

FTC V. SIMEON MANAGEMENT CORP.: THE FIRST AMENDMENT AND THE NEED FOR PRELIMINARY INJUNCTIONS OF COMMERCIAL SPEECH

The constant flow of complaints, by politicians and citizens alike, about bureaucracy and governmental red tape reflects a widespread feeling that unnecessary delay is a major problem for administrative agencies functioning at all levels of government.¹ The complaints are not without foundation. Enforcement proceedings before an agency or regulatory commission can be complex, time-consuming affairs.² The problems which result from delays in administrative procedure, however, go much deeper than mere frustration over the passage of inordinate amounts of time. Because of the long interval often required to complete full-scale enforcement proceedings, agencies may be unable to prevent impending or continued violations of the statutes that define their subject matter jurisdiction.

To overcome the enforcement problems which may result from delay, Congress has explicitly authorized several federal administrative agencies to seek temporary injunctions, pending completion of final enforcement proceedings, against particular violations of the regulatory schemes they are charged with implementing.³ The motivating concern behind the enactment of these provisions is to preserve the integrity of enforcement efforts by blocking attempts by offenders to collect the spoils of their illegal practices and disappear before the agency can complete enforcement proceedings.⁴ Thus, the preliminary injunction derives its value as an immediate remedy from the ease and speed with which it can be procured to prevent allegedly illegal activity.

It follows that the efficacy of the preliminary injunction as an enforcement tool will be largely determined by the showing which the courts

1. See, e.g., Rosenbaum, *Carter's Position on Issues Designed for Wide Appeal*, N.Y. Times, June 11, 1976, at 1, col. 6 (noting one candidate's proposal that the federal bureaucracy be streamlined).

2. See, e.g., 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.08, at 549-50 (1958); ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, app. G, at 327-74 (1941).

3. E.g., 7 U.S.C. § 608(a)(6) (1970) (market administrator of the USDA); 15 U.S.C. § 53 (Supp. III 1973) (Federal Trade Commission); 15 U.S.C. §§ 77t(b), 78u(e) (1970) (Securities Exchange Commission); 16 U.S.C. § 825m(a) (1970) (Federal Power Commission); 29 U.S.C. §§ 160(j), (l) (1970) (National Labor Relations Board); 42 U.S.C. § 2280 (1970) (Atomic Energy Commission [now the Nuclear Regulatory Commission]); 49 U.S.C. § 322(b)(1) (1970) (Interstate Commerce Commission); 49 U.S.C. § 1487 (1970) (Civil Aeronautics Board).

4. *FTC v. Thomsen-King & Co.*, 109 F.2d 516, 518 (7th Cir. 1940).

require the agencies to make before an application for such an injunction will be granted. If the agency is required to meet a rigorous test before it can obtain a preliminary injunction against an apparent statutory violation, long periods of time may lapse before injunctive relief can be obtained on the public's behalf; indeed, in some cases where it may ultimately prevail on the merits, the agency may be prevented from obtaining any preliminary relief.⁵ The problem of delay inherent in a formal proceeding on the merits cannot be circumvented through pursuit of temporary relief where such relief is conditioned upon proof of likely success on the merits in the formal proceedings. Such a purportedly "preliminary" proceeding may be extremely time-consuming, as evidence from both sides must be collected and weighed. Statutory provisions authorizing preliminary injunctions will fulfill their purpose only where the injunction can be obtained from the courts upon a more limited showing by the agency.⁶

A further problem arises, however, when the conduct being regulated involves elements of speech which may be entitled to first amendment protection. With increasing frequency, federal administrative agencies are being granted authority to regulate various aspects of commercial speech. Deceptive advertising,⁷ deceptive labor practices,⁸ and fraudulent misrepresentations concerning securities offerings⁹ are only a few examples. To be effective, these regulatory schemes require the same prompt enforcement as other government programs. Yet the first amendment places an overriding constraint on the government's authority to restrain speech, thereby complicating the problem of determining when a preliminary injunction may appropriately be granted.

This conflict between the need for rapid enforcement via the preliminary injunction and the first amendment's protection of speech was recently considered by the Ninth Circuit in *FTC v. Simeon Management Corp.*¹⁰ Relying on a dual rationale which focused on legislative intent and the first amendment's applicability to commercial speech, the court of appeals held that a temporary injunction could not be issued against deceptive advertising under the Federal Trade Commission Act without a demonstration that the FTC was likely to succeed on the merits and that the equities of the case favored issuance of the injunction.

The purpose of this Note is to argue, through analysis of *Simeon*, that the case was wrongly decided. Unless some greater showing is clearly

5. See, e.g., *FTC v. American Medicinal Prod., Inc.*, 30 F.T.C. 1683 (S.D. Cal. 1940), *aff'd*, 136 F.2d 426 (9th Cir. 1943).

6. See notes 44-60 *infra* and accompanying text.

7. See Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1970).

8. See National Labor Relations Act, 29 U.S.C. §§ 141-187 (1970).

9. See Securities Act of 1933, 15 U.S.C. §§ 77a-aa (1970); Securities Exchange Act of 1934, *id.* §§ 78a-jj.

10. 532 F.2d 708 (9th Cir. 1976).

required by statute, a demonstration of a reasonable basis for the agency's belief that its statute is being violated and that an injunction would be in the public interest should be sufficient to justify issuance of a preliminary injunction against commercial speech. The need for prompt administrative enforcement of public policy, the legislative histories of the Federal Trade Commission Act and similar statutory provisions, and the Supreme Court's current position on the applicability of the first amendment to commercial speech all commend this view.

SECTION 53(A) OF THE FEDERAL TRADE COMMISSION ACT AND
FTC v. Simeon Management Corp.

Under section 53(a) of the Federal Trade Commission Act, the federal district courts are authorized to issue, upon a "proper showing" by the FTC, temporary injunctions against the dissemination of false advertisements which are likely to induce the purchase of drugs, food or cosmetics, whenever the Commission has "reason to believe" that such an injunction would be in the public interest.¹¹ Unfortunately, the statute does not articulate a clear standard for the district courts to use in determining whether a temporary injunction should be granted. One reading of section 53(a) suggests that the Commission must demonstrate only that it "has reason to believe" that the statute is being violated and that the public interest would be served by injunctive action.¹² Alternatively, the statutory phrase "upon a proper showing" might suggest that a more stringent requirement has been imposed on the Commission, since at common law the courts will not grant a preliminary injunction unless the plaintiff has satisfied a test which includes a demonstration of likely success on the merits.¹³

11. (a) Whenever the Commission has *reason to believe*—

- (1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and
 - (2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public,
- the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. *Upon proper showing* a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

15 U.S.C. § 53(a) (1970) (emphases added). Section 45(a)(1) declares "unfair or deceptive acts or practices in commerce" unlawful. *Id.* § 45(a)(1). Section 52(b) states that causing the dissemination of any false advertisement is such an "unfair or deceptive act or practice in commerce." *Id.* § 52(b).

12. See *FTC v. Rhodes Pharmacal Co.*, 191 F.2d 744 (7th Cir. 1951), discussed at notes 21-22 *infra* and accompanying text; *FTC v. Koch Laboratories, Inc.*, 38 F.T.C. 931 (E.D. Mich. 1942).

13. Generally, the courts will not grant a preliminary injunction to an agency without a

The Simeon Decision

The latter, more stringent interpretation of section 53(a) was recently adopted by the Ninth Circuit in *FTC v. Simeon Management Corp.*¹⁴ There the FTC had initiated proceedings for a cease and desist order, charging the Simeon Corporation with false and unfair advertising in connection with its use of certain drugs in its weight reduction clinics.¹⁵ Simultaneously, the Commission applied to the district court for a preliminary injunction.¹⁶ The lower court denied the application on the grounds that the FTC was unlikely to succeed on the merits of its administrative action against the corporation and because the equities of the case did not favor injunctive relief.¹⁷

The Ninth Circuit affirmed, concluding that the district judge was correct in ruling that a "proper showing" under section 53(a) must include a demonstration of both the likelihood of the FTC's ultimate success on the merits and that the equities of the case balanced in favor of a grant of the requested relief.¹⁸ Since the Commission had not met its burden in this respect, the Ninth Circuit held that the injunction had been properly denied.¹⁹ The court of appeals explicitly recognized²⁰ that the Seventh Circuit had taken a contrary position many years earlier in *FTC v. Rhodes Pharmaceutical Co.*,²¹ which held that section 53(a) required the Commission to show only that it had "reasonable cause to believe" that a violation had taken place.²² Nevertheless, it preferred the view articulated by the district court in

showing by it that: (1) it stands to suffer irreparable injury without such relief; (2) that it is likely to succeed at a trial on the merits; (3) that the injury it would receive if relief were not granted is greater than the injury others would suffer if it were granted; and (4) that the public interest would be served thereby. *See, e.g., SEC v. Senex Corp.*, 534 F.2d 1240, 1241 (6th Cir. 1976); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

14. 532 F.2d 708 (9th Cir. 1976).

15. The Simeon Corporation operated several weight reduction clinics in California. The clinics advertised, in newspapers and magazines and on television, that their "Simeons" weight-loss programs were effective, safe and medically approved. The "Simeons" method consisted of a four- to six-week program of limited daily diets, medical counseling, and daily injections of human chorionic gonadotropin (HCG). HCG is a prescription drug approved by the FDA for some purposes, though not for weight reduction. The FTC contended that HCG is not safe for older men because it might activate previously latent prostate cancer. *Id.* at 710, 714.

16. *See FTC v. Simeon Management Corp.*, 391 F. Supp. 697 (N.D. Cal. 1975).

17. *See id.* at 699-700.

18. 532 F.2d at 713-14.

19. *Id.* at 714-17. The court refused to overturn as "clearly erroneous" the district court's conclusion that the FTC's claims would not ultimately prevail. The Ninth Circuit pointed to recorded testimony indicating that experts were split as to whether HCG would bring on prostate cancer in older men. *Id.* at 715.

20. *Id.* at 712.

21. 191 F.2d 744 (7th Cir. 1951).

22. *Id.* at 747-48. In *Rhodes*, the trial judge had denied an injunction because the verified pleadings and affidavits presented "debatable questions," and where "the equities of the complaint are fully and explicitly met by denial under oath, a preliminary injunction will not be

*FTC v. National Health Aids*²³ that while the Commission's reasonable belief may be sufficient to warrant *application* for an injunction, something more must be demonstrated before it will be granted.²⁴

The Ninth Circuit advanced two justifications for its adoption of the stricter test: the legislative history of the Federal Trade Commission Act and the first amendment's proscription of prior restraints on protected commercial expression. In the succeeding pages, this Note will discuss the difficulties with each of the *Simeon* rationales. The legislative history argument will be examined first, since an understanding of the way in which the statutory preliminary injunction functions undercuts the conclusion that it imposes an unconstitutional prior restraint on expression.²⁵

THE LEGISLATIVE HISTORY ARGUMENT

The key to the *Simeon* court's interpretation of the legislative intent behind section 53(a) was a 1973 statute which added a new section 53(b) to the Federal Trade Commission Act.²⁶ The new section authorizes the FTC to seek an injunction when it believes that there has been a violation of any provision of law which it enforces.²⁷ Section 53(b) includes an explicit definition of the burden the FTC must meet in seeking an injunction: the Commission must show through a weighing of the equities and a demonstration of the likelihood of its ultimate success in the enforcement proceeding that a temporary injunction would be in the public interest.²⁸ The court also noted statements by the amendment's proponents in Conference Committee which indicated that the standard explicated in section 53(b) was intended to

granted." *Id.* at 746. In reversing, the Seventh Circuit noted that while a balancing of equities and a showing of likelihood of success on the merits might be properly required in a private suit for a preliminary injunction, they were not required in a suit where the "public interest" was involved. *Id.* at 747. See notes 44-48 *infra* and accompanying text.

The *Rhodes* litigation neatly illustrates the difference in focus taken by courts which subscribe to different constructions of the "proper showing" required under section 53(a). Under the stricter test utilized by the trial court, the district judge must evaluate the strength of the agency's petition by balancing the claims of one opposing party against the other. Thus, a full set of denials to the allegations of the complaint will place a heavy evidentiary burden on the agency. On the other hand, where the required showing is only a reasonable basis for belief, the court's focus will be primarily on the sufficiency of the agency's complaint as showing a possible violation of the statute and only secondarily on the denials and defenses of the respondent, which will be considered fully at the administrative proceeding. See *FTC v. Koch Laboratories, Inc.*, 38 F.T.C. 931 (E.D. Mich. 1942).

23. 108 F. Supp. 340 (D. Md. 1952). See also *FTC v. American Medicinal Prod., Inc.*, 30 F.T.C. 1683 (S.D. Cal. 1940), *aff'd*, 136 F.2d 426 (9th Cir. 1943) (temporary injunction will not issue where an answer and affidavits are filed denying the equities of the petition).

24. 108 F. Supp. at 346-47.

25. The first amendment argument is discussed at notes 75-134 *infra* and accompanying text.

26. 15 U.S.C. § 53(b) (Supp. III 1973).

27. *Id.*

28. See *id.*

codify the decisional law on section 53(a).²⁹ The court therefore concluded that Congress intended similar standards to govern the availability of temporary injunctions under both sections.³⁰

The Ninth Circuit's argument in *Simeon*—that because Congress has required the Commission to meet the stricter standard in its applications for injunctions under section 53(b), the standard must be the same for applications under section 53(a)³¹—is a non sequitur. First, it is doubtful that the interpretation of this existing statutory provision by the drafters of subsequent legislation is entitled to much weight in a judicial determination of the statutory burden placed on the Commission.³² Even if it were appropriate to rely on the interpretation of subsequent legislators, however, no clear expression of that interpretation can be gleaned from the legislative history of the more recent statute. The Conference Committee's discussion of the 1973 amendment is confused at best:³³ the Conference Report bluntly contradicts the language of the amended section itself³⁴ and reflects a perplexing lack of familiarity with previous judicial interpretations of section 53(a).³⁵

29. CONF. REP. NO. 624, 93d Cong., 1st Sess. 31 (1973), reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2523, 2533. Curiously, in referring to the decisional law on section 53(a), the conferees cited only *FTC v. National Health Aids, Inc.*, 108 F. Supp. 340 (D. Md. 1952) (discussed in text accompanying notes 23-24 *supra*) and *FTC v. Sterling Drug, Inc.*, 317 F.2d 669 (2d Cir. 1963). The latter case, however, specifically declined to decide whether something more than the Commission's "reasonable belief" must be shown under section 53(a). *Sterling* held that the Commission had failed to show even a "reasonable belief" that the statute had been violated and thus affirmed the denial of the injunction. The ambiguity of the Conference Committee Report on this point is characteristic of the Report's entire treatment of the new section 53(b). See notes 33-35 *infra* and accompanying text.

30. *FTC v. Simeon Management Corp.*, 532 F.2d at 712-13.

31. See *id.* at 712.

32. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). While the Ninth Circuit was able to cite other statements by the Supreme Court that such after-the-fact expressions of intent might be entitled to some weight, it overlooked the significance of the considerable lapse of time involved in this case. The 1973 amendment adding the new section 53(b) was passed 35 years after the Wheeler-Lea Act, (see note 38 *infra*), which added the present section 53(a). "[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (citations omitted).

33. See *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485, 488-89 (7th Cir. 1975), noting that the Seventh Circuit's view that section 53(a) only requires a showing of reasonable cause to believe was not refuted by "the somewhat ambiguous legislative history of the [1973] amendment."

34. The new section 53(b) explicitly defines a "proper showing" in terms of a "weighing [of] the equities and considering the Commission's likelihood of ultimate success." 15 U.S.C. § 53(b) (Supp. III 1973). Yet the Conferees stated that: "The intent of section 53(b) is to maintain the statutory or public interest standard which is now applicable, and not to impose the traditional equity standard of irreparable damage, probability of success on the merits, and that the balance of the equities favors petitioner." CONF. REP. NO. 624, 93d Cong., 1st Sess. 31 (1973), reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2523, 2533.

35. According to the Conference Report, the "new language [of section 53] is intended to

The better view is that since sections 53(a) and 53(b) are directed at different subject matter areas of the Commission's jurisdiction, it need not be assumed that the showings required by the two provisions are the same. Since violations of the law concerning false advertising of food, drugs and cosmetics have been and continue to be singled out from violations of other statutory provisions enforced by the Commission³⁶—at least for purposes of securing temporary injunctions—it is more reasonable to conclude that such violations have been viewed differently by Congress, and as a result, that the Commission's burden with respect to them has intentionally been made lighter.³⁷ An examination of the legislative history of the Wheeler-Lea Act of 1938³⁸ suggests that the prevention of false and unfair advertising was a matter of special importance to the Congress.³⁹ Moreover, it shows that

codify the decisional law of [*National Health Aids and Sterling*] and similar cases which have defined the judicial role to include the exercise of such independent judgment." *Id.* It is difficult to determine what the conferees meant by "the exercise of such independent judgment." The phrase has taken on no special significance in the cases. In *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 677 (2d Cir. 1963) it was stated only that a court's power to exercise independent judgment in section 53(a) proceedings prevented it from providing a "rubber stamp" for the FTC solely on the basis of the latter's "reason to believe." Further, the Conference Report does not mention the view of section 53(a) taken by the Seventh Circuit in *FTC v. Rhodes Pharmacal Co.*, 191 F.2d 744 (7th Cir. 1951), discussed at notes 21-22 *supra* and accompanying text. Another confused commentator has suggested that Congress may have intended to require an intermediate showing somewhere between the reasonable-cause-to-believe standard and the traditional requirements of equity. See Halverson, *The Federal Trade Commission's Injunctive Powers Under the Alaskan Pipeline Amendments: An Analysis*, 69 Nw. U.L. REV. 872, 879-81 (1975).

36. Compare 15 U.S.C. § 52(a) (1970) (making it unlawful to distribute false advertisement likely to induce the purchase of a food, drug, device or cosmetic), *with id.* § 52(b) (declaring dissemination of any false advertisement to be illegal as an unfair or deceptive act or practice under section 45).

37. This is the view taken by the Seventh Circuit in *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485 (1975). In reversing a district court's denial of a temporary injunction, the court held that:

Congress added subsection (b) in 1973, leaving subsection (a) unchanged. By providing the traditional equity standards . . . and the permissive 'may' in (b), while leaving (a) without those standards and with its preemptory 'shall,' Congress indicated . . . no intention that the judicial interpretations of (a) should be affected by the amendment.

Id. at 488-89.

38. Act of March 21, 1938, 52 Stat. 111 (codified at 15 U.S.C. §§ 52-58 (1970)). This statute made two substantive additions to the Federal Trade Commission Act. First, it extended section 5 of the FTC Act to prohibit unfair or deceptive acts or practices, as well as unfair methods of competition, thereby bringing wronged consumers *and* wronged competitors within its protection. Second, it added the special provision against false advertisement of food, drugs, devices and cosmetics, supplementing the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. §§ 301-327 (1970). C. DUNN, WHEELER-LEA ACT: A STATEMENT OF ITS LEGISLATIVE RECORD iii (1938).

39. See, e.g., H.R. REP. NO. 1613, 75th Cong., 1st Sess. 4 (1937), *quoted in* C. DUNN, *supra* note 38, at 168:

false advertising of particular commodities—food, drugs and cosmetics—was intentionally and purposefully singled out for immediate extirpation.⁴⁰

The legislative history of the Wheeler-Lea Act is less helpful in revealing the particular burden which the 75th Congress intended to impose on the FTC when it sought the newly authorized preliminary injunction.⁴¹ An explanatory comment by the bill's Senate sponsor indicates that the principal proponents of the Act intended the preliminary injunction to issue whenever the FTC's complaint appeared "reasonable" on its face.⁴² The same conclusion is reached, however, without relying on the force of this solitary statement. Discussions of the enforcement provisions of the statute in congressional hearings and debates emphasized that the public need for *immediate* relief from the effects of deceptive food, drug and cosmetic advertising was a dominant concern.⁴³

[W]e cannot ignore the evils and abuses of advertising; the imposition upon the unsuspecting; and the downright criminality of preying upon the sick as well as the consuming public through fraudulent, false, or subtle misleading advertisements.

The need of amending the existing act to give the Federal Trade Commission more effective control over advertising as an unfair practice, is urgent and manifest.

40. 83 CONG. REC. 3255-56 (1938) (remarks of Sen. Wheeler presenting the Conference Report to the Senate):

The Federal Trade Commission has always had jurisdiction over false advertising of food, drugs, devices, and cosmetics, as well as over all other commodities More stringent control over the advertising of these four commodities has been provided because their use directly affects the consumer's health rather than his pocketbook.

41. Recorded debates over the Wheeler-Lea Act generally suggest that the only seriously contested provision was that which vested jurisdiction over false food, drug and cosmetic advertising in the FTC rather than the FDA. *See, e.g.*, 83 CONG. REC. 393 (1938) (remarks of Rep. Mapes).

42. In presenting the Conference Report on S. 1077 to the Senate, Senator Wheeler commented that section 13 of the bill (now codified as section 53(a)):

authorizes the Commission to *secure* temporary injunctions restraining the dissemination or the causing of the dissemination of false advertisements pending the issuance of complaints by the Commission and their review by the courts, whenever the Commission has reason to believe that such injunctive relief is in the interest of the public.

Id. at 3255 (emphasis added). Explanatory statements by the legislation's sponsors should be accorded "substantial weight" in the interpretation of an ambiguous statute. *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *cf. NLRB v. Thompson Prod., Inc.*, 141 F.2d 794, 797 (9th Cir. 1944) (interpreting the National Labor Relations Act through review of legislators' comments during floor debates).

43. In hearings on an early bill which gave jurisdiction over false food, drug and cosmetic advertising to the FDA, the head of that agency called the temporary injunction provision "one of the most important sections of the act," since "by expediting action and suppressing continued offenses" the public would be more adequately protected. *Hearings on S. 1944 Before the Senate Commerce Committee*, 73d Cong., 2d Sess. 604 (1933), *quoted in* C. DUNN, *FEDERAL FOOD, DRUG, AND COSMETIC ACT: A STATEMENT OF ITS LEGISLATIVE RECORD* 1102 (1938). At least one legislator saw the enactment of section 53(a) as a way to meet the criticism that the FTC could not "proceed swiftly to meet an emergency situation involving a menace to life or health." 83 CONG. REC. 398 (1938) (remarks of Rep. Reece).

The Preliminary Injunction and the Public Interest

Given this background, it simply is not reasonable to conclude that Congress intended to condition the granting of a section 53(a) preliminary injunction on the satisfaction of traditional equitable requirements. On the contrary, it is generally accepted that where a statute specifically authorizes a federal regulatory commission to apply to a district court for a preliminary injunction, the propriety of and need for injunctive relief will be governed by concern for the public interest.⁴⁴ The "public interest" is established by the substantive provisions of the particular statute which the agency enforces.⁴⁵ That public interest may include, as it does in the case of false food, drug and cosmetic advertisement legislation, a need for effective and immediate relief from the substantive evils outlined. Thus, a showing that the statute is probably being violated should replace the various showings generally required in equity practice,⁴⁶ including likelihood of success on the merits and a favorable balance of the equities. Similarly, a showing of irreparable injury should not be required since Congress, in passing the statute, has arguably already concluded that a violation will cause irreparable harm.⁴⁷ An agency need only show that it has a reasonable or justifiable belief that the public interest as declared by the statute has been violated.⁴⁸

44. *Hecht Co. v. Bowles*, 321 U.S. 321 (1944). In *Hecht* the Supreme Court held that a district court judge was not required automatically to grant an injunction against violations of the Emergency Price Control Act of 1942, 56 Stat. 23, even though section 205(a) of that Act provided that where violations of the Act are established the court "shall" grant the injunction. The Court ruled that the district judge's discretion under § 205(a) must be exercised in light of the broad objectives of the Act. 321 U.S. at 331. *See also* *Shafer v. United States*, 229 F.2d 124 (4th Cir. 1956).

45. *See* *SEC v. Lake Havasu Estates*, 340 F. Supp. 1318, 1324 (D. Minn. 1972).

46. It is generally stated that the purpose of a preliminary injunction in an action between private parties is to maintain the status quo between them in order to preserve the court's ability to render a meaningful decision on the merits. *See, e.g., Meis v. Sanitas Serv. Corp.*, 511 F.2d 655, 656 (5th Cir. 1975). *See generally* D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 110 (1973). Statutes authorizing government agencies to petition for temporary injunctive relief against probable statutory violations contemplate a different role for the courts. It is the agency's jurisdiction, not that of the court, which is to be preserved. The purpose is not so much to preserve the ability to render a meaningful decision in a particular conflict as it is to protect the broad interests of the public as declared by statute. Seen in this light, the court's injunctive powers are an important implementing tool for the agencies. *See Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944): "Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action."

47. *See, e.g., American Fruit Growers, Inc. v. United States*, 105 F.2d 722, 725 (9th Cir. 1939); *SEC v. Lake Havasu Estates*, 340 F. Supp. 1318, 1324 (D. Minn. 1972).

48. *See Bowles v. Montgomery Ward & Co.*, 143 F.2d 38, 42 (7th Cir. 1944) (suit by OPA to enjoin violations of the Emergency Price Control Act of 1942): "[T]he action of the court on a motion for a preliminary injunction is not predicated upon an anticipated determination of the issues of fact which may be involved in the case. . . . There need be only evidence tending to make out a prima facie case."

Analogous Statutory Provisions

Further support for this formulation of the FTC's burden in seeking a preliminary injunction emerges from a survey of the showings required from other federal agencies under analogous statutory provisions. The Labor-Management Relations Act, for example, authorizes the National Labor Relations Board to petition a federal district court for temporary injunctive relief, pending final adjudication by the Board, when there is "reasonable cause to believe" that any person has engaged in an unfair labor practice as defined by specific sections of the statute.⁴⁹ Where a petition has been filed, the district court is empowered to grant such injunctive relief "as it deems just and proper."⁵⁰ This provision was intended to facilitate quick relief where unfair labor practices threatened harm which the normal enforcement procedures provided by the statute might not be able to prevent.⁵¹ For example, in *Douds v. Milk Drivers Local 584*,⁵² the district court granted the NLRB a temporary injunction against a secondary boycott upon allegations by the Board that daily delivery of milk to over 100,000 consumers was being threatened.⁵³ The only judicially imposed prerequisite to temporary injunctive relief under the National Labor Relations Act is a showing by the Board that there is reasonable cause to believe that the Act has been violated and that such relief is just and proper.⁵⁴ No demonstration of the truth of the factual charge or of the validity of underlying principles of law is required; it need only appear that the charge is "substantial and not frivolous."⁵⁵

The preliminary injunction has also been utilized as a means of preventing injury pending completion of administrative proceedings in another historically important area of federal regulatory activity: the effort to eliminate fraudulent securities transactions.⁵⁶ Both the Securities Act of 1933 and the Securities Exchange Act of 1934 authorize the SEC to petition a district

49. 29 U.S.C. §§ 160(j), (l) (1970).

50. *Id.*

51. *Douds v. Milk Drivers Local 584*, 154 F. Supp. 222, 234 (S.D.N.Y.), *aff'd*, 248 F.2d 534 (2d Cir. 1957).

52. 154 F. Supp. at 234.

53. *Id.* at 224.

54. *See Douds v. International Longshoremen's Ass'n*, 242 F.2d 808, 810-11 (2d Cir. 1957); *Kennedy v. Sheet Metal Workers Local 108*, 289 F. Supp. 65, 85 (C.D. Cal. 1968).

55. *Schauffler v. Local 1291, International Longshoremen's Ass'n*, 292 F.2d 182, 187 (3d Cir. 1961).

56. Section 17 of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1970), and section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970), constitute the backbone of this effort. "The need for regulatory measures, and for the observance of high standards of scrupulous conduct in this field for the protection of the public interest, has long been recognized by statutory intervention . . . and by case law dealing with the elements of fraudulent conduct in the sale of securities." *SEC v. F.S. Johns & Co.*, 207 F. Supp. 566, 573 (D.N.J. 1962).

court for temporary injunctive relief "whenever it shall appear" that violations of the statute have occurred or will occur.⁵⁷ Under both statutes, the courts are to grant the injunction "upon a proper showing."⁵⁸ But, as under section 53(a) of the Federal Trade Commission Act, the securities laws do not set out criteria for determining whether a proper showing has been made. Further, neither statute makes explicit reference to the agency's "reasonable cause to believe."⁵⁹ Nevertheless, it has been consistently held that the SEC's burden is met by a demonstration that it has reasonable cause to believe a violation of either act has occurred and that the public interest will be harmed unless an injunction issues.⁶⁰

A similar approach appears to characterize judicial interpretations of preliminary injunction provisions in statutory schemes which bear on commercial speech in a more indirect way than do the securities laws or the Federal Trade Commission Act. An example is provided by the Motor Carrier Act of 1935,⁶¹ which is the basis for federal regulation of the trucking industry. The Act's regulatory plan is built on the requirements that motor carriers obtain certificates of public convenience and necessity⁶² and that transport brokers (those who sell transportation services provided by others) acquire brokerage licenses.⁶³ The statute authorizes the Interstate Commerce Commission to apply to the courts for injunctive enforcement of its provisions, or of any term of a certificate, against carriers and brokers.⁶⁴ Since brokers are forbidden to advertise or otherwise hold themselves out as qualified to perform brokerage services unless licensed,⁶⁵ ICC regulation via the preliminary injunction may affect a "broker's" exercise of commercial speech. Though there is no mention in the statute of the showing required of the agency when an injunction is sought,⁶⁶ and though the case law is sparse, it seems clear that the agency will not be required to meet the traditional equitable burden of showing a likelihood of success on the merits.⁶⁷

57. 15 U.S.C. §§ 77t(b), 78u(e) (1970).

58. *See id.*

59. *See id.*

60. *See, e.g.,* SEC v. Globus Int'l Ltd., 320 F. Supp. 158, 160 (S.D.N.Y. 1970) (action to enjoin alleged violations of 1933 and 1934 Acts); SEC v. F.S. Johns & Co., 207 F. Supp. 566, 573 (D.N.J. 1962) (action to enjoin alleged violation of the 1933 Act).

61. 49 U.S.C. §§ 301-327 (1970).

62. *Id.* § 306.

63. *Id.* § 311.

64. *Id.* § 322(b)(1).

65. *Id.* § 311(a).

66. *See id.* § 322(b)(1).

67. *See* ICC v. Consolidated Freightways, Inc., 41 F. Supp. 651 (D.N.D. 1941). Respondent hauled freight between North Dakota and Montana without obtaining a certificate from the Commission. During a series of proceedings before the agency to determine whether Consolidated would be allowed to make the runs under the Act's "grandfather" provisions, the ICC

It should be emphasized that the reasonable-cause-to-believe standard emerges in each of these regulatory schemes only from a specific statutory authorization of an agency to seek a preliminary injunction.⁶⁸ Thus, where it is a private party who seeks temporary injunctive relief against violations of specific statutory provisions, a more stringent showing has consistently been required by the courts.⁶⁹ The result is the same where other elements are varied. For the reasonable-cause-to-believe standard to apply, the agency's application for a preliminary injunction must be specifically authorized by statute and must be filed with the court pursuant to that statute. Accordingly, where the SEC moves for temporary injunctive relief from violations of the securities laws under the Federal Rules of Civil Procedure⁷⁰ rather than under the specific provisions of the 1933 or 1934 Acts,⁷¹ it has been required to demonstrate the likelihood of its ultimate success on the merits.⁷² Similarly, while it has been held that the federal courts have the "inherent power" to grant a federal agency a temporary injunction where no specific statute authorizes the agency to request such relief,⁷³ the agency will be required to

petitioned for a preliminary injunction. The court discarded respondent's defense that irreparable harm had not been shown by holding that since the purpose of section 322(b)(1) was to restrain actions declared by Congress to violate public policy, no allegation or proof of irreparable harm was necessary. *Id.* at 656; *accord*, *ICC v. All American Bus Lines, Inc.*, 22 F. Supp. 525, 526-27 (S.D.N.Y. 1937) (ICC need not satisfy the ordinary prerequisites of injunctive relief since such relief was specifically authorized by statute).

Injunctive enforcement of the Act from the private sector will be more difficult. *See* 49 U.S.C. § 322(b)(2) (1970). Private party plaintiffs seeking injunctive relief must post security with the court in such amount "as the court deems proper." *Id.* A further disincentive to private injunctive enforcement has emerged from court holdings that such plaintiffs must allege and prove the traditional equity requirements for injunctions. *See e.g.*, *Tri-State Motor Transit Co. v. International Transport, Inc.*, 343 F. Supp. 588 (E.D. Mo.), *aff'd in part and rev'd in part on other grounds*, 479 F.2d 171 (8th Cir. 1973).

68. *See, e.g.*, *CAB v. Modern Air Transport, Inc.*, 81 F. Supp. 803, 806 (S.D.N.Y. 1949).

69. *See, e.g.*, *Sultan v. Bessemer-Birmingham Motel Assoc.*, 322 F. Supp. 86, 89 (S.D.N.Y. 1970) (private party plaintiff must demonstrate likelihood of success on merits and balance of equities favorable to temporary injunctive relief). *See also note 67 supra.*

70. FED. R. CIV. P. 65.

71. *See* 15 U.S.C. §§ 77t(b), 78u(e) (1970).

72. *See* *SEC v. Glen-Arden Commodities, Inc.*, 368 F. Supp. 1386, 1390-91 (E.D.N.Y.), *aff'd sub nom. Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027 (2d Cir. 1974). There, the SEC sought permanent injunctive relief against respondent's alleged violations of the securities laws. The procedural setting for the attempt to get temporary injunctive relief in this case was odd: the Commission apparently felt compelled to move for temporary relief pending the court's (not the agency's) final decision as to permanent restraint. The court of appeals subsequently questioned the district court's failure to consolidate the application for a preliminary injunction with its hearing on the merits relative to the final injunction, as is permissible under FED. R. CIV. P. 65(a)(2). *See* 493 F.2d at 1030 n.2. Though peculiar, the case clearly illustrates the point that an agency enjoys the benefit of the less demanding reasonable-cause-to-believe standard only when seeking temporary relief pursuant to a particular statutory provision.

73. *See* *Federal Maritime Comm'n v. Atlantic & Gulf/Panama Canal Zone*, 241 F. Supp. 766, 776-77 (S.D.N.Y. 1965) (lack of specific statutory authorization did not preclude the

meet the stricter burdens traditionally demanded at equity.⁷⁴

THE FIRST AMENDMENT ARGUMENT:
PRELIMINARY INJUNCTIONS AFFECTING COMMERCIAL SPEECH

As a second rationale for its decision in *Simeon*, the Ninth Circuit concluded that a construction of section 53(a) which required only that the FTC show reasonable cause to believe that the statute has been violated and that the public interest would be served by an injunction would conflict with first amendment protection of commercial speech.⁷⁵ The court reasoned that, at least since *Bigelow v. Virginia*,⁷⁶ commercial advertising has assumed a protected status under the first amendment; that “[w]hen potentially protected speech is subjected to prior restraint . . . procedural safeguards are vitally important”; and that the minimum safeguard needed before an injunction could be granted in this context would be a required showing of likely success on the merits and a favorable balance of the equities.⁷⁷

The Supreme Court and Commercial Speech

The longstanding doctrine that commercial speech receives no first amendment protection⁷⁸ has been virtually destroyed by two recent Supreme Court decisions. In *Bigelow v. Virginia*,⁷⁹ the Court struck down as unconstitutional a state statute which made it illegal to encourage, by way of publication, the procurement of an abortion.⁸⁰ The *Bigelow* Court set forth a two-step test for determining the extent, if any, to which commercial speech is protected by the first amendment. First, in order to receive *any* protection, the advertisement must contain “factual material of clear ‘public interest’”⁸¹ and must refer to or propose a transaction that is

Commission from seeking temporary injunctive relief, pending investigation and hearings, against collection by steamship conference of a 10% surcharge on trips between U.S. and Latin American ports).

74. *Id.* at 777.

75. *FTC v. Simeon Management Corp.*, 532 F.2d 708, 713 (9th Cir. 1976).

76. 421 U.S. 809 (1975), discussed at notes 79-83 *infra* and accompanying text.

77. 532 F.2d at 713.

78. *See Valentine v. Chrestensen*, 316 U.S. 52 (1942). In upholding a city ordinance restricting the street distribution of commercial advertising matter, the Court stated: “We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.” *Id.* at 54.

79. 421 U.S. 809 (1975).

80. The “Virginia Weekly” had published an advertisement pointing out the legality and availability of abortions in the state of New York. As manager of the paper, petitioner was tried and convicted pursuant to the Virginia statute. The conviction was struck down as an unconstitutional application of the statute; the Court concluded that the state of Virginia did not have a valid interest in regulating what its citizens heard and read about services in New York. *Id.* at 827-28.

81. *Id.* at 822.

legal.⁸² Second, to determine the extent of protection, the first amendment interest in protecting the challenged speech must be weighed against the public interest purportedly served by the state regulation.⁸³

One year later, in *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*,⁸⁴ the Supreme Court eliminated any remaining doubts as to the first amendment's general protection of commercial speech and made it clear that *Bigelow* had established a balancing test. While the advertisement of legalized abortion in New York state which had been at issue in *Bigelow* appeared to contain "factual material of clear 'public interest,'"⁸⁵ the advertisement before the Court in *Virginia Pharmacy* did no more than propose a purely commercial transaction—the purchase of prescription drugs.⁸⁶ The *Virginia Pharmacy* Court gave two reasons for circumventing the "factual material of clear 'public interest'" requirement.⁸⁷ First, it properly noted that a consumer's interest in the flow of commercial information might easily be as great as, if not greater "than his interest in the day's most urgent political debate."⁸⁸ Furthermore, since the

82. *Id.* at 822-24. The Court was thus able to distinguish its results in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), see note 78 *supra*, and *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1974) (holding that no first amendment protection was available for "help-wanted" advertising separated into sex-designated columns since such advertising merely proposed a commercial transaction and since the underlying commercial activity—use of an applicant's sex as a criterion of employment—was illegal).

83. 421 U.S. at 826. Since the Court denied that the state of Virginia had any valid interest in the conduct it sought to regulate (see note 80 *supra*), it was able to avoid a more difficult issue: while *Bigelow* makes it clear that speech will not be denied first amendment protection solely by reason of its commercial character, it did not confront the question of how the protection afforded advertising would be applied to activities which the states have a legitimate interest in regulating.

84. 425 U.S. 748 (1976).

85. 421 U.S. at 822.

86. 425 U.S. at 760-61. The case involved a challenge by a state consumer organization to a Virginia statute which provided that a pharmacist is guilty of "unprofessional conduct" when he ". . . (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee . . . for any drugs which may be dispensed only by prescription." VA. CODE ANN. § 54-524.35 (1974). A finding of "unprofessional conduct" might in turn result in the imposition of a civil monetary penalty against the pharmacist or revocation of his license by the State Board of Pharmacy. *Id.* § 54-524.22:1.

87. The Court did not discuss the status of the latter half of the first test set out in *Bigelow*—that the advertisement must refer to or propose a *legal* commercial transaction to receive any first amendment protection. See note 82 *supra* and accompanying text. However, it seems likely that advertisements of illegal commercial transactions remain unprotected by the first amendment. The Court's utilitarian rationale for protecting commercial speech, discussed at notes 88-89 *infra* and accompanying text, would clearly be inapplicable to advertisements proposing illegal transactions. *Cf.* *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 68 (1976) ("We have recently held that the First Amendment affords some protection to commercial speech [citing *Virginia Pharmacy*]. We have also made it clear, however, that the content of a particular advertisement may determine the extent of its protection").

88. 425 U.S. at 763. See also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314-15 (1973) (Brennan, J., dissenting); *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 905 (1971) (Douglas, J., dissenting from denial of certiorari).

consumer's private economic decisions affect the overall allocation of the nation's resources, "[i]t is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed."⁸⁹ Employing the balancing test suggested in *Bigelow*, the Supreme Court held that the justifications offered by the state of Virginia⁹⁰ were insufficient to justify the impediment to the flow of commercial information created by its statute.⁹¹ Since the public interest is best served by an uninhibited flow of commercial information, any particular advertisement is entitled to first amendment protection regardless of whether it contains factual material of clear public interest.⁹²

This broad endorsement of unimpeded public access to commercial information is not without qualification. *Virginia Pharmacy* also clarifies the scope of protection which the first amendment affords commercial speech when such protection conflicts with historically recognized state regulatory powers.⁹³ False or misleading speech still receives no first amendment protection:⁹⁴ "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake."⁹⁵

The Role of Procedural Safeguards

While recognizing the legitimacy of the government's interest in preventing the occurrence and harmful consequences of untruthful speech, the Supreme Court has required that safeguards be built into regulatory programs in order to minimize the possibility of unconstitutional regulation of protected speech.⁹⁶ In the area of defamatory communications, for example,

89. 425 U.S. at 765. See also *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603-04 (1967) (Harlan, J., concurring). It has been suggested that restrictions on the content of advertising would have the "anti-competitive" effect of making it difficult for new firms in one industry to mount imaginative advertising campaigns, would deprive society of a prolific source of popular culture, and would limit an important source of revenue for the mass media. *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1016 (1967).

90. The state of Virginia had argued that price advertising would adversely affect the quality of service offered by practicing pharmacists by encouraging them to sacrifice careful work in favor of cost-cutting techniques, to the possible detriment of consumer health; would impair the profession's image, making it hard to attract new talent into the profession; would inflate the cost of drugs to the consumer; and would destroy "stable pharmacist-customer relationships" by encouraging price shopping. 425 U.S. at 768.

91. The Court was not convinced that the ban on price advertising contributed anything to the maintenance of high standards of professional conduct not already guaranteed by other forms of regulation. *Id.* at 768-70.

92. *Id.* at 761-62.

93. *Id.* at 771-72. This issue was left open in *Bigelow*. See note 83 *supra*.

94. See 425 U.S. at 771. The courts have consistently held that there is no constitutional right to disseminate false advertisements. See, e.g., *E.F. Drew & Co., Inc. v. FTC*, 235 F.2d 735, 740 (2d Cir. 1956), *cert. denied*, 352 U.S. 959 (1957).

95. 425 U.S. at 771. The Court also intimated that its decision would not impair efforts at regulation of the broadcast media. *Id.* at 773.

96. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41 (1973); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968).

the Court has placed substantial limitations on legislative authority to permit recovery against offending publishers and broadcasters.⁹⁷ This reflects the Court's recognition that "factual errors are inevitable in free debate" and its fear that imposition of liability for such assertions would unduly restrict public discussion by inducing self-censorship.⁹⁸

The Court has not perceived any similar need to restrict the government's efforts to control the problem of false or misleading advertising.⁹⁹ Though there is no justification for denying first amendment protection to commercial speech, there are "common sense differences" between it and other varieties of speech which suggest that a lesser degree of protection is required to insure the flow of "truthful and legitimate" commercial information.¹⁰⁰ In contrast to publishers and broadcasters who "must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publishing deadlines," the truth of the assertions contained in a commercial advertisement can often be more easily verified by both the advertiser and the FTC.¹⁰¹ Furthermore, commercial speech is likely to be relatively durable, since repetitive advertising of some sort is generally recognized as an important prerequisite to commercial success.¹⁰² Accordingly, regulation for false or misleading advertisements is less likely to have a chilling effect on legitimate (that is, fully protected) commercial speech.

One further fundamental difference between commercial and non-commercial speech provides additional justification for requiring less procedural precaution in the government's regulation of commercial speech. Non-commercial speech frequently involves an exposition of ideas—

97. The states may not allow recovery against publishers and broadcasters, in the absence of their actual knowledge of falsehood or reckless disregard for truth, for libelous statements made about "public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The same limitation has been applied to libelous statements made about "public figures," see *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), though the breadth of that category remains unclear. See *Time, Inc. v. Firestone*, 424 U.S. 448, 453-55 (1976); Note, *Defamation, Privacy and the First Amendment*, 1976 *DUKE L.J.* 1016. Further, the Court has made it impossible for the states to allow any plaintiff to recover presumed or punitive damages (as opposed to actual damages which are supported by "competent evidence concerning the injury") where plaintiff cannot prove actual knowledge of falsehood or reckless disregard for truth. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50 (1973). However delimited, *New York Times* remains a restriction on the states' ability to award damages against publishers and broadcasters for libel of certain persons where such an award would unnecessarily cramp the "uninhibited, robust" debate on public issues that the first amendment was designed to protect. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

98. *Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 777 (1976) (Stewart, J., concurring).

99. See *id.* at 771-72 n.24 (majority opinion); *id.* at 776-77 (Stewart, J., concurring).

100. *Id.* at 771-72 n.24 (majority opinion).

101. *Id.* at 777 (Stewart, J., concurring); *id.* at 771-72 n.24 (majority opinion).

102. *Id.* at 771-72 n.24.

political or religious commentary, for example—which is generally thought to be the type of communication the first amendment was originally designed to protect.¹⁰³ Under one widely accepted view, the first amendment's protection of speech is conceptually founded on the proposition that the best test of truth is the power of an idea to gain acceptance in the intellectual marketplace.¹⁰⁴ If not tampered with, these abstract market forces will separate the true from the false. In the commercial setting, however, it is products, not ideas, that compete.¹⁰⁵ Two corollaries follow. First, the fear of the Constitution's framers that a system of prior restraints on expression would be used to stifle unpopular ideas¹⁰⁶ is unjustified in the marketplace of goods and services.¹⁰⁷ While suppliers of goods or services may attempt to eliminate competition from other sources, this simply is not a core first amendment problem. The success or failure of a particular product is hardly relevant to the first amendment's purpose of promoting robust and uninhibited political discussion.¹⁰⁸ Second, to the extent that an advertisement misrepresents what a product is or can do, it loses any worthiness of protection under the amendment,¹⁰⁹ since it will to the same extent distort the operation of the marketplace of ideas in favor of the misrepresented product.

The Bigelow/Virginia Pharmacy Analysis Applied

An application of the analysis outlined by the Supreme Court in *Bigelow* and *Virginia Pharmacy* belies the Ninth Circuit's conclusion that the first amendment requires an agency to show more than reasonable cause to believe that a violation has occurred before a temporary injunction can be granted. As has been shown, the government's interest in stifling false and misleading advertising is legitimate and strong.¹¹⁰ Congress' power to utilize its authority over the mails and interstate commerce to protect the public against fraud is firmly established.¹¹¹ But this strong public interest in

103. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964).

104. E.g., *id.* at 270. This view received its classic statement in Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919).

105. See *Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 780-81 (1976) (Stewart, J., concurring).

106. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713, 716 (1931).

107. *Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 770-71 (1976); cf. *id.* at 778 n.3 (Stewart J., concurring).

108. See note 103 *supra* and accompanying text.

109. See *Developments in the Law, supra* note 89, at 1030.

110. "[T]he elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking." *Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 781 (1976) (Stewart, J., concurring). See notes 36-43 *supra* and accompanying text.

111. E.g., *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948).

preventing commercial frauds of all sorts must be juxtaposed against the particular means chosen to combat their occurrence.

The crucial question at this point is the extent to which a particular regulatory system chills or in some way restricts the exercise of protected rights of communication. As noted, commercial speech possesses a quality of durability in spite of regulation which other varieties of speech may not possess.¹¹² Nonetheless, the particular form which the regulation takes may be as important as the nature and characteristics of the type of communication being regulated.

In *Simeon*, the Ninth Circuit suggested that since a preliminary injunction of false advertising might be conceptualized as a prior restraint of expression, the section 53(a) injunction procedure will be burdened with a heavy presumption against its own constitutional validity.¹¹³ This is a problem of much significance, as the rule against prior restraints is at the heart of first amendment protection of expression.¹¹⁴ Though some broad exceptions have been developed,¹¹⁵ prohibitions against publication without prior administrative approval or censorship have generally been held unenforceable as violations of the first amendment.¹¹⁶ While most proceedings for injunctive relief are subject to the general prohibition against prior restraints, some categories fall within recognized exceptions.¹¹⁷

112. See note 102 *supra* and accompanying text.

113. 532 F.2d at 713; see *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968). See also *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).

114. See *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

115. Licensing systems have been upheld where the discretion of the issuing official is limited to matters of time, place, and manner of communication. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569 (1941). The courts are also less likely to find an invalid system of prior restraints where the subject matter of the communication is not protected by the first amendment or is expressly illegal. Thus, in the context of obscene publications, which are unprotected by the first amendment, see *Roth v. United States*, 354 U.S. 476 (1957), it has been held that not all systems of prior administrative censorship will violate the amendment. See *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961) (upholding a municipal ordinance requiring submission of all motion pictures for examination or censorship prior to their public exhibition and forbidding such exhibition where certain standards were not met). Similarly, federal statutes which authorize the Postmaster General to forbid delivery of mail and payment of postal money orders to any person found, "upon evidence satisfactory" to him, to be conducting a "scheme or device for obtaining money . . . through the mails by means of false or fraudulent pretenses . . .," 39 U.S.C. § 4005 (1970), have been upheld against attacks that they were invalid systems of prior restraint on private communications. See *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178 (1948).

116. See, e.g., *Schneider v. State*, 308 U.S. 147 (1939) (striking down a city ordinance which barred unlicensed door-to-door communication; licenses were available only from local police who possessed broad discretion under the statute to determine what types of literature could be distributed and who could distribute it).

117. In *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968), for example, the Supreme Court held that issuance of an *ex parte* temporary restraining order against the holding of a protest meeting by a white supremacist group violated the first amendment. The

The procedures for obtaining temporary injunctions against fraudulent commercial activities under the Federal Trade Commission Act and similar provisions do not fall within the category of prior restraints and, before *Simeon*, had not been treated as if they did by the Ninth Circuit. While its conceptual boundaries are somewhat unclear,¹¹⁸ the prior restraint doctrine seems best explained and understood in terms of the political milieu of another century.¹¹⁹

A prior restraint is the partial or complete prevention of publication imposed by an executive official.¹²⁰ However, the issuance of an injunction, under section 53(a) for example, is the result of an adversary judicial proceeding, not the decision of an executive official. Further, the restraint under such provisions will take the form of subsequent punishment for contempt of a court order, not actual pre-publication censorship.¹²¹ As a

Court found that the *ex parte* character of the proceeding, at least where no effort had been made to notify petitioners, was fatal. *Id.* at 181-82.

Compare *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). In that case the appellant newspaper publisher had enjoyed a substantial monopoly over the local dissemination of news and over local advertising. When a competing radio station was established, the publisher refused to accept advertising from those who also advertised over the radio. The United States sought and received an injunction against such conduct as a violation of the antitrust laws. The Court held that the injunction did not amount to an unconstitutional prior restraint: since the antitrust laws apply to competitors in all businesses—communications included—an injunction was just as appropriate a means of enforcing those laws against publishers as against other violators. *Id.* at 155-56.

The point here is not that *Carroll* and *Lorain Journal* are somehow indicative of a clear conceptual distinction in which some injunctions of communication become “prior restraints” of expression and others do not. On the contrary, they merely illustrate the more general point that not all procedures for injunction of potentially protected speech are constitutionally invalid. Professor Emerson’s study of the development and scope of the doctrine led him to comment that “[d]espite an ancient and celebrated history, the doctrine of prior restraint remains today curiously confused and unformed.” Emerson, *The Doctrine of Prior Restraint*, 20 *LAW & CONTEMP. PROB.* 648, 649 (1955). It is no wonder, then, that the courts have relied primarily on historic definitions of prior restraint to give shape to the concept. See note 119 *infra* and accompanying text.

118. See note 117 *supra*.

119. See *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 389-90 (1973); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-14 (1931); Emerson, *supra* note 117, at 650-52.

120. See, e.g., *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 389-90 (1973).

121. In *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), the challenged impediment to communication also took the form of an injunction under which future violations would be punished by way of subsequent citation for contempt. The Court nevertheless held that the injunction operated as an invalid prior restraint since, in order to avoid citation for contempt, the newspaper would have to clear future publications with a judge. *Id.* at 712-13. The characterization of the Minnesota statute as a system of prior restraint thus conflicts with the traditional understanding of that concept. See notes 119-20 *supra* and accompanying text. *Near*, however, does not mandate the conclusion that the procedure for enjoining commercial speech under section 53(a) constitutes a prior restraint of expression. In *Near*, the invalidated

result, it is doubtful that the first amendment requires the FTC to overcome a "heavy presumption" against the constitutionality of the section 53(a) procedure each time it seeks a preliminary injunction against a misleading advertisement.¹²²

Further support for this conclusion is drawn from the Ninth Circuit's treatment of a statutory temporary injunction procedure utilized by another agency. As previously noted, the NLRB is authorized to seek temporary injunctive relief against unfair labor practices pending termination of its administrative proceedings.¹²³ Some of the unfair practices prohibited by the

statute authorized an injunction against any newspaper which had been found guilty of publishing "malicious, scandalous [or] defamatory" material from publishing any such material in the future; a publisher could defend by proving that his publications were true and published "with good motives and for justifiable ends." *Id.* at 702-03. The Court's concern in *Near* focused on the broad, vague nature of the restraint which might be placed upon publication. *Id.* at 712-13. Indeed, a "malicious publication" was not even defined by the statute. *Id.* at 712.

Contrast this with the procedure for enjoining false advertisements under section 53(a). It has already been noted that the truth of commercial speech is more readily verified by advertisers, agencies and courts than is that of other types of speech. See note 101 *supra* and accompanying text. Further, there is no reason why an injunction granted under section 53(a) might not be precisely and narrowly drawn so as to inform the respondent exactly what sort of communication (advertisement) was being prohibited. The potential for unconstitutional "chilling" of legitimate speech, which appeared to be great in the Minnesota statute involved in *Near*, is negligible under section 53(a). Finally, it should be noted that the Court's most recent treatment of the prior restraint doctrine defined it in narrow terms and characterized its expression in *Near* as aberrant. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389-90 (1973).

122. Even if the procedure for obtaining a temporary injunction under section 53(a) is characterized as a "system of prior restraints," the presumption against its constitutionality might be overcome by the FTC. In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Supreme Court held that the heavy presumption was met in the case of a non-criminal proceeding requiring prior submission of films to an administrative censor, where: (1) the burden of proving that a film is unprotected expression rested on the censor; (2) any restraint prior to a final determination on the merits was limited to a preservation of the status quo for the shortest time compatible with sound judicial procedure; and (3) a prompt final judicial determination of obscenity was assured. *Id.* at 57-59. Restraint of false or misleading commercial speech pursuant to section 53(a) may well satisfy these standards. The burden of proof in the section 53(a) proceeding and in the final proceeding on the merits is on the FTC. A section 53(a) injunction necessarily preserves the status quo (but see note 46 *supra*) and is effective only until the Commission reaches a decision on the merits of its complaint against the advertiser. Finally, a decision on the merits adverse to the advertiser is reviewable in the courts of appeals, 15 U.S.C. § 45(c) (1970). However, it is important to note that in construing the second and third requirements of *Freedman*, the Supreme Court has required that the period of time for which the prior restraint is to last and within which a final judicial determination on the merits is to be had be *fixed* and *brief*. Thus, in *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968) (*per curiam*), the Court struck down a city obscenity censorship procedure which required initiation of the final judicial proceeding within 57 days of the beginning of the administrative restraint. The period of time specified simply was not brief enough. *Id.* at 141-42. Obviously, the section 53(a) procedure does not meet this requirement. Since the procedure contemplated under section 53(a) *begins* with a judicial proceeding, however, it is unclear whether the Court would expect the *Freedman-Teitel* requirements to be met exactly.

123. See text accompanying note 49 *supra*.

National Labor Relations Act relate to labor picketing.¹²⁴ Though picketing is said to involve elements of both speech and conduct,¹²⁵ it is well established that peaceful picketing, conducted in areas open to the general public, is protected by the first amendment.¹²⁶ Nevertheless, in *Department and Specialty Store Employees Local 1265 v. Brown*,¹²⁷ the Ninth Circuit held that the NLRB's demonstration of reasonable cause to believe that the union's "recognitional" picketing activities constituted unfair labor practices was sufficient to entitle the Board to an injunction against the picketing.¹²⁸ This was so, the court held, even though the picketing in question may have been "informational and advisory to the extent of being permissible under this legislation."¹²⁹ The court did not characterize the procedure as a prior restraint carrying a strong presumption against its constitutionality.¹³⁰ The preliminary injunction was granted upon a showing of reasonable cause to believe that prohibited activities were occurring even though the same activities were, to the extent that the picketing was informational and not recognitional, protected by the first amendment.

With its decision in *Simeon* the Ninth Circuit appears to have also retreated from its position in *Department Store Employees*. Since there is nothing in the statutes themselves or in the case law interpreting them which suggests that Congress meant to impose different burdens on the NLRB and the FTC,¹³¹ it is difficult to determine why the Ninth Circuit now expects the FTC to demonstrate a favorable balance of the equities and a likelihood of success on the merits when it seeks a temporary injunction against deceptive advertising.

Since the various statutory injunction procedures do not constitute prior restraints within the strict meaning of that concept, there is no first amendment reason to require the agencies to overcome an especially heavy presumption when they seek relief under those provisions. This is not to say, of course, that the standard adopted by the Seventh Circuit in *Rhodes Pharmacal* imposes no restrictions at all on an agency's ability to enjoin commercial expression. Regardless of its characterization, the reasonable-cause-

124. See 29 U.S.C. § 158(b)(7) (1970).

125. See *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 (1968).

126. *Id.* at 313. This broad statement is qualified by the illegal object doctrine: "a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." *International Brotherhood of Teamsters v. Vogt*, 354 U.S. 284, 293 (1957). The seminal case in this area is *Thornhill v. Alabama*, 310 U.S. 88 (1940) (striking down on first amendment grounds a state statute flatly prohibiting picketing).

127. 284 F.2d 619 (9th Cir.), *cert. denied*, 366 U.S. 934 (1961).

128. 284 F.2d at 628.

129. *Id.*

130. See *id.*

131. See notes 49-55 *supra* and accompanying text.

to-believe standard does not permit the state to halt the dissemination of an advertisement at will.¹³² In each case, the Commission must demonstrate the reasonableness of its substantive complaint against the advertiser. The *Simeon* requirement of showing likely success on the merits, on the other hand, risks turning the application for a temporary injunction into a ritualistic "contest of oaths" through which a respondent may be allowed to continue dissemination of an allegedly false advertisement merely by appearing before the court and denying the full substance of the Commission's complaint.¹³³ The first amendment requires no such result.¹³⁴ Given the greater amenability of commercial speech to objective verification for accuracy, its greater durability in the face of regulation, and its relatively non-controversial nature (at least by comparison with unpopular political speech), the procedural safeguard afforded by the reasonable-cause-to-believe standard should be held sufficient under the first amendment.

CONCLUSION

The Ninth Circuit's holding in *Simeon* that the Federal Trade Commission Act requires more than a showing of reasonable cause to believe in order for the Commission to obtain a preliminary injunction under section

132. In *FTC v. Sterling Drug, Inc.*, 317 F.2d 669 (2d Cir. 1963), the FTC sought a temporary injunction against an aspirin manufacturer advertising the results of a "scientific investigation" of the leading analgesic products. The Commission alleged that the advertisements implied that the results of the investigation, which were favorable to respondent's product, were endorsed by the U.S. government and the AMA, when they actually were not so endorsed. The court of appeals upheld the lower court's finding that the advertisement was not necessarily misleading, and its conclusion that the FTC had not demonstrated a reasonable cause to believe that the FTC Act was being violated (though the court also specifically refused to adopt this as the correct standard; see note 29 *supra*).

133. See note 22 *supra*. Again, it is not being argued here that the agencies will never be able to meet the more difficult standard. See *FTC v. National Health Aids*, 108 F. Supp. 340 (D. Md. 1952), where the more difficult standard was in fact met by the FTC. However, that a respondent may be able to frustrate prompt enforcement efforts by appearing in court with a full set of denials is also a real possibility. See, e.g., *FTC v. American Medicinal Prods.*, 30 F.T.C. 1683 (S.D. Cal. 1940). See note 23 *supra*.

134. See *Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976). See also *Reilly v. Pinkus*, 338 U.S. 269 (1949). There, petitioner sought an injunction against enforcement by the Postmaster General of a postal fraud order as entered against petitioner pursuant to 39 U.S.C. §§ 259, 732 (current version at 39 U.S.C. § 4005 (1970)). That statute, see note 115 *supra*, authorized the Postmaster General to order the return of all mail sent to any person "upon evidence satisfactory to" him that the latter is conducting fraudulent moneymaking schemes through the U.S. mail. Petitioner sought to counter damaging testimony by the government's medical witnesses by producing an authority of his own whose testimony corroborated the claims he had made in advertisements extolling the efficacy and safety of his weight-reducing plan. The Court upheld the Postmaster General's decision to disregard the latter testimony and issue the fraud order, noting that there was no requirement—constitutional or statutory—that the order be withheld anytime "medical witnesses can be produced who blindly adhere to views discredited by scientific experience." 338 U.S. at 274 (dictum).

53(a) is unsupportable. It ignores the clear intent of Congress to provide an effective and immediate means of halting potentially injurious violations of substantive provisions of the Act. It also suggests a new reading of other federal statutes dealing with deceptive commercial transactions which would limit the availability of the preliminary injunction as an enforcement tool for the NLRB, the SEC and the ICC.

The result in *Simeon* is not required by the first amendment's protection of commercial speech. In recognition of the special character of commercial speech, the Supreme Court has adopted a balancing test to evaluate government regulation in the economic sphere. The application of this approach in the commercial speech cases reflects the Court's appreciation of the government's strong interest in stifling fraudulent transactions in all contexts. Since the first amendment does not require the agencies to demonstrate more than reasonable cause to believe that a fraudulent transaction is occurring, it is surely best from an enforcement perspective that the issuance of a temporary injunction be conditioned on no more burdensome a showing. In this way the offending party will not profit, at the public's expense, from the often unavoidable delays which frequently characterize administrative enforcement proceedings.