Washington and Lee Law Review

Volume 34 | Issue 1 Article 13

Winter 1-1-1977

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THE DEMISE OF THE COMMERCIAL SPEECH DOCTRINE AND THE REGULATION OF PROFESSIONAL'S ADVERTISING: THE *VIRGINIA PHARMACY* CASE

The first amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] Although the first amendment protects a wide variety of activities,[2] commercial advertising was never accorded this protection. The commercial speech doctrine provides generally that any expression which is primarily commercial is not protected by the first amendment and may be regulated by the states consistent with the due process clause.[3] From its inception, the doctrine was ambiguous, difficult to apply, and engendered much controversy and comment.[4] In recent years the commercial speech doctrine has been weakened by several cases that have restricted the doctrine's application and broadened the first amendment protection that some commercial speech would receive.[5] The Supreme Court in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[6] finally put the doctrine to rest by holding that commercial speech, like other forms of expression, is entitled to full first amendment protection.[7]

Early Supreme Court cases recognized the State's power to regulate commercial advertising, but did not address the extent of first amendment protection, if any, to which commercial advertising was entitled.[8] The first statement by the Supreme Court on that issue

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[1] U.S. CONST. amend. I.

[2] *E.g.* Street v. New York, 394 U.S. 576 (1969) (flag burning); Stanley v. Georgia, 394 U.S. 557 (1969) (possession of pornographic materials); West Virginia Bd. of Education v. Barnett, 319 U.S. 624 (1943) (refusal to salute flag); Jamison v. Texas, 318 U.S. 413 (1943) (religious solicitation). *See generally* Richards, *The Historical Rationale of the Speech-And-Press Clause of the First Amendment,* 21 U. FLA. L. REV. 203 (1969); Note, 48 TUL. L. REV. 426 (1974).

[3] Breard v. City of Alexandria, 341 U.S. 622 (1951); Valentine v. Chrestensen, 316 U.S. 52 (1942).

[4] *See, e.g.,* Note, 2 BILL OF RIGHTS REV. 222 (1942); Note, 8 OHIO ST. U. L. J. 331 (1942). *But see* RESNIK, *Freedom of Speech and Commercial Solicitation,* 30 CALIF. L. REV. 655 (1942); Note, 26 MINN. L. REV. 895 (1942).

[5] Bigelow v. Virginia, 421 U.S. 809 (1975); Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 412 U.S. 376 (1973).

[6] 96 S. Ct. 1817 (1976).

[7] *Id.* at 1824. *See* text accompanying notes 48-68 *infra.*

[8] Packer Corp. v. Utah, 285 U.S. 105 (1932); Fifth Avenue Coach Co. v. New York, 221 U.S. 467 (1911). These cases did not reach the specific issue of first amendment

came in the *Handbill Cases.*[9] These cases involved attempts by local municipalities to prohibit Jehovah's Witnesses from distributing handbills on the streets. In the *Handbill Cases,* the Court held that an ordinance banning the distribution of all handbills and literature was an unconstitutional abridgement of the freedom of speech.[10]

Although the *Handbill Cases* did not deal directly with commercial speech,[11] dicta in the cases indicated that the Supreme Court would not grant full first amendment protection to speech in a strictly commercial context.[12] The Court squarely faced the issue of the degree of first amendment protection for commercial speech in *Valentine v. Chrestensen.*[13] Chrestensen wished to distribute a commercial handbill in the streets. After the police informed him that a city ordinance prohibited such a distribution, Chrestensen appended a protest to the back of the handbill in an effort to evade the ordinance.[14] The police would not allow him to distribute this revised handbill and Chrestensen sought an injunction to restrain enforcement of the statute.[15] The district court granted a permanent injunction[16] and the court of appeals affirmed.[17] The Supreme Court re-

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protection for commercial advertising. For example, the real issue in *Packer* was whether Utah's exception of newspapers from a general ban on tobacco advertising violated the equal protection clause of the fourteenth amendment. 285 U.S. at 108.

[9] Schneider v. Town of Irvington, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

[10] 308 U.S. at 163; 303 U.S. at 451.

[11] Several cases with similar facts were joined for decision in *Schneider.* The handbills in the various cases contained a variety of information. One handbill carried a statement by a labor union with respect to a local employer. 308 U.S. at 155. Another handbill announced a protest meeting in connection with the administration of state unemployment insurance. *Id.* at 156. The third handbill contained religious information distributed by Jehovah's Witnesses. *Id.* at 158. In *Lovell,* the handbill contained religious information similar to the third handbill in *Schneider.* 303 U.S. at 448.

[12] In *Schneider,* the Court noted that their holding did not imply that commercial soliciting and canvassing may not be regulated. 308 U.S. at 165.

[13] 316 U.S. 52 (1942).

[14] The protest that Chrestensen appended to his original handbill concerned the refusal by the city docks commissioner to allow Chrestensen to dock his submarine at any city owned wharf. 316 U.S. at 53.

[15] *Id.*

[16] Chrestensen v. Valentine, 34 F. Supp. 596, 600 (S.D.N.Y. 1940), *aff'd* 122 F.2d 511 (2d Cir. 1941), *rev'd* 316 U.S. 52 (1942).

[17] Chrestensen v. Valentine, 122 F.2d 511, 516 (2d Cir. 1941). While the court of appeals refused to decide whether any prohibition of commercial advertising is invalid under the first amendment, they held than any prohibition of a combined protest and advertisement could not be valid under the first amendment. *Id.* at 516. The court believed that any distinction between communication that was primarily commercial and primarily non-commercial was uncertain because the determination involved ele-

versed declaring that although the states cannot unduly burden the use of the streets for the dissemination of information and opinion, the Constitution "imposes no such restraint on [the] Government as respects purely commercial advertising."[18]

A comparison of *Chrestensen* and the *Handbill Cases* supports the inference that the first amendment does not protect commercial speech.[19] In the *Handbill Cases,* ordinances that prohibited the distribution of all handbills violated the first amendment. In *Chrestensen* an ordinance prohibiting the distribution of all commercial handbills did not violate the first amendment. Thus, a predominate commercial element was dispositive in resolving whether to extend first amendment protection.

The commercial speech doctrine became firmly established during the twenty years following *Chrestensen.* The doctrine was strengthened in *Breard v. City of Alexandria*[20] where the Court upheld a local ordinance that prohibited door-to-door solicitation without the homeowner's prior consent. Previously the Court had struck down an ordinance that prohibited door-to-door religious solicitation.[21] The *Breard* Court distinguished this situation by noting that in *Breard* "the selling . . . brings into the transaction a commercial feature" and thus receives no first amendment protection.[22]

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ments of both a subjective and objective test. *Id.* at 515. Judge Frank lodged a spirited dissent. Essentially, he saw the handbill as separate statements of protest and advertising. Viewed in this way, the advertisement can be severed from the protest without any chilling effect. *Id.* at 517 (Frank, J., dissenting). In cases in which these two elements can not be so easily separated, the purpose of the speaker would be dispositive. *Id.* at 521 (Frank, J., dissenting).

[18] 316 U.S. at 54.

[19] Note, *The Commercial Speech Doctrine: The First Amendment at a Discount,* 41 BROOKLYN L. REV. 60, 67 (1974); Note, *Freedom of the Press—The Commercial Speech Doctrine Applied to Abortion Advertisements,* 24 EMORY L. J. 1165, 1168 (1975).

[20] 341 U.S. 622 (1951). In *Breard,* appellant solicited subscriptions door-to-door for nationally known magazines. Appellant was arrested while going door-to-door because he did not seek the owners' permission. *Id.* at 624. The Court upheld the ordinance forbidding such conduct by balancing the right of privacy of the homeowner against the first amendment rights of the magazine publisher. *Id.* at 641.

[21] Martin v. City of Struthers, 319 U.S. 141 (1943). The city of Struthers, Ohio, had an ordinance that prohibited all door-to-door solicitation. The Supreme Court held the ordinance unconstitutional and reversed the convictions of several Jehovah's Witnesses who had violated it. The Court held that a state may not prohibit the dissemination of otherwise protected information when there is a speaker and a willing listener. *Id.* at 146-47. The defect in the ordinance was its blanket prohibition of all solicitation thereby preventing those residents who wished to receive this information door-to-door from doing so. *Id.* at 147. *See also* note 48 *infra.*

[22] 341 U.S. at 642. *Chrestensen* and *Breard* implied that any expression that is sold

After *Breard*, lower courts mechanically applied the commercial speech doctrine, holding that all commercial speech was unprotected.[23] This rote acceptance of the doctrine continued until *New*

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or includes a commercial solicitation of any degree is without first amendment protection. The Court certainly did not intend this result. *See* Smith v. California, 361 U.S. 147, 150 (1959) (books); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (movies); Grossjean v. American Press Co., 297 U.S. 233, 250 (1936) (newspapers). The Supreme Court held that the above media were entitled to first amendment protection even though they were sold for a profit. *See also* Note, *Commercial Speech — An End in Sight for* CHRESTENSEN?, 23 DEPAUL L. REV. 1258, 1266 (1974). The *Chrestensen* and *Breard* decisions indicate the Court's reluctance to afford first amendment protection to commercial speech. If an expression was "purely commercial," as in *Breard*, or had a primarily commercial motive, as in *Chrestensen*, it would not fall within the protection of the first amendment. The Court, however, offered little guidance in either case as to the application of the doctrine. Nevertheless, the cases show that when the activity involves religious proselytization the first amendment will operate to protect the activity, irrespective of any commercial solicitation involved as well. *Compare* Murdock v. Pennsylvania, 319 U.S. 105 (1943) *and* Schneider v. Town of Irvington, 308 U.S. 147 (1939) *with* Breard v. Alexandria, 341 U.S. 622 (1951) *and* Valentine v. Chrestensen, 316 U.S. 52 (1942). In *Murdock*, the Court overturned a local ordinance that prohibited the door-to-door dissemination of information without a license. The Court noted that the fact that religious literature is sold does not transform its distribution into a commercial enterprise. 319 U.S. at 111. In *Schneider*, the Court similarly overturned an ordinance prohibiting the dissemination of information and literature in the streets by a religious group. These holdings contrast with *Breard* and *Chrestensen* where the Court upheld similar ordinances when applied to commercial solicitation and advertising.

[23] *See, e.g.*, Polack v. Public Util. Comm'n, 191 F.2d 450, 457 (D.C. Cir. 1951), *rev'd on other grounds*, 343 U.S. 451 (1953); Halsted v. SEC, 182 F.2d 660, 668-69 (D.C. Cir. 1950); United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 93 A.2d 362, 366 (1952); Slater v. Salt Lake City, 115 Utah 476, 206 P.2d 153, 158 (1949). Other courts have attempted a more analytical approach by inquiring into the speaker's purpose. *E.g.*, People v. Uffindell, 90 Cal.2d 881, 202 P.2d 874 (App. Dept. Super. Ct. 1949) (plaintiff was engaged in commercial activity for profit and therefore the ordinance regulating handbills was held constitutional); People *ex rel* Greenberg v. Healy, 74 N.Y.S. 2d 102 (Mag. Ct. 1947) (statute regulating handbills was unconstitutional when applied to a labor union because its activity was not for a commercial purpose); Kenyon v. City of Chicopee, 320 Mass. 448, 70 N.E.2d 241 (1946) (an activity with a religious purpose cannot be regulated as commercial activity); Commonwealth v. Akmakjian, 316 Mass. 97, 55 N.E.2d 6 (1944) (statute could regulate activities of salesmen but not activities of a registered minister carrying out a religious duty); State v. Van Daalan, 69 S.D. 466, 11 N.W.2d 523 (1943) (if an activity is carried out with a religious purpose, it cannot be regulated as a commercial activity; the fact that religious literature is sold does not render it commercial). This approach is not entirely satisfactory. When a religious group distributes literature for a donation they are engaging in both religious and commercial solicitation. Religious proselytization is a protected activity but commercial solicitation is not protected. *See* text accompanying note 22 *supra*. Moreover, an inquiry into the speaker's purpose begs the question of the definition of commercial speech. For instance, a passerby stopped by a religious zealot

York Times v. Sullivan.[24] There the Court held that an advertisement in the newspaper which "communicated information, expressed opinion, recited grievances, protested claimed abuses and sought financial support" for a movement of the highest public importance was entitled to first amendment protection.[25] This was the first attempt by the Supreme Court to define the boundaries of the commercial speech doctrine.[26] Th Court's test created difficulties in the subse-

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and solicited for a donation may view the activity as "purely commercial" but the zealot may believe that he is furthering his religious belief. A court would have a difficult task in separating the believers and the capitalists from among the "zealots". Jehovah's Witnesses regard the public distribution of literature as the work of God. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943). Passersby who are solicited do not always regard it as such. Cantwell v. Connecticut, 310 U.S. 296, 309 (1940). In some cases the behavior of the zealot is so overreaching that his conduct will be subject to censure notwithstanding its religious context. Chaplinksy v. New Hampshire, 315 U.S. 568 (1942).

[24] 376 U.S. 254 (1964). The Court recognized that advertising can convey noncommercial information making an analysis of the content of the advertisement necessary in commercial speech cases. *Id.* at 266. The Committee to Defend Martin Luther King published a full page advertisement in the New York Times reciting certain incidents, criticizing unnamed public officials in the South, and soliciting contributions for the civil rights movement. *Id.* at 257. Some of the statements were factually inaccurate. For example, the advertisement claimed that certain students were expelled from school for singing the national anthem on the steps of the state capitol when, in reality, they sang "My Country 'Tis of Thee." *Id.* at 258-59. Also, the advertisement claimed that Dr. King had been arrested seven times when the number of arrests was actually four. *Id.* It would be a mistake, however, to conclude that the falsity of the statements was harmless. The common law of defamation measures the defense of truth against very strict standards. Even though the inaccuracies seem minor they could constitute libel. Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment,* 1964 SUP. CT. REV. 191. [Hereinafter cited as Kalven].

Sullivan, the Commissioner of Public Affairs of Montgomery, Alabama, brought a libel action against the four Alabama clergymen who signed the advertisement and the New York Times. 376 U.S. at 256. The Times contended that the advertisement was protected from libel suits by the First Amendment. Sullivan, however, argued that the advertisement was commercial and thus beyond the scope of the first amendment's protection. The Court rejected Sullivan's argument saying that the advertisement in question was not commercial in the same sense that the word was used in *Chrestensen. Id.* at 266.

[25] 376 U.S. at 266.

[26] In addition to its importance to the commercial speech doctrine, *New York Times* is a major case in other areas of constitutional law. *New York Times* has been interpreted as ending the clear and present danger test and replacing the balancing test with an information analysis. *See* Kalven, *supra* note 24 at 213-14. In addition, *New York Times* restricted the speech that a state could punish as libel and made seditious libel impossible. *See* Brennan, *The Supreme Court and the Meickeljohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1, 15 (1965); See also Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877 (1963).

quent application of the doctrine. Logically, the information analysis used by the Court could be extended so that even advertisements as in *Chrestensen* would fall within the protection of the first amendment.[27] Thus, while attempting a clarification of the commercial speech doctrine, *New York Times* only served to weaken its fundamental principle.[28]

A subsequent erosion of the doctrine took place in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.*[29] In

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[27] *New York Times* suggests that advertisements that convey a social protest will receive first amendment protection. 376 U.S. at 266. Chrestensen's handbill contained a protest against the city docks commissioner. *See* text accompanying note 14 *supra.* Thus under a strict reading of *New York Times,* Chrestensen's handbill should have received first amendment protection. *New York Times,* however, may apply only to advertisements that convey information of the "highest public importance" and thus no different result would have been reached in *Chrestensen.* 376 U.S. at 266. A test of this kind places the courts in the difficult position of weighing the social significance of different types of information.

[28] The importance of the *New York Times* decision does not lie in its immediate effect on the commercial speech doctrine. The case did not define commercial speech and formulated a test so restrictive that its effect on the commercial speech doctrine was negligible. The Court recognized, however, that advertising can convey noncommercial information. *Id.* This recognition of the informative function of advertising places advertising within a theoretical framework in which first amendment issues may be raised and decided. *See, e.g.,* Business Executives Move for Viet Nam Peace v. FCC, 450 F.2d 642, 658 (D.C. Cir. 1971) (advertising not protected because it does not express ideas); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969). The *Banzhaf* court noted that

> Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. . . . [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 . . . a form of individual self-expression.

405 F.2d at 1101-02. *But see* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41 (1971) ("Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government"); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) ("guarantees for speech and press are not the preserve of political expression or comment upon public affairs"). *See* Note, *Freedom of Expression in a Commercial Context,* 78 HARV. L. REV. 1191, 1194 (1965); Note, *The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech,* 50 ORE. L. REV. 177, 188 (1972). *See generally* Thompson, *Advertising and the FTC: The Role of Information in a Free-Enterprise Economy,* 6 ANTITRUST L. & ECON. J. 73 (1973) [hereinafter cited as Thompson].

[29] 413 U.S. 376 (1973). In *Pittsburgh Press* the National Organization of Women (NOW) filed a complaint with the Pittsburgh Commission on Human Relations charging that the Pittsburgh Press Company violated a municipal ordinance by arranging help-wanted advertisements in Male and Female columns of the classified pages. The Human Relations Commission concluded that the Pittsburgh Press Company was in violation of the ordinance and issued a cease and desist order. *Id.* at 379. The order

Pittsburgh Press, the Court employed the *New York Times* analysis and concluded that the employment advertisement did not convey information concerning public issues.[30] In addition, the Court stated that because the advertisements also furthered illegal activity they would not be entitled to first amendment protection.[31] Speech promoting an illegal enterprise had long been considered unprotected by the first amendment.[32] The Court's discussion implied that commercial speech may be entitled to first amendment protection when it furthers legal activities.[33]

Both *Pittsburgh Press* and *New York Times* attempted clarifications of the commercial speech doctrine, but neither succeeded. Instead, these two cases weakened the once firm principle and intensified the mounting criticism of the doctrine.[34] This criticism appeared

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was affirmed by the Court of Common Pleas. *Id.* at 380. The Commonwealth Court on appeal narrowed the order somewhat but barred "all reference to sex in employment advertising column headings." *Id.* The Pennsylvania Supreme Court denied review and the United States Supreme Court granted certiorari. *Id.* at 381.

[30] Id. at 385. The *Pittsburgh Press* Court emphasized the dissimilarity between the advertisements in *Pittsburgh Press* and the appellant's advertisement in *New York Times.* The Court ruled that none of the advertisements stated an opinion as to whether certain positions should be filled by members of one sex or the other. Rather, they merely offered employment. Thus, the advertisements were "classic examples" of commercial speech. *Id.* at 385.

[31] *Id.* at 389. The Court posited the legal/illegal distinction in response to an argument by the petitioner that commercial speech should be accorded a higher level of protection than it received previously. The court responded by saying that advertisements for other illegal activities, notably prostitution and the sale of narcotics, could be regulated constitutionally. 413 U.S. at 388. Although, the illegal activity furthered in the *Pittsburgh Press* advertisement is less overt, it is nonetheless illegal and should not receive greater protection than advertisements for other illegal services. *Id.* at 388-89.

[32] *See, e.g.,* Holiday Magic Inc. v. Warren, 357 F. Supp. 20, 26 (E.D. Wis. 1973), where the district judge noted: "Just as solicitation of murder is regulable, though only speech is involved, so is the promotion of an unlawful commercial activity. In both cases the speech is inseparably related to the particular unlawful activity and not remotely related to the . . . purposes of the First Amendment."

[33] *See* Note, *Commercial Speech — An End in Sight for* Chrestensen? 23 DEPAUL L. REV. 1258 (1974). In *Pittsburgh Press* the Court stated

> Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid restriction on economic activity.

413 U.S. at 389.

[34] The criticism of the commercial speech doctrine came primarily from two Supreme Court Justices. Justice Douglas, who was on the Court when *Chrestensen* was decided and who voted with the majority at that time, reversed his position and

to reach its peak in *Bigelow v. Virginia.*[35] In *Bigelow* the Supreme Court overturned the conviction under Virginia law of a newspaper editor who published an advertisement for an abortion service in New York. The Court characterized *Chrestensen* as a "distinctly limited holding" that regulated only the manner of commercial advertising.[36] The *Bigelow* Court concluded that the first amendment protected the advertisement because it "conveyed information of potential interest to a diverse audience" about an activity that was legal in another state.[37] The Court combined the "public issue" rationale of *New York Times* with the legality distinction of *Pittsburgh Press* to create a new test for the application of the commercial speech doctrine.[38] Moreover, the *Bigelow* Court effectively overruled *Chrestensen* by narrowly restricting its holding to the manner of distributing handbills.[39]

Following *Bigelow,* there was a split of opinion as to whether that case marked the end of the commercial speech doctrine.[40] The "public

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subsequently criticized that holding. Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898 (1971) (Douglas, J., dissenting from the denial of certiorari); Cammarano v. United States, 358 U.S. 498 (1959) (Douglas, J., concurring). Justice Brennan had also expressed doubt as to the validity of the commercial speech doctrine. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (Brennan, J., dissenting). *See also* United States v. Pellegrino, 467 F.2d 41 (9th Cir. 1972).

[35] 421 U.S. 809 (1975). Bigelow, the managing editor of a weekly mewspaper, published the advertisement of a New York organization announcing that abortion was legal and available in New York state. The organization offered its services, for a fee, in arranging abortions in New York hospitals. *Id.,* at 812. Bigelow was convicted of violating a Virginia statute that made it a misdemeanor to encourage or prompt the processing of an abortion. The Supreme Court of Virginia affirmed Bigelow's conviction. Bigelow v. Commonwealth, 213 Va. 191, 191 S.E.2d 173 (1972). Bigelow appealed this decision to the Supreme Court. During the time his appeal was pending, the Court decided Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973). These two cases held that at certain stages of pregnancy a state may not unduly restrict a woman's right to an abortion. 410 U.S. at 164. Accordingly, the Court vacated Bigelow's conviction and remanded the case for further consideration in view of *Roe* and*Doe.* 413 U.S. 909 (1973). The Virginia Supreme Court found nothing in those two decisions to alter their holding and affirmed Bigelow's conviction. 214 Va. 341, 342, 200 S.E.2d 680, 680 (1973). *See* Note, *The First Amendment and Commercial Advertising: Bigelow v. Commonwealth,* 60 VA. L. REV. 154 (1974). The Supreme Court of the United States then noted probable jurisdiction to review the first amendment issue. 418 U.S. 909 (1974).

[36] 421 U.S. at 819. The *Bigelow* Court stated that merely because *Chrestensen* had the effect of banning a particular handbill, the case is not authority for the proposition that advertising is unprotected *per se. Id.*

[37] 421 U.S. at 822.

[38] *Id.*

[39] *Id.* at 819.

[40] *Compare* Note, *The First Amendment Status of Commercial Advertising,* 54 N.C. L. REV. 468 (1974) *and* Note, *Freedom of Speech Protection for Commercial*

issue" rationale of *New York Times* arguably remained valid because of the subject matter of the advertisement in *Bigelow*. The abortion issue, like the civil rights movement of the 1960's, was an issue of "the highest public importance."[41] If the Court meant to provide a first amendment test to apply to commercial speech, the opinion offered little guidance. The Court intimated that a balancing test would be an appropriate method to determine the first amendment value of commercial speech.[42] Rather than demonstrating the type of social interests that commercial speech furthers, the Court focused exclusively on the lack of any legitimate state interests in the regulation of commercial speech.[43] Thus, *Bigelow* offers little guidance for the application of its balancing test in situations that are not factually similar. In spite of its apparently far reaching effect, *Bigelow* failed to clarify many of the uncertainties that surrounded the commercial speech doctrine. Nevertheless, the Court did hold that advertising may be subject to reasonable regulation that serves a legitimate public interest.[44]

After *Bigelow*, some hope remained for the continuing validity of the commercial speech doctrine. Any such hope disappeared after *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council,*

Advertising, 42 TENN. L. REV. 573 (1975) *with* Comment, *Prohibition of Abortion Referral Advertising Held Unconstitutional*, 61 CORNELL L. REV. 640 (1976) *and* Note, *Freedom of the Press, The Commercial Speech Doctrine Applied to Abortion Advertisements*, 24 EMORY L. REV. 1168 (1975).

[41] *See* text accompanying notes 23-27 *supra*.

[42] The test employed by the *Bigelow* Court to determine the validity of the restriction balances the individual and social interest in the expression against the state's interest in the regulation. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); NAACP v. Alabama, 357 U.S. 449 (1958). The test represents the usual approach to first amendment problems. *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877 (1963). *But see*, Braden v. United States, 365 U.S. 431 (1961).

[43] The Court found that the advertisement did not affect the quality of medical care in the Commonwealth which was a legitimate concern. 421 U.S. at 827. The Court also expressed concern that a state could exert power over publications with a national circulation if the prosecution by Virginia was allowed. *Id.* at 829.

[44] 421 U.S. at 826. *Bigelow* was also criticized as a retreat from the standards of *New York Times* and *Pittsburgh Press*. Comment, *Prohibition of Abortion Referral Advertising Held Unconstitutional*, 61 CORNELL L. REV. 640 (1976). *New York Times* and *Pittsburgh Press* would allow state regulation only to further a compelling state interest. 421 U.S. at 826. Conceivably, *Bigelow* would lower the standard that state regulation of speech would have to meet. The reference apparently was to the type of regulation rather than to the type of interest. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (local ordinance that barred all political advertising on public transportation vehicles upheld).

Inc. The plaintiffs[45] contended that a portion of a Virginia statute[46] that prohibited pharmacists from advertising violated their first amendment right to receive information.[48] The defendant responded

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[45] 96 S. Ct. 1817 (1976).

[46] *Id.* at 1821. The plaintiffs were a daily user of prescription drugs, the AFL-CIO, and the Virginia Citizens Consumers Council, Inc. *Id.*

[47] VA. CODE ANN. § 54-524.35. (1974 Repl. Vol.) The statute provides that:

> Any pharmacist shall be considered guilty of unprofessional conduct who . . . (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

This was not the first attack on the statute. In Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969), a drug retailing company and one of its pharmacists challenged the statute. The district court upheld the statute as a reasonable exercise of the state's police power in an area that affects the public health, safety, and welfare. *Id.* at 824-25. This decision was not appealed. In *Virginia Pharmacy,* the district court distinguished *Kingery* by saying that "[the plaintiffs here] are consumers; their concern is fundamentally deeper than a trade consideration." Thus their right to receive drug price information removed any commercial speech restrictions. Virginia Citizens Consumers Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683, 686 (E.D. Va. 1973).

[48] The right to receive information can be traced to Martin v. City of Struthers, 319 U.S. 141 (1943). There the Supreme Court overturned a local ordinance that banned all door-to-door solicitation as violative of the first amendment. *See* text accompanying note 21 *supra.* The Court stated that "freedom of speech necessarily protects the right to receive [speech]." 319 U.S. at 143. The right to receive information was further developed in subsequent cases. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptive information); Marsh v. Alabama, 326 U.S. 501 (1946) (religious information); Thomas v. Collins, 323 U.S. 516 (1945) (labor union organizing). In recent years, the Supreme Court has held that the criminalization of mere possession of obscene materials was unconstitutional because the right to receive information protected the materials, Stanley v. Georgia, 394 U.S. 557 (1969); that the right to receive information is essential to the fairness doctrine as applied to the broadcast media, Red Lion Broadcasting Corp. v. FCC, 395 U.S. 367 (1969); and that the right to receive information guarantees the right to receive Communist propaganda through the mails, Lamont v. Postmaster General, 381 U.S. 301 (1965). In contrast to Lamont, however, the Supreme Court held in Kleindienst v. Mandel, 408 U.S. 753 (1972), that the Attorney General could exclude a foreign Marxist without violating any first amendment right to receive information. The court noted that to allow the alleged first amendment interests to predominate would nullify the sovereign power to exclude aliens. *Id.* at 768. Thus, after *Mandel,* the strength of the right to receive information was in doubt. The *Mandel* decision apparently represented the Court's deference to the power of the executive to exclude aliens rather than any dilution of the right to

by saying that prescription advertising was commercial speech and thus freely regulable. The Supreme Court found that, because commercial speech resembled other forms of protected speech, there was no justification for denying it first amendment protection, and accordingly held the statute unconstitutional.[49]

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receive information. Presumably, once Mandel was in the country, the plaintiffs could not be prevented from hearing him. Note, *The Right to Receive and The Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975).

The right to receive information otherwise may be limited. In Zemel v. Rusk, 381 U.S. 1 (1965), the Court upheld the State Department's denial of a visa to visit Cuba in spite of the plaintiff's assertion that the denial violated his right to receive information. The Court noted that such an argument would not automatically dispose of a case because almost any legitimate regulation may be attacked as decreasing the flow of information. 381 U.S. at 8. *See also* Note, *State Statute Prohibiting Pharmacists From Publishing Prescription Drug Prices Violates Consumer's Right to Know*, 23 KANSAS L. REV. 289 (1975); Comment, *The First Amendment and the Public Right to Information*, 35 U. PITT. L. REV. 93 (1973).

The right was clarified most recently in Procunier v. Martinez, 416 U.S. 396 (1974), where a rule relating to the censorship of prisoner mail was held to be violative of the first amendment. The Court relied on the right of non-inmates to receive the prisoner's mail to overturn the rule:

> [c]ommunication by letter is not accomplished by the act of writing words on paper. Rather it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily infringes on the interests of each.

416 U.S. at 408.

The Supreme Court in *Virginia Pharmacy* acknowledged the right to receive information but did not rest its decision on the theory. The Court stated that, where a speaker exists, first amendment protection is afforded "to the communication, to its source and its recipients both." 96 S. Ct. at 1823. The parties stipulated that absent the statute in question some pharmacists would advertise. Thus, a speaker (advertiser) exists and the Court concluded that "if there is a right to advertise, there is a reciprocal right to receive that advertising. *Id.* This formulation made an inquiry into the commercial speech doctrine necessary. The district court apparently would require the interests of the recipients of the advertising to be balanced against the commercial nature of the advertisements. The Supreme Court rejected this approach. If the right to receive information would substantiate a first amendment challenge, even though the particular expression itself has no first amendment protection, then the rights of the listeners would rise above the rights of the speaker. This would conflict with *Procunier* where the Court extended first amendment protection to the combined interests of the listener and the speaker in the communication rather than to the rights of any individual party to the communication.

[49] 96 S. Ct. at 1830. The *Virginia Pharmacy* Court criticized any mechanistic application of the commercial speech doctrine. The Court noted that "some fragment of hope for the continuing validity of [the commercial speech doctrine] might have persisted" after the *Bigelow* decision. *Id.* at 1825. *Virginia Pharmacy,* however, placed the question of the doctrine's continuing validity squarely before the Court. The Court stated that pharmacists who desire to advertise, do not wish to speak on any social or

The Court arrived at its conclusion by balancing the comparative interests of advertisers, consumers, and society in the advertisements against the interest of the state in the regulation.[50] The Court found the pharmacist's interest in the advertisements to be economic. Economic interests, however, have not disqualified the speech of labor disputants from first amendment protection.[51] Thus, the Court found no valid basis to distinguish commercial speech from other protected speech solely because the speech was economic in nature.[52]

The Court then shifted its focus to the interests of consumers in prescription advertising and found that consumers with fixed or small incomes have a strong interest in the free flow of price information since it would allow them to patronize pharmacies with the lowest prices.[53] When the Court examined society's interest in the advertisment, it found the essential link between commercial speech and other forms of protected speech; both types of speech convey information.[54] Theoretically, speech is accorded first amendment protection when it conveys information necessary to the exercise of our duties as citizens, allowing a reasoned and intelligent decision on public issues.[55] Commercial speech performs this same decision-making

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political topic. Rather, the communication is simply "I will sell you the X prescription drug at the Y price." *Id.* Thus, the question before the Court was whether commercial speech was wholly outside the first amendment. The Court noted that speech does not lose its first amendment protection because of its commercial form. Buckley v. Valeo, 96 S. Ct. 612 (1976); NAACP v. Button, 371 U.S. 415 (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940). *See* cases cited in note 26 *supra.* Thus, any distinction between commercial and otherwise protected speech must be based on its content. 96 S. Ct. at 1825.

[50] *Id.*

[51] The first amendment protects the speech of parties to a labor dispute even though this speech is directed toward an economic end. *See, e.g.,* Thomas v. Collins, 323 U.S. 516 (1945); Thornhill v. Alabama, 310 U.S. 88 (1938). Commercial speech is directed toward an economic end; the sale of the advertiser's product at a profit. The Court found no satisfactory distinction between the forms of speech so as to afford the former protection and deny protection to the latter. 96 S. Ct. at 1826.

[52] 96 S. Ct. at 1826.

[53] *Id.* The Court noted the forced choice that many consumers, particularly the aged, had to make in purchasing prescription drugs because of a lack of advertising information. *Id.* at 1826-27 n. 18. The aged spend more than twice the amount per capita for prescription drugs than all other age groups. Almost 17% suffer from some form of chronic condition. Thus the aged have a recurring need for prescription drugs but generally do not have the resources to conduct the extensive investigation into drug prices that a lack of price information makes imperative. *Id.*

[54] 96 S. Ct. at 1827.

[55] Meickeljohn, *The First Amendment is an Absolute,* 1961 SUP. CT. REV. 245. Professor Meickeljohn believed that the Constitution created a unique form of self-government by the people of the United States. He viewed the first amendment as a

function. In a free-market economy, commercial information is necessary so that consumers may make intelligent choices in the marketplace.[56] Without an adequate supply of price and product information, consumers are forced to make blind choices. Thus, like speech concerning general political or social topics, commercial speech must be protected to preserve a system of free and independent choice.[57]

Protected speech may be restricted, however, if the interests of the state in the regulation outweigh the first amendment interests in the expression.[58] In this regard, the state in *Virginia Pharmacy* contended that the professional standards of pharmacists would be lowered if advertising were allowed.[59] The Supreme Court observed that professional standards may be maintained in ways other than the prohibition of advertising.[60] Any prohibition on advertising would only further insulate the already substandard pharmacist from price competition. The board also contended that the pharmacist who renders

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device to ensure that voting, the means of self-government, would be an informed process. *Id.* at 254. The first amendment would protect speech which tends to inform and enlighten citizens in voting. *Id. See also* A. MEICKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[56] 96 S. Ct. at 1827. *See generally* Thompson, *supra* note 28 at 73.

[57] 96 S. Ct. at 1827. *See* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 435 (1971); *See also* Thompson, *supra* note 28 at 77.

[58] *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (Congress' interest in maintaining military force outweighs citizen's interest in symbolic protest); Kovacs v. Cooper, 336 U.S. 77 (1949) (interest of State in protecting homeowner's right to privacy outweighs interest of speaker using sound truck in residential area to broadcast ideas).

[59] 96 S. Ct. at 1828. The pharmacy board specifically contended that if price advertising were allowed, pharmacists would buy "in bulk" in order to maintain a large inventory. If the drugs were left on the shelf too long, the drugs would lose their potency. Consumers may then be forced to buy drugs which may not be effective. Additionally, the board contended that, since consumers will now "shop around" for the pharmacists with the lowest prices, any continuing relationship with one pharmacist will be destroyed. Accordingly, a pharmacist would be unable to monitor his customer's prescriptions. *Id. See* Supermarkets Gen. Corp. v. Sills, 93 N.J. Super. 326, 225 A.2d 728 (1966); *contra* Pennsylvania Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971). The pharmacy board's arguments in *Virginia Pharmacy* have been argued unsuccessfully in several state courts. *See* Maryland Bd. of Pharmacy v. Sav-O-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973); Pennsylvania 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); all holding the regulation bore no relation to the legitimate state end of protecting the public health. *Contra*, Urowsky v. Board of Regents, 46 A.2d 974, 312 N.Y.S.2d 46 (1974); Supermarkets Gen. Corp. v. Sills, 93 N.J. Super 326, 225 A.2d 728 (1966). *See also* Comment, *Regulation of Prescription Drug Discount Advertising*, 24 WASH. & LEE L. REV. 299 (1967).

[60] 96 S. Ct. at 1829. The Court noted that "any pharmacist guilty of professional dereliction that actually endangers his customers will promptly lose his license." *Id.*

more professional, and hence more expensive, services will be forced out of business by consumers seeking the lowest prices.[61] The Court noted, however, that it is just as possible that consumers, rather than sacrificing service for price, will perceive their own interests and continue to patronize the more professional pharmacist.[62] The *Virginia Pharmacy* Court found that the interests of the board and the state did not outweigh the first amendment interests in the expression, and consequently that, prescription drug advertising is entitled to full first amendment protection.[63] *Virginia Pharmacy* expressly recognized that advertising conveys important information even when the advertisement is not concerned with pertinent social topics.[64] This repudiates the "public issue" rationale that *New York Times* and *Bigelow* arguably established.[65] Moreover, *Virginia Pharmacy* goes beyond *Bigelow* by providing a framework within which the interests of the parties must be weighed.

After *Virginia Pharmacy,* courts must balance the interests of the advertiser, the consumer, and society in the advertisement against the interest of the state in the regulation.[66] If the combined interests

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[61] *Id.* 1828-29.

[62] *Id.* at 1829.

[63] *Id.* at 1830. *See also* Christopher, *Free Speech and the Regulation of Labeling and Advertising,* 30 FOOD, DRUG, COS. L. J. 512 (1975).

[64] 96 S. Ct. at 1827. Although *Virginia Pharmacy* accorded first amendment protection to commercial speech, the decision does not prohibit regulation of commercial speech. *See, e.g.,* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969) (upholding FCC ruling requiring radio and television stations that carry cigarette advertising to carry antismoking messages as well); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (state may proscribe the broadcast of defamatory falsehoods that injure a private individual). An analogy to speech in a labor context is helpful. The Court has long recognized the first amendment interests of the parties to a labor dispute. *See, e.g.,* Thomas v. Collins, 323 U.S. 516 (1945). But speech in a labor context may be regulated in ways which would be violative of the first amendment in other contexts. NLRB v. Gissel Packing Co., 395 U.S. 574, 616-20 (1969). Presumably, commercial speech will be subject to the same treatment. 96 S. Ct. at 1830 n. 24.

[65] 96 S. Ct. at 1827. *See* text accompanying note 54 *supra.*

[66] *Virginia Pharmacy* represents an expansion of the Meickeljohn approach to the first amendment. *See* text accompanying note 55 *supra.* Meickeljohn would exclude commercial speech from the protection of the first amendment because it is essentially private and does not deal with matters of public importance. A. MEICKELJOHN, POLITICAL FREEDOM 67 (1965). The matters with which commercial speech deals are no less important to the body politic than matters of public importance, however, The Constitution reserves a large amount of power in the hands of the people and restrains the government from unduly interfering in individual affairs. The people are thus engaged in private self-government as well as public self-government. In their private economic affairs, the people must make decisions which involve reflection, the weighing of alternatives, and rational choice. The communications that help to inform this process

of the former outweigh the interests of the state, the speech must be afforded first amendment protection. The result is that the confusion concerning the extent of first amendment protection for commercial speech which existed after *Pittsburgh Press* and *Bigelow* is dispelled. The first amendment now protects essentially all commercial speech, but this does not mean that any restriction of commercial speech will violate the first amendment. Commercial speech, like other forms of protected speech, can be regulated by the state if the regulations are justified without reference to the context of the speech, if they further a significant governmental interest, and if they do not restrict alternative means of communication.[67] Moreover, false, illegal, or deceptive advertising may be prohibited.[68] Essentially, commercial speech now enters the mainstream of first amendment speech and any regulation of it must meet standard first amendment tests.[69]

The end of the commercial speech doctrine in *Virginia Pharmacy* is especially significant to the legal profession. The decision outlines a framework for a first amendment attack on the advertising restrictions on lawyers and other professionals.[70] Many of the reasons ad-

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should be protected just as the communications that inform the public governmental process are protected. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,* 39 GEO. WASH. L. REV. 429, 435 (1971).

[67] 96 S. Ct. at 1830. *See, e.g.,* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[68] *Id.* at 1930-31. *Compare* United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (7th Cir. 1973) with FTC v. National Commission on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975). *See generally Developments in the Law—Deceptive Advertising,* 80 HARV. L. REV. 1005 (1967). Mr. Justice Stewart, in a concurring opinion to *Virginia Pharmacy,* contended that the decision called into question the legitimacy of laws regulating false and deceptive advertising. He reasoned that the distinction between the empirical basis of advertising claims and the non-empirical basis of non-advertising speech resolved this issue. The truth or falsity of an advertising claim may be empirically validated. 96 S. Ct. at 1833 (Stewart, J., concurring). In contrast, non-commercial speech often may not be empirically validated. The Court has traditionally allowed "breathing space" for such speech so as not to hamper free expression. *Id.* There is no need to allow such space for commercial speech since the speaker possesses the information needed to validate the advertising claim. There would be no stifling effect if advertising claims were expected to be factually true. Accordingly, Justice Stewart contended that *Virginia Pharmacy* would not affect state and federal laws regulating the truthfulness of advertising claims. *Id.* at 1835 (Stewart, J., concurring).

[69] 96 S.Ct. at 1830. *See* cases cited in notes 42 & 58 *supra.*

[70] *See* text accompanying notes 51-68 *supra.* A recent district court decision relied on *Virginia Pharmacy* to strike down a Virginia statute that prohibited advertising by physicians. Health Systems of Virginia v. Virginia Bd. of Medicine, No. 76-37-A (E.D. Va. 1976). The court held that the interests of the state in a total ban on physician advertising did not outweigh the interests of consumers in the information. *Id.* slip op. at 17. In addition, several cases have been filed attacking the advertising ban on

vanced by the pharmacy board in defense of their advertising prohibition have been used to defend the legal advertising ban.[71] The legal profession will find it difficult to justify its prohibition on advertising with the same basic arguments that the Court found unpersuasive in *Virginia Pharmacy*. Furthermore, there are strong economic and social arguments indicating that advertising legal services is beneficial to the public and to the profession.[72] The different functions of phar-

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lawyers. See Niles v. Lowe, 407 F. Supp. 132 (D. Hawaii 1976) Bomstein v. Disciplinary Bd., No. 76-464 (E.D. Pa. 1976); Marine v. State Bar of Wisconsin, No. 76-C-373 (E.D. Wis. 1976); Hirshkop v. Virginia State Bar, No. 76-692-A (E.D. Va. 1975); Consumers Union, Inc. v. American Bar Ass'n, No. 75-0105-R (E.D. Va., filed Feb. 27, 1975); Consumers Union, Inc. v. State Bar of California, No. C-75-2385 S.C. (N.D. Cal. filed Nov. 13, 1975); Pearson v. Bar of New York, No. 75-C-987 (E.D. N.Y., filed June 23, 1975). The efficacy of a first amendment challenge to professional advertising bans is underscored by a comparison of the *Virginia Pharmacy* decision to other Supreme Court decisions on similar issues. In North Dakota Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973), the Court upheld North Dakota's requirement that an applicant for a license to operate a pharmacy be a licensed pharmacist. The Court deferred to the state's power to regulate professionals in the interest of public health. In Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955), the Court upheld an Oklahoma statute making it unlawful for any person not a licensed optometrist or ophthamologist to fit lenses without prescription. The Court stated that the law may not be proper in all respects "but it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." 348 U.S. at 487. The Court concluded that all that was necessary for the law to be constitutional was that there be an "evil that needed correction and that the particular measure be a rational way to remedy that evil." 348 U.S. at 488. In both *Snyder* and *Williamson*, the Court sought only a rational basis for the regulation to uphold its constitutionality.

In *Virginia Pharmacy* the Court distinguished *Williamson* by saying that because the instant challenge rested on first amendment grounds the justifications advanced by the pharmacy board must be viewed in a different light. 96 S. Ct. at 1829. Presumably, this means that more than a rational basis for the regulation must be advanced. Rather, a compelling state interest must be shown to uphold the regulation. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 615 (1969). Thus, a state must show a stronger interest in the regulation when it is challenged on first amendment grounds. 96 S. Ct. at 1829. *See* J. BARRON & C.T. DIENES CONSTITUTIONAL LAW: PRINCIPLES AND POLICY (1st ed. 1975).

See Head v. New Mexico Bd., 374 U.S. 424 (1963) (Court refused to consider first amendment issue not raised in state court on appeal); Semler v. Dental Examiners, 294 U.S. 608 (1935) (Court upheld ban on dental advertisements as a reasonable exercise of state's police power.) *See also* Freedman, *Advertising and Solicitation by Lawyers: A Proposed Redraft of Canon 2 of the Code of Professional Responsibility*, 4 HOFSTRA L. REV. 183 (1976). The specific restriction on legal advertising is found in ABA CODE OF PROFESSIONAL RESPONSIBILITY *DR* 2-101.

[71] *See generally* H. DRINKER, LEGAL ETHICS 210-20 (1953).

[72] The right to obtain meaningful access to the courts is a fundamental right within the protection of the first amendment. United Transp. Union v. State Bar of Michigan, 401 U.S. 576 (1971); UMW v. Illinois State Bar, 389 U.S. 217 (1967);

macists and lawyers, however, may refute any argument based on *Virginia Pharmacy*.[73]

The mere invocation of that distinction will not dispose of the case. The state cannot restrict legitimate first amendment interests under the guise of professional regulation.[74] The state must show that its interest in the regulatlon outweighs the first amendment interests involved.[75] This balance between legitimate professional regulation and undue first amendment restrictions must be struck with care.[76] In any event, the *Virginia Pharmacy* decision at least showed that the legal profession cannot rely on a commercial speech argument to justify its advertising ban.[77]

NAACP v. Button, 371 U.S. 415 (1963). Furthermore, the ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON 2 (1971) places an affirmative duty on lawyers to help provide access to the judicial system. Advertising is the best means available to communicate the information necessary to enable Americans to recognize their need for legal services and seek competent counsel. M. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM, 118 (1975); Wilson, *Madison Avenue, Meet the Bar*, 61 ABA J. 586, 588 (1975); Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1185 (1972).

Economic price theory dictates that the prices of legal services should decline due to the increased competition among lawyers if advertising is allowed. Note, *Bar Restrictions on the Dissemination of Information About Legal Services*, 22 UCLA L. REV. 483 (1974). *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW (1973). Many people unaccustomed to using a lawyer's services are apprehensive of lawyers because of what they perceive to be the high cost of legal services. Respondents to a recent survey overestimated the price of a lawyer's services by 91% in drawing up a will; by 123% for thirty minutes of consultation; and by an astonishing 340% for reading and giving advice on a two page sales contract. Curran & Spalding, *The Legal Needs of the Public*, AMERICAN BAR FOUNDATION STUDY (1974), *quoted in* Cochran, *Legal Advertising, Don't Panic But the Hour is At Hand*, 3 BARRISTER 6 (1976).

[73] In *Virginia Pharmacy* the parties stipulated that approximately 95% of all prescriptions are filled according to dosage forms provided by the manufacturing supplier. 96 S. Ct. at 1821. This contrasts sharply with the highly discretionary work of a lawyer where each case is different and must be handled in a different way than previous cases. Chief Justice Burger noted this distinction in his concurring opinion. 96 S. Ct. at 1831 n.25. (Burger, C.J., concurring).

[74] NAACP v. Button, 371 U.S. 415 (1963).

[75] *See* text accompanying note 43 *supra*.

[76] Hobbs, *Lawyer Advertising: A Good Beginning But Not Enough*, 62 ABA J. 735 (1976). *See* notes 72 & 73 *supra*.

[77] A first amendment attack on the advertising ban may not be necessary. The justice department recently filed a complaint charging that the advertising prohibition is an anti-trust violation. United States v. American Bar Ass'n, No. 76-1182 (D.D.C. 1976). Although a minimum fee schedule for title examinations was found to be price fixing in violation of § 1 of the Sherman Act, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the same considerations which led the *Goldfarb* Court to find an antitrust violation are not present in state advertising bans. In *Goldfarb*, the fact that substan-

Although lawyers and other professionals must await the ultimate effect of *Virginia Pharmacy*,[78] the effect on the commercial speech doctrine is clear. After a confusing and unpopular history, the commercial speech doctrine is dead. Advertising is now recognized as a conveyor of information and is entitled to first amendment protection. Thus, the "marketplace of ideas", long protected by the first amendment, now includes the commercial marketplace as well.

JOHN M. DIPIPPA

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tial money to finance real estate transactions came from another state convinced the Court that the fee schedule effected interestate commerce. *Id.* at 783. This flow of money is not so apparent in the case of legal advertising. Moreover, the minimum fee schedule in *Goldfarb* obviously restrained competition by producing a floor below which no other prices for a title examination could drop. Notwithstanding the above difficulties, state restrictions on lawyers' advertising may be exempt from antitrust attacks as state action. *See* Parker v. Brown, 317 U.S. 341 (1943). Although the advertising ban restricts the public's knowledge of the prices of legal assistance, it does not follow that this restriction serves to hinder price competition. A lawyer may charge less than his colleagues; he merely cannot advertise that fact. Although an antitrust approach was successful in *Goldfarb*, an antitrust attack on the advertising ban may not be similarly successful.

[78] The legal profession may not have to wait very long to see whether their advertising ban will withstand both an antitrust and first amendment attack. A recent Arizona decision which upheld that state's ban on lawyer advertising will be reviewed by the Supreme Court on both the first amendment and antitrust issues. Bates v. Arizona State Bar, No. SB-96 (Sup. Ct., July 26, 1976), *cert. granted*, 45 U.S. L. W. 3219 (1976).