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## Lowe v. Securities and Exchange Commission: The Deterioration of Financial Newsletter Regulation

Lori Denise Coffman\*

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# Lowe v. Securities and Exchange Commission: The Deterioration of Financial Newsletter Regulation

Lori Denise Coffman

## **Abstract**

In *Lowe v. Securities and Exchange Commission*,<sup>1</sup> the Supreme Court granted certiorari to determine whether the Securities and Exchange Commission (hereinafter the **SEC**) had the authority under the Investment Adviser's Act<sup>2</sup> (hereinafter the Act) to enjoin the publication of a financial newsletter **by** an unregistered financial adviser.

**KEYWORDS:** financial, newsletter, exchange

## *Lowe v. Securities and Exchange Commission: The Deterioration of Financial Newsletter Regulation*

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### I. Introduction

In *Lowe v. Securities and Exchange Commission*,<sup>1</sup> the Supreme Court granted certiorari to determine whether the Securities and Exchange Commission (hereinafter the SEC) had the authority under the Investment Adviser's Act<sup>2</sup> (hereinafter the Act) to enjoin the publication of a financial newsletter by an unregistered financial adviser. The SEC's activities, designed to protect unsophisticated investors through the regulation of financial newsletters,<sup>3</sup> threatened to collide with the first amendment freedom of the press.<sup>4</sup> In a decision labelled as one of statutory construction, the *Lowe* Court interpreted the Act<sup>5</sup> to exclude publishers of impersonal financial newsletters.<sup>6</sup> Justice White, while concurring in the result, criticized the majority and concluded that the majority's decision, "[i]s in fact based on a thinly disguised conviction that the Act is unconstitutional as applied to prohibit publication of

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1. 105 S. Ct. 2557 (1985).

2. 15 U.S.C. § 80b (1982).

3. The Act's provision on the findings of the SEC suggests concern over the availability of the mail to disseminate financial advice. According to the act:

Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission . . . and facts otherwise disclosed and ascertained, it is found that investment advisers are of national concern, in that, among other things - (1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, . . . by the use of the mails and means . . . of interstate commerce.

15 U.S.C. § 80b-1 (1982).

4. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

5. The Investment Adviser's Act of 1940 regulates the profession of investment advising. The statute codified at 15 U.S.C. § 80-b (1982), sets forth procedural guidelines to regulate this profession. This includes a registration requirement for those persons who render financial advice through verbal or written means for a consideration. An unregistered adviser who renders investment advice is subject to both civil and criminal sanctions under the Act.

6. *Lowe*, 105 S. Ct. at 2573.

newsletters by unregistered advisers.”<sup>7</sup>

In order to understand the *Lowe* decision, this comment begins with an overview of the Act and its application to investment newsletters prior to this Supreme Court decision. A separate evaluation of the “bona fide” newspaper exclusion is included because of its significance in the Court’s ultimate construction of the Act. Next, legislative history concerning the purpose and proposed application of the Act is analyzed in an effort to understand its intended scope. The lower court opinions resulting in the Supreme Court’s grant of certiorari are then summarily discussed with a focus towards the divergence of opinion between and within the courts.

The majority opinion delivered by Justice Stevens and joined by Justices Brennan, Marshall, Blackmun and O’Connor is then examined and evaluated in view of the strong concurring opinion delivered by Justice White and joined by Chief Justice Burger and Justice Rehnquist. Although the majority decision states a conclusion based on statutory construction, this comment will examine the influential nature of first amendment concerns in the majority’s decision.

In conclusion, this comment articulates some possible ramifications of the *Lowe* decision that may have been produced unnecessarily through the majority’s determination to avoid the first amendment issue. An effort is made to determine whether confronting the constitutional issue would have better balanced the competing interests of first amendment concerns and the protection of the investing public.

## II. The Investment Adviser’s Act

The Investment Adviser’s Act<sup>8</sup> of 1940 was enacted to protect the public from abuses in the securities industry.<sup>9</sup> The stock market crash of 1929 brought a new awareness of the influence investment advisers were capable of wielding. Abuses of this influence were thought to have contributed in large part to the crash of 1929.<sup>10</sup> As the activities of investment adviser’s resumed and then increased following the crash, the need for federal legislation to protect unsophisticated investors became apparent.<sup>11</sup>

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7. *Id.* at 2581 (White, J., concurring).

8. *See supra* note 5.

9. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191 (1963).

10. *Id.* at 186.

11. S. REP. NO. 1775, 76th Cong., 3d Sess. 21 (1940).

According to a House Report, "The essential purpose of [this legislation] is to protect the public from the frauds and misrepresentations of unscrupulous tipsters and touts and to safeguard the honest investment adviser against the stigma of the activities of these individuals by making fraudulent practices by investment advisers unlawful."<sup>12</sup> In the drafting of the Act, the primary goal of protecting the public from fraud and manipulation was balanced with the need to protect the fiduciary nature of an adviser-client relationship.<sup>13</sup>

The Act, codified at title 15, section 80b of the United States Code requires investment advisers to file a registration with the SEC.<sup>14</sup> The registration application requires disclosure of past misconduct involving financial matters as well as information on the advisers current business.<sup>15</sup> "Investment advisers,"<sup>16</sup> as defined by the Act, must be registered with the SEC or they will be prohibited from engaging in advisory activities. This prohibition extends to the use of the mail to disseminate financial advice.<sup>17</sup>

Investment advisers registered under the Act must keep records and may be required to file reports when the SEC deems it necessary to protect the public.<sup>18</sup> Both reports and records must be made available for public inspection.<sup>19</sup> The Act's regulatory power includes injunctive relief available whenever the SEC finds that an adviser is, or is about to, violate a provision of the Act.<sup>20</sup> According to the Act, upon a showing that a violation has occurred or is about to occur, an injunction shall issue without bond.<sup>21</sup> This order can require compliance with the Act, prohibit future violations, or both. Additionally, criminal proceedings can be instituted for violations of the Act.<sup>22</sup>

Under the Act, the SEC is given the power to revoke, suspend or deny the registration of an investment adviser. If the adviser has been convicted of a felony or misdemeanor involving the purchase or sale of securities within ten years preceding the filing of the application, he

12. H.R. REP. NO. 2639, 76th Cong., 3d Sess. 28 (1940).

13. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 191.

14. 15 U.S.C. § 80b-3(a) (1982).

15. 15 U.S.C. § 80b-3(c) (1982).

16. See *infra* text accompanying note 25.

17. 15 U.S.C. § 80b-3(a) (1982).

18. 15 U.S.C. § 80b-4 (1982).

19. *Id.*

20. 15 U.S.C. § 80b-9(e) (1982).

21. *Id.*

22. *Id.*

may be barred from registering under the Act. If the adviser is convicted of a felony or misdemeanor involving securities while he is registered, his registration may be revoked or suspended. Before such disciplinary measures are taken the SEC must also determine that the public interest is benefitted by the revocation or denial of registration and that the misconduct took place within the scope of the adviser's business.<sup>23</sup> The SEC is also granted these powers upon a finding that the adviser has falsified material information on an application or in a report filed with the SEC.<sup>24</sup>

An investment adviser is defined under the Act as:

[A]ny person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. . . .<sup>25</sup>

The first element of this definition involves the rendering of investment advice to others. Exactly what qualifies as investment advice is not clear. For example, a publication containing information on a variety of investments may or may not qualify as an investment advisory publication under the Act.

The SEC has concluded that a person who provides advice, recommendations or analyses, concerning securities, but not relating to specific securities, would generally be deemed an investment adviser, assuming such services are performed as part of a business and for compensation.<sup>26</sup> This definition includes persons who advise clients directly or through publications or writings. The advice can be specific or can be related to the general advantages or disadvantages of investing in securities compared to other investment opportunities.<sup>27</sup>

The second element in the definition of an investment adviser re-

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23. 15 U.S.C. § 80b-3(e) (1982).

24. *Id.*

25. 15 U.S.C. § 80b-2(a)(11) (1982).

26. 17 C.F.R. § 276.563 (1984); Applicability of Investment Advisers Act to Certain Publications, 5 FED. SEC. L. REP. (CCH) ¶ 56,156A (Jan. 10, 1977).

27. 17 C.F.R. § 276.770 (1984) (Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons who Provide Investment Advisory Services as an Integral Component of Other Financially Related Services, 5 FED. SEC. L. REP. (CCH) ¶ 56,156B (Aug. 13, 1981)).

quires that the person be "engaged in the business" of advising others. The SEC views someone as "in the business" if he gives advice more than incidentally in the course of his business.<sup>28</sup> Other determinative factors are how specific the advice is and whether any special compensation is received for the advice. According to the SEC, a person is in the business "if, on anything other than rare and isolated instances, he discusses the advisability of investing in, or issues reports or analyses as to, specific securities or specific categories of securities. . . ."<sup>29</sup>

Finally, a person must receive compensation for his financial advice to qualify as an investment adviser. Any economic benefit received as a result of financial advice or in payment for a package of services including financial advice, is sufficient compensation for purposes of the Act. This compensation does not have to be attributed to a specific item of information. Commission payments resulting from investment information qualify as an economic benefit for purposes of the definition.<sup>30</sup>

Some investment advisers are excluded from the registration requirements of the Act. Among those excluded are advisers who do not engage in interstate business transactions (including use of the mail) and those who had fewer than fifteen clients in the preceding year. Others excluded from registration include advisers having only insurance companies as clients, banks or lending institutions, and attorneys who give investment advice only incidentally to their profession. Arguably, the most ambiguous exception applies to publishers of "bona fide" newspapers and news magazines of general and regular circulation.<sup>31</sup>

### III. The "Bona Fide" Newspaper Exception

According to the Act, publishers of "bona fide" newspapers, news magazines and business or financial publications are excepted from the

28. *Id.*

29. *Id.*

30. *Id.*

31. 15 U.S.C. § 80b-2(a)(11) (1982).

Note: Other investment advisers excluded from the provisions of the Act are: a) banks or bank holding companies, lawyers, accountants, engineers, or teachers whose performance of such service is incidental to the practice of the profession; b) brokers and dealers who receive no special compensation and engage in the activity only incidentally to their profession; c) persons who engage solely in activities relating to securities guaranteed by the United States or securities issued or guaranteed by corporations, in which the United States has an interest and d) such other persons not within the intent of this Act as the SEC may designate.

definition of investment adviser if these publications are of general and regular circulation.<sup>32</sup> However, the Act does not explicitly set forth what qualifies as a "bona fide" newspaper.

In *Securities and Exchange Commission v. Wall Street Transcript Corp.*,<sup>33</sup> the leading case raising this issue, the "bona fide" newspaper exception was defined as "those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred."<sup>34</sup> The Second Circuit indicated that the format or appearance of the publication was not the critical issue in determining whether a publication was "bona fide." According to *Wall Street Transcript*, the question of whether a publication is a bona fide newspaper is made by examining the nature of the publication's practices.<sup>35</sup>

The *Wall Street Transcript* court studied the contents of the publication and the likelihood that readers would respond to this information as financial advice. If the contents warrant such a conclusion then the publication is not a "bona fide" newspaper for purposes of the Act.<sup>36</sup> Further, no reason was found to substantiate the argument that Congress intended to exclude all newspaper publications from the requirements of the Act. The court explained in a note, "[i]t appears rather that those newspapers referred to as 'bona fide' were considered to be those outside the regulatory intent of the Act."<sup>37</sup> The court reached this conclusion by applying the language of the Act which excludes "bona fide" newspapers from regulation as well as "such other persons not within the intent of this paragraph. . . ."<sup>38</sup> The Second Circuit interpreted this language to mean that the validity of an exclusion can be determined by examining what the Act was logically created to regulate.<sup>39</sup> If the publication falls within an area which the Act was intended to regulate, then it is probably subject to the registration requirements.

The SEC has ruled that publishers of books and periodical articles are excluded from the Act in a number of situations. According to the SEC, the definition of an investment adviser does not include the au-

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32. 15 U.S.C. § 80b-2(a)(11) (1982).

33. 422 F.2d 1371 (2d Cir. 1970), *cert. denied*, 398 U.S. 958 (1970).

34. *Id.* at 1377.

35. *Id.* at 1378.

36. *Id.*

37. *Id.* at 1377, n.9.

38. 15 U.S.C. § 80b-2(a)(11) (1982).

39. *Wall Street Transcript Corp.*, 422 F.2d at 1377.



thor of a book or periodical unless the publication contains reports, recommendations or otherwise advises readers on specific securities or issuers. In addition, the publication must not be one of a series which is intended to be updated or supplemented and the publisher must not engage in any other activity which would qualify as investment advisory activity under the Act.<sup>40</sup>

#### IV. SEC v. Lowe

In 1983 the SEC brought suit in federal district court to enjoin Christopher Lowe and Lowe Management Corporation from publishing investment newsletters as an unregistered financial adviser. In 1981 Lowe's registration was revoked and he was barred from associating with any financial adviser. This action followed the discovery of Lowe's failure to disclose prior criminal convictions in New York and an administrative finding that he had misappropriated client funds.<sup>41</sup>

Lowe continued to publish advisory newsletters after the revocation of his license. These newsletters included the Lowe Investment and Financial Letter and the Lowe Stock Advisory. A third publication was in the planning stages but no issues had been distributed at the time the SEC brought suit. Lowe also offered a telephone "hotline" for subscribers of six months or more.<sup>42</sup>

The Lowe Investment and Financial Letter had between 3,000 and 19,000 subscribers. A subscription cost thirty-nine dollars for one year and seventy-nine dollars for three years. The publication included advice on investing in treasury bills, stocks and money market funds. It also recommended the desirability of purchasing or selling specific stocks.<sup>43</sup>

The Lowe Stock Advisory contained purchase, sale and hold recommendations on low-priced stocks. It also analyzed the general trend of the market. A few hundred clients subscribed to this service. The SEC did not allege that fraudulent or misleading information was contained in any of these publications.<sup>44</sup>

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40. Applicability of Investment Adviser's Act to Certain Publications, *see supra* note 26.

41. SEC v. Lowe, 556 F. Supp. 1359 (E.D.N.Y. 1983).

42. *Id.* at 1361.

43. *Id.*

44. Subscribers only complaints about Lowe's services concerned the lack of regular publication. The District Court explains this problem, "[t]he lack of regularity of publication — an understandable problem in view if the amount of time the publisher

The district court defined the central issue as whether the SEC could restrain Lowe from publishing his newsletters, which the court termed impersonal financial advice, by denying him registration status under the Act.<sup>45</sup> To reach his decision, Judge Weinstein construed the statute as differentiating between personal and impersonal advice offered through publications although the statute itself contained no justification for this approach. He suggested, however, that this construction was necessary to prevent a ruling that the Act as applied to all publications is unconstitutional.<sup>46</sup>

The court's rationale evolved around a belief that the Act may involve an unconstitutional prior restraint on publication.<sup>47</sup> The SEC argued that the publication of financial newsletters constitutes a category of commercial speech and thus can be regulated more closely than other areas of first amendment protection.<sup>48</sup> The district court disagreed with the SEC's analysis and concluded that publishers of financial newsletters are entitled to full first amendment protection.<sup>49</sup>

The district court concluded that even under a commercial speech doctrine the publication of Lowe's newsletters could not be constitutionally enjoined. The court adhered to the doctrine developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>50</sup> which established guidelines for regulating commercial speech. Under these guidelines the restraint must not be more extensive than necessary to achieve the desired purpose.<sup>51</sup> Since the SEC can require Lowe to disclose his past misdeeds, Judge Weinstein reasoned that a total

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has been devoting in recent years to defending himself before federal and state law enforcement agencies." *Id.* at 1361-62.

45. *Id.* at 1362.

46. *Id.* at 1365.

47. *Id.*

48. *Id.* Commercial Speech is an evolving doctrine which involves a degree of permissible regulation of speech which would normally be wholly protected by the first amendment. Prior applications have largely been related to commercial advertising of products or services. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

49. *Lowe*, 556 F. Supp. at 1366-67.

50. 447 U.S. 557, 566 (1980).

51. *Id.* The requirements outlined in *Central Hudson* are: 1) whether the publication concerns lawful activity and is not misleading; If it meets the first criteria, a restraint will be allowed only if 2) the government interest is substantial; 3) the regulation directly advances the government's interests and 4) is not more extensive than necessary to achieve the desired goal.

prohibition on publishing is unnecessarily harsh.<sup>52</sup>

To prevent a conclusion that the Act is unconstitutional as applied to advisory publishers, the statute was interpreted to mean that registration can be required but cannot be denied.<sup>53</sup> Therefore, if Lowe reported his previous criminal convictions in his application and also met the other SEC requirements, then he must be allowed to register for the purpose of publishing his newsletters. The court concluded that the sanctions of denial of registration, suspension or revocation of registration and bar from association with an investment adviser would not be applicable to advisers who render only impersonal advice. Impersonal advice meant advice which was not formulated for a particular person but was offered through a subscription list to a group of people.<sup>54</sup>

The SEC appealed this decision to the Second Circuit Court of Appeals. The circuit court disagreed with the district court's analysis and viewed the central issue as "whether the publication of such advice is protected by the first amendment so as to preclude the SEC from seeking to enjoin its continuance."<sup>55</sup> The Second Circuit found no substantive basis for the district court's interpretation of the Act which excluded impersonal investment publications from the Act's injunctive power. The circuit court examined the "bona fide" newspaper exclusion and found that Lowe was not engaged in customary newspaper activities. In fact, his activities were exactly the type of activity the Act was intended to regulate. The circuit court decided that the SEC has the statutory authority to revoke Lowe's registration and prohibit the publication of his newsletter.<sup>56</sup>

The Second Circuit began by reasoning that the Act serves as a permissible regulation of economic activity.<sup>57</sup> It then recognized that regulation of commercial activity cannot be denied simply because it involves the press.<sup>58</sup> The court found that in the interests of protecting the public, the government is able to regulate commercial activity involving speech.<sup>59</sup> The decision was based in part on the case of *Wall Street Transcript*<sup>60</sup> which held that the Investment Advisers Act is not

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52. *Lowe*, 556 F. Supp. at 1366.

53. *Id.* at 1369.

54. *Id.*

55. *SEC v. Lowe*, 725 F.2d 892, 894 (1984).

56. *Id.* at 898.

57. *Id.* at 900.

58. *Id.* at 899-900.

59. *Id.* at 899.

60. 422 F.2d at 1371.

unconstitutional simply because it regulates certain kinds of publications.<sup>61</sup> As the *Wall Street Transcript* court explained, "[i]t is not necessary to base a construction of the Act on the assumption that the activities involved in giving commercial investment advice are entitled to the identical constitutional protection provided for certain forms of social, political or religious expression."<sup>62</sup> To determine whether a publication is "bona fide" and thus exempt from regulation under the *Wall Street* analysis, a distinction must be drawn between ideological expressions which should be protected and merchandising activities which are subject to regulation.<sup>63</sup>

Lowe argued that the prohibition against publishing constitutes an unconstitutional prior restraint.<sup>64</sup> The SEC argued that Lowe's newsletters consisted of commercial speech and are thus subject to greater control than other publications.<sup>65</sup> The circuit court defined commercial speech as speech that involves commercial activity and influences the economic interests of both the speaker and his audience.<sup>66</sup> The application of the doctrine depends on the contents of a publication and its relationship to an economic activity of the publisher or his readers.<sup>67</sup> According to the Second Circuit, Lowe's publications could be characterized as commercial speech since they relate to the economic interests of Lowe and his readers.<sup>68</sup> The court reasoned that because Lowe's publications were potentially deceptive they could be enjoined under the commercial speech doctrine. The court explained, "[j]ust as the potential for deception may justify the regulation of a profession, . . . so, too, the potential for deception permits government to ban potentially deceptive commercial speech."<sup>69</sup>

The Second Circuit decided that the Act is analagous to the licensing of professionals in that past conduct can bar the granting of a license or registration. Since Lowe's past behavior involved among other things, misappropriating client funds and a larceny conviction,

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61. *Id.* at 1379.

62. *Id.*

63. *Id.*

64. *Lowe*, 725 F.2d at 901.

65. Brief for the Securities and Exchange Commission at 28, *Lowe v. Securities and Exch. Comm'n*, 105 S. Ct. 2557 (1985); *See supra* note 48.

66. *Lowe*, 725 F.2d at 900 (citing *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 561).

67. *Lowe*, 725 F.2d at 900.

68. *Id.*

69. *Id.* at 901 (footnote omitted).

there is substantive rationale to justify barring his registration as an adviser. The doctrine of commercial speech was interpreted to allow the government to ban such publications to prevent future deceptive practices. The court reasoned that it was ridiculous to allow Lowe to publish misleading advice, and then punish him after the fact since the public would already be harmed by his fraudulent practices.<sup>70</sup>

### A. *The Circuit Court Dissent*

Judge Brieant, in dissent, disagreed with the majority's determination that Lowe's newsletters were commercial speech. He argued "[i]nvestment opinion . . . is as much speech protected from prior restraint as is political opinion, philosophy or gibberish. Not only for the Zengers, the Patrick Henrys and the Ellsbergs was this basic freedom secured, but also for an ex-convict whom the majority assumes to be motivated towards recidivism."<sup>71</sup>

Judge Brieant interpreted the majority decision to "impose an injunction upon appellee Lowe . . . , which at best, will be illusory and unenforceable, and at worst, constitutes a prior judicial restraint upon the publication of regularly issued journals of fact and opinion. . . ."<sup>72</sup> He found this result both unconstitutional and unnecessary in light of the language of the statute which he interpreted to exclude Lowe.<sup>73</sup>

The dissenting judge discussed the licensing of professionals to determine if Lowe can be subjected to regulation as a professional. According to Judge Brieant, Lowe and his publications were offering a general information service of fact and opinion. Because Lowe's publications were available to anyone who subscribed, were received several days after the news was public and could readily be examined and criticized at the time of publication, they were more like an ordinary newspaper than a professional opinion. To require Lowe to register in order to publish these newsletters would be extending a licensing scheme to the press. Judge Brieant concluded that this result would virtually disregard the enactment of the first amendment.<sup>74</sup>

The majority's interpretation of commercial speech was also criti-

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70. *Id.*

71. *Lowe*, 725 F.2d at 907 (Brieant, J., dissenting).

72. *Id.* at 903 (Brieant, J., dissenting).

73. *Id.*

74. *Id.*

cized by Judge Brieant. He construed recent cases<sup>75</sup> which discuss the doctrine to apply only to advertising and closely related ways of approaching potential customers.<sup>76</sup> He considers this construction to be particularly appropriate in view of the Supreme Court's attempts to define commercial speech in these cases. The Supreme Court's definition of commercial speech has been closely intertwined with advertising and commercial activities according to the dissent.<sup>77</sup>

Judge Brieant concluded that Lowe's newsletters were more than a commercial endeavor. In fact, he finds Lowe's publications were comparable to other financial magazines such as *Forbes* or *Barron's* since they offer impersonal third party analysis of stocks.<sup>78</sup> To require these magazines to register in order to be published would clearly be an unconstitutional prior restraint.

Judge Brieant continued by arguing that even if Lowe's publications constituted commercial speech, the injunction failed to meet the criteria outlined in *Central Hudson*<sup>79</sup> and therefore could not be upheld.<sup>80</sup> Accordingly, he found that the injunction does not directly advance a governmental interest and is in fact more severe than necessary to effectuate a legitimate purpose.<sup>81</sup>

In conclusion, Judge Brieant agreed with the statutory construction and ultimate decision of the district court.<sup>82</sup> He found that the Act is not unconstitutional on its face and should not be interpreted as inconsistent with the first amendment if another construction is possible. Judge Brieant considered the injunction to be too vague to be either effective or enforceable and because it served no legitimate purpose it

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75. Judge Brieant cites a list of cases for the proposition that all recent Supreme Court commercial speech cases have related to advertising: *Bolger v. Youngs Drug Prods. Corp.*, 103 S. Ct. 2875 (1983); *Matter of R.M.J.*, 455 U.S. 191 (1982); *Metro-media, Inc. v. San Diego*, 453 U.S. 490 (1981); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Arizona*, 438 U.S. 350 (1977); *Linmark Assocs. v. Willingboro*, 431 U.S. 85 (1977); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

76. *Lowe*, 725 F.2d at 905 (Brieant, J., dissenting).

77. *Id.*

78. *Id.* at 906 (Brieant, J., dissenting).

79. *See supra* note 51.

80. *Lowe*, 725 F.2d at 907 (Brieant, J., dissenting).

81. *Id.*

82. *Id.* at 910.

should not have been issued.<sup>83</sup>

## V. The Supreme Court Decision

Although the Supreme Court granted certiorari to determine whether “an injunction against the publication and distribution of petitioner’s newsletters is prohibited by the first amendment,”<sup>84</sup> the majority ultimately decided that *Lowe* was not an investment adviser and thus avoided the first amendment issue.<sup>85</sup> Three justices agreed that *Lowe* should not be prohibited from publishing his newsletters but would have held that the Act was unconstitutional to the extent it prohibits an unregistered person from furnishing impersonal investment advice through publications.<sup>86</sup>

### A. *The Lowe Majority*

The *Lowe* Court began by examining the legislative history to determine the purpose and intended scope of the Investment Adviser’s Act.<sup>87</sup> This first step was necessitated by the Court’s desire to avoid, if possible, the first amendment question.<sup>88</sup> The Court focused on language in the history indicating that person to person investment advice was conducive to fraudulent practices and thus regulation was needed to protect investors. The *Lowe* Court appeared to formulate a definition of investment adviser which was based on personal interaction and trust between investor and adviser. This definition places the adviser and investor in a fiduciary relationship. Frequent personal contact is an important element of this definition. The *Lowe* Court concluded, “petitioners’ publications do not fit within the central purpose of the Act because they do not offer individualized advice attuned to any specific

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83. *Id.*

84. *Lowe*, 105 S. Ct. at 2562.

85. *Id.* at 2573-74. Justices Stevens, Brennan, Marshall, Blackmun and O'Connor joined in the majority opinion (Justice Powell took no part in the decision).

86. Justice Rehnquist and Chief Justice Burger joined with Justice White in a concurring opinion. Although they concurred in the result, they did not agree with the reasoning of the majority.

87. *Lowe*, 105 S. Ct. at 2563.

88. *Id.* The Court recognizes a duty to avoid a constitutional issue if there is a reasonable alternative. Since both the district court and the dissenting judge in the court of appeals asserted that the case should be decided on statutory grounds, the majority believed the constitutional issue may well be eliminated or narrowed through statutory analysis.

portfolio or to any client's particular needs."<sup>89</sup>

To reach this characterization of an investment adviser the *Lowe* Court examined congressional reports containing opinions on what type of legislation was needed and who it should include. The Court began its survey by examining a 1940 study conducted by the Securities and Exchange Commission on investment trusts and investment companies.<sup>90</sup> This report analyzed problems in the investment industry. The *Lowe* majority found language in the Report which suggested that the application of the regulations be limited to personal advice and subscription-list publications were specifically excluded.<sup>91</sup> Representatives of the investment counselors stated in the report that the primary purpose of an investment counselor was to provide personalized investment advice to clients.<sup>92</sup>

The 1940 SEC report concluded that there were two main categories of concern in the investment industry: 1) distinguishing the legitimate counselors from the fraudulent ones and 2) organization and management of investment firms.<sup>93</sup> The Investment Adviser's Act was intended to address these problems.<sup>94</sup>

The *Lowe* majority found further support for its position in the hearings on the bill which resulted from the SEC's study.<sup>95</sup> Descriptions of the advisory profession stressed person to person, individually tailored advice.<sup>96</sup> The Court stressed the importance of language in a House Report discussing the revised bill which became the Act.<sup>97</sup> The report states, "[t]he title also recognizes the personalized character of the services of investment advisers and especial care has been taken . . . to respect this relationship between investment advisers and their clients."<sup>98</sup> The Court interpreted this language to imply that only personal advice rendered through publication is meant to be regulated. The House Report goes on to say, however, that investment advisers utilizing the mails for transacting their business must register with the

89. *Id.* at 2572.

90. *Id.* at 2563. See S. REP. NO. 1775, *supra* note 11.

91. *Lowe*, 105 S. Ct. at 2563.

92. *Id.* at 2564.

93. *Id.* at 2565.

94. The bill which resulted from the SEC's Report was introduced by Senator Wagner.

95. *Lowe*, 105 S. Ct. at 2566.

96. *Id.*

97. *Id.* at 2569.

98. H.R. REP. NO. 2639, *supra* note 12.



SEC.<sup>99</sup> Arguably, the language "respect this relationship" was intended to prevent unreasonable encroachment or interference in the business dealings between adviser and advisee.

The majority definition appears to overlook the language of the statute which clearly includes persons who advise others, "either directly or through publications. . ." as investment advisers.<sup>100</sup> The language also includes a person who "promulgates analyses or reports. . . ."<sup>101</sup> The Court also overlooks the fact that a report or analysis is often tailored to general needs and not individualized recommendations. In addition, the introductory portion of the Act reflects the congressional intent to include publications. The Act reads, "it is found that investment advisers are of national concern, in that, among other things - (1) their advice, counsel, publications, writings and analyses and reports are furnished and distributed . . . by the use of the mails and means and instrumentalities of interstate commerce . . . ."<sup>102</sup>

Legislative material includes impersonal publications and cites examples of the manipulative power of these advisory services.<sup>103</sup> A Senate Report expressed the need for regulation of financial publications because of "their potential influence on security markets and the dangerous potentialities of stock market tipsters imposing upon unsophisticated investors. . . ."<sup>104</sup> It is also significant that these Senate Committee reports define an investment adviser as anyone falling within a wide range of classifications, including those offering impersonal advice to a specified category of clientele and those sending advice through the mail.<sup>105</sup> This definition appears to include publishers of impersonal newsletters.

In *S.E.C. v. Capital Gains Research Bureau*,<sup>106</sup> the Supreme Court construed the Investment Advisers Act broadly to effectuate the purpose of preventing the perpetration of fraud upon the public.<sup>107</sup> In *Capital Gains* the Court granted the SEC the power to compel the

99. *Id.*

100. 15 U.S.C. § 80b-2(a)(11) (1982) (emphasis added).

101. *Id.*

102. 15 U.S.C. § 80b-1 (1982).

103. See Brief for Securities and Exchange Commission at 16, *Lowe v. Securities and Exch. Comm'n*, 105 S. Ct. 2557 (1985).

104. S. REP. NO. 1775, *supra* note 11.

105. Brief for Securities and Exchange Commission at 16, *Lowe v. Securities and Exchange Commission*, 105 S. Ct. 2557 (1985).

106. 375 U.S. at 180.

107. *Id.* at 195.

defendant to disclose his trading activities of the stocks he recommended in his publication.<sup>108</sup> The Court specifically mentioned the language of the statute in a note, indicating that publications were intended to be included in the Act.<sup>109</sup>

The *Lowe* majority concluded that the Act's definition of investment adviser, read without knowledge of the drafter's intent, appeared to include Lowe, unless he was entitled to the "bona fide" newspaper exclusion. To determine the parameters of the exclusion, the majority read the language of the Act in light of what they viewed as legislative concern over first amendment violations. The Court believed this concern stemmed from a 1940 report prepared by the Illinois Research Council, discussing the possible constitutional ramifications of including impersonal advice within Illinois' regulation of investment counselors. This report was submitted to and examined by Congress. The report recommended the exclusion of impersonal publications from the definition of investment counselor to prevent the possibility of first amendment infringement.<sup>110</sup> The *Lowe* majority apparently concluded that the Illinois Report was persuasive evidence of the congressional intent to limit the scope of the Act to personal publications. Because Congress was made aware of the possible constitutional ramifications of including impersonal advice within the Act, the Court reasoned that they must have taken a course designed to avoid this undesirable result. Therefore, Congress must have intended to exclude impersonal publications from the requirements of the Act.

The Court recalled that prior to the adoption of the Act, two cases recognizing prior restraint on speech as unconstitutional had emerged as landmark decisions.<sup>111</sup> One case was specifically mentioned in the

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108. *Id.* at 181-82.

109. *Id.* at 187 n.15.

110. *Lowe*, 105 S. Ct. at 2567-68 (citing *Hearings on S. 3580 Before the Subcommittee on Securities and Exchange of the Senate Committee on Banking and Currency*, 76th Cong., 3d Sess. pt 1, p. 27 (1940)). Note: The Court finds significance in the difference between the original draft of the "bona fide" newspaper exclusion which read, "the publisher of any bona fide newspaper or newsmagazine of general circulation" and the final version which reads, "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation. . . ." The majority notes the broadening of the exclusion following the introduction of the Illinois report thereby indicating the legislators concern that they draft legislation consistent with constitutional principles.

111. *Id.* at 2570; see *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Near v. Minnesota ex. rel. Olson*, 283 U.S. 697 (1931).

legislative history which the *Lowe* Court found to be indicative of the legislators' intention to avoid constitutional implications.<sup>112</sup> According to the majority, "[C]ongress, plainly sensitive to first amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of nonpersonalized publishing activities."<sup>113</sup>

Since *Lowe's* newsletters were impersonal in character and published on a regular schedule, the Court felt they fit within the "bona fide" newspaper exclusion.<sup>114</sup> According to the majority, "bona fide" was defined to be most closely analogous to the term "genuine." Since *Lowe's* publications "are not personal communications masquerading in the clothing of newspapers, news magazines or financial publications,"<sup>115</sup> they are genuine. The majority concluded that the plain language of the exclusion, read with the intent of Congress to prevent constitutional problems, justified this result. The *Lowe* Court reasoned that "[t]o the extent that the chart service (*Lowe's* publication) contains factual information about past transactions and market trends, and the newsletters contain commentary on general market conditions, there can be no doubt about the protected character of the communications, a matter that concerned Congress when the exclusion was drafted."<sup>116</sup>

The majority's definition seems to overrule the SEC's decision on who must register as an investment adviser. Prior to *Lowe*, the SEC required impersonal financial publications which were addressed primarily to investors to register.<sup>117</sup> The SEC grants a "bona fide" publication exception only where a publication judged by its content, promotion, readership and other matters, does not appeal to readers generally as an investment advisory publication.<sup>118</sup> Thus the SEC concentrates its analysis on whether the publication would be used by an investor for making decisions on buying, selling, or otherwise handling securities.<sup>119</sup> The decision in *Wall Street Transcript*<sup>120</sup> helped to define the param-

112. *Lowell v. City of Griffin*, 303 U.S. 444 (1938).

113. *Lowe*, 105 S. Ct. at 2570.

114. *Id.* at 2572-73.

115. *Id.* at 2572.

116. *Id.* at 2573.

117. See, e.g., Applicability of Investment Adviser's Act to Certain Publications, *supra* note 26; New Directions Group, Inc., SEC No-Action Letters [1984-85 New Decisions Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 77,917 (April 2, 1985).

118. Applicability of Investment Adviser's Act to Certain Publications, *supra* note 26 at n. 1. See also *Wall Street Transcript Corp.*, 422 F.2d 1371.

119. *Id.*

120. 422 F.2d at 1371.

ters of the "bona fide" newspaper exclusion. The *Wall Street Transcript* court held that "bona fide" was meant to include publications engaged in ordinary newspaper activities and which are not likely to engage in the improper behavior envisioned by the Act.<sup>121</sup>

The *Lowe* Court explained their variance with these definitions by reasoning that the former guidelines lacked insight into the purpose of the legislation and the intent of Congress when they drafted the Act. According to the *Lowe* Court, Congress did not intend to regulate impersonal publications because they were aware of the likelihood of first amendment infringement. The *Lowe* majority also concluded that the creators of the Investment Adviser's Act had no intention of regulating impersonal investment advice because this would not serve the public purpose of protecting those involved in a fiduciary relationship. A fiduciary relationship is characteristic of an adviser-client relationship. The majority determined that Congress enacted the exclusion to prevent intrusion into the protected area of public acquisition of information through publications. Therefore, the Court concluded that *Lowe* is entitled to the "bona fide" newspaper exclusion and is not an investment adviser within the definition of the Act.<sup>122</sup>

The majority's construction of the history of the Act is similar to that made by the district court. Both identify two distinct categories of regulation within the Act; one dealing with personal advice and one dealing with impersonal advice through publication. As the district court recognized, the language of the statute does not support this construction of the Act.<sup>123</sup> Both courts seem to agree, however, that Congress must have intended this result to prevent an intrusion into the rights guaranteed by the first amendment.

## B. *Justice White's Concurrence*

Justice White would categorize *Lowe* as an investment adviser

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121. *Id.* at 1377; *See also* Securities and Exchange Commission v. Suter, 732 F.2d 1294 (1984) (holding that investment adviser's publication was not "bona fide" newspaper).

122. *Lowe*, 105 S. Ct. at 2573.

123. *Lowe*, 556 F. Supp. at 1365. "Admittedly there is no suggestion on the face of the statute that persons whose only advisory capacity is the publication of impersonal investment suggestions, reports and analyses should be treated differently . . . from other persons within the definition of investment advisor. . . . Nevertheless, this interpretation is suggested by constitutional considerations." *Id.*

within the jurisdiction of the Act.<sup>124</sup> He concurred with the majority result because he believes that the Act's prohibition on publishing by unregistered advisers engaged in rendering impersonal investment advice is unconstitutional.<sup>125</sup>

He agreed with the majority on the proposition that a statute should not be construed to conflict with constitutional objectives if an alternative construction is possible.<sup>126</sup> He emphasized however, that the construction must be "fairly possible."<sup>127</sup> The duty of the court he concluded, is not to rewrite legislation but to construe it in accordance with legislative objectives since it is the legislature's duty to define public policy.<sup>128</sup>

Turning to the plain language of the Act, Justice White found that Lowe is an adviser unless his newsletter is a "bona fide" publication of general and regular circulation. Justice White believed Lowe clearly met the Act's initial criteria of engaging in the business of rendering investment advice through publications or writings. According to Justice White, the critical issue was "whether the 'bona fide publications' exception is to be construed so broadly as to exclude from the definition all persons whose advisory activities are carried out solely through publications offering impersonal investment advice to their subscribers."<sup>129</sup>

Justice White thought substantial weight should be given to the SEC's interpretation of the applicability of the Act to publishers.<sup>130</sup> The SEC has included publishers of newsletters and market advice in the definition of investment adviser since the enactment of the legislation.<sup>131</sup> The SEC has defined the "bona fide" newspaper exclusion "as applicable only where, based on the content, advertising material, readership and other relevant factors, a publication is not *primarily* a vehicle for distributing investment advice."<sup>132</sup>

The majority appeared to adopt a broader interpretation of the

124. *Lowe*, 105 S. Ct. at 2586 (White, J., concurring).

125. *Id.* at 2587.

126. *Id.* at 2574 (White, J., concurring).

127. *Id.*

128. *Id.* at 2574-75 (White, J., concurring).

129. *Id.*

130. *Id.* at 2576.

131. *Id.* E.g., Applicability of Investment Adviser's Act to Certain Publications, *supra* note 26; The SEC and the First Amendment — Enforcement Not Infringement [1984-85 Transfer Binder], FED. SEC. L. REP. (CCH) ¶ 83,701 (Nov. 1, 1984).

132. See, e.g., Applicability of Investment Adviser's Act to Certain Publications, *supra* note 26 at 44,055-3 n.1 (emphasis added).

"bona fide" publication exception than the SEC had allowed. Justice White construed the majority's expanded definition as broad enough to encompass all publications that do not offer personal investment advice. This broadening of the definition, according to him, appears both illogical and inconsistent with the language of the Act, which defines investment adviser as one who renders advice either directly or through *publications* or *writings*, or who issues analyses or reports.<sup>133</sup>

Justice White felt that if Congress intended the "bona fide" newspaper exception to include all publications there would have been no reason to include the language "or through publications" in the statute itself. He determined that the specific nature of the language indicates that both direct advice or advice issued through publication was to be included in the scope of the Act. He could find no logical reason for the "bona fide" term if Congress had not intended that the content of a publication be examined to determine if it fit the exclusion. Justice White concluded that the majority's interpretation fails to recognize the fundamental principle of giving effect to all the language of a statute.<sup>134</sup>

In Justice White's view, the Act's history does not support the conclusion that persons who engage in giving investment advice through publication are to be excluded from the definition of investment adviser.<sup>135</sup> In fact, representatives of both the SEC and the investment advisers thought that the Act would include these publications.<sup>136</sup> Douglas T. Johnston, the Vice President of the Investment Counsel of America stated in a subcommittee hearing:

The definition of investment adviser as given in the bill, in spite of certain exclusions, is quite broad and covers a number of services which are entirely different in their scope and in their methods of operation. For example, as we read the definition, among others, it would include those companies which publish manuals of securities such as Moody's, Poor's and so forth; it would include those companies issuing weekly investment letters such as Babson's, United Business Service, Standard Statistics, and so forth . . . .<sup>137</sup>

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133. *Lowe*, 105 S. Ct. at 2576-77 (White, J., concurring).

134. *Id.* at 2577-78 (White, J., concurring).

135. *Id.* at 2578 (White, J., concurring).

136. *Id.*

137. *Id.* at 2565 n.38 (quoting *Hearings on S. 3580 Before the Subcommittee on Securities and Exchange of the Senate Committee on Banking and Currency*, 76th Cong., 3d Sess. p. 711-712 (1940)).

Justice White points to language in a Senate Report preceding the final draft of the Act which says, "[w]ith respect to a certain class of investment advisers, a type of personalized relationship may exist with their clients."<sup>138</sup> He emphasizes the phrases "a certain class" and "may exist" to demonstrate a legislative intent to recognize both personal and impersonal advisory services in the Act.<sup>139</sup> The majority relies on a subsequent committee report,<sup>140</sup> accompanying the final draft of the Act, which they construe as recognizing only the personal services of an investment adviser within its language.<sup>141</sup>

According to Justice White, the history of subsequent revisions of the Act seems to include these impersonal publications.<sup>142</sup> Language in a Senate Report included "financial publishing houses not of general circulation" in the scope of the Act.<sup>143</sup> Nearly ten years later a Senate Report again describes the Act as relating to "the business of issuing analysis or reports concerning securities."<sup>144</sup>

Justice White found the purposes of the Act frustrated by the majority's interpretation.<sup>145</sup> A construction of the Act which excludes publishers of impersonal advice from regulation renders the SEC ineffective in its attempts to protect investors who read these publications. The SEC has consistently tried to protect the public from fraud and manipulative practices, particularly scalping.<sup>146</sup> In scalping, an adviser purchases a stock and then begins recommending it to his clients. When the price rises the adviser sells his stock at a profit.<sup>147</sup> Justice White concluded that the majority effectively overruled *Capital Gains Research Bureau*,<sup>148</sup> leaving the SEC with little effective means of

138. See S. REP. NO. 1775, 76th Cong., 3d Sess. 22 (1940).

139. *Lowe*, 105 S. Ct. at 2579 (White, J., concurring).

140. H.R. REP. NO. 2639, *supra* note 12.

141. *Lowe*, 105 S. Ct. at 2569 n. 46 (White, J., concurring).

142. *Id.* at 2580 (White, J., concurring).

143. *Id.* See S. REP. NO. 1760, 86th Cong., 2d Sess. 2 (1960).

144. *Lowe*, 105 S. Ct. at 2580 (White, J., concurring).

145. *Id.* at 2580 (White, J., concurring).

146. *Id.*

147. According to *Capital Gains Research Bureau, Inc.*, 375 U.S. at 181, scalping is the practice of buying securities shortly before recommending them as investments to clients. As soon as the market price of the recommended stocks rise, the adviser sells his shares at a profit.

148. *Lowe*, 105 S. Ct. at 2581 (White, J., concurring). Justice White recalls the holding of *Capital Gains Research Bureau*:

[In which we held] that the antifraud provisions of the [Act] could be invoked against the publisher of an investment advisory newsletter who

preventing serious fraud or self-serving manipulation through these publications.<sup>149</sup>

According to Justice White, the majority's efforts to avoid the constitutional question led the Court to adopt a construction of the Act which is unnecessarily narrow.<sup>150</sup> He points to the Court's traditional policy of construing securities statutes broadly to enable them to effectively achieve their purposes.<sup>151</sup> As Justice White explained:

The certainty that the Advisers Act provides a remedy against scalping thus remains, for me, a persuasive reason for not adopting a construction of the Act that would exclude petitioner. In addition, the antifraud provisions of the Act are supplemented by reporting requirements that may be used [to] aid the SEC in uncovering scalping. By taking petitioner outside the category of investment advisers, the Court places him beyond the reach of these additional tools for uncovering deceit.<sup>152</sup>

Justice White argued that the *Lowe* majority assumed Congress enacted the legislation in 1940 with first amendment constitutional issues in mind.<sup>153</sup> He concluded that the majority's construction of the Act empowered the legislature with constitutional foresight, because the majority assumed Congress would not have drafted an Act violative of the first amendment.<sup>154</sup> Justice White found this reasoning far-fetched. As he explained, "[t]he court thus attributes to the 76th Congress a clairvoyance the Solicitor General and the Second Circuit apparently lack - that is the ability to predict our constitutional holdings 45 years in advance of our declining to reach them."<sup>155</sup> In light of the legislative history and the language and purpose behind the Act, he concluded that the Act should be reasonably construed so as to include *Lowe* within its parameters.<sup>156</sup>

Justice White next turned to the question of whether the first

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had engaged in scalping, and that such an advisor could be required to make full and frank disclosure of his practice of trading on the effect of his recommendations.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* n.9.

153. *Id.* at 2582 (White, J., concurring).

154. *Id.*

155. *Id.*

156. *Id.*



amendment permits the SEC to permanently enjoin Lowe from publishing his impersonal financial newsletters. He explained that the *Lowe* Court is required to balance two important competing goals in this case. One is the protection of first amendment privileges. The other is the governmental right to protect the public through regulation and licensing. Justice White recognized that professional licensing has been held constitutional, and the government does not lose its right to license simply because speech or publication is involved in the activities of a profession.<sup>157</sup>

Justice White used the example of an attorney as a constitutionally licensed professional. Although an attorney is involved in speaking and writing, high moral and educational qualifications can be required of entrants. The SEC argued that it has the same right to require high ethical and moral standards of investment advisers. These advisers are in a position to harm the public both through publication and personal communication of fraudulent or misleading material. The SEC believes that the government has a compelling interest in the protection of the public. Therefore, a licensing requirement is justified, as in other professions, regardless of the element of speech used in the practice of this profession.<sup>158</sup>

The SEC suggests that an invalidation of the licensing requirements for publishers of impersonal advice would render other licensing provisions open to attack.<sup>159</sup> As an example, the SEC refers to an attorney who distributes an impersonal newsletter regarding recent law developments.<sup>160</sup> An attorney is required to be licensed as a professional engaged in the practice of law even though his newsletter is not tailored to an individual's needs.<sup>161</sup> The SEC would question the validity of such a licensing provision if the *Lowe* Court held that it is unconstitutional to require impersonal publishers to be registered.<sup>162</sup> Justice White found the argument flawed however, because there is no precedent for extending a licensing scheme to publication or speech themselves.<sup>163</sup> He apparently concluded that the Act's registration requirements are not limited to the regulation of professionals but appear to

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157. *Id.* at 2582 (White, J., concurring).

158. *Id.* at 2583.

159. Brief for Securities and Exchange Commission at 34, *Lowe v. Securities and Exch. Comm'n*, 105 S. Ct. 2557 (1985).

160. *Id.* at 34, n.44.

161. *Id.* at 34.

162. *Id.*

163. *Lowe*, 105 S. Ct. at 2583 (White, J., concurring).

extend to anyone who desires to publish information concerning securities.

Justice White pointed to an imaginary line which must be drawn; dividing the regulation of a profession from the regulation of free speech. He appeared to draw a distinction between a professional giving personal advice and someone giving general information to whom-ever will listen.

The SEC argued that an investment adviser is a fiduciary and the legislature intended broad regulatory powers be given the SEC to protect the public. According to the SEC, the legislature is the proper forum to determine the purpose and extent of a statute and their decision should be respected. Justice White found this argument unpersuasive, apparently because it assumes Congress writes only constitutional legislation and ignores the constitutional system of checks and balances. He pointed out that the judiciary function of reviewing legislation is to insure that it is constitutional.<sup>164</sup>

Relying in part on an analysis by Justice Jackson in *Thomas v. Collins*,<sup>165</sup> Justice White explained that a regulation of speech can stand only if it is in conjunction with the valid regulation of a profession. He reasoned that someone who renders individualized advice to a client can be properly regarded as engaged in a profession. Justice White characterized the speech used by a professional as a by-product of the practice of the profession. He concluded that a licensing statute prohibiting these personal communications in the absence of the required license, is constitutionally based on the government's right to regulate a profession. He cautioned, however, that where no personal relationship exists and the publisher does not purport to render advice for any specific individual, then a license requirement ceases to be a regulation of a profession and deteriorates into a prior restraint on protected speech.<sup>166</sup>

Justice White was careful to point out the distinction between a licensing scheme to regulate a profession and a licensing scheme that restricts publishing of impersonal information to those who obtain a license. The Act's requirement of a license for one who engages in giving person to person, individually tailored advice is constitutional, the same as requiring a physician to obtain a license.<sup>167</sup> What becomes ob-

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164. *Id.* at 2583-84 (White, J., concurring).

165. 323 U.S. 516, 544-48 (1945) (Jackson, J., concurring).

166. *Id.* at 2584-85 (White, J., concurring).

167. *Id.* at 2585 (White, J., concurring).

jectionable is the Act's ability to prevent unregistered advisers from publishing impersonal investment advice for a general audience.<sup>168</sup>

Justice White continued his analysis by examining the SEC's contention that Lowe's newsletters could be regulated in the context of commercial speech.<sup>169</sup> Under a commercial speech theory,<sup>170</sup> if the prohibition advances a substantial government interest, then it may be permissible.<sup>171</sup> Lowe argued that his newsletters were fully protected speech because they did not involve a commercial transaction.<sup>172</sup> Justice White concluded that there is no reason to categorize these newsletters to reach a decision.<sup>173</sup> Since the Act makes it unlawful for an unregistered adviser to publish both personal and impersonal investment advice, it cannot be constitutional as it exists.<sup>174</sup> Justice White explained, "[s]uch a flat prohibition or prior restraint on speech is, as applied to fully protected speech presumptively invalid and may be sustained only under the most extraordinary circumstances."<sup>175</sup>

Justice White reasoned that even under a commercial speech theory, the Act's remedy is too extreme. A total prohibition on publishing, because the SEC fears Lowe may one day defraud or mislead, is unreasonable. Although a legitimate government purpose is served by the Act, the proposed restraint is too broad. According to Justice White, "[o]ur commercial speech cases have consistently rejected the proposition that such drastic prohibitions on speech may be justified by a mere possibility that the prohibited speech will be fraudulent."<sup>176</sup> He suggested application of the Act's antifraud provisions as an acceptable alternative to a total prohibition on newsletter publishing.<sup>177</sup>

Justice White would define investment adviser to include publishers of impersonal investment advice. He found the provisions of the Act pertaining to the antifraud and reporting sections constitutional and reasoned that these provisions could be applied to both registered and

168. *Id.*

169. *Id.*

170. *See supra* note 48.

171. *Lowe*, 105 S. Ct. at 2585 (White, J., concurring). *See Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985). For the elements of constitutional commercial speech regulation *see supra* note 51.

172. *Lowe*, 105 S. Ct. at 2585 (White, J., concurring).

173. *Id.* at 2586 (White, J., concurring).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

unregistered investment advisers engaged in publication. Justice White's constitutional objection is expressly limited to that portion of the Act which requires advisers giving impersonal investment advice through publication to register with the SEC. In conclusion he emphasized, "I would hold only that the Act may not constitutionally be applied to prevent persons who are unregistered (including persons whose registration has been denied or revoked) from offering impersonal investment advice through publications such as the newsletters published by petitioner."<sup>178</sup>

## VI. Effect of the *Lowe* Decision

The Supreme Court's decision in *Lowe* broadens the scope of the "bona fide" newspaper exception to include all publishers of impersonal investment advice. This interpretation of the Act will probably result in the extinction of newsletter regulation under the Act. The *Lowe* decision may well inspire a new proliferation of self-serving, manipulative publications disguised as financial newsletters. Under the Act's new interpretation, the SEC may be powerless to control or regulate these impersonal publications.

The *Lowe* Court derived its "impersonal" distinction from the legislative history of the Act. The Court construed this history as limiting the scope of the Act to individually-tailored advice rather than the general information offered in *Lowe's* newsletters.<sup>179</sup> However, the concurrence in *Lowe* cited numerous examples of legislative history which indicated an intent to include these impersonal publications.<sup>180</sup> Also, the clear language of the Act defines an adviser as one who renders advice "either directly or through publications."<sup>181</sup> Furthermore, the Act's scope as indicated in the section of the Act relating to the findings of the SEC, clearly includes publications.<sup>182</sup> These sections of the Act draw no distinction between publications offering personal advice as compared to impersonal advice. As the district court admitted, the Act itself provides no justification for such a distinction.<sup>183</sup>

The *Lowe* Court's construction of the Act made only brief mention

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178. *Lowe*, 105 S. Ct. at 2587 (White, J., concurring).

179. *Id.* at 2572.

180. *Id.* at 2578-80 (White, J., concurring).

181. 15 U.S.C. § 80b-2(a)(11) (1982).

182. 15 U.S.C. § 80b-1 (1982).

183. *Lowe*, 556 F. Supp. at 1365.

of the SEC's rulings on the applicability of the Act. Previous court decisions applying the Act to newsletter publishers, were granted only minimal consideration in the majority's reasoning.<sup>184</sup> In a surprising reversal, the Supreme Court apparently overruled an early Supreme Court interpretation of the Act in the case of *Capital Gains Research Bureau*.<sup>185</sup> The decision rendered under the Act in 1963, held that a financial newsletter publisher could be required to disclose his personal interests in the securities he recommended to his subscribers.<sup>186</sup> Following the *Lowe* decision, the SEC may have no recourse under the Act against impersonal newsletter publishers who engage in self-serving activities such as scalping.<sup>187</sup>

Prior to *Lowe* many states, including Florida, had required newsletter publishers to comply with the registration provisions of the Act.<sup>188</sup> By denying registration status to those advisers convicted of financial-type crimes and by requiring advisers to disclose possible conflicts of interest, investors were given both protection and forewarning of the likelihood of deceptive or fraudulently published advice. As described in *Capital Gains*, "[a] fundamental purpose . . . [of the Act] was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry."<sup>189</sup> It now appears that this fundamental purpose of the Act, protection of the public, will erode under the Supreme Court's analysis.

Justice White concluded that a less onerous and more defensible ruling would have been a decision that held unconstitutional the portion of the Act which prevents unregistered publishers from publishing impersonal newsletters.<sup>190</sup> According to Justice White, had the majority held that portion of the Act unconstitutional, these publishers could still be controlled through the reporting and antifraud provisions of the Act.<sup>191</sup> Under this analysis, the original purpose of the Act, which was to protect the investing public,<sup>192</sup> could still be effectuated although to

184. *Lowe*, 105 S. Ct. at 2571-72.

185. 375 U.S. at 180.

186. *Id.*

187. *See supra* note 147.

188. Edwards, *Comptroller clears way for newsletters*, Fort Lauderdale Sun-Sentinel, Aug. 14, 1985, at § D, at 1, col. 1.

189. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 at 186.

190. *Lowe*, 105 S. Ct. at 2586-87 (White, J., concurring).

191. *Id.*

192. *See* H.R. REP. NO. 2639; *supra* note 12; H.R. REP. NO. 2179, 86th Cong.,

a reduced degree.

The decision of the Supreme Court in *Lowe* was arguably too broad in that it undermines the purposes of the Act and results in the deregulation of a potentially harmful interstate activity. A newsletter is inherently dangerous because of the wide range of investors that can be readily approached through its subscribers.<sup>193</sup> A compelling example of the need to protect readers of financial newsletters was presented in 1981 when one man "was credited with singlehandedly knocking 23.8 points off the Dow Jones Industrial Average . . . by advising subscribers to his Early Warning Service . . . to sell everything and short stocks."<sup>194</sup> This was a reversal of the advice he issued on the preceding day which indicated that the next 50 points on the Industrial Average would "be a piece of cake."<sup>195</sup>

The practice prior to *Lowe* was to require investment publishers to register and to bar the registration of those advisers who have been convicted of financial misdealings. This policy provided some protection for investors since an adviser was forced to disclose his previous misconduct and could be barred from acting as an adviser if the SEC deemed the sanction appropriate. Following *Lowe*, these subscribers will have no help in gauging the reliability or truthfulness of a financial newsletter or its publisher. To determine the soundness of a publishers advice, investors will have to rely on their common sense, a method which apparently failed to work in the 1920's.

## VII. Conclusion

The *Lowe* decision is apparently an unwarranted break with the modern trend of protecting the public and stabilizing our economy though the regulation of investment activity. The old era of *caveat emptor*<sup>196</sup> has reemerged under the majority's decision to exempt impersonal newsletter publishers from regulation under the Act. Until

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2d Sess. 3 (1960); S. REP. NO. 792, 73rd Cong., 2d Sess. 1-3 (1934).

193. Brief for Securities and Exchange Commission at 15, *Lowe v. Securities and Exch. Comm'n*, 105 S. Ct. 2557 (1985).

194. The Securities and Exchange Commission and the First Amendment — Enforcement Not Infringement, [1984-85 Transfer Binder], FED. SEC. L. REP. (CCH) ¶ 87,116 (quoting Bayless, *If You Believe in Joseph Granville Stay Out of Los Angeles on April 10*, Wall St. J., Feb. 27, 1981, at 25, col. 1).

195. *Id.*

196. *Caveat emptor* is defined as "let the purchaser beware." BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

new regulations designed to prevent fraudulent practices through these publications emerge from Congress, investors should not trust the publications' so-called "advice." These newsletters can be published by virtually anyone and there is no guarantee that such "advice" is anything more than a publisher's not-too honest effort to get rich quick.

*Lori Denise Coffman*