly be called either — it need not yield to the utilities' interest in profits.

2. *The Consumer's Interest in Access to Commercial Information*

Although consumers obviously have an interest in advertising, that interest — standing alone — is not one that the Court would protect at the expense of New York's energy policy. Consumers read or listen to advertising because they want to make informed decisions about products.[75] That desire deserves respect, but no more than the consumer's legitimate desire to partake of the activity or commodity being advertised.[76] Hence, advertising about illegal transactions can be entirely prohibited,[77] while advertising that relates to the exercise of fundamental rights receives full first amendment protection.[78] The consumer's interest in electric utility services,

70. [1979] 5 MEDIA L. REP. (CCH) 1241, 1245 (quoting 425 U.S. at 762).

71. Friedman v. Rogers, 440 U.S. at 18 n.19. *See* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 430 (1971).

72. 436 U.S. at 459. In *Bates*, the Court referred to the attorney's interest in advertising as "largely economic." 433 U.S. at 364. The Court may have been unwilling to deny completely the elements of individual expression in advertising by lawyers. But this personal interest would not extend to a large publicly held corporation.

73. 440 U.S. at 8.

74. *See* Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978).

75. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763-65 (1976).

76. *See* Jackson & Jeffries, *supra* note 21, at 35-36:

> If independent first amendment significance did exist, it would also exist when the state has declared the underlying transaction unlawful. . . . That no such independent purpose in fact can be identified confirms the hypothesis that the significance of ordinary business advertising lies entirely in its relation to the contemplated economic transaction.

77. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763 (1976); Pittsburgh Press Co. v. Pittsburgh Commn. on Human Relations, 413 U S. 376 (1973).

78. *See* note 29 *supra* and accompanying text.

like the interest in prescription drug services, may be "the alleviation of pain or the enjoyment of basic necessities."[79] At the very least, it is an interest in "daily comfort."[80] Daily comfort is not illegal, but under the Court's analysis it is not a fundamental right, either. The state may infringe upon it by comporting with the requirements of due process and equal protection.[81] Therefore, within those minimal constraints, New York could deny electrical services to consumers altogether.[82] Since the individual's interest in electrical service is inadequate to outweigh a legitimate state interest in denying that service, the individual's interest in information about electricity sales should not outweigh New York's substantial interest in preventing its advertisement.

3. *Society's Interest in the Free Flow of Information*

The most important interest served by utility advertising is a general one: society's desire to maintain a free flow of commercial information. In *Virginia Board of Pharmacy*, the Court suggested two ways in which society's interest in the free flow of commercial ideas might exceed the sum of the interests of speakers and listeners. The first is economic: "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed."[83] The second is political: "[I]t is also indispensable to the formation of intelligent opinions as to how [the economic] system ought to be regulated or altered."[84]

The free enterprise justification for a special societal interest in advertising, although plausible in *Virginia Board of Pharmacy* where the regulation was motivated by purposes other than the allocation of resources, seems irrelevant to the PSC ban. The PSC's goal is precisely to override the market's allocation of society's resources. *Virginia Board of Pharmacy* was not suggesting that the Constitution requires a legislature "to hew to the teachings of Adam Smith in its

79. 425 U.S. at 764.

80. [1979] 5 MEDIA L. REP. (CCH) 1241, 1245.

81. *See* note 36 *supra*.

82. This is admittedly a troubling proposition. The tension, however, lies not in the first amendment reasoning; rather it is embedded in the conclusion that there is no fundamental right to shelter. Is it more troubling that a state may deny someone information contained in an electricity advertisement than that a state may allow a public utility to discontinue all service to an indigent family?

Nonetheless, not even a fundamental right to shelter would outweigh the state's interest in conserving energy if that interest were found "compelling." *See* note 28 *supra* and accompanying text.

83. 425 U.S. at 765.

84. 425 U.S. at 765. *See* Jackson & Jeffries, *supra* note 21, at 18 n.58.

legislative decisions";[85] rather, it was noting the value of free commercial speech where the Virginia legislature had not disclaimed the economic rationality of the invisible hand. New York, pursuant to its undisputed authority to regulate the market, *has* disclaimed the invisible hand. By banning promotional utility advertising, New York has decided that the unchecked operations of the market fail to allocate resources properly. Thus, the utilities' promotional advertisements serve no public interest in resource allocation; the only economic interests served by the advertisements are purely private.

As for the political value of commercial information, the Court has never repeated its observation in *Virginia Board of Pharmacy* that commercial speech is "an instrument to enlighten public decisionmaking in a democracy."[86] It is not clear that the Court continues to perceive the free flow of commercial information as "indispensable to the formation of intelligent opinions as to how [the economic] system ought to be regulated."[87] Later commercial speech cases have stressed the presence or absence of a substantial state interest in regulation, declining to comment on the value of commercial speech as a source of information for political decision.[88]

Moreover, the Court's 1978 decision in *Bellotti v. First National Bank of Boston*,[89] which expressly protected corporate political speech, may have eliminated any need to protect commercial advertising as a source of politically valuable information. Any information that would reach the electorate or political leaders through corporate political speech now receives first amendment protection. The political importance of commercial speech is not even arguably

85. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 784 (1976) (Rehnquist, J., dissenting and arguing for the proposition opposite from that given in text).

86. 425 U.S. at 765.

87. 425 U.S. at 765.

88. If the Court has abandoned the view that regulable commercial speech has value in the political process, then the value of commercial speech may be defined entirely in economic terms. As such, regulable commercial speech would be entitled only to fifth and fourteenth amendment protection. *See* note 36 *supra*. This may lead to a more workable standard than has emerged thus far. For example, the Court could rule that a prohibition of commercial advertising is valid if a legislature has identified the advertised activity as harmful; such a rule would at least assure an adequate end-means fit.

89. 435 U.S. 765 (1978). The Court has indicated, however, that corporate political speech may be entitled to less protection than individual political expression. "[W]e need not survey the outer boundaries of the [First] Amendment's protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment." 435 U.S. at 777. "The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion." 435 U.S. at 777 n.12. "Nor is there any occasion to consider in this case whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities." 435 U.S. at 777-78 n.13.

significant for information that would reach the public in another, protected way. But direct corporate efforts to inform or persuade those who make regulatory decisions will almost always convey any information about "who is producing and selling what product, for what reason, and at what price"[90] that would be conveyed through advertising.

Admittedly, the PSC ban denies business the opportunity to profit from its communication. Perhaps this denial would reduce the utilities' incentive to communicate with the public, the legislature, and the Public Service Commission. Although the ban leaves the utilities free to advertise on an informational or institutional basis,[91] and the utilities have long used such advertising to influence regulatory decisions,[92] the ban may keep some iota of information from reaching the public forum. The question is whether that possibility outweighs the state's interest in preventing the waste of scarce energy resources.

CONCLUSION

The New York ban on promotional advertising by electric utilities reasonably promotes the state's legitimate and substantial interest in energy conservation. Under the Supreme Court's commercial speech balancing test, that interest should be weighed against the interests in electric utility promotional advertising. The interests potentially advanced by the advertising are slight compared to the state's interest. The advertiser's interest in profit is purely economic, and the consumer's interest in advertising is no greater than his interest in consuming electricity. Both, under the Supreme Court's reasoning, may be subordinated to reasonable state regulation in the public interest. Society has an interest in the proper allocation of resources through informed market decisions, but the state can allocate resources directly if it chooses, rather than relying on the market process. Society also has an interest in the free flow of information relevant to regulating electric utilities, but such information may be communicated by informational, institutional, or political advertising. Because the utilities are motivated to influence regulatory decisions through such advertising, the elimination of promotional advertising is unlikely to keep useful information from the polity.

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90. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976).

91. *See* Statement, *supra* note 3, at 8-R.

92. To the extent that this type of advertising reduces the utility consumer's hostility, it may be a good investment for the utility since it may reduce the flow of consumer complaints to the regulatory commission. In addition, the corporate image advertising may have a direct impact on the regulatory commission and may tend to shift the balance of power between utility and customer with respect to the regulatory commission's outlook.

Wilder, *Public Utility Advertising: Some Observations*, 49 LAND ECON. 458, 459 (1973).

New York has not found it necessary or desirable to limit sales of electricity directly, but the state has a strong interest in discouraging its use. The ban is founded not on paternalism that distrusts the individual's ability to perceive his own best interest, but rather on legitimate state power that limits individual activity in the interests of society as a whole. There is, therefore, insufficient reason to deprive the state of its authority to conserve energy by banning advertising.