THE CONSTITUTIONAL STATUS OF COMMERCIAL EXPRESSION

*By Elaine Bayus**

I. Introduction

The First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech."[1] But in spite of the unequivocal words "no law,"[2] Congress as well as the states, which are subject to First Amendment prohibitions through Fourteenth Amendment guarantees, have passed many laws abridging the freedom of certain forms of speech, and these laws have been upheld by the courts. Forms of speech defined as obscenity,[3] incitement,[4] libel,[5] fraudulent assertions,[6] solicitation of crime,[7] and "fighting words"[8] have all been denied First Amendment protection. Like these forms of expression, speech defined as commercial has also been regulated or prohibited when it did not contribute to the exchange of information and ideas, and when the expression was likely to conflict with the interests of those who were affected by it.

The commercial expression subject to regulation or prohibition has included both advertising that did "no more than propose a commercial transaction,"[9] and nonadvertising speech that arose in a busi-

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* Member, second year class.

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

2. For a strict interpretation of these words, see Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

3. *E.g.*, Miller v. California, 413 U.S. 15 (1973); Ginzburg v. United States, 383 U.S. 463 (1966); Roth v. United States, 354 U.S. 476 (1957).

4. *E.g.*, Dennis v. United States, 341 U.S. 494 (1951); De Jonge v. Oregon, 299 U.S. 353 (1937); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919).

5. *E.g.*, Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

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

7. *E.g.*, Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949); Fox v. Washington, 236 U.S. 273 (1915).

8. *E.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

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

ness context, such as credit reports[10] and communications with investors.[11] Such expression was explicitly denied full First Amendment protection in 1942, when a unanimous Supreme Court in *Valentine v. Chrestensen*[12] created the commercial speech doctrine by distinguishing between the protections accorded to commercial and to noncommercial speech:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.[13]

Subsequent decisions by the Court have shown that the principle announced in *Chrestensen* was not so much a doctrine, with all the inflexibility that word implies, as it was a distinction that allowed greater regulation of commercial than noncommercial speech, after a balancing of the interests involved.

Two recent Supreme Court decisions have raised doubts about whether that distinction may any longer be made. In 1975, in *Bigelow v. Virginia*,[14] the Court held that one state could not suppress an advertisement for abortion information, counseling, and referral available in another state, leading one federal district court to conclude that "the *Chrestensen* rationale was sent to oblivion in *Bigelow*."[15] The Court in *Bigelow*, however, had not discarded the distinction, but rather had concluded that the advertisement in question "contained factual material of clear 'public interest,' "[16] and so was not purely commercial

10. *E.g.*, Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971).

11. *E.g.*, SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971); SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970); Halsted v. SEC, 182 F.2d 660 (D.C. Cir.), *cert. denied*, 340 U.S. 834 (1950).

12. 316 U.S. 52 (1942).

13. *Id.* at 54. The commercial-noncommercial distinction is not without precedent in contexts outside the area of speech. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) (legislation affecting "ordinary commercial transactions" requires only a rational basis, while legislation affecting other interests may require more); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (applying only a rationality test in upholding a state minimum wage law against a freedom of contract challenge).

14. 421 U.S. 809 (1975).

15. Terminal-Hudson Electronics, Inc. v. Department of Consumer Affairs, 407 F. Supp. 1075, 1078 (C.D. Cal. 1976).

16. 421 U.S. at 822.

within the meaning of *Chrestensen.* But the Court may indeed have sent the *Chrestensen* rationale to oblivion in 1976 when it decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.*[17] In a challenge by a consumer group to a statute prohibiting price advertising of prescription drugs, the Court held that although such advertising did no more than propose a commercial transaction, it was entitled to First Amendment protection.[18] It is now clear that the Constitution does place restraints on government as respects purely commercial advertising. It is not as clear, however, to what extent the Court will now permit any distinction to be made between commercial and noncommercial speech in order to regulate the former without abridging the freedom of the latter.

This note outlines the development of the commercial speech distinction and its subsequent judicial refinement and clarification. The discussion focuses on cases in which federal courts have employed the distinction to protect such interests as privacy, equal protection, and public health over the commercial interests of advertisers, while at the same time preserving various First Amendment interests. Finally, an analysis will be made of the *Virginia Citizens* case and its effect on the constitutional status of commercial speech, particularly in relation to interests to which such speech has previously been subordinated.

II. Early Developments

A. Announcement of the Distinction

The dispute prompting the announcement of the commercial speech distinction in *Valentine v. Chrestensen*[19] involved a New York City anti-litter ordinance prohibiting street distribution of commercial advertising matter.[20] Under authority of the ordinance, police restrained one F.J. Chrestensen from distributing handbills that on one side advertised his exhibition of a submarine and on the other side protested the ordinance. Chrestensen challenged the police action on First Amendment grounds, and the Second Circuit affirmed an order enjoining enforcement of the ordinance against him. The court's holding was based not on the invalidity of the ordinance as to commercial advertising, but rather on

17. 96 S. Ct. 1817 (1976), *aff'g* 373 F. Supp. 683 (E.D. Va. 1974).

18. The Court has previously upheld analogous statutes, but without being presented with a First Amendment challenge. Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963) (due process and commerce clause); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) (equal protection and due process); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935) (equal protection, due process, and contracts clause). Moreover, in these cases the challenges were brought by the advertisers themselves, not by consumers.

19. 316 U.S. 52 (1942).

20. NEW YORK CITY SANITARY CODE § 318 (1938).

the ground that the protest on one side of the handbill constituted non-commercial speech and thus raised the entire handbill to protected status.[21]

The circuit court opinion discussed a number of earlier state court decisions involving similar ordinances, some of which had been found overbroad to the extent that they violated constitutional rights.[22] But others, equally broad, had been upheld as valid implements of the police power to protect the public health and safety,[23] while others were upheld because they had been narrowly drawn to prohibit street distribution only of commercial matter.[24] Judge Jerome Frank's dissent justified this final category of ordinances and articulated the principle upon which the Supreme Court subsequently based its position. He first noted that the purpose of the First Amendment had not been to protect commercial speech: "[T]he historical events which yielded the constitutional protection of free speech and free expression do not by any means compel or even suggest the conclusion that there is an equally important constitutional right to distribute commercial handbills . . . ."[25] Nor would such a conclusion serve any First Amendment interests:

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21. 122 F.2d 511, 516 (2d Cir. 1941).

22. Three courts upheld ordinances only insofar as they prohibited posting and scattering leaflets, but invalidated them insofar as they prohibited personal distribution to willing recipients. People v. Taylor, 33 Cal. App. 2d 760, 85 P.2d 978 (1938) (political publication with some advertising); *Ex parte* Pierce, 127 Tex. Crim. 35, 75 S.W.2d 264 (1934) (advertising matter); People v. Armstrong, 73 Mich. 288, 41 N.W. 275 (1889) (invitations to YMCA gathering). Two courts found ordinances overbroad in prohibiting all street distribution of advertising matter of any kind. *In re* Thornburg, 55 Ohio App. 229, 9 N.E.2d 516 (1936) (street photographer's business cards); Chicago v. Shultz, 341 Ill. 208, 173 N.E. 276 (1930) (advertising circulars).

23. Milwaukee v. Kassen, 203 Wis. 383, 234 N.W. 352 (1931) (political handbills); People v. Horwitz, 27 N.Y. Crim. 237, 140 N.Y.S. 437 (Magis. Ct. 1912) (advertising matter inserted by vendor into newspapers); Philadelphia v. Brabender, 201 Pa. 574, 51 A. 374 (1902) (advertising circulars). *Accord,* San Francisco Shopping News Co. v. South San Francisco, 69 F.2d 879 (9th Cir.), *cert. denied,* 293 U.S. 606 (1934) (advertising publication with financial news); *In re* Anderson, 69 Neb. 686, 96 N.W. 149 (1903) (handbills); Wettengel v. Denver, 20 Colo. 552, 39 P. 343 (1895) (leaflets advertising store). The courts in most of these cases noted that the printed matter in question was of the sort that would probably become litter.

24. In People v. La Rollo, 24 N.Y.S.2d 350 (Magis. Ct. 1940), an anti-litter ordinance applying only to commercial matter was unsuccessfully attacked as violative of equal protection. In People v. Johnson, 117 Misc. 133, 191 N.Y.S. 750 (Ct. Gen. Sess. 1921), the New York anti-litter ordinance was held not to apply to NAACP leaflets protesting activities of the Ku Klux Klan. Coughlin v. Sullivan, 100 N.J.L. 42, 126 A. 177 (Sup. Ct. 1924), followed *Johnson* in upholding an ordinance regulating the distribution of advertising matter, but holding that it did not apply to a pamphlet criticizing municipal administration. The presumption was not as great that the latter would be thrown away and become litter.

25. 122 F.2d at 524.

> So to amplify the constitutional guaranty would be to "thingify" the words "free speech" and "free expression," and to become forgetful of the vital ideas—"the defense of liberty" and the functioning of "the processes of popular rule"— for which they stand. The danger of converting words into thought-paralyzing entities is illustrated by the judicial history of the phrase "liberty of contract."[26]

The dissent also found that the two messages on the handbill were separable and that the coupling of them was an "artificial hybrid" to which the ordinance could constitutionally be applied.[27] The Supreme Court, reversing the Second Circuit, agreed with Judge Frank's dissent that the protest portion of the handbill was merely an attempt to evade the ordinance, and upheld the power of the state to prohibit the use of public thoroughfares for "purely commercial advertising."[28]

B. Evolution Before Chrestensen

Although the 1942 decision in *Chrestensen* was the first enunciation by the Supreme Court of a distinction between commercial and noncommercial expression, the Court had previously upheld laws directed only against commercial speech and had overturned less specific laws. For instance, in 1911 in *Fifth Avenue Coach Co. v. New York*,[29] the Court upheld a city ordinance prohibiting the display of advertisements on vehicles but exempting business notices on business wagons.[30] The company challenged the ordinance as a deprivation of its property without due process, a denial of equal protection, and an impairment of the obligations of its contracts. The Court agreed with the New York Court of Appeals that advertisements on vehicles "would make such [vehicles] a parade or show for the display of advertisements which would clearly tend to produce congestion upon the streets."[31] Because the ordinance was therefore a proper exercise of the police power, its enforcement did not deprive the coach company of property without due process, nor impair its contractual obligations, which were subject to the law. The Court also rejected the equal protection argument on the ground that a "distinction between business wagons and those used for advertising purposes has a proper relation

26. *Id.* at 525.

27. *Id.* at 526.

28. 316 U.S. at 54-55.

29. 221 U.S. 467 (1911). The decision did not turn on First Amendment principles because it was not until 1925, in Gitlow v. New York, 268 U.S. 652 (1925), that the Court first indicated that the Fourteenth Amendment would prohibit the states from abridging the freedom of speech and of the press.

30. The Court later upheld the successor ordinance in Railway Express Agency v. New York, 336 U.S. 106 (1949), again without being presented with a First Amendment argument.

31. 221 U.S. at 480, *quoting* 194 N.Y. 19, 30, 86 N.E. 824, 827 (1909).

to the purpose of the ordinance."[32]

The Supreme Court took a similar position in 1932 when it decided *Packer Corp. v. Utah*.[33] Under a Utah statute making it a misdemeanor to advertise tobacco products in any place other than newspapers or periodicals and tobacco dealers' stores,[34] a billboard company was convicted for displaying a cigarette advertisement. The company's ultimate appeal to the Supreme Court challenged the statute under the equal protection and due process clauses of the Fourteenth Amendment and under the contracts and commerce clauses of article I, but did not raise a First Amendment argument.[35] The Court addressed itself primarily to the equal protection issue and found "a difference which justifies the classification between display advertising and that in periodicals or newspapers,"[36] in that display advertisements "thrust" their messages upon the viewer, while those in periodicals or newspapers cannot convey their messages without an affirmative act by the reader. The Court rejected the company's due process and contracts clause arguments under reasoning similar to that in the *Fifth Avenue Coach* case: because the statutory prohibition was a valid exercise of the state's police power, it was neither a taking of property without due process nor an impairment of contracts. Finally, the Court disposed of the commerce clause challenge on the ground that the statute operated only within Utah, on advertising matter whose interstate movement had ceased.[37] Finding no constitutional barrier to the statute, the Court affirmed the conviction under it.

The Court did, on the other hand, find constitutional barriers to laws that circumscribed more than commercial expression. In 1938 in *Lovell v. Griffin*,[38] the Court found invalid on its face a city ordinance prohibiting "the distribution of literature of any kind at any time, at any place, and in any manner without a permit."[39] The appellant, who had been convicted for distributing religious tracts without obtaining the required permit, challenged the ordinance as a restraint

32. 221 U.S. at 484.

33. 285 U.S. 105 (1932).

34. 1929 Utah Laws 173, ch. 92, § 2, *as amended*, UTAH CODE ANN. § 76-10-102 (Supp. 1975).

35. For a similar case in which the First Amendment was raised, see Howard v. State Dept. of Highways, 478 F.2d 581 (10th Cir. 1973), upholding the Colorado Outdoor Advertising Act, which required a permit to maintain signs on state highways. The court cited *Chrestensen* and *Packer* in rejecting the First Amendment argument, finding a legitimate exercise of the police power of states in the "regulation and prohibition of various forms of outdoor commercial advertising." *Id.* at 584.

36. 285 U.S. at 110.

37. *Id.* at 111.

38. 303 U.S. 444 (1938).

39. *Id.* at 451.

upon the free exercise of religion and as an abridgement of the freedom of the press. The Court declined to address the issue of religious freedom,[40] but reversed the conviction upon a finding that the law "strikes at the very foundation of the freedom of the press"[41] in requiring a permit without regard to the type of literature involved or to the time, place, or manner of its distribution.

The Court discussed *Lovell* the following year in *Schneider v. State*,[42] a review of four state court decisions. In each case a city ordinance had to some extent limited the freedom to distribute literature, and in each case the state court had distinguished *Lovell* and affirmed convictions under the ordinances. The Los Angeles, California, and Worchester, Massachusetts, anti-litter ordinances prohibited distribution of literature only along public streets or in parks, and on that basis were distinguished from the ordinance in *Lovell*, which prohibited distribution anywhere in the city. The Milwaukee, Wisconsin, ordinance prohibited distribution in all public places, but unlike the ordinance in *Lovell*, its only purpose was to prevent littering and it was construed by the state not to be enforceable against the distributor unless his activities actually resulted in littering. The Supreme Court rejected these distinctions and reversed the convictions, finding that the burden upon cities to keep streets clean "does not justify an exertion of the police power which invades the free communication of information and opinion."[43] The Irvington, New Jersey, ordinance required a permit for house-to-house distribution and solicitation, and the state court found *Lovell* not controlling because the ordinance condemned in that case required a permit for all distribution of literature. The Supreme Court also rejected this distinction because of the discretion given to the police in refusing permits,[44] and because alternative means

40. The issue had been raised in an earlier challenge to the same ordinance and the Supreme Court had dismissed the appeal for want of a substantial federal question. Coleman v. City of Griffin, 55 Ga. App. 123, 189 S.E. 427 (1936), *appeal dismissed*, 302 U.S. 636 (1937).

41. 303 U.S. at 451.

42. 308 U.S. 147 (1939), *rev'g* Town of Irvington v. Schneider, 121 N.J.L. 542, 3 A.2d 609 (Ct. Err. & App. 1939); Milwaukee v. Snyder, 230 Wis. 131, 283 N.W. 301 (1939); Commonwealth v. Nichols, 301 Mass. 584, 18 N.E.2d 166 (1938); People v. Young, 33 Cal. App. 2d 747, 85 P.2d 231 (1938).

43. 308 U.S. at 163.

44. *See also* Hague v. CIO, 307 U.S. 496 (1939) (invalidating an ordinance requiring a permit for distribution of any literature in public places); Kunz v. New York, 340 U.S. 290 (1951) (invalidating an ordinance giving the police commissioner wide discretion in denying a permit to a speaker whose meetings had caused disorder). Poulos v. New Hampshire, 345 U.S. 395 (1953), distinguished both of these cases in upholding an ordinance requiring a license to hold a public meeting, because the state had interpreted it as requiring even-handed administration. Of the two earlier cases the Court in *Poulos* said that "the ordinances were held invalid, not because they regulated the

were available to the town for dealing with trespass and fraud. In all four cases, the ordinances had been enforced against persons distributing religious or political matter,[45] and in reversing the New Jersey case the Court noted that the decision was "not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires."[46] This indication that the same protections might not apply to commercial as to noncommercial expression foreshadowed the distinction the Court would make three years later in *Chrestensen.*

C. Refinements After Chrestensen: Balancing

In 1943, shortly after deciding *Chrestensen*, the Court again distinguished commercial from noncommercial speech, but this time to favor the latter. The distinction was made in *Jamison v. Texas*,[47] *Jones v. Opelika*,[48] and *Murdock v. Pennsylvania*,[49] all involving solicitation of contributions for religious literature, and in *Martin v. City of Struthers*,[50] involving door-to-door distribution of religious literature. In *Jamison* a city ordinance prohibited street distribution of advertising matter. Jamison had been convicted for distributing handbills containing both an invitation to a religious meeting and an advertisement for the sale of religious books. The Court reversed the conviction, rejecting the city's argument that the ordinance could constitutionally be applied in such circumstances:

> The states can prohibit the use of the streets for the distribution of purely commercial leaflets, even though such leaflets may have "a civic appeal, or a moral platitude" appended. [Citing *Chrestensen.*] They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books . . . or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.[51]

The Court quoted this language in reversing the convictions in *Murdock* and in *Jones*. In *Jones*, city ordinances requiring the payment of a

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use of the parks for meeting and instruction but because they left complete discretion to refuse the use in the hands of officials." *Id.* at 406-07.

45. The California and Massachusetts cases involved street distribution of announcements of a meeting to discuss the war in Spain and invitations to a meeting protesting administration of state unemployment insurance, respectively. The Wisconsin case involved distribution by store pickets of a position statement in a labor dispute, and the New Jersey case involved door-to-door religious solicitation.

46. 308 U.S. at 165.

47. 318 U.S. 413 (1943).

48. 319 U.S. 103 (1943).

49. 319 U.S. 105 (1943).

50. 319 U.S. 141 (1943).

51. 318 U.S. at 417.

fee for a license to sell goods had been enforced against peddlers of religious literature.[52] The Court vacated its earlier opinion in that case, which had followed *Chrestensen* in holding:

> When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the State to charge reasonable fees for the privilege of canvassing.[53]

The Court's reasons for abandoning this position were stated in *Murdock*, where an ordinance requiring payment of a fee for a license to canvas or solicit was applied to door-to-door sales of religious pamphlets.[54] The Court found that the imposition of a license fee on such activities was a restraint upon the freedom of religion and of the press.[55]

That same day in *Martin* the Court reviewed an ordinance making it unlawful to distribute handbills to residents in their homes. The ordinance, which had been enforced against a door-to-door distributor of leaflets advertising a religious meeting, was held invalid as an interference with the freedom of speech and of the press.[56] The Court weighed the First Amendment rights claimed by Martin against the interests of householders in not being disturbed and those of the city in protecting its residents from annoyance and crime, concluding that the hazards of distribution could "easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors."[57]

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52. 316 U.S. 584, 586-91 (1942), *vacated*, 319 U.S. 103 (1943).

53. 316 U.S. at 597.

54. 319 U.S. at 106-07. *See also* Cantwell v. Connecticut, 310 U.S. 296 (1940) (invalidating, as applied to solicitors for a religious cause, an ordinance requiring a certificate of approval to solicit money for any purpose).

55. 319 U.S. at 114. *Accord*, Follett v. McCormick, 321 U.S. 573 (1944) (flat license tax on book agents invalid as applied to distributor of religious tracts); Largent v. Texas, 318 U.S. 418 (1943) (ordinance requiring permit to offer books for sale invalid as applied to peddler of religious books).

56. 319 U.S. at 149. *See also* Marsh v. Alabama, 326 U.S. 501 (1946) (reversing conviction under trespass statute as applied to distributors of religious literature in a company-owned town); Tucker v. Texas, 326 U.S. 517 (1946) (same, but in a government-owned town).

57. 319 U.S. at 147. Also decided that day was Douglas v. Jeannette, 319 U.S. 157 (1943), involving members of the same religious group, who sought an injunction against enforcement of the ordinance in Jeannette, Pennsylvania, where *Murdock* arose. Due to the *Murdock* decision, the injunction was denied as unnecessary. Justice Jackson concurred in *Douglas* and dissented in *Murdock* and *Martin*, finding a parallel with the facts in *Chrestensen*, where there was a civic appeal on one side of the handbill and a commercial advertisement on the other. *Id.* at 180 n.4. Justice Jackson gave greater weight than the majority to the rights of householders to be undisturbed, and found that the First Amendment protects freedom to practice religion, but not "to force it upon others." *Id.* at 182. Not all religious practices have been allowed. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166 (1878), where, in upholding a law against polygamy, the Court noted that although the laws "cannot interfere with mere religious belief and

In 1951 the Court distinguished the *Martin* case in deciding *Breard v. Alexandria*,[58] upholding an ordinance prohibiting, as a nuisance, door-to-door solicitation by uninvited peddlers. The Court referred to the prohibition as a "Green River ordinance,"[59] after two cases arising in Green River, Wyoming, both upholding an ordinance similar to that in *Breard*. In 1933, in *Green River v. Fuller Brush Co.*,[60] the Tenth Circuit found the ordinance an appropriate exercise of the police power to prevent disturbance of residents and upheld it against assertions that it deprived the company of property without due process, denied it equal protection, and interfered with interstate commerce. Three years later, in *Green River v. Bunger*,[61] the Wyoming Supreme Court upheld the same ordinance against the same challenges and against one further argument. A Fuller Brush salesman had attempted to avoid the "not having been requested or invited" provision of the ordinance by going from house to house soliciting invitations to return with his brushes, and he argued that the prohibition did not apply in such circumstances. But the court found that the salesman disturbed residents as much by soliciting invitations as he would by soliciting orders for his wares, and so held that the proscription of the ordinance encompassed both activities.

The ordinance in *Breard*, like that in the *Green River* cases, was upheld against due process and commerce clause challenges. Breard, however, was selling magazine subscriptions rather than brushes, so the Supreme Court was also presented with a First Amendment argument that the ordinance abridged the freedom of the press. Without citing *Chrestensen*, the Court drew the same distinction drawn therein, pointing out that the selling of the subscriptions "brings into the transaction a commercial feature."[62] The Court emphasized this point when it distinguished the ordinance in *Martin* on the ground that it "was not aimed 'solely at commercial advertising.' "[63] The Court found, then, that the constitutionality of the ordinance turned "upon a balancing of the con-

opinions, they may with practices." *Accord*, Church of Latter Day Saints v. United States, 136 U.S. 1 (1890).

58. 341 U.S. 622 (1951).

59. *Id.* at 627. The model was Green River, Wyo., Ordinance 175 (Nov. 16, 1931), which provided: "Section 1. The practice of going in and upon private residences in the Town of Green River, Wyoming, by solicitors, peddlers, hawkers, itinerant merchants and transient vendors of merchandise, not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences, for the purpose of soliciting orders for the sale of goods, wares and merchandise, and/or for the purpose of disposing of and/or peddling or hawking the same, is hereby declared to be a nuisance, and punishable as such nuisance as a misdemeanor."

60. 65 F.2d 112 (10th Cir. 1933).

61. 50 Wyo. 52, 58 P.2d 456 (1936), *appeal dismissed*, 300 U.S. 638 (1937).

62. 341 U.S. at 642.

63. *Id., quoting* Martin v. City of Struthers, 319 U.S. 141, 142 n.1 (1943).

veniences between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results."[64] The Court, having noted that "the exigencies of trade are not ordinarily expected to have a higher rating constitutionally than the tranquillity of the fireside,"[65] concluded that the ordinance did not abridge the freedom of the press.[66]

Thus, the treatment of commercial speech has been a threshold question, followed by a balancing of interests. The threshold was a determination whether there was any purpose in the expression other than a commercial transaction. If, as in *Chrestensen*, the purpose was purely commercial, regulating the speech was a matter for legislative judgment.[67] If, on the other hand, the speaker had some other pur-

64. 341 U.S. at 644.

65. *Id.* at 627.

66. Justice Black, dissenting, would have invalidated the law as applied to sellers of magazine subscriptions, but felt that it "could constitutionally be applied to a 'merchant' who goes from door to door 'selling pots.'" *Id.* at 650. He found the majority opinion irreconcilable with *Jones, Murdock*, and *Martin*. See text accompanying notes 48-57 *supra*.

67. In a variety of cases federal courts have found that certain expression did not merit analysis beyond this threshold. For instance, Morgan v. Detroit, 389 F. Supp. 922 (E.D. Mich. 1975), upheld a city ordinance prohibiting solicitation for prostitution, where neither the city nor the state made prostitution itself a crime. After discussing the difference between advocating the legalization of prostitution, which involves debate on a matter of controversy, and soliciting for prostitution, which does not, the court decided that the latter was essentially commercial: "Whatever else one might say about the act of accosting and soliciting, it is doubtlessly intended to sell a product." *Id.* at 927. Other prohibitions of certain expression have been upheld when the interests at stake on both sides were far from compelling. *See, e.g.*, Ad-Express, Inc. v. Kirvin, 516 F.2d 195 (2d Cir. 1975) (ordinance making it unlawful to leave advertising literature or samples at residences without prior written consent of occupants); Sabin v. Butz, 515 F.2d 1061 (10th Cir. 1975) (denial by the Forest Service of a special permit to give ski instruction in a national forest); Boscia v. Warren, 359 F. Supp. 900 (E.D. Wis. 1973) (ordinance prohibiting use of the word "saloon" in the name of a tavern); Hodges v. Fitle, 332 F. Supp. 504 (D. Neb. 1971) (ordinance providing for revocation of the liquor license of a licensee employing nude entertainers: topless dancing is expression, but with a commercial purpose). In other cases the interests to be served by regulating commercial speech have been more significant. The SEC has successfully urged the commercial speech distinction in several cases. *See, e.g.*, SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1306 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971) (imposing liability for mere negligence in preparing a news release that violated the Securities Exchange Act of 1934); SEC v. Wall Street Transcript Corp., 422 F.2d 1371, 1379 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970) (requirement that investment advisors register with the SEC upheld as applied to a publication acting as such an advisor against a claim of abridgment of the freedom of the press); Halsted v. SEC, 182 F.2d 660, 668 (D.C. Cir.), *cert. denied*, 340 U.S. 834 (1950) (prohibiting a stockholders' protective committee from soliciting financial contributions from stockholders). The distinction was also invoked to uphold a ban on all promotional advertisement of the New York State lottery. New York State Broadcasters Ass'n v. United States, 414 F.2d 990, 998 (2d Cir.

pose, such as promulgating religious ideas or exercising the freedom of the press, the competing interests at stake had to be balanced. In those cases involving religious expression the commercial purpose was found to be very slight, and in the balance between the interests of advocates in spreading their religion and those of the state in preventing litter or protecting its citizens, the religious interests weighed more heavily.[68] But in a similar balance between the interests of the press in a particular method of selling magazines and those of the state in securing the privacy of its citizens, where the commercial purpose of the prohibited activity was substantial, the interest in privacy weighed more heavily.[69] The economic interest did not remove all protection, but rather became a factor in determining when one person's freedom of expression had to be limited in order that other interests, such as privacy, might be protected.

III. Interests Involved in Distinguishing Commercial From Noncommercial Expression

A. Privacy

The Supreme Court has found an implicit right of privacy embodied in "several fundamental constitutional guarantees,"[70] including the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.

1969), *cert. denied*, 396 U.S. 1061 (1970). And a denial of antitrust immunity for efforts to influence public officials, where efforts were made to sell products to officials acting under competitive bidding statutes, was upheld as not violating rights of petition or of free speech because only commercial expression was involved. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). In such cases as these, the inhibiting effect of the legislation on the free expression of ideas is slight, and governmental interests, whether trivial or weighty, are therefore accorded great deference.

68. In later cases in which states have raised the commercial speech distinction in defense of legislation, courts have invalidated ordinances that went beyond the scope of the ordinance in *Chrestensen* to inhibit noncommercial expression. *See, e.g.*, Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972) (ordinance requiring anyone selling newspapers on the street to obtain a permit); Strother v. Thompson, 372 F.2d 654 (5th Cir. 1967) (ordinance under which city council had unfettered discretion in issuing permits required for distribution of handbills); International Soc'y for Krishna Consciousness v. New Orleans, 347 F. Supp. 945 (E.D. La. 1972) (ordinance prohibiting solicitation of money, as applied to a religious group).

69. *Cf.* Borough of Collingswood v. Ringgold, 66 N.J. 350, 331 A.2d 262 (1975), affirming convictions for violation of an ordinance requiring a permit to canvas or solicit. Defendants were surveying listener preferences for radio stations by interviewing residents in their homes, an activity the court found not within the concept of commercial speech. Nevertheless, the court upheld the ordinance on the ground that it did not regulate pure speech, but only "door-to-door activity on private property," a limited kind of activity. *Id.* at 365, 331 A.2d at 271.

70. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (Justice Douglas for the Court in a plurality opinion).

The courts have denied First Amendment protection to commercial speech, or drawn a distinction between commercial and noncommercial speech, in order to safeguard two features of this right of privacy, the right to be left alone and the right to one's reputation.[71]

1. The Right to Be Left Alone

In 1951 the Supreme Court protected the right of householders to be left alone—"the tranquillity of the fireside"—in *Breard v. Alexandria.*[72] Although the Court had refused to protect this interest against intrusion by religious advocates,[73] the intruder in *Breard* added a "commercial feature" to the balance of interests, which then weighed more heavily in favor of privacy.

Nineteen years later the Court reaffirmed this right to be left alone in *Rowan v. Post Office Department,*[74] upholding a federal postal statute[75] against a First Amendment challenge. The statute allows the postmaster general, at the request of an individual receiving pandering advertisements in the mail, to require the sender to strike the individual's name from the mailing list and to refrain from sending further mailings to that address. The statute gives the mail recipient absolute discretion to determine whether the initial advertisement is "erotically arousing or sexually provocative."[76] The first question considered by the Court was whether "further mailings" meant "all future mailings," "all future mailings of advertising material," or "all future mailings of similar materials."[77] In order to avoid the appearance of censorship by the post office, the Court decided that the provision must be construed to prohibit all future mailings. Moreover, the Court rejected the argument that the addressee's "sole discretion" in determining what is objectionable should be reviewable by a court. The Court read the statute broadly, both to protect privacy and to avoid vesting a censorship function in the postmaster general, and concluded that it would encompass all advertisements: "In operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog . . . ."[78] Thus the only questions for the postmaster general or for a court are whether the initial mailing was an

71. The conclusion that the right to one's reputation is one instance of a larger right of privacy was reached in the seminal article by Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

72. 341 U.S. 622, 627 (1951).

73. Murdock v. Pennsylvania, 319 U.S. 105 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943). See notes 49-57 and accompanying text *supra.*

74. 397 U.S. 728 (1970).

75. 39 U.S.C. § 4009 (Supp. IV, 1964), *as amended,* 39 U.S.C. § 3008 (1971).

76. *Id.* § 4009(a).

77. 397 U.S. at 732.

78. *Id.* at 737.

advertisement and whether the sender mailed any other material to the addressee more than thirty days after receiving a prohibitory order.[79] In evaluating the sender's asserted First Amendment right of expression, the Court found that the right of some individuals to communicate must be balanced against the right of others to be left alone.[80] The Court concluded that in this case the right of privacy weighed more heavily: "If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient."[81]

In a number of cases the Court has protected the privacy of the unwilling recipient from the free expression of advertisers. As early as 1932, in *Packer Corp. v. Utah*,[82] this kind of privacy provided the justification for a state statute prohibiting tobacco advertisements in public places, but exempting stores and periodicals. In a discussion of the equal protection issue raised by a billboard company, the Court pointed out that display advertisements were "constantly before the eyes of the observers,"[83] and concluded that the state had a valid interest in protecting its citizens from this kind of visual imposition upon their privacy.[84]

In 1974 the Supreme Court protected unwilling recipients by using a novel approach to the commercial speech distinction in *Lehman v. City of Shaker Heights*.[85] An advertising company, pursuant to its contract with the city, declined to accept political advertisements for display in the city-owned rapid transit cars on which the company managed the advertising space. A candidate for public office, who was refused space on the cars for his campaign signs, challenged the city's policy as violative of his free speech and equal protection rights. He argued that the advertising space on the cars constituted a public forum for First Amendment speech and that nondiscriminatory access to that forum was protected by the Fourteenth Amendment. The Court disagreed in a plurality opinion by Justice Blackmun, who cited the *Packer* case for the proposition that display advertising imposes itself upon the observer, and noted specifically that a "streetcar audience is a captive

79. *Id.* at 739 and n.6.

80. *Id.* at 736.

81. *Id.* at 738.

82. 285 U.S. 105 (1932).

83. *Id.* at 110, *quoting* State v. Packer Corp., 77 Utah 500, 515, 297 P. 1013, 1019 (1931).

84. *See also* Kovacs v. Cooper, 336 U.S. 77 (1949), upholding an ordinance forbidding the use of a "loud and raucous" loudspeaker on any public street, because the "unwilling listener . . . is practically helpless to escape this interference with his privacy . . . ." *Id.* at 86-87.

85. 418 U.S. 298 (1974).

audience."[86] The distinction between commercial and noncommercial expression provided the Court's answer to the argument urged by the dissent[87] that the advertising space on the transit cars constituted a forum subject to First and Fourteenth Amendment protection. Because the city allowed only commercial advertisements on the cars, no such forum had been created:

> The city consciously has limted access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.[88]

Justice Douglas concurred in upholding the city's policy, emphasizing the right to privacy of the transit system's passengers:

> [T]he right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.[89]

The treatment of commercial speech as different in kind from noncommercial speech,[90] then, may operate both to exclude commercial expression from areas in which noncommercial expression must be protected, and to allow commercial advertising in certain places without creating a forum for the exercise of political speech; both applications preserve the interests of privacy.

2. The Right to One's Reputation

The distinction between commercial and noncommercial speech has also been used to protect the privacy of one's personal life against

86. *Id.* at 302, *quoting* PUC v. Pollak, 343 U.S. 451, 468 (1952). *Pollak* upheld a PUC decision to allow a transit company to broadcast radio programs in its cars, a survey having shown 92% passenger approval.

87. 418 U.S. at 315 (Brennan, J., dissenting, joined by Justices Stewart, Marshall, and Powell).

88. *Id.* at 304.

89. *Id.* at 307.

90. The suggestion that commercial speech is different in kind, rather than merely different in degree, from noncommercial speech was also made in Jenness v. Forbes, 351 F. Supp. 88 (D.R.I. 1972), where the distinction was cited in support of noncommercial activities. In upholding the right of a political group to distribute leaflets in housing areas of a Navy base, the court found that although the commandant exercised valid control over commercial activities in the area, it did not follow that he could also control political activities: "Commercial speech is not protected by the First Amendment [citing *Chrestensen*], so these restrictions on commercial activities involve no submission of otherwise constitutionally protected activities to military authority." *Id.* at 96-97. For other cases involving political activities on private property, see Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973) (company labor camp); Unemployed Workers Union v. Hackett, 332 F. Supp. 1372 (D.R.I. 1971) (state unemployment office).

libel with a purely commercial motive. Defamation had traditionally been regarded as a form of speech unprotected by the First Amendment[91] until the Supreme Court, in a series of decisions beginning with *New York Times Co. v. Sullivan*,[92] expanded the scope of constitutional guarantees to give the press a greater privilege against libel suits. As announced in *New York Times*, a public official may not recover damages for a defamatory report about his official conduct without proof that the statement was made with knowledge of its falsity or with reckless disregard for its truth or falsity.[93] The Supreme Court subsequently applied this test of "actual malice" in an action for invasion of privacy in connection with a matter of public interest,[94] and applied a modified form of the test in actions for libel of public figures.[95] This special treatment has not, however, been accorded to defamatory publications with no purpose other than a purely economic one. The Court drew the distinction in *New York Times*, a libel action based on statements in an editorial advertisement for which the newspaper space had been purchased:

> The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.[96]

The Court found further that if the statements themselves were protected by the First Amendment, that protection extended to the newspaper, regardless of its acceptance of payment for the publication space. The Court found such a conclusion necessary in order not to discourage the press from making its advertising space available to the public as "an important outlet for the promulgation of information and ideas."[97]

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91. Near v. Minnesota, 283 U.S. 697 (1931). "[T]he common law rules that subject the libeler to responsibility . . . are not abolished by the protection extended in our constitutions." *Id.* at 715.

92. 376 U.S. 254 (1964).

93. *Id.* at 279-80.

94. Time, Inc. v. Hill, 385 U.S. 374 (1967).

95. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), requiring only "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155.

96. 376 U.S. at 266.

97. *Id.* A recent case refusing to apply the *New York Times* test to commercial matter was Rinaldi v. Village Voice, Inc., 47 App. Div. 2d 180, 365 N.Y.S.2d 199, *cert. denied*, 423 U.S. 883 (1975). The *Village Voice* had first published news stories about a public figure, making allegations that would have been subject to the protections of the *New York Times* test. Later, the *Voice* solicited subscriptions by advertising in another paper, making sufficiently detailed reference to the earlier articles that, unless the allegations were true or were constitutionally privileged, the advertisement would be actionable libel. The plaintiff brought an action for libel and for invasion

The considerations that required protection of the press in *New York Times* are not present in publications with a purely commercial purpose. In *Hood v. Dun & Bradstreet, Inc.*,[98] the Fifth Circuit in 1973 allowed the plaintiff to pursue a libel action for defamatory statements in a credit report. The defendant argued that the *New York Times* test should apply to give its reports a constitutional privilege absent proof of actual malice because the information was of public interest.[99] The court cited *Chrestensen* in holding that "matters of general and public interest do not include libelous and defamatory publications of such a commercial nature as credit reports."[100] The court discussed the distinction between the content of the advertisement in *New York Times* and that in *Chrestensen* and concluded that "because this commercial credit report did not express social concerns and grievances . . . such a report coincides with the doctrine of commercial speech."[101] The report was therefore not protected by the First Amendment, and in the absence of a privilege granted by the state,[102] the defamation was actionable without a showing of actual malice.

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of privacy based not on the earlier articles, but on the later advertisement, and the *Voice* raised the defense of constitutional privilege. The trial court dismissed the defense, finding first a parallel with the commercial purpose of the advertisement in *Chrestensen*, and second a difference from the situation in *New York Times* in that here the *Voice* had access to the pages of its own publication and did not need to purchase advertising space in another paper in order to express social concerns. Rinaldi v. Village Voice, Inc., 79 Misc. 2d 57, 359 N.Y.S.2d 176 (1974). The appellate court upheld the order, distinguishing between an advertisement like that in *New York Times* and one "designed solely to sell The Village Voice." 47 App. Div. 2d at 182, 365 N.Y.S.2d at 201. The case appears to answer a question presented in Time, Inc. v. Hill, 385 U.S. 374 (1967), where Justice Harlan pointed out that the *Hill* decision left open "the question whether a state may apply more stringent limitations to the use of the personality in 'purely commercial advertising.'" *Id.* at 405 (Harlan, J., concurring in part and dissenting in part). Certiorari was denied in *Rinaldi* for want of a final judgment, so the Supreme Court has yet to pass on the question.

98. 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974).

99. The *New York Times* privilege had been extended to libel of private persons in reporting matters of public interest, by a plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), but the decision was apparently limited or overruled in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), which held that the *New York Times* rule does not apply if the individual defamed is neither a public official nor a public figure. *Hood* was decided before *Gertz* and defendants had relied on *Rosenbloom.*

100. 486 F.2d at 29. *Accord*, Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381 (7th Cir. 1972); Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc., 448 F.2d 647 (10th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972).

101. 486 F.2d at 30.

102. The court in *Hood* noted that a majority of the states granted a conditional privilege to credit reporting agencies. 486 F.2d at 30 n.12. Georgia, where the case arose, had not recognized such a privilege, and the Fifth Circuit declined to presume that a state court would do so if presented with the opportunity. *Id.* at 31-32.

In *Grove v. Dun & Bradstreet, Inc.*,[103] a 1971 case very similar to *Hood*, the Third Circuit had held that mere negligence would support an action for libel in a credit report. The court recognized that if *New York Times* were controlling, as urged by defendant, investigatory error would not constitute the required recklessness to meet the test.[104] But the court found that the report was "not a medium entitled to that extended constitutional protection."[105] The Supreme Court denied certiorari in the case, and Justice Douglas dissented, pointing out that "[t]he language of the First Amendment does not except speech directed at private economic decisionmaking."[106] He argued that states should no longer be permitted to award damages for defamation, since the First Amendment had proscribed a federal libel law, and since the First Amendment was now binding upon the states through the Fourteenth Amendment. He concluded that even deliberate falsehoods should be protected, as "catalytic elements which tend to cause us to react, to rethink, and to reply."[107] However, as the circuit court in *Grove* had pointed out:

> Plaintiff here is denied [the] opportunity to respond to such false assertions both because it lacks the very access to the medium which [*New York*] *Times* and its progeny assumed, and for the more pernicious reason that the source or nature of the assertions may never be exposed.[108]

The victim of a credit report, who has but a limited opportunity to react or to reply to its contents, is given some protection by the recognition that speech in this commercial context is not entitled to the constitutional privilege accorded to political advertisements like that in *New York Times*.[109]

In cases where speech affects privacy, courts are faced with conflicting claims of fundamental rights. The First Amendment guarantees freedom of expression, but freedom from intrusion upon one's senses, from invasion of one's home, and from abuse of one's personality are equally fundamental to human existence, even if not explicitly guaranteed by the Constitution. Courts must necessarily balance these conflicting interests, and when commercialism is added

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103. 438 F.2d 433 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971).

104. *Id.* at 435 n.2.

105. *Id.* at 437.

106. 404 U.S. at 905 (Douglas, J., dissenting). Justice Douglas also asserted that the *Chrestensen* "holding was ill-conceived and has not weathered subsequent scrutiny." *Id.*

107. *Id.* at 900.

108. 438 F.2d at 437.

109. For an exhaustive study of the invasion of privacy by credit reporting agencies, see Note, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother Is Watching You*, 2 HASTINGS CONST. L.Q. 773 (1975).

to the scales, they generally weigh more heavily in favor of privacy, both as a right to be left alone and as a right to defend one's reputation.

B. Equal Protection

Freedom of expression has also at times conflicted with freedom from discrimination, a fundamental right some elements of which are incorporated into the Constitution by the Fourteenth Amendment. While that amendment prohibits the states from denying to anyone the equal protection of the laws, it does not regulate the conduct of individuals. Congress enacted fair housing legislation in the Civil Rights Act of 1968,[110] however, which does restrict certain acts of discrimination by individuals. The distinction between commercial and noncommercial speech has been invoked to promote equal protection interests in two cases upholding fair housing provisions of the 1968 act and in cases upholding a related state law and a city ordinance aimed at employment discrimination.

1. Fair Housing and Commercial Speech

In 1972 the Fourth Circuit in *United States v. Hunter*[111] upheld the constitutionality of a fair housing provision of the Civil Rights Act of 1968 prohibiting the publication of a discriminatory notice relating to the sale or rental of a dwelling.[112] The defendant, editor and publisher of a weekly newspaper, had printed a classified advertisement for an apartment for rent in a "white home." The dwelling was itself exempt from regulation under another provision of the act,[113] but the exemption did not extend to the advertisement.[114] Defendant argued that the statutory prohibition abridged the freedom of the press, both by curtailing a source of the newspaper's income and by imposing a prior restraint upon publication. The court found no such infringement. First, publicizing an intent to discriminate was prohibited "only

110. 42 U.S.C. §§ 3601-31 (1968).

111. 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

112. 42 U.S.C. § 3604(c) (1968), *as amended*, 42 U.S.C. § 3604(c) (1974), made it unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination." The 1974 amendment added the word "sex" after "religion."

113. 42 U.S.C. § 3603(b)(2) (1968) exempts from the provisions of § 3604, "other than subsection (c)," an owner-occupied dwelling intended to be occupied by no more than four families.

114. In giving effect to the terms of § 3603(b), the court said: "While the owner or landlord of an exempted dwelling is free to indulge his discriminatory preferences in selling or renting that dwelling, neither the Act nor the Constitution gives him a right to publicize his intent to so discriminate." 459 F.2d at 213.

in a commercial context and not in relation to the dissemination of ideas."[115] In finding that therefore no First Amendment rights were violated, the court referred to "an unbroken line of authority"[116] that distinguished between commercial and noncommercial speech. The defendant argued that such a distinction was irrelevant under the circumstances, since he needed revenues from classified advertising in order to publish his newspaper. The court found it doubtful that any revenues would be lost, since potential advertisers were also barred from private publication of discriminatory rental proposals and would therefore have no inducement to discontinue use of newspaper want ads. The court held moreover that the proscription was not an unlawful prior restraint because the prohibited expression was purely commercial and thus not entitled to full First Amendment protection. The court noted that enforcement of the act would have no effect on defendant's right to publish articles or editorials about racial discrimination or about the act; he was simply prevented from publishing a racially discriminatory proposal to enter into a commercial transaction.

The following year in *United States v. Bob Lawrence Realty, Inc.*,[117] the Fifth Circuit applied the commercial speech distinction to uphold another fair housing provision of the Civil Rights Act of 1968.[118] The section prohibits the "blockbusting" device of representing to white homeowners that nonwhites are moving into the neighborhood, so that residents will sell their homes for less than fair value and real estate agents will reap profits upon resale. The trial court found that defendant real estate brokers had made representations prohibited by the act,[119] and defendant on appeal argued that the section violated his First Amendment right to free speech. The Fifth Circuit disagreed, noting that the statute proscribed only representations made for profit, and that the profit motive rendered the speech commercial and not entitled to full First Amendment protection. Defendant further argued that if the representations were true they could not be prohibited. Again the court disagreed, drawing an analogy with the facts in *Chres-*

115. *Id.* at 211.

116. *Id., citing* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942); Breard v. Alexandria, 341 U.S. 622, 641-45 (1951); New York State Broadcasters Ass'n, Inc. v. United States, 414 F.2d 990, 998-99 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); Banzhaf v. FCC, 405 F.2d 1082, 1099-1103 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).

117. 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973).

118. 42 U.S.C. § 3604(e) (1968), *as amended*, 42 U.S.C. § 3604(e) (1974), made it unlawful "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin." The 1974 amendment added the word "sex" after "religion."

119. United States v. Mitchell, 335 F. Supp. 1004 (N.D. Ga. 1971).

tensen to conclude that the government could legitimately prohibit speech with a commercial purpose even if some additional purpose were asserted. Here, the balance between spreading truth and ending discrimination was resolved in favor of the latter: "Any informational value in a statement violative of [the section] is clearly outweighed by the government's overriding interest in preventing blockbusting."[120] The court pointed out that the statute proscribed only profit-motivated commercial speech consisting of racial representations, and that similar representations made without a profit motive remained protected.[121]

In 1974 the Seventh Circuit upheld a city ordinance[122] also directed against blockbusting in *Barrick Realty, Inc. v. City of Gary*.[123] The ordinance prohibited the use of "For Sale" or similar signs in residential areas of the city, and was intended to prevent "panic selling" due to fear of racial integration. Plaintiffs sued the city, challenging the ordinance as, *inter alia*, violative of their freedom of speech. Because freedom of speech is a fundamental right, plaintiffs argued, the state cannot restrict the expression absent a compelling governmental interest. The district court found, however, that fundamental rights were not involved because the expression prohibited by the ban on "For Sale" signs was purely commercial: "The Supreme Court has consistently held that reasonable regulations upon communications of a purely commercial nature are not subject to scrutiny under the First Amendment."[124] As no fundamental rights were in jeopardy, the court had only to find the ordinance reasonable and rationally related to a legitimate governmental purpose. The court found from the evidence that the proliferation of "For Sale" signs in neighborhoods of mixed racial composition created fears among white residents that the area was losing its stability, that it would become segregated, and that their property values would decline. These fears then became self-fulfilling as white residents sold their homes at depressed prices to nonwhites. Prohibition of the signs would remove a source of the pressure to sell, and neighborhoods would remain more stable.[125] The court held that the ordinance was a reasonable and appropriate means for achieving a legitimate goal, the elimination of racial segregation, by creating an atmosphere of security and balance in the city's neighborhoods.

On appeal, the Seventh Circuit adopted the district court's opinion as its own, but commented further on the commercial nature of the prohibited speech. Although the purpose of a "For Sale" sign is commer-

120. 474 F.2d at 122.
121. *Id.*
122. Gary, Ind., Ordinance 4685 (July 25, 1972).
123. 491 F.2d 161 (7th Cir. 1974), *aff'g* 354 F. Supp. 126 (N.D. Ind. 1973).
124. 354 F. Supp. at 132.
125. *Id.* at 135.

cial, it also conveys information, so that First Amendment interests are at issue.[126] The court observed, however, that other means of communication were available to prospective buyers and sellers of homes. In a balance between the conflicting interests involved, the court found, as had the court in *Bob Lawrence*, that the legislative interest in fair and open housing outweighed any individual interest in commercial expression that might perpetuate segregated residential areas. The circuit court in *Barrick* found support for its holding in a 1973 Supreme Court decision striking a similar balance with respect to commercial speech in the context of employment discrimination.

2. Employment Discrimination and Commercial Speech

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[127] the Supreme Court upheld an ordinance forbidding employers to engage in discriminatory hiring practices and forbidding others to aid in those practices.[128] Suit was brought against a newspaper for aiding in sexually discriminatory hiring by publishing sex-designated help-wanted advertisements. A cease and desist order was issued, and the Supreme Court affirmed the order, finding no violation of the newspaper's First Amendment rights. The Court first indicated that regulation of newspaper advertising would be impermissible if it disabled the press by substantially reducing advertising revenues.[129] It was not argued, however, that the decrease in income from sexually

126. 491 F.2d at 164. For the current view of such signs, see Linmark Assocs. v. Township of Willingboro, 535 F.2d 786 (3d Cir.), *cert. granted*, 45 U.S.L.W. 3345 (U.S. Nov. 8, 1976).

127. 413 U.S. 376 (1973).

128. Pittsburgh Pa., Ordinance 395 (July 8, 1969), *amending* Ordinance 75 (Feb. 27, 1967), makes it an unlawful employment practice:

"(e) For any employer, employment agency, or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to employment or membership which indicates any discrimination because of race, color, religion, ancestry, national origin or place of birth, or sex.

. . . .

"(j) For any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance . . . ."

129. 413 U.S. at 382-83. *See* Grosjean v. American Press Co., 297 U.S. 233 (1936), invalidating a state tax on gross receipts from advertising in newspapers. The Court found that the tax would decrease the amount of revenue realized by the newspapers and that the direct effect would be to curtail circulation. *But cf.* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972), upholding a ban on cigarette advertising in the electronic media as not abridging the freedom of the press. Such advertising involved over $300 million per year in advertising revenue, and accounted for over 7% of all television advertising revenues. Banzhaf v. FCC, 405 F.2d 1082, 1102 n.83 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

discriminatory classified advertisements would impair the financial strength of Pittsburgh Press. The Court then addressed the commission's argument that because the prohibited speech was commercial it was not constitutionally protected. Initially the Court invoked *New York Times* to illustrate the proposition that "speech is not rendered commercial by the mere fact that it relates to an advertisement,"[130] and that a newspaper's profit motive is not determinative. After emphasizing that the advertisement in *Chrestensen* "did no more than propose a commercial transaction,"[131] the court compared the two cases in weighing the *Pittsburgh Press* advertisements:

> In the crucial respects, the advertisements in the present record resemble the *Chrestensen* rather than the *Sullivan* advertisement. None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.[132]

Pittsburgh Press objected to this application of the distinction on the ground that the newspaper made editorial judgments in accepting and displaying advertisements, and that it was these judgments, not the advertisements, which were in issue and which should be protected. The Court addressed the issue from the perspective suggested by Pittsburgh Press, but decided that the minimal editorial discretion exercised was insufficient to divest the advertisements of their commercial nature. The Court concluded that the column headings were sufficiently integrated with the advertisements beneath to constitute a single commercial message, the thrust of which was "overtly discriminatory."[133] The Court then dismissed the newspaper's further argument that, given the importance of disseminating information about commercial matters, no distinction should be made between commercial and noncommercial speech; discriminatory hiring practices were themselves illegal in Pittsburgh, and no First Amendment interest could be served by advertising the illegal activity.[134]

Four justices dissented to the opinion in *Pittsburgh Press*, and particularly to its application of the commercial speech doctrine;[135] all

130. 413 U.S. at 384.

131. *Id.* at 385.

132. *Id.*

133. *Id.* at 388.

134. *Id.* at 388-89.

135. All four insisted that the government could not constitutionally dictate the content and layout of the advertising in a newspaper. Chief Justice Burger characterized the Court's holding as a "disturbing enlargement of the 'commercial speech' doctrine." *Id.* at 393. Justice Stewart, joined by Justices Douglas and Blackmun, stated: "Whatever validity the *Chrestensen* case may still retain when limited to its own facts, it cer-

expressed concern over the inhibiting effect the decision might have on the press and over possible extensions of government interference. The majority, however, had carefully limited the scope of the holding to emphasize the right of the newspaper to publish commentary on the ordinance and to exercise editorial judgment and control over the content and layout of its stories and commentary.[136] The decision upheld only the prohibition of sex-designated help-wanted advertisements, which promoted a legitimate state interest in eliminating sex discrimination. As in the fair housing cases, the Court in *Pittsburgh Press* added the commercial factor to its balance of interests in order to overcome an asserted First Amendment right. And, as in the fair housing cases, the interests to be balanced were both fundamental rights: freedom of the press on one side and equal protection on the other.

The national commitment to equal protection was manifested in the passage of the Fourteenth Amendment, but that only prohibited governments from discriminating on the basis of irrelevant characteristics. Statutes forbidding certain discriminatory conduct by individuals have been upheld under the Fourteenth Amendment on a finding of state involvement,[137] or under article I, section eight when acts of individuals affect interstate commerce,[138] or under the Thirteenth Amendment on the theory that it mandated the abolition of all badges and incidents of slavery, including racial discrimination in private property transactions.[139] No theory, however, could support legislation abridging the freedom of individuals or of the press to express ideas and opinions protected by the First Amendment, no matter how discriminatory and irrational those ideas and opinions might be.[140] But if commercial expression is not fully protected by the First Amend-

tainly does not stand for the proposition that the advertising pages of a newspaper are outside the protection given the newspaper by the First and Fourteenth Amendments." *Id.* at 401.

136. *Id.* at 391. A year later the Supreme Court had occasion to quote and confirm this limitation in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 255 (1974). A unanimous Court invalidated FLA. STAT. § 104.38 (1973), which required any newspaper attacking a political candidate to give him, free of cost, equal space to reply. The Court considered at length the interest of the public in access to the press and the difficulty of gaining that access, but concluded that the First Amendment required that the press be free of governmental interference in exercising control over the news and commentary it prints.

137. *E.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948).

138. *E.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

139. *E.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

140. Beauharnais v. Illinois, 343 U.S. 250 (1952) (5-4 decision), is not to the contrary. Although the Court there upheld a conviction under a state law prohibiting publication of racial defamation, it did so on the ground that libel is not protected by the First Amendment.

ment, then legislatures may prohibit discriminatory speech uttered in the context of proposing a commercial transaction. Because such commercial speech does little to accomplish the First Amendment purpose of disseminating information and ideas, and does much to hinder the national purpose of eliminating irrational classifications, the balance between the conflicting interests weighs in favor of inhibiting the speech in order to promote impartial treatment of the races and the sexes.

C. Public Health

The distinction between commercial and noncommercial speech was announced in *Chrestensen* in order to uphold an anti-litter ordinance designed to protect the public health and safety. Since then, states have often cited *Chrestensen* in defense of legislation restricting commercial expression in order to achieve public health goals. The judicial response has been either to find no purpose in the speech other than a commercial one and therefore to give effect to the public health interest, or to find some other value in the speech and to weigh that value as overriding.

1. Cigarette Advertising

In 1968 the District of Columbia Circuit in *Banzhaf v. FCC*[141] found cigarette advertising sufficiently commercial to warrant a balancing of the free expression of advertisers against the health of the audience. *Banzhaf* affirmed an FCC ruling[142] that required radio and television stations carrying such advertising to devote a significant amount of broadcast time, but not necessarily equal time, to presenting the message that smoking may be a health hazard. The ruling had been based on the fairness doctrine, an FCC principle that the electronic media must present a fair and balanced view of controversial public issues.[143] The circuit court in *Banzhaf*, however, declined to rely on the fairness doctrine, both because its application to product advertising was without clear precedent,[144] and because the constitutionality of certain aspects of the doctrine were in doubt while *Banzhaf* was before the court and were not finally resolved until the following year.[145]

141. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

142. Television Station WCBS-TV, 9 F.C.C.2d 921 (1967).

143. The fairness doctrine as defined differs from the "equal space" requirement imposed on newspapers and held unconstitutional in Maimi Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); see note 136 *supra*. The doctrine differs also from the "equal time" requirement imposed on the broadcast media for political candidates under 47 U.S.C. § 315 (Supp. IV, 1974).

144. 405 F.2d at 1091-92.

145. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The specific application of the doctrine under review in *Red Lion* was an FCC requirement that a right

Rather, the opinion was based on the duty of broadcasters to operate in the public interest, since "the public interest indisputably includes the public health."[146] Broadcasters and advertisers argued that the FCC ruling was an unconstitutional interference with control by the electronic media over the content of their broadcasts. The court listed several reasons for concluding that the ruling would not abridge First Amendment rights with respect to the advertisements themselves. Moreover, given the public health purpose of the ruling, the Court concluded that it should be sustained in spite of the broader implications with respect to broadcasters' autonomy. First, the ruling did not directly ban any speech, and the only "chilling effect" it might create would be to make broadcasters reluctant to carry cigarette advertising.[147] Second, the only speech that might conceivably be chilled was commercial speech and outside the intended scope of constitutional guarantees:

> Promoting the sale of a product is not ordinary associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self expression. It is rather a form of merchandising subject to limitations for public purposes like other business practices. . . . [T]he advertisements in question present no information or arguments in favor of smoking which might contribute to the public debate.[148]

Because the cigarette advertisements served only a commercial purpose, the court found that no First Amendment rights would be violated by a ruling that might have a chilling effect on such commercial advertising. The court then weighed the interests of the broadcasters against those of the public health that would be served by a balanced view of cigarette smoking. The court found that the danger was marginal that even commercial speech would be chilled by the ruling; that even if speech were inhibited, the social gain would be greater than the loss; and that the ruling would affirmatively serve to provide information vital to the decision whether to smoke or not.[149] For these reasons,

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to reply be given to persons specifically attacked by broadcasters. The Court held that neither the underlying fairness doctrine nor the personal attack regulation was "inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs." *Id.* at 392. The fairness doctrine as approved in *Red Lion* was followed in Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971), an extension of the *Banzhaf* principle to the issue of the relationships between big cars, high test gasoline, and air pollution.

146. 405 F.2d at 1096.

147. *Id.* at 1101-02.

148. *Id.*

149. *Id.* at 1102-03.

the interests of public health were allowed to prevail over those of the broadcasters.

In 1971 the commercial speech distinction was again invoked to promote public health interests in *Capital Broadcasting Co. v. Mitchell.*[150] A three-judge district court for the District of Columbia denied a petition to enjoin enforcement of a federal law banning all cigarette advertising in the electronic media.[151] The petition was brought by broadcasters who argued that the act abridged the freedom of the electronic press to disseminate information about cigarettes. The court found no First Amendment violation because cigarette advertising was purely commercial and not entitled to the same protections as other forms of speech.[152] Furthermore, nothing in the act prevented the broadcasters from airing opinions or information about smoking; it only prevented them from collecting revenue for airing the commercial messages of others.[153] Petitioners also argued that application of the advertising ban only to electronic and not to other media constituted an arbitrary and invidious classification. Considering the public health purpose of a ban on advertisements that encourage people to smoke, the court found the classification reasonable in light of the disproportionate influence of the broadcast media on the decisions of individuals, particularly the young. The court took notice of evidence that the warnings on cigarette packages had not reduced cigarette consumption and that Congress required stronger measures to protect the public health. The court found the ban an appropriate means of effectuating the congressional purpose.

Judge J. Skelly Wright dissented in *Capital Broadcasting* on two grounds. First, he found that the public interest would not be served by the ban: "Whereas the *Banzhaf* decision had increased the flow of information by air so that the American people could make an informed judgment on the hazards of cigarette smoking, the 1969 Act cut off the flow of information altogether."[154] Second, *Banzhaf* had established

150. 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).

151. Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335 (1969).

152. 333 F. Supp. at 584.

153. *But cf.* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Grosjean v. American Press Co., 297 U.S. 233 (1936). See note 129 and accompanying text *supra.* The court in *Capital Broadcasting* glossed over the question whether the loss of revenues could be debilitating. 333 F. Supp. at 584.

154. 333 F. Supp. at 589. Since the *Banzhaf* ruling, anti-smoking messages had been effective in significantly reducing cigarette smoking, and as long as cigarette advertisements were on the air so would be the opposing messages. An agreement among the cigarette companies to stop advertising would violate antitrust laws, and if individual companies stopped advertising they would lose their competitive positions. The companies therefore supported the statutory ban on cigarette advertising, which also effectively removed unpaid anti-smoking messages from the air, and cigarette consumption again

that cigarette advertisements implicitly state a position on the issue of smoking. Judge Wright reasoned that because these advertisements were deemed to address a matter of public controversy for the purpose of requiring presentation of the opposing view, they should be deemed to have the same character for the purpose of receiving First Amendment protection.[155] He concluded that the advertisements were not purely commercial because of the implicit message, and that therefore the government should be precluded from suppressing them. The majority's responses to this argument were that the *Banzhaf* opinion itself had distinguished cigarette advertising from constitutionally protected speech, and that the scope of the First Amendment is not determined by an application of the fairness doctrine to the speech in question.[156]

2. Medical Advertising

A source of frequent litigation involving advertising and public health has been legislation that forbids advertising by the medical professions. The results of the cases have been mixed. Until recently, courts have been inclined to uphold such advertising bans as reasonable regulation of matters affecting the public health. Challenges by consumers, however, have added a new dimension to the issue, and recent decisions indicate that such legislation will be subject to increasing judicial scrutiny in the future.

In three cases the Supreme Court has upheld, against other than First Amendment challenges, several laws prohibiting medical advertising. In 1935, in *Semler v. Oregon State Board of Dental Examiners*,[157] due process, equal protection, and contracts clause challenges were raised against a statute providing for revocation of the license of any dentist who engaged in any kind of advertising. In upholding the statute as

increased. *Id.* at 587-89. Thus, although intended by Congress as a health measure, the legislation actually hindered the anti-smoking effort. The majority opinion did not address this factual issue, but approached the case from the perspective of congressional intent.

155. *Id.* at 592.

156. *Id.* at 585. Shortly after affirming this decision, the Supreme Court reaffirmed the control of the electronic press over noncommercial aspects of its activities. In Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Court held that broadcasters were not required by the First Amendment to accept paid editorial advertisements. In a balance between the First Amendment rights of the public and those of the broadcasters, the fairness doctrine was found to be sufficient to keep the public informed; any right-of-access doctrine, requiring that individual members of the public be permitted to broadcast their particular views, would violate the rights of the broadcasting stations. *Accord*, Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975), reiterating that "the public has no absolute right to dictate the content of broadcast material." *Id.* at 402.

157. 294 U.S. 608 (1935).

a public health measure the Court said: "The legislature was not dealing with traders in commodities, but with . . . a profession . . . demanding different standards of conduct from those which are traditional in the competition of the marketplace."[158] Twenty years later, in *Williamson v. Lee Optical of Oklahoma, Inc.*,[159] the Court upheld a statute prohibiting solicitation of sales of eyeglasses. In answer to a due process challenge the Court found the legislation rationally related to the public health: "We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."[160] In 1963 another statute forbidding optometrists to advertise withstood attack in *Head v. New Mexico Board of Examiners.*[161] The New Mexico statute was enforced against a Texas optometrist who advertised on a New Mexico radio station that broadcast into Texas. The Court upheld the law as a health measure against the charge that it was an unconstitutional burden on interstate commerce.[162]

In 1975, however, in *Bigelow v. Virginia*,[163] the Court was presented with a First Amendment challenge to a Virginia statute prohibiting the advertisement of abortions.[164] Bigelow, as managing editor of a newspaper, published an advertisement for abortion referral, information, and counseling available at a for-profit agency in New York, where abortion laws were more liberal than in Virginia.[165] Bige-

158. *Id.* at 612. *Accord*, Levine v. State Bd. of Registration, 121 N.J.L. 193, 1 A.2d 876 (Sup. Ct. 1938) (price advertising by dentists).

159. 348 U.S. 483 (1955).

160. *Id.* at 490. When eyeglasses were being sold as mere articles of merchandise, state courts have invalidated statutes barring advertisement of their prices. Ritholz v. Detroit, 308 Mich. 258, 13 N.W.2d 283 (1944); State *ex rel.* Booth v. Beck Jewelry Enterprises, Inc., 220 Ind. 276, 41 N.E.2d 622 (1942). The courts found no public health justification for the statutes, which were therefore judged by due process principles and found to violate the Fourteenth Amendment.

161. 374 U.S. 424 (1963). The Court did not reach the First Amendment argument because it was not properly raised. The First Amendment argument was, however, properly raised against a prohibition of advertising by optometrists in Ullom v. Boehm, 392 Pa. 643, 142 A.2d 19 (1958), and the statute withstood the challenge.

162. For other Supreme Court decisions resting on the state interest in regulating professions concerned with the public health, see North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) (upholding statutory requirement that majority of stock in pharmacy corporation be held by pharmacists), and Barksy v. Board of Regents, 347 U.S. 442 (1954) (upholding statute under which the license of a physician was suspended for failure to comply with a congressional subpoena).

163. 421 U.S. 809 (1975).

164. VA. CODE ANN. § 18.1-63 (1960), *as amended*, VA. CODE ANN. § 18.2-76.1 (1975), provided: "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." The amendment made the statute applicable only to illegal abortions.

165. New York later adopted a statute prohibiting such advertisement by for-profit

low was convicted under the statute and the Virginia Supreme Court affirmed, holding that the advertisement was a commercial advertisement and could be prohibited, particularly since it related to matters of health. While an appeal to the United States Supreme Court was pending, the Court decided *Roe v. Wade*[166] and *Doe v. Bolton*,[167] which established that abortion decisions involve constitutionally protected rights of privacy and limited the extent to which states may prohibit abortions. *Bigelow* was then remanded to the Virginia court for reconsideration in light of *Roe* and *Doe*.[168] The conviction was again affirmed and again appealed to the Supreme Court, which then considered the First Amendment issue involved.

The Court first noted that speech involving sales or solicitations is not necessarily commercial, as established in the religious solicitation cases,[169] and that payment for publishing the advertisement is equally inconclusive, as established in *New York Times Co. v. Sullivan*.[170] The Court also stated that *Chrestensen* did not stand for the proposition that all advertising is without any constitutional protection. The Court then distinguished *Pittsburgh Press*,[171] emphasizing that employment discrimination was illegal in Pittsburgh and discriminatory employment advertisements published in Pittsburgh indicated an intent to engage in discriminatory employment practices in Pittsburgh. In *Bigelow*, on the other hand, the advertisements were published in Virginia, but the abortions were available in New York, where they were legal.[172] The

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referral services. The statute was upheld in S.P.S. Consultants, Inc. v. Lefkowitz, 333 F. Supp. 1373 (S.D.N.Y. 1971), on the ground that it did not prohibit dissemination of information. For-profit agencies could provide lists of available physicians and facilities, but such lists could not be so selective as to constitute a referral or recommendation. The purpose of the restriction was to prevent fee-splitting and other unprofessional practices. After noting that non-profit services like Planned Parenthood were allowed to provide referrals, the court upheld the classification as not violative of equal protection: "The state, in exercising its police power in the field of medicine, may ban commercial practices which it believes violate its public policy." *Id.* at 1376. The court found that non-profit organizations were not subject to the same commercial pressures that might influence for-profit services. *Id.* at 1379.

166. 410 U.S. 113 (1973).

167. 410 U.S. 179 (1973).

168. Bigelow v. Virginia, 413 U.S. 909 (1973).

169. *E.g.*, Murdock v. Pennsylvania, 319 U.S. 105 (1943). See text accompanying notes 47-55 *supra*.

170. 376 U.S. 254 (1964).

171. 413 U.S. 376 (1973).

172. *But cf.* Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963). The Court left open the question whether Virginia would be able to prohibit an advertisement in Virginia for an activity in New York that was illegal in New York, giving as an example the sale of narcotics. 421 U.S. at 828 n.14. A more interesting example of the question suggested by *Bigelow*, taken together with the facts of *Pittsburgh Press*, is whether the city of Pittsburgh could prevent the publication of an advertisement placed in the *Pittsburgh Press* by an employment agency in a state where employment discrimi-

Court also found "important differences" between the two advertisements: the one in *Pittsburgh Press* was purely commercial but the one in *Bigelow* was not; the latter "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' Portions of its message . . . involve the exercise of the freedom of communicating information and disseminating opinion."[173]

Having concluded that the advertisement had other than a purely commercial purpose, the Court then turned to a balancing of the conflicting interests involved. The state asserted an interest in protecting women from the unethical practices of for-profit abortion referral services.[174] The Court found that the quality of medical services in Virginia was not affected by activities in New York, and that Virginia had no power to regulate the agency in New York or its advertising.

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nation is legal, offering employment in that other state, and stipulating that no women (or minorities) need apply. The Court in *Pittsburgh Press* said that the advertisements promoted an illegal activity as much as if they had said "Narcotics for Sale" or "Prostitutes Wanted." 413 U.S. at 388. Unless some factor other than the legality or illegality of the activity in the state where it is being offered distinguishes *Pittsburgh Press* from *Bigelow*, then if the prostitutes were wanted in Nevada and the advertisement were published in Virginia, it would be protected; and if the narcotics were legal in the place where they were being sold, the advertisement would be protected.

173. 421 U.S. at 822. A federal district court two years earlier had also distinguished abortion advertisements from commercial speech. Associated Students v. Attorney General, 368 F. Supp. 11 (C.D. Cal. 1973). The court invalidated a statute prohibiting the mailing of unsolicited abortion information and birth control advertisements, finding the speech noncommercial: "Plaintiffs have no financial stake in the distribution of the pamphlet; the mailing was free. Nor do plaintiffs have any demonstrable interest in the family planning aids and techniques which are objectively analyzed and evaluated within the pamphlet." *Id.* at 24. In a similar vein, Hiett v. United States, 415 F.2d 664 (5th Cir. 1969), *cert. denied*, 397 U.S. 936 (1970), invalidated 18 U.S.C. § 1714 (1964), which prohibited use of the mails to distribute material giving information and soliciting business in connection with the procurement of divorces in foreign countries. The court found that although "divorce information does not rise to the same dignity as political expression that affects 'governing' rights," nevertheless "information on matters of social importance, especially those relating to the marriage relation, . . . is also given extensive Constitutional protection." 415 F.2d at 672, *citing* Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating, as violative of the right of marital privacy, state statutes forbidding counsel in and use of contraceptive drugs). *See also* Atlanta Cooperative News Project v. United States Postal Serv., 350 F. Supp. 234 (N.D. Ga. 1972) (invalidating federal postal statute to the extent that it rendered abortion information nonmailable); Mitchell Family Planning, Inc. v. City of Royal Oak, 335 F. Supp. 738 (E.D. Mich. 1972) (ordinance banning abortion advertising overbroad as not distinguishing between legal and illegal abortions).

174. 421 U.S. at 827. Justice Rehnquist, dissenting, would have given effect to this legislative interest. He quoted a passage from S.P.S. Consultants, Inc. v. Lefkowitz, 333 F. Supp. 1373, 1378 (S.D.N.Y. 1971), discussing the recent New York legislation restricting advertising by for-profit agencies: "[C]ertain hospitals give discounts to these lucrative, profit-making organizations. Thus, at the expense of desperate, frightened women these agencies are making a huge profit—some, such a huge profit that our Committee members were actually shocked." 421 U.S. at 833.

The Court found that the state's only interest was in regulating the information available to its citizens, an interest entitled to little weight, so the publisher's interest in disseminating information was given effect. In so holding, the Court followed the traditional approach to commercial speech and the First Amendment, as evolved from *Chrestensen* and later cases.

Although *Bigelow* thus conforms to the pattern of earlier commercial speech cases,[175] the Court suggested that a different approach might be taken. Some special characteristic, other than its commercial nature, might be found to distinguish commercial expression from fully protected speech in order to allow regulation of the former. Thus the Court described the fair housing cases[176] as involving not commercial speech, but advertising in connection with "an activity that the government was legitimately regulating."[177] *Banzhaf* and *Capital Broadcasting* were described as involving not commercial speech, but the electronic media, whose "unique characteristics . . . make it especially subject to regulation in the public interest."[178] And the Court's opinions upholding bans on medical advertising in *Semler, Williamson,* and *Head* were distinguished as Fourteenth Amendment cases not inconsistent with *Bigelow*.[179] This approach suggested in *Bigelow* was followed a year later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,*[180] in which the Supreme Court held that First Amendment protections extended to commercial expression.

IV. Virginia Citizens and Beyond

Virginia Citizens involved a consumer group challenge to a Virginia statute prohibiting, as unprofessional conduct, the advertisement by pharmacists of prescription drug prices.[181] Similar statutes have been challenged in a number of states and most have been invali-

175. See text accompanying notes 67-69 *supra.* This conformity with earlier cases is demonstrated by the Court's finding that the crucial difference between the advertisements in *Pittsburgh Press* and that in *Bigelow* was that the former were "classic examples of commercial speech," while the latter "conveyed information of potential interest and value to a diverse audience." 421 U.S. at 821-22. The *Bigelow* advertisement was simply not purely commercial speech, just as the advertisements for religious books were found not to be commercial speech in Jamison v. Texas, 318 U.S. 413 (1943).

176. United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir.), *cert. denied,* 414 U.S. 826 (1973); United States v. Hunter, 459 F.2d 205 (4th Cir.), *cert. denied,* 409 U.S. 934 (1972). See text accompanying notes 111-21 *supra.*

177. 421 U.S. at 825 n.10.

178. *Id., quoting* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971), *aff'd,* 405 U.S. 1000 (1972).

179. 421 U.S. at 825 n.10.

180. 96 S. Ct. 1817 (1976).

181. VA. CODE ANN. § 54-524.35 (1974).

dated,[182] although some have been upheld.[183] The First Amendment was not a significant issue for any of the state courts that considered such statutes; rather, they concerned themselves with the merits of public health arguments advanced by states to justify the prohibition. Many of these arguments were also reviewed in abbreviated form by the Supreme Court in *Virginia Citizens*, and they provide the setting for that decision.

A. Public Health Considerations

Five major arguments have been advanced in support of bans on prescription drug price advertising by pharmacists. First, it has been argued, the state has an interest in preventing improper competitive practices that lower the standards of service among professions serving the public health.[184] The answer to this argument has been that regulation of professional practices can, more effectively than prohibition of advertising, maintain both high standards of service and truthful advertising; moreover, while promotional advertising by pharmacists might be used to distort the quality of service, a price list is merely informative.[185] Second, states have argued, if customers were able to compare prices they might not patronize a single druggist, who could monitor prescriptions to insure that a customer was not taking antagonistic drugs.[186] But the practice of monitoring is infrequent and ineffective and can better be performed by the prescribing physician.[187] Third, in order to offer competitive prices pharmacists might take advantage of quantity discounts and then allow the drugs to remain too

182. Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971); Florida Bd. of Pharmacy v. Webb's City, Inc., 219 So. 2d 681 (Fla. 1969); Stadnik v. Shell's City, Inc., 140 So. 2d 871 (Fla. 1962).

183. Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969); Supermarkets General Corp. v. Sills, 93 N.J. Super. 326, 225 A.2d 728 (Ch. 1966). In both of these cases a First Amendment argument was raised, but the statutes were upheld.

184. Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 109, 311 A.2d 242, 246 (1973); Supermarkets General Corp. v. Sills, 93 N.J. Super. 326, 338, 225 A.2d 728, 735 (Ch. 1966).

185. Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 113-15, 311 A.2d 242, 248-49 (1973). The court also pointed out that the practice of pharmacy had evolved from a professional service into a retail business, so that the dignity of the practice would not be demeaned by price advertising. *Id.* at 116, 311 A.2d at 249.

186. *Id.* at 109, 311 A.2d at 246; Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 193, 272 A.2d 487, 491 (1971); Patterson Drug Co. v. Kingery, 305 F. Supp. 821, 824 (W.D. Va. 1969); Supermarkets General Corp. v. Sills, 93 N.J. Super. 326, 341, 225 A.2d 728, 736 (Ch. 1966).

187. Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 111-12, 311 A.2d 242, 247 (1973); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 196-97, 272 A.2d 487, 493 (1971).

long on the shelf and to deteriorate.[188] But this health hazard can be prevented by direct regulation rather than by the indirect means of advertising bans.[189] Fourth, patients wanting to take advantage of quantity discounts might put pressure on physicians to write prescriptions for large quantities.[190] But the physician, not the consumer, makes the decision about quantity, and physicians are constrained by professional ethics not to bow to pressures from patients.[191] Finally, a related argument offered by the states is that advertising might create an excessive demand for prescription drugs and result in drug abuse.[192] The counter-argument is that price advertising bans apply only to drugs that cannot be obtained without a doctor's prescription, so that although advertising might increase demand, increased prescriptions and use will not necessarily follow, and regulatory schemes can prevent any drug abuse that might result from a heightened public demand for drugs.[193] Moreover, it has been argued in opposition to advertising bans that beyond the failure of such bans to serve any public interest, they injure the public by denying information to consumers who pay inflated prices for the drugs they need.[194]

Most of these arguments and counter-arguments were mentioned briefly by the Supreme Court in *Virginia Citizens*,[195] and the Court concluded that close regulation would prevent the impairment of high professional standards by price advertising.[196] But the Court also noted that similar arguments in support of similar statutes had previously persuaded the Court to uphold medical advertising bans challenged by due

188. Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 193, 272 A.2d 487, 491 (1971); Supermarkets General Corp. v. Sills, 93 N.J. Super. 326, 342, 225 A.2d 728, 737 (Ch. 1966).

189. Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 197, 272 A.2d 487, 494 (1971).

190. Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 109, 311 A.2d 242, 246 (1973).

191. *Id.* at 116-17, 311 A.2d at 250.

192. *Id.* at 109, 311 A.2d at 246; Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 193, 272 A.2d 487, 491 (1971); Stadnik v. Shell's City, Inc., 140 So. 2d 871, 873 (Fla. 1962).

193. Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 110, 311 A.2d 242, 246 (1973); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 193-95, 272 A.2d 487, 492 (1971); Stadnik v. Shell's City, Inc., 140 So. 2d 871, 875 (Fla. 1962). *Stadnik*, which involved an administrative regulation, was held to be controlling in Florida Bd. of Pharmacy v. Webb's City, Inc., 219 So. 2d 681 (Fla. 1969), which invalidated a statute similar to the regulation.

194. But for this final point, the Pennsylvania court would have upheld the prohibition in spite of the weakness of each argument offered in its support. Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 197-98, 272 A.2d 487, 494 (1971).

195. 96 S. Ct. 1817, 1828 (1976).

196. *Id.* at 1829.

process and equal protection arguments.[197] These arguments were not, however, sufficient to justify the ban in *Virginia Citizens*, where the challenge was based on the First Amendment.

B. First Amendment Considerations

The statute invalidated in *Virginia Citizens* had been attacked on First Amendment grounds in two federal courts in Virginia. In 1969 the statute was upheld in *Patterson Drug Co. v. Kingery*.[198] A drug company seeking to enjoin enforcement of the statute argued that it abridged the freedom of speech. The court for the Western District of Virginia rejected the petition on the ground that "regulation of commercial advertising does not intrude upon First Amendment rights of free speech."[199] The court found that since the dispensing of drugs affects the public health, the state was justified in regulating the practices of druggists. The decision of the Western District was not appealed.

A court for the Eastern District of Virginia invalidated the same statute five years later in *Virginia Citizens Consumer Council v. State Board of Pharmacy*.[200] This time the action was brought by consumers, who asserted a constitutional right to receive information, theorizing that "the First Amendment assures its freedoms to the auditor and and reader as stoutly as it does the speaker and writer."[201] They argued that the absence of information on drug prices results in consumers paying higher prices than necessary[202] and has a detrimental rather than beneficial effect on the public health. The pharmacy board argued that commercial expression was not constitutionally protected and that drug price advertising was commercial expression. The court first distinguished the holding in *Patterson Drug*, pointing out that the challengers there were sellers of drugs, with a necessarily commercial interest in the advertising. The challengers in *Virginia Citizens*, on the other hand, were consumers, and "their concern is fundamentally deeper than a trade consideration. While it touches commerce closely, the overriding worry is the hindrance to a means for preserving health

197. *Id., citing* Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935). See notes 157-162 and accompanying text *supra*.

198. 305 F. Supp. 821 (W.D. Va. 1969).

199. *Id.* at 825.

200. 373 F. Supp. 683 (E.D. Va. 1974), *aff'd*, 96 S. Ct. 1817 (1976).

201. 373 F. Supp. at 685. For an analysis of this evolving constitutional theory, see Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975).

202. Among the price discrepancies noted by the court, the same amount of one drug at different pharmacies ranged in cost from $1.20 to $9.00. 373 F. Supp. at 685.

or even saving life."[203] The court also distinguished the earlier Supreme Court opinions upholding similar statutes[204] on the ground that the advertisements prohibited in those cases were of a promotional rather than informational variety. In *Virginia Citizens*, the advertisements sought to be permitted were not purely commercial, but contributed to the dissemination of information. After balancing the public interest in the advertising against the state's asserted purpose in prohibiting it, the court concluded that the consumers did have a First Amendment right to the information. That decision was affirmed on appeal, but the Supreme Court's reasoning was different from that of the district court.

The Supreme Court first addressed the question whether First Amendment protections can be claimed by those who seek to receive information, "and *not solely*, if at all, by the advertisers themselves who seek to disseminate that information."[205] In so framing the question, the Court apparently foreclosed the approach taken by the district court, that the right to receive can be asserted when there is no independent right of expression.[206] Thus, after reviewing the leading cases suggesting that the First Amendment grants an implied right to receive,[207] the Supreme Court stated: "*If* there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees."[208]

The Supreme Court also differed from the district court in the First Amendment treatment of drug price advertising. While the latter had concluded that such advertising was not commercial speech because of its informational value to consumers and was therefore entitled to First Amendment protection, the Supreme Court concluded that it was commercial speech but was nevertheless protected by the First Amendment. The Court began with a brief review of the treatment of commercial speech since *Chrestensen* and cited several criticisms of that case.[209] The Court also discussed *Bigelow v.*

203. *Id.* at 686.

204. Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935).

205. 96 S. Ct. at 1823 (emphasis added).

206. That is, the district court had invalidated the statute not because druggists had a right to advertise, but because consumers had a right to know. The Supreme Court indicated that the right to advertise must be established before the right to receive can be asserted.

207. Procunier v. Martinez, 416 U.S. 396 (1974); Kleindienst v. Mandel, 408 U.S. 753 (1972); Lamont v. Postmaster General, 381 U.S. 301 (1965).

208. 96 S. Ct. at 1823 (emphasis added).

209. *Id.* at 1823-24, *citing* Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring); Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting in an opinion joined by Justices Stewart, Marshall, and

Virginia,[210] in which "the notion of unprotected 'commercial speech' all but passed from the scene,"[211] but in which the advertisement was not purely commercial because it conveyed information of public interest about a constitutionally protected activity. *Bigelow*, then, had not discarded the commercial speech distinction, but rather had followed it. In *Virginia Citizens*, on the other hand, the Court concluded that drug price advertisements did no more than propose a commercial transaction and were therefore purely commercial speech.[212] Thus squarely presented with the question whether such "purely commercial" expression was entitled to First Amendment protection, the Court decided that it was.[213]

In holding that the First Amendment protects drug price advertising, the Court first cited a number of labor cases for the proposition that a purely economic interest in speech does not remove protection from the speaker.[214] The Court then discussed the consumer's interest in commercial information, which may be greater than his interest in traditionally protected political expression, and the importance to society of certain commercial advertisements that convey information of public interest.[215] Finally, the Court concluded that "no line . . . could ever be drawn"[216] which would protect commercial advertising only if it were of public interest and importance, since all advertising disseminates information necessary to a free enterprise economy. In light of the First Amendment protections thus granted by the Court to commercial advertising, the state's public health arguments[217] were inadequate to justify the ban on drug price advertising by pharmacists.

C. Commercial Speech After Virginia Citizens

The Court in *Virginia Citizens* did not limit its holding to the particular facts before it, but it did mention certain forms of commercial speech regulation that were still permissible. However, present law in other areas of commercial speech regulation, not mentioned by the Court, may be affected by the decision.

Powell); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 393 (1973) (Burger, J., dissenting); *id.* at 398 (Douglas, J., dissenting); *id.* at 401 (Stewart, J., dissenting); Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 904-06 (1971) (Douglas, J., dissenting).

210. 421 U.S. 809 (1975).

211. 96 S. Ct. at 1824.

212. *Id.*

213. *Id.* at 1826.

214. *Id., citing* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941); AFL v. Swing, 312 U.S. 321 (1941); Thornhill v. Alabama, 310 U.S. 88 (1940).

215. 96 S. Ct. at 1826-27.

216. *Id.* at 1827.

217. See text accompanying notes 184-97 *supra*.

First, the Court pointed out, the issue in *Virginia Citizens* did not involve time, place, and manner restrictions applicable to all communications, regardless of content.[218] But the Court left open the question whether the facts in *Chrestensen*, or in *Breard v. Alexandria*,[219] would now lead to the holdings reached in those cases. For in *Chrestensen* and *Breard* restrictions on the time, place, and manner of communications with a commercial purpose were upheld, while identical restrictions were invalidated when applied to communications involving religious or political matters.[220] Thus a householder's right of privacy, which was protected in *Breard*, may now weigh less heavily with the courts than the interests of advertisers, just as it has previously weighed less heavily than the interests of religious advocates. Moreover, the Court in *Virginia Citizens* stated that all advertising, "however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information,"[221] so that the right of unwilling recipients to privacy from intrusions upon their senses[222] may no longer be protected by the distinction between commercial and noncommercial speech.

Second, the Court noted that false or deceptive advertising was not in issue in *Virginia Citizens* and that states were not prevented from regulating commercial expression to insure its truth.[223] Moreover, the Court indicated that in this context a distinction might continue to be made on the basis of "commonsense differences" between commercial and noncommercial speech:

> Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.[224]

The Court mentioned two of these differences. First, the advertiser can more easily verify the truth of commercial speech than, for example, a news reporter or political commentator can verify the substance of his communications. Second, commercial advertising is not as likely as noncommercial speech to be chilled by regulation. These

218. 96 S. Ct. at 1830.

219. 341 U.S. 622 (1951). See text accompanying notes 58-66 *supra*.

220. Martin v. City of Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. State, 308 U.S. 147 (1939). See text accompanying notes 42-57 *supra*.

221. 96 S. Ct. at 1827.

222. See text accompanying notes 82-90 *supra*.

223. 96 S. Ct. at 1830-31. Justice Stewart's concurring opinion expands upon this statement by the majority to emphasize that false or misleading commercial speech is not protected by the First Amendment. *Id.* at 1832-35.

224. *Id.* at 1830 n.24.

differences permit the requirement of complete accuracy in commercial statements and the tolerance of less accuracy in statements made without a commercial purpose. Thus, the distinction may still be made in the area of defamation, so that the First Amendment will continue to protect the speaker without a commercial motive who is negligent, as in *New York Times Co. v. Sullivan*,[225] but may not protect the negligent disseminator of false commercial speech.[226] Prior restraints, too, may be allowed in a commercial context, but not in the context of political speech, news reporting, and other traditionally protected speech.[227]

Third, the Court pointed out that the advertisements considered in *Virginia Citizens* did not involve transactions that were themselves illegal, and thus distinguished the case from *Pittsburgh Press*[228] and *United States v. Hunter*,[229] in which sexually or racially discriminatory advertisements were at issue.[230] The Court thus indicated that a distinction might still be drawn between commercial and noncommercial speech in order to promote equal protection in a commercial context, as well as to protect the public from other illegal activities.[231] The Court did not, however, mention speech that does not itself promote discrimination, but that might result in conditions that perpetuate segregation, such as "For Sale" signs in transitional neighborhoods,[232] or representations to white homeowners that nonwhites are moving into the neighborhood.[233] In *Bigelow*, though, the Court had noted that such commercial expression involved an "activity that the government was legitimately regulating,"[234] and this characterization might remain a valid one after *Virginia Citizens*.

Finally, the Court observed that "the special problems of the elec-

225. 376 U.S. 254 (1964). See notes 92-97 and accompanying text *supra*.

226. *See, e.g.*, Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971); see text accompanying notes 103-09 *supra*. *See also* SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1306 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971) (liability imposed for mere negligence in preparing a news release that violated securities regulations).

227. 96 S. Ct. at 1830-31 n.24.

228. 413 U.S. 376 (1973).

229. 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

230. See text accompanying notes 111-36 *supra*.

231. The Court did not mention *Bigelow* in its discussion of commercial speech promoting illegal activities, so the question remains open whether a state may prohibit the advertisement of an activity that is illegal in that state, but legal where it is to take place. See note 172 *supra*.

232. Barrick Realty, Inc. v. City of Gary, 491 F.2d 161 (7th Cir. 1974), *aff'g* 354 F. Supp. 126 (N.D. Ind. 1973). *See also* Linmark Assocs. v. Township of Willingboro, 535 F.2d 786 (3d Cir.), *cert. granted*, 45 U.S.L.W. 3345 (U.S. Nov. 8, 1976).

233. United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973).

234. 421 U.S. 809, 825 n.10 (1975).

tronic broadcast media"[235] were not involved in *Virginia Citizens*, suggesting that it might still be acceptable for the FCC to distinguish between commercial and noncommercial speech, and to regulate the former more closely than the latter. It appears, then, that at least when only the electronic media are affected, commercial advertising may continue to be regulated in the interests of public health and welfare.[236] If some other medium of communication is involved, however, those interests may have to be subordinated to the First Amendment protections now accorded to commercial advertising.

Virginia Citizens expressly left intact several of the areas in which the commercial speech distinction has previously protected other interests over the free expression of advertisers and other disseminators of commercial matter. The right to one's reputation, one aspect of privacy, may still be protected from negligence in commercial publications, even if not in publications of other kinds; and freedom from discrimination may still be advanced by regulation of commercial expression, even though regulation of noncommercial discriminatory expression is clearly repugnant to the First Amendment. And the public health and welfare may still be protected by laws that prevent the imposition on the public of false or misleading advertisements, or advertisements, at least in the electronic media, for products inimical to the public health.

The major interest previously protected by the commercial speech distinction and now susceptible to re-evaluation is the right to be left alone. None of the ways in which the Court distinguished *Virginia Citizens* from earlier decisions touched on cases involving this aspect of privacy, and in several early cases the only feature of speech that allowed its suppression in order to protect privacy was its commercial nature. It is possible, then, that the right to be left alone will no longer be protected in favor of the First Amendment rights of advertisers.

Another area left open to re-evaluation is commercial speech injurious to the public health or welfare, but in places other than the electronic media. Thus, although the FCC may prohibit cigarette advertising on television and radio stations,[237] or may require presentation of the anti-smoking message,[238] it is now open to question whether a state may prohibit display advertising of tobacco products,[239] or

235. 96 S. Ct. at 1831.

236. See text accompanying notes 141-56 *supra*.

237. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).

238. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

239. *Cf.* Packer Corp. v. Utah, 285 U.S. 105 (1932). See text accompanying notes 33-37 and 82-83 *supra*.

require a permit to maintain a billboard,[240] or prohibit street distribution of commercial advertising matter.[241] The Court, in holding that speech does not lose its constitutional protection merely because its purpose is purely commercial, has renounced the broadly stated position taken in *Chrestensen*, and left open possibilities for much wider applications of the guarantees embodied in the First Amendment.

V. Conclusion

Until recently, the judicial approach to regulation of commercial speech had been to determine whether the speech had any purpose other than the promotion of a commercial transaction. If it did not, the regulation of it was within legislative discretion. If other interests were present, these were balanced against the interests to be advanced by the regulation, and the weightier interests were given protection.[242]

After *Bigelow*, and particularly after *Virginia Citizens*, the approach is now to begin with the premise that commercial expression is as protected by the First Amendment as other forms of expression, and then to inquire into whether there is any overriding social reason why a particular instance of commercial speech should be regulated or prohibited. In some circumstances the determination whether the reason is overriding may take into account the commercial purpose of the speech, as in the regulation of false advertising, advertising of an illegal activity, or advertising in the electronic media. Although in these contexts there may still be a distinction between commercial and noncommercial speech, it is clear now that even purely commercial expression may no longer be dismissed automatically as undeserving of the freedoms protected by the First Amendment.

240. *Cf.* Howard v. State Dept. of Highways, 478 F.2d 581 (10th Cir. 1973). See note 35 *supra.*

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

242. See text accompanying notes 67-69 *supra.*