Tulsa Law Review

Volume 12 | Issue 4

1977

The Commercial Speech Doctrine and the First Amendment

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NOTES & COMMENTS

THE COMMERCIAL SPEECH DOCTRINE AND THE FIRST AMENDMENT

INTRODUCTION

In three recent terms, the United States Supreme Court ruled on five cases presenting issues raised by the commercial speech doctrine. When the doctrine was first announced by the Court, the characterization of an expression as commercial speech deprived that expression of any first amendment protection. In more recent cases, however, first amendment protection has been extended to some commercial speech, but the doctrine has retained enough vitality to leave much commercial speech without constitutional protection. At the same time, these cases have left unanswered important questions concerning the permissible scope of state regulation in the commercial speech area.

Dissenting in *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*[1] Justice Rehnquist criticized the current trend of the Supreme Court in extending constitutional protection to commercial speech. Accusing the majority of abandoning its previous "bright line" distinction between commercial (unprotected) and noncommercial (protected) speech, Justice Rehnquist read the majority opinion as substituting an uncertain and wavering distinction between truthful speech and speech which is false or misleading. Accordingly, Justice Rehnquist concluded that the newer standard was far too arbitrary to accomodate the range of factors which should influence a decision on whether commercial advertising may be regulated.[2]

Thorough examination of the recent commercial speech decisions, however, indicates that the Court has not completely abandoned the

1. 425 U.S. 748 (1976).
2. *Id.* at 787.

distinction between commercial and noncommercial speech. Instead, the distinction appears to remain viable in the determination of whether a state's regulation of false or deceptive commercial advertising is valid. In other words, scrutiny of commercial speech for false content or a tendency to mislead seems to have become an additional factor in determining the extent to which constitutional protection should be given to a particular expression. As the case law in the commercial speech area demonstrates, however, the gradual shift in protection accorded commercial speech essentially belies the difficulty in many circumstances of distinguishing between commercial and noncommercial speech on the one hand, and between truthful advertising and advertising which is false or misleading on the other.

The commentary which follows will critically examine the Supreme Court's recent decisions in the commercial speech area, in an attempt to demonstrate that the commercial speech doctrine is still an integral part of first amendment theory. Furthermore, the discussion will show that advertisements of all types may still be subjected to substantial state regulation despite the existence of first amendment interests.

HISTORICAL BACKGROUND

Speech Unprotected Because of Commercial Content

Although the historical antecedents of the "commercial speech" exception to the first amendment have been collected and discussed by other writers,[3] a brief review of the principal decisions is essential in exploring the current bounds of this important constitutional doctrine.

The earliest distinction made by the United States Supreme Court between speech entitled to constitutional protection and unprotected commercial expression was in *Valentine v. Chrestensen*.[4] Mr. Chrestensen was an entrepreneur who had possession of a former U.S. Navy submarine which he desired to exhibit to the public, for an admission fee, from a New York City pier. Chrestensen intended to publicize his exhibition by passing out handbills advertising the attraction. This intent, however, conflicted with an ordinance prohibiting the circulation

3. *See, e.g.*, Note, *The Constitutional Status of Free Expression*, 3 HASTINGS CONST. L. Q. 761 (1976).

4. 316 U.S. 52 (1942).

of advertising material in public streets.[5] Because of the difficulty Chrestensen encountered in obtaining Port Authority permission to conduct the exhibit, he caused a political protest of the treatment he received from the police and Port Authority to be printed on the back of his advertising handbill. The political content of the document did not, however, prevent Chrestensen's arrest for violation of the ordinance.

An injunction against the enforcement of the law was obtained from the United States Court of Appeals for the Second Circuit,[6] but that decision was subsequently reversed by the United States Supreme Court.[7] The Court in *Chrestensen* found commercial speech completely undeserving of first amendment protection. Perhaps more importantly, it found that the accompanying ideological speech lost whatever constitutional protection it might otherwise have had because of the presence of the commercial content.[8]

As a result of *Chrestensen* and for a number of years thereafter, the term "commercial speech" was used as an incantation sufficient to strip any expression with commercial content of all constitutional protection. This is illustrated by the approach taken by the United States Supreme Court in *Breard v. Alexandria.*[9] The case arose from a challenge by a magazine salesperson to a local ordinance of the "Green River" type.[10] In addition to arguing that the law constituted a denial of due process and excessively burdened interstate commerce, Breard protested that the first amendment prohibited the application of the ordinance to prevent the door-to-door solicitation of magazine subscriptions. In addressing the free expression argument, the Court in *Breard* noted a "commercial feature"[11] which distinguished the case from earlier decisions in which door-to-door distribution of religious material had been found worthy of first amendment protection.[12] The

5. NEW YORK CITY, N.Y., SANITARY CODE, § 318 (1940).
6. Valentine v. Chrestensen, 122 F.2d 511 (2d Cir. 1941).
7. 316 U.S. at 53.
8. "It is enough for the present purpose that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent and for the purpose of evading the prohibition of the ordinance." *Id.* at 55.
9. 341 U.S. 622 (1951).
10. The general effect of such an ordinance, styled after GREEN RIVER, WYO., ORD. # 175, was to declare door-to-door solicitation by uninvited peddlers to be a nuisance, punishable as a misdemeanor. *See generally* Town of Green River v. Fuller Brush Co., 65 F.2d 1012 (10th Cir. 1933).
11. 341 U.S. at 642.
12. *See* Martin v. City of Struthers, 319 U.S. 141 (1943).

ordinance in *Breard* was directed solely at commercial solicitation, i.e. peddlers, and this feature apparently devitalized any first amendment protection otherwise extended to magazine distribution.

The *Chrestensen* and *Breard* cases together appear to support the proposition that the state may regulate, on merely rational grounds, expression with commercial content where the only constitutional protection sought is the right of the speaker to impart the message.[13] In subsequent cases,[14] however, the Supreme Court recognized two principles which have recently led to the extension of some first amendment protection to commercial speech. The first group of cases extended protection to commercial speech in spite of its commercial content. The second group, on the other hand, extended protection because of the commercial content.[15]

First Amendment Protection of Speech Despite Commercial Content[16]

In *New York Times Co. v. Sullivan,*[17] the Supreme Court held that a paid commercial advertisement soliciting contributors to a fund was protected by the first amendment even though a "commercial feature" was clearly present.[18] The issue was whether an individual libeled by false statements in a newspaper solicitation could recover damages from the publisher. The Court held that the defamed plaintiff could not recover absent proof that the paper knew the defamatory statements were false or had recklessly disregarded their lack of truth.[19]

To reach this conclusion, the Court found it necessary to distinguish *Chrestensen* on two grounds. First, the purpose of Chrestensen's ad was the commercial solicitation of business. In *New York Times* there was no business purpose. More importantly, there was a public

13. 341 U.S. at 649.

14. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Bigelow v. Virginia, 421 U.S. 809 (1975).

15. *See* Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc., 425 U.S. 748 (1976); Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977).

16. The development of the commercial speech doctrine as an exception to first amendment protection occurred while the Court was demarking two other first amendment exceptions, incitement in political speech and obscenity. However, although the Court has articulated standards for these excepted areas, *e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); Roth v. United States, 354 U.S. 476 (1957), it has yet to explicitly state any parameters for permissible regulation of commercial speech.

17. 376 U.S. 254 (1964).

18. The allegedly libelous expression was a paid advertisement soliciting contributions to the Committee to Defend Doctor Martin Luther King and The Struggle for Freedom in the South. *Id.* at 293.

19. *Id.* at 279-80.

interest in receiving the content of the advertisement in *New York Times*.[20] Despite these glib distinctions, however, it is difficult to overlook the fact that the handbills in *Chrestensen* also "communicated information, expressed opinion, recited grievances, and protested claimed abuses".[21] Thus, in the final analysis, *New York Times* may be construed as narrowing the commercial speech exception to cases where it is the sole intent of the speaker to solicit sales of a commercial product or service pursuant to a profit motive. This form of expression could be characterized as pure commercial speech.

Several recent decisions by the United States Supreme Court have made it clear that "even commercial speech" is entitled to some degree of first amendment protection. The earliest of these cases was *Bigelow v. Virginia*,[22] in which the Court struck down a Virginia statute prohibiting the advertisement of abortions by imposing criminal sanctions.[23] Bigelow was the editor of a newspaper which had published and ad soliciting the sale of legal abortion referral services by a profit-making New York agency.

In *Bigelow* the Supreme Court, for the first time, applied the first amendment to invalidate a state act prohibiting speech which, on its face, did no more than solicit the sale of services conducted solely for profit.[24] The holding was based on the public's need for knowledge upon which to base informed, constitutionally protected decision-making, *i.e.*, a mother's decision of whether or not to bear a child.[25] The existence of this interest caused the Court to treat the basic advertisement as more than a simple proposal for a commercial transaction, because the transaction itself had independent constitutional significance to the public.

First Amendment Protection of Speech Because of Commercial Content

Less than a year after *Bigelow*, the Supreme Court decided *Vir-*

20. *Id.* at 266.
21. *Id.* *See* discussion of Valentine v. Chrestensen *infra.*
22. 421 U.S. 809 (1975).
23. VA. CODE ANN. § 18.1-63 (1960) provides:
> If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner, encourages or promotes the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor.

24. *See* Note, 12 URBAN L. ANN. 221 (1976).
25. *See generally* Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

ginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc.,[26] a case which has been the subject of a constant stream of comment and criticism.[27] The *Virginia Board* decision involved a challenge to a Virginia statute declaring pharmacists guilty of "unprofessional conduct" if they advertised the retail prices at which pharmaceuticals would be sold.[28] The challenge was raised by an organization of consumers of retail prescription drugs and was primarily based on the asserted right of consumers to receive such retail price information.

The State of Virginia argued that the statute was a rational exercise of the police power in an area where important health and safety considerations were at stake.[29] The State maintained that a level of judicial scrutiny more demanding than mere rationality would be inappropriate, since the speech for which the consumers sought constitutional protection was devoid of political or ideological content. Furthermore, there was no relationship between this pure commercial speech and the exercise of any other constitutional interest, such as a mother's abortion decision. The State contended that, as pure commercial speech, such ads were completely unworthy of constitutional protection.[30]

Speaking for the Court in *Virginia Board*, Justice Blackmun found that the concept of "commercial speech" as a totally unprotected exception to the first amendment had "all but passed from the scene" in *Bigelow*.[31] He characterized the issue in the case as whether speech with no content other than a proposal for a purely commercial transaction, i.e. "I will sell you the X prescription drug at the Y price,"[32] was imbued with an inherent constitutional significance sufficient to justify some degree of first amendment protection.

In order to resolve this issue, Justice Blackmun identified the interests arrayed against the state's attempted prohibition of the advertisements. First, the advertiser in *Virginia Board* had a purely eco-

26. 425 U.S. 748 (1976).

27. *See, e.g.*, Note, 60 MARQUETTE L. R. 138 (1976); Note, 51 TULANE L. R. 149 (1976).

28. VA. CODE ANN. § 54-524.35 provides:

> Any pharmacist shall be considered guilty of unprofessional conduct who . . . (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.

29. 425 U.S. at 757.

30. *Id.* at 758.

31. *Id.* at 760.

32. *Id.* at 761.

nomic interest in delivering his message. However, the Court has protected purely economic interests in labor disputes, and it seems clear that the presence of such an interest would not prevent constitutional protection.[33] Second, the public has an interest in the free flow of information generally.[34] Finally, and perhaps most significantly, Justice Blackmun identified a constitutional right of consumers, as distinguished from the public, to receive, without unjustified state interference, information necessary for informed private economic decisionmaking.[35]

Of these three interests, it should be emphasized that the only operative consideration is the consumer's right to know, because it is the only interest which is a variable. Because of the Court's definition of commercial speech, which requires an element of commercial solicitation,[36] the speaker's purely economic interest in soliciting a commercial transaction will always be present. This interest, moreover, will remain constant where there is no associated political or ideological content. Furthermore, absent any countervailing interest, the general public interest in the free flow of information seems to be little more than an affirmation that a free market place of ideas is the *sine qua non* of a free society.[37] Therefore, based on the logic of *Virginia Board*, the result in any case involving state prohibitions on commercial speech may only be explained by reference to the significance of the particular consumer interest at stake. Under this analysis, neither the speaker's interest nor the general public interest favoring dissemination of the commercial speech would be independently sufficient to invalidate a commercial speech regulation.

33. *See, e.g.* National Labor Rel. Bd. v. Gissel Packing Co., 395 U.S. 575 (1969). The main interest of striking workers in a labor dispute is economic. Nonetheless, workers may rely upon the first amendment to protect their right to make wage demands.

34. 425 U.S. at 766.

35. *Id.* at 765.

36. *See* text accompanying notes 21-25 *supra*.

37. One of the best known statements stressing the importance of free speech as a general societal value is Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616, 630:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

This view of the general public value of free expression was also a basic component of the philosophy of John Stewart Mill. *See generally* G. HIMMELFARB, ON LIBERTY AND LIBERALISM, 23-56 (1974).

Having identified the constitutional interests opposing enforcement of the statute, Justice Blackmun identified the particular state interests supporting the advertising ban. These interests included a legitimate desire for a high degree of professionalism and expertise, and speculation that advertising might have an adverse effect on prices.[38] Although any one of these state interests would have been sufficient to justify regulation of an area not entitled to first amendment protection, the Court held they were insufficient when balanced against the consumer's need for the information contained in the ads.

Because the state was fully equipped to discipline any pharmacist whose conduct was detrimental to the quality of goods and services provided to the public, the Court in *Virginia Board* would not permit the state to minimize its burden of regulating the profession by keeping the public ignorant of pharmaceutical pricing practices. Thus, in what has been characterized by some as the death of the commercial speech doctrine,[39] the Supreme Court struck down Virginia's ban on prescription price advertisements.[40]

The *Virginia Board* decision concluded with dicta which reintroduced uncertainty into issues which had appeared settled earlier in the opinion. For example, although the opinion seems to state at one point that there no longer is a commercial speech exception to the first amendment,[41] a subsequent footnote appears to imply that some types of speech with commercial content may still fall outside first amendment protection.[42] To further complicate things, the Court in *Virginia Board* indicated that commercial speech may well be subject to substantially more stringent state regulation than speech with political or ideological content.[43]

In the final analysis, the decision in *Virginia Board* is precedent for only two propositions. First, the mere recital of the words "commercial speech" by a state no longer provides an independent basis

38. The Pharmacy Board claimed that "prices might not necessarily fall as a result of advertising. If one pharmacist advertises, others must, and the resulting expense will increase the cost of drugs." 425 U.S. at 768.

39. *See* text accompanying note 144 *infra*.

40. Justice Stevens did not participate in the Court's decision. The only dissent was by Justice Rehnquist, who felt that the Constitution did not require that "commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain . . . [be elevated] to the same plane previously reserved for the free market place of ideas. . . ." 425 U.S. at 781. *See* note 2 *supra* and accompanying text.

41. 425 U.S. at 762.

42. *See* text accompanying notes 67-90 *infra* for a discussion of some problems caused by this inconsistency.

43. 425 U.S. at 771 n.24.

for decision. It is clear that a court's analysis must focus on other factors. Second, because of the nature of our economy, some commercial speech is entitled to first amendment protection because it is necessary for informed consumer decisionmaking. The decision, however, left unresolved substantial questions concerning burdens of proof, presumptions of constitutionality, and the scope of the constitutional protection which has been extended to commercial speech.[44]

Instead of resolving these issues, the decision in *Bates v. State Bar of Arizona*[45] served only to reinforce the confusion still remaining in the commercial speech area. The defendants in *Bates* were young lawyers who, after working for their local legal aid service following graduation from law school, decided to open their own legal clinic. They conceived of a law office geared solely to providing basic legal services to persons who, though not wealthy, were too solvent to qualify for free legal aid. It was their intent to restrict the practice to legal matters which, though usually uncontested, nevertheless required legal drafting or representation, *e.g.*, uncontested divorces, simple wills, uncontested adoptions. By using standardized forms and a substantial staff of paralegals and clerical workers, they hoped to be able to handle a high volume of cases on a low margin, thus realizing a reasonable profit while providing their community with much needed low cost legal services.[46]

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44. During the October, 1976 term, the Supreme Court announced decisions in three commercial speech cases, all of which rely on *Virginia Board*. However, none of these cases provides much guidance in solving the problems left open by *Virginia Board*. The most recent of these cases was Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977).

Earlier in the term, in Linmark Associates, Inc. v. Township of Willingboro, 97 S. Ct. 1614 (1977), the Court held that the first amendment protection to which commercial speech is entitled prevented the local government from prohibiting the posting of "for sale" or "sold" signs in the yards of residences. Although the Township argued an important interest in support of the prohibition, *i.e.*, discouraging "white flight" so as to preserve a racially integrated community, the Court found the ordinance defective because it was enacted to prevent residents of the community from receiving information necessary to "one of the most important decisions they have a right to make: Where to live and raise their families." 97 S. Ct. at 1620.

In Carey v. Population Services International, 97 S. Ct. 2010 (1977), the Court also relied upon *Virginia Board* to strike down a New York prohibition of contraceptive advertising. The result in *Carey* was also supported by the constitutional protection accorded an individual's decision on whether to use contraceptives, which is based on the right of privacy. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). Therefore, the result in *Carey* was supported by the rationale of *Bigelow* as well as that of *Virginia Board*.

45. 97 S. Ct. 2691 (1977).

46. Brief for the Appellants at 5-9. *See* Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977).

Unfortunately, Bates and O'Steen discovered that the type of practice they envisaged was not possible unless the existence and nature of their practice could be conveyed to the potential consumers of their services.[47] They reasoned that such widespread knowledge was impossible without advertising; yet this requirement placed them squarely in conflict with the disciplinary rules of the Arizona Bar, as adopted from the American Bar Association Code of Professional Responsibility.[48]

Bates and O'Steen decided to test the validity of this blanket prohibition of professional advertising. Toward that end, they ran what will hereafter be referred to as the "Bates Ad" in the "Arizona Republic" issue for February 22, 1976. The ad listed the fees for several of the lawyer's standardized services and characterized the fees as "very reasonable". The President of the state bar subsequently filed a complaint against the lawyers. Pursuant to a disciplinary procedure, they were suspended from practice for one week by the State Bar Board of Governors.

Appealing the Bar decision to the Arizona Supreme Court,[49] Bates and O'Steen argued that under the logic of the *Virginia Board* case, their truthful, nondeceptive advertisement was entitled to first amendment protection based on the right of consumers to receive information necessary to informed decision-making in the open commercial market. Such decision-making they maintained, is the primary regulatory device of our free enterprise economic system. However, the Arizona Supreme Court rejected this argument, relying on an aside to the *Virginia Board* decision which had distinguished professional services from the sale of standardized products.[50] Because of the myriad of factors

47. *Id.* at 2694.

48. Disciplinary Rule 2-101(B), under which the attorneys were suspended, reads in part:

> A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display announcements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

The remainder of the section lists a number of specific exceptions to the rule which would allow limited identification of a lawyer in certain publications; however, no argument was made that the *Bates* advertisement fell within one of the special rules.

49. 113 Ariz. 394, 555 P.2d 640 (1976).

50. The Court stated:

> We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional ser-

which contribute to the cost and value of legal services, the Arizona court determined that advertising of professional services fell entirely outside any protection the first amendment might otherwise provide to commercial speech. The court, therefore, affirmed the disciplinary action imposed by the Arizona Bar on the errant appellant attorneys.[51]

The decision was immediately appealed to the United States Supreme Court, thus setting the stage for further explication of the commercial speech doctrine. But the appellants in *Bates* framed the issues of their appeal with such narrow specificity that, in the resulting opinion, Justice Blackmun found it unnecessary to declare new constitutional law. The majority found, rather, that the facts of *Bates* fell directly within the law of *Virginia Board.* As a result, the *Bates* decision is more remarkable for the issues it specifically reserves than for its exposition of new constitutional doctrine. As the analysis which follows will demonstrate, despite the far reaching consequences some feel the decision will have on professional advertising,[52] the case represents no more than a very narrow extension of the law of *Virginia Board* to facts which, although different, are analogous to those in the earlier decision.

The Bates Decision—New Law or New Facts?

The Supreme Court in *Bates* reversed the state court decision on first amendment grounds.[53] The first amendment portion of the *Bates* opinion involves a fairly lengthy review of the *Virginia Board* opinion, including citation of the cases on which that decision relied. This review concluded by noting that the only first amendment issue presented by the appellants in *Bates* was whether the professional services/product sales distinction reserved in *Virginia Board*[54] was of any constitutional significance.

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vices of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

425 U.S. at 773 n.25.

51. Bates and O'Steen also raised vagueness and due process arguments before the Arizona Supreme Court. 113 Ariz. at —, 555 P.2d at 646. These arguments were abandoned on appeal to the United States Supreme Court. Moreover, in recognition of the right of citizens to challenge unconstitutional exercises of state power, the Arizona court noted that the sole motivation which led the lawyers to place their ad was the desire to test the constitutionality of the advertising ban. As a result, the court reduced the sanctions imposed by the State Bar to censure. *Id.* at —, 555 P.2d at 646.

52. *See* 97 S. Ct. at 2712 (Powell, J., dissenting).

53. Justice Blackmun was joined in his majority opinion by Justices Marshall, Brennan, White and Stevens.

54. *See* text accompanying note 50 *supra.*

To underscore the narrowness of the issue, the opinion recited a number of questions upon which the decision was intended to have no bearing. Thus, the Court in *Bates* explicitly reserved evaluation of constitutional questions which might be raised by advertisements concerning the quality of services provided or in person solicitation. Furthermore, the Court implicitly reserved those issues raised by a basic factual ad indicating no more than the existence and location of a law office, with no reference to fees or available services.[55]

These reserved questions limited the holding of the Court to a single, narrow issue: "The heart of the dispute before us today is whether lawyers also may constitutionally advertise the *prices* at which certain routine services will be performed."[56] Having defined the issue, Justice Blackmun reviewed the justifications offered by the state in support of its advertising ban.[57] Perhaps the bar's strongest argument was that lawyer advertising would be inherently misleading. The gist of this argument, which formed the core of the dissents by Chief Justice Burger and Justices Powell and Stewart, was that the public may be so unfamiliar with what will be required of a lawyer in a particular situation that legal consumers cannot understand the services the lawyer is offering for the advertised price.[58] Furthermore, consumers would be unable to judge whether the service advertised would satisfy their particular needs. However, although the majority recognized that a lawyer ad could be deceiving, it also felt that nondeceptive advertising was possible. The court was unwilling to assume that consumers are not sophisticated enough to realize "the limitations of advertising" and was "dubious of any argument based on the benefits of public ignorance.[59]

The bar also argued that lawyer advertising would promote unnecessary litigation and increase lawyer overhead and ultimate con-

55. 97 S. Ct. at 2700.

56. *Id.* at 2701 (emphasis in original).

57. One of the justifications posited was that advertising by lawyers would lead to commercialization which in turn would lead to reduced public respect for the legal profession. The majority, however, found that any vitality this argument may otherwise have had was substantially undermined by the admission of the Bar's attorney that to characterize the practice of law as noncommercial was "sanctimonious humbug".

58. 97 S. Ct. at 2710 (Burger, C.J., concurring in part, dissenting in part); *id.* at 2711 (Powell, J., concurring in part, dissenting in part). Justice Rehnquist based his dissent on the grounds that the *Chrestensen* commercial speech exception to the first amendment was sound constitutional doctrine and was dispositive of all issues raised in *Bates*. *Id.* at 2719.

59. *Id.* at 2704.

sumer costs. Moreover, preventing deception by lawyers would impose a crippling policing burden on the bar if ads were permitted.

The majority responded to these arguments by finding that the historical effect of price advertising is lower prices, despite the fact that advertising budgets increase overhead. In addition, the court felt that lawyers as a class are conscientious professionals who would neither cut corners nor push their advertising materials so close to the line between truth and deception as to create a regulatory burden for the bar. As the dissents pointed out, however, this last observation is particularly interesting in light of the lack of authoritative guidance on how state bars may deal with deception in attorney advertising.

The majority's refusal to accept the Arizona Bar's regulatory burden argument indicated no more than the bar's inability to convince the Court that such a burden potentially existed. Should deception problems develop in practice, there is nothing in the language of *Bates* to indicate that this state interest might not outweigh the constitutional interests at stake in lawyer advertisements:

> We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising there will be thousands of others who will be candid and honest and straight forward.[60]

As Justice Blackmun originally framed the *Bates* issue, the task of the Court was to determine if there was any constitutional significance to the distinction between standardized products and nonstandardized services. His analysis, however, avoided that question by finding that the services advertised in *Bates* were analogous to the prepackaged prescription ads permitted under the *Virginia Board* rationale. That this analogy forms the basis of the majority decision is underscored by the Court's observation that:

> Although many services performed by attorneys are indeed unique, it is doubtful that any attorney would or could advertise fixed prices for services of that type. The only services that lend themselves to advertising are the routine ones: the uncontested personal bankruptcy, the change of name, and the like—the very services advertised by appellants.[61]

60. *Id.* at 2707.
61. *Id.* at 2703.

The *Bates* majority did address one question which had not been considered in *Virginia Board.* The Court found the overbreadth doctrine inapplicable in all commercial speech cases. In a first amendment case involving political or ideological speech, the doctrine would allow a litigant whose speech could have been prohibited or regulated by a narrowly drawn statute to challenge an overbroad statute on the grounds that it also infringed protected speech. If the overbreadth doctrine were applied in *Bates,* the appellants would be allowed to challenge the Arizona advertising prohibition even if their own ad were false or deceptive, and, therefore, unworthy of first amendment protection on its own.

But the Court held that interests which justify application of the overbreadth doctrine in most free speech cases are different from the constitutional interests underlying the protection of commercial speech. In other words, the overbreadth doctrine typically applies where the constitutional value at stake is the interest of the speaker in conveying his message. A statute applicable to both protected and unprotected speech could deter speakers from expressing themselves at all, since its mere existence would have a "chilling effect" on protected expression.[62]

In the case of commercial speech, however, the speaker's interest is of minor importance. As indicated by the earlier analysis of *Virginia Board,* the operative interest is the consumer's need for information which is necessary for constiutionally significant decision-making. This analysis is consistent with Justice Blackmun's observation that, in a commercial speech case, the speaker's interest merits little regard because the profit motive associated with commercial speech assures that the speaker will seek out and find a permissible outlet for his advertising. He is unlikely to be "chilled" and, therefore, there is no need to apply the overbreadth doctrine.[63]

Since the overbreadth analysis was inappropriate to *Bates,* the majority found it necessary to scrutinize the Bates Ad to determine

62. *See, e.g.,* Gooding v. Wilson, 405 U.S. 518 (1972).

63. The opinion also focused on the peculiar ability of an advertiser to become familiar with its own product, thus justifying a high standard for truth in advertising and a corresponding low standard of constitutional protection for commercial advertising:

> Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation (citation omitted). Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or a service he provides, and presumably he can determine more readily than others whether his speech is truthful and protected.

97 S. Ct. at 2707 (citations omitted).

whether it was false, deceptive, misleading, or in some other manner undeserving of constitutional protection.[64] Determining that it was not, the opinion concluded by noting "some of the clearly permissible limitations on advertising not foreclosed by our holding."[65] These included restraints on false, deceptive, or misleading advertising; time, place, and manner restrictions; restrictions on the advertising of illegal transactions; and, possibly, other restrictions based on the content of the advertisement.

The court also recited dicta contained in the *Virginia Board* decision. This dicta included the Court's declaration that commercial speech is distinguishable from other kinds of speech, that it is regulable regarding time, place and manner, and that the state may act to prevent fraud or deception. The Court treated these questions as settled issues, although the opinion contained little guidance for the regulation of commercial speech in any of these areas. Regardless of how the Court ultimately resolves the questions specifically reserved by *Bates*,[66] it is certain that the future will also present further litigation on the issues treated as settled by the dicta in the case. The remainder of this comment is directed toward an analysis of questions which are likely to form the bases for state regulation in this area.

REGULATION OF TIME, PLACE AND MANNER OF COMMERCIAL SPEECH

In *Virginia Board*, the Supreme Court stated that the extension of first amendment protection in that case in no way limited the power of the state to impose reasonable time, place and manner restrictions on commercial speech.[67] This dicta was later cited with approval in *Bates*.[68] Neither case, however, presented the issue of whether a regulation could be upheld as a time, place or manner restriction. As a result, they give no guidance on how this type of regulation should apply in a commercial speech context.

It may be that guidance is not required with particular reference to commercial speech because, according to the Court in *Virginia Board*, time, place and manner regulations are valid only if conceived and imposed completely without reference to content. The regulation

64. *Id.* at 2708.
65. *Id.*
66. *Id.* at 2709.
67. 425 U.S. at 771.
68. 97 S. Ct. at 2709.

must also serve a "significant government interest" and leave ample alternative means of communication.[69] Under this three-step formulation, it would appear that a characterization of speech as commercial or noncommercial would be irrelevant.[70] Unfortunately, this test still leaves the difficult problem of distinguishing between regulations justified without reference to content and impermissible regulations which are based on content.

The Supreme Court demonstrated the pitfalls of drawing such a distinction in *Bigelow v. Virginia,* where the majority opinion by Justice Blackmun interpreted the *Chrestensen* holding as limited to sustaining a "reasonable regulation of the manner in which commercial advertising could be distributed."[71] The implication of this holding is that the ordinance in *Chrestensen* was upheld as a reasonable time, place and manner restriction. If this interpretation is correct, *Chrestensen* did not raise a first amendment issue.

Although it is true that in *Chrestensen* the plaintiff had methods of advertising other than handbilling available to him, and the government did have a significant interest in preventing litter, it is also true that the challenged ordinance only prohibited commercial handbilling. The regulation was imposed solely on the basis of the content of the speech. As a result, Justice Blackmun's characterization appears to be inconsistent with the three-step test generally employed by the Court to evaluate time, place and manner restrictions.[72]

In view of this inconsistency, it is not surprising that lower courts have encountered difficulty in distinguishing content-oriented regulations from acceptable time, place and manner restrictions. This problem is illustrated by several recent commercial speech cases dealing with regulation and prohibition of outdoor billboards and signs under the Federal Highway Beautification Act[73] and other laws.

One of these cases, although reaching a result consistent with the three-step test, nevertheless demonstrates some judicial confusion as to whether consideration should be given to the content of a particular expression when a determination is made of the regulation's validity.

69. 425 U.S. at 771.

70. *But see* Schneider v. State, 308 U.S. 147 (1939) (availability of alternate forums could not be used to justify a ban on street distribution of leaflets containing political speech).

71. 421 U.S. at 819.

72. *See* text accompanying note 69 *supra.*

73. 23 U.S.C. § 131 (1966).

In *Donnelly Advertising Corp. v. City of Baltimore*,[74] the Maryland Court of Appeals relied upon *Virginia Board* in deciding that an ordinance prohibiting nearly all outdoor billboards within a Baltimore urban renewal area was not unconstitutional. The ordinance in question prohibited "all signs other than those identifying the property where they are installed or identifying the use conducted therein. . . ."[75]

The ordinance was challenged on a number of grounds,[76] including an argument based on first amendment protection of commercial speech. In its analysis, the court in *Donnelly* acknowledged that the billboards in question were entitled to some degree of first amendment protection. But the court also cited *Young v. American Mini Theatres*[77] for the proposition that the degree of first amendment protection to which a particular advertisement might be entitled could be determined by reference to the content of the advertisement.[78] The *Donnelly* court noted, however, that the Baltimore ordinance was imposed without reference to content because it banned "all messages, whatever their content."[79] The court concluded its analysis of the first amendment issue by stating its version of the three-step test for time, place and manner regulations, holding that such regulations must further a substantial government interest, be unrelated to the suppression of free expression, and be no more restrictive than necessary to further the government interests.[80]

The nature of the reference to *Young* by the court in *Donnelly* is clouded by the subsequent conclusion that the ordinance should be sustained because it was imposed without reference to content; thus no first amendment interests were at stake. The opinion did recognize, parenthetically, that one aspect of the ordinance was clearly based on content, *i.e.*, the exception in favor of signs advertising the premises upon which the sign was located. Accordingly, the reference to the *Young* quotation may have been intended only to justify allowing that distinction to stand. At any rate, despite the superficial confusion over

74. 370 A.2d 1127 (Md. 1977).

75. BALTIMORE, MD., OLDTOWN URBAN RENEWAL ORDINANCE, #760, § 5(g) (1970).

76. In addition to the first amendment attack based on *Virginia Board*, the plaintiffs claimed that the ordinance was an exercise of the zoning power and that its enactment was procedurally defective. They also argued that the ordinance deprived them of property without compensation and denied them equal protection of the law. The court found no merit to any of these arguments. 370 A.2d at 1132-34.

77. 427 U.S. 50 (1976). For a more detailed examination of this case, see text accompanying notes 133-138 *infra*.

78. *Id.* at 68.

79. 370 A.2d at 1132.

80. *Id.*

the distinction between content-oriented regulation and permissible time, place and manner restrictions, the Maryland court appears to have applied a test and reached a result consistent with the treatment of time, place and manner restrictions of the Supreme Court in *Virginia Board, Bates,* and other recent cases.[81]

In *Modjeska Sign Studios, Inc. v. Berle,*[82] an intermediate New York appellate court attempted to apply the same test to similar facts, but reached a result which appears to be unsupportable under the three-step standard announced in *Virginia Board.* In the *Modjeska* decision, the court considered a challenge to a New York statute banning advertising signs in the Adirondack and Catskill state parks, except where permits were obtained.[83] The plaintiff operated a large number of outdoor billboards in the parks, none of which qualified for a permit. Therefore, the plaintiff had no choice but to remove the signs after the expiration of a grace period.

As in *Donnelly,* the challenge in *Modjeska* was based on a number of grounds. Of interest here, however, is the court's brief treatment of the plaintiff's contention that the ban infringed first amendment interests entitled to protection under *Virginia Board.* The New York court recognized that *Virginia Board* required some protection of first amendment interests, but also noted that, under *Virginia Board,* commercial speech was still a proper subject for some state regulation. The decision recognized a legitimate state interest in controlling ugliness in state parks and identified several alternative channels of communication which were available to the plaintiff, including newspaper, radio and television advertising. As a result of the analysis in *Modjeska,* the court upheld the state billboard ban. Significantly, however, the court failed to consider the interest of highway travelers in receiving the information conveyed by billboards.

Perhaps even more significantly, the *Modjeska* decision neglected to comment on whether the regulation was imposed without reference to content, the third component of the test for a permissible time, place and manner restriction.[84] In fact, the statute on its face was clearly based

81. *See* note 44 *supra.*

82. 390 N.Y.S.2d 945 (S. Ct. 1977).

83. NEW YORK ENVIRONMENTAL CONSERVATION LAW § 9-3050(1) (1972).

84. 390 N.Y.S.2d at 949. Although the court did not explicitly state that it considered the statute a time, place and manner restriction, this inference may be drawn from the language and the analytical methodology of the court. However, the result might also be explained by assuming the court recognized that the statutory ban was directed solely at the content of commercial speech. The court may have balanced the

on content. Unlike the ordinance upheld in *Donnelly* which, except for on-premises signs, banned all billboards regardless of whether their message "be of a commercial, political, or charitable nature",[85] the New York statute prohibited only "any advertising sign, advertising structure, or devise of any kind, except under written permit from the department."[86] Although the New York court did not address the issue, the statute would presumably have no application to a park billboard containing a purely political, noneconomic, nonadvertising message as, for example, "Get the U.S. out of the U.N."[87]

The courts in *Donnelly* and *Modjeska* both upheld the challenged regulations even though the differences between the statutes were apparently of constitutional significance. This could be explained by assuming that the New York court interpreted *Virginia Board* as implying that time, place and manner regulations may be imposed in a somewhat more restrictive manner in commercial speech cases than in cases of political or ideological speech. Such a reading would require, in all cases, a preliminary determination of whether the speech was commercial. This requirement, however, would automatically undermine the usual rule that a time, place and manner regulation should not refer to content.

If, in fact, this was the New York court's interpretation of *Virginia Board*, it is not altogether untenable, even in light of *Bates* and other recent commercial speech decisions. In *Virginia Board*, the Court

consumer/tourist's interests in receiving information concerning food, lodging and entertainment against the general public interest in uncluttered state parks and concluded that the need for tourist information was outweighed by the desire for natural, undeveloped state parks. Whether it would be appropriate for the court to consider any of these content-oriented factors in its balancing is a matter of speculation. For further analysis, see text accompanying notes 133-143 *infra*.

85. 370 A.2d at 1132.

86. NEW YORK ENVIRONMENTAL CONSERVATION LAW, § 9-3050(a). The result in this case would have been correct if the court had chosen to avoid the constitutional issue by construing the statute as banning all signs in the parks. If construed in that manner, the statute would be clearly justifiable as a time, place, and manner limitation. However, there is no hint in the opinion that the court considered such a construction.

87. Another issue raised by *Modjeska*, though it was not discussed by the opinion, is the validity of the statutory permit requirement. Licensing and permit requirements for exercise of political and ideological speech must generally be drawn with particular specificity and are usually required to relate directly to an important state interest. *See* Lovell v. Griffin, 303 U.S. 444 (1938); Cox v. New Hampshire, 312 U.S. 569 (1941). However, in light of the second class protection to which commercial speech appears to be entitled, it may be that states will be allowed greater latitude in requiring licenses and imposing prior restraints in commercial speech cases. This potential is supported by the observation in *Virginia Board* that the common sense differences between commercial speech and other speech may mean that the prohibition against prior restraints would be inapplicable to commercial speech. 425 U.S. at 771 n.24.

clearly asserted that "commonsense differences" exist between commercial speech and other varieties of speech. Therefore, commercial speech is entitled to a "different degree of protection" than other communications.[88] Restrictions on the constitutional protection extended to commercial speech, however, tend to obscure the meaning of the Court's otherwise clear statement that time, place and manner regulations must be imposed without reference to content.

To summarize, the general standard for review of a regulation which the state attempts to justify as a time, place and manner restriction is clearly stated in *Virginia Board* and requires that such a regulation must be imposed without reference to content. But this standard leaves courts with the difficult problem of distinguishing between impermissible content-oriented regulations and legitimate restrictions based on interests such as aesthetics, litter, privacy or traffic.[89] The problem of evaluating a time, place and manner restriction is further complicated by the Supreme Court's recognition in *Virginia Board* that commercial speech differs from other types of speech. As the *Modjeska* decision demonstrates, some courts may find these differences significant in reviewing commercial speech regulations. The Supreme Court has not yet indicated what effect these differences may have on the validity of time, place and manner regulations. Until it does, the inconsistencies between cases like *Donnelly* and *Modjeska* are certain to occur in the lower courts.[90]

Regulation of Advertisements Which Are Deceptive or Concern Illegal Transactions

Both *Bates* and *Virginia Board* explicitly stated that advertisements which are deceptive or concern illegal transactions would be subject to state regulation.[91] The opinions are less clear, however, on whether there are any first amendment interests to be considered by state regulation of these types of ads. Nonetheless, there are indica-

88. *Id.*

89. The difficulties in drawing this distinction are pointed out by the differing views of the majority and dissent in People v. Remeny, 355 N.E.2d 375 (N.Y. 1976). In that case, the New York Court of Appeals relied on *Virginia Board* in declaring unconstitutional the New York City ordinance which was the successor to the law found constitutional by the Supreme Court in *Chrestensen*. The majority held that the ordinance was an impermissible content-oriented regulation. Justice Jasen, however, dissented on the basis that the city's interest in controlling the place and manner of handbilling outweighed the constitutional protection extended to commercial speech by *Virginia Board*.

90. *See also* Modjeska Sign Studios v. Berle, 386 N.Y.S.2d 765 (S. Ct. 1976).

91. 97 S. Ct. at 2708-09; 425 U.S. at 771-72.

tions in *Bates* and other cases that the first amendment may require some balancing of interests even where an advertisement contains false or deceptive material or pertains to an illegal transaction.

Pittsburgh Press and Illegal Advertisements

The United States Supreme Court's decision in *Pittsburgh Press v. Pittsburgh Commission on Human Relations*[92] indicated that advertisements concerning illegal transactions were to be excepted from the degree of first amendment protection to which commercial advertisements might otherwise be entitled.[93] At the time of the *Pittsburgh Press* decision, however, the Court had not yet determined that some commercial speech was entitled to first amendment protection because of the importance of its content to consumers. This narrowing of the commercial speech exception to the first amendment was the result of *Bigelow v. Virginia* and other subsequent cases.[94] However, *Pittsburgh Press* did provide early hints that the Court was prepared to extend some degree of protection to commercial speech.[95] Furthermore, because the Supreme Court could choose to treat deception in advertising just as it treated illegality in *Pittsburgh Press*, an analysis of the case is useful to the examination of both issues.

The *Pittsburgh Press* decision was based on a conflict between the Human Relations Ordinance of the City of Pittsburgh[96] and the editorial policies of a major newspaper, the Pittsburgh Press. The ordinance proscribed employment discrimination on the basis of sex and other grounds, and made it an unlawful employment practice for an employer to publish a "help wanted" ad indicating discrimination on the basis of sex. The Pittsburgh Press was charged with violating the section of the ordinance making it unlawful for any person to aid another in any act constituting an unlawful employment practice under the ordinance.

Pursuant to a complaint filed by the National Organization of Women, the Pittsburgh Commission on Human Relations determined that the newspaper's policy of placing help-wanted ads under sex-designated column headings was an unlawful practice forbidden by the ordi-

92. 413 U.S. 376 (1973).
93. *Id.* at 388.
94. *See* notes 17-25 *supra* and accompanying text.
95. 413 U.S. at 386-88.
96. PITTSBURGH, PA., ORDINANCE # 75 (1967), *as amended*, ORDINANCE # 395 (1969), §§ 8(a), (e), (j).

nance.[97] The Commission found that the practice assisted employers in engaging in sex discrimination in their job ads.[98]

The Commission ordered the paper to utilize a job advertisement classification system without reference to sex. On appeal,[99] a state court modified the order to bar "reference to sex in employment advertising column headings, except as may be exempt under said Ordinance or as may be certified exempt by said Commission."[100] The Supreme Court granted certiorari to determine whether the order infringed the freedom of the press.[101]

In support of its order, the Human Relations Commission argued that the regulation was directed solely to commercial speech and, therefore, no first amendment challenge was possible.[102] Justice Powell, writing for the majority, agreed that the sex-designated column headings and accompanying ads were "classic examples of commercial speech."[103] He also agreed with the newspaper, however, that despite *Chrestensen* and the commercial speech exception to the first amendment, some degree of constitutional protection for commercial advertising might be appropriate in some cases.[104] Nevertheless, in this case the Court found the first amendment arguments unpersuasive, since employment discrimination is *illegal* commercial activity. Thus, commercial speech concerning illegal transactions was treated by the Court as a specific exception to first amendment protection.[105]

It would appear from this decision that speech concerning illegal activity loses first amendment protection only when it can be characterized as commercial. Political and ideological speech are not unpro-

97. The columns were headed "Jobs—Male Interest"; "Jobs—Female Interest"; and "Male—Female." 413 U.S. at 379.

98. *Id.* at 380.

99. Pittsburgh Press Co. v. Pittsburgh Commission On Human Relations, 287 A.2d 161 (Pa. Commw. Ct. 1972).

100. *Id.* at 172. Because the ordinance permitted sex discrimination where necessitated by a "bona fide occupational exception," the commonwealth court held that the prohibition of all sex-designated column headings went beyond the statutory grant of power to the Commission. Although the Commission apparently considered the newspaper's first amendment defense in the original hearing, there is no indication that the issue was examined by the appellate court.

101. 409 U.S. 1036 (1972).

102. 413 U.S. at 386.

103. *Id.* at 385.

104. This dicta from *Pittsburgh Press* was the first sign by the Court that it was prepared to conduct the major re-evaluation of the commercial speech doctrine which has taken place in *Bigelow, Virginia Board* and subsequent decisions. *See* Note, 12 DUQUESNE L. R. 1000 (1974).

105. The Court analogized the sex-designated job column headings to headings of "Narcotics for Sale" or "Prostitutes Wanted." 413 U.S. at 388.

tected simply because the subject matter is an illegal act. The first amendment requires the state to meet a stricter standard of scrutiny in order to regulate or suppress such speech.[106] Therefore, in order for a particular expression to be excepted from first amendment protection if it concerns an illegal transaction, it must be distinguished from political or ideological speech based on its commercial content. Although the Supreme Court appeared to have little difficulty making this distinction in *Pittsburgh Press*,[107] other courts have found that the mixture of commercial and noncommercial elements in many advertisements make such a distinction virtually impossible to justify.[108]

The Court in *Pittsburgh Press* found it unnecessary to balance first amendment interests in order to affirm the Commission's order, as modified. In his dissent, however, Chief Justice Burger criticized the majority decision, which he perceived as an enlargement of the commercial speech exception to the first amendment at the expense of freedom of the press.[109] Justice Burger was willing to assume, without deciding, that there were no first amendment interests preventing the state from regulating the content of commercial speech. However, he was unwilling to sustain the Commission's order in light of what he believed to be an important constitutional interest of editors in exercising discretion in the organization and layout of their newspapers.

In deciding that the Commission's order should have been reversed, the Chief Justice placed particular emphasis on the "Notice to Job Seekers" which the editors inserted at the top of each sex-designated column heading.[110] He believed that the newspaper's first amendment interest in controlling its own format required that the "Notice" be scrutinized to determine whether it overcame the tendency of the column headings to discriminate on the basis of sex.[111]

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106. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).
107. *See* 413 U.S. at 385.
108. *See, e.g.*, Commonwealth v. Sterlace, 354 A.2d 27 (Pa. Commw. Ct. 1976).
109. 413 U.S. at 393.
110. The notice advised readers that:

> Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances, local, state and federal, prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination.

413 U.S. at 394.
111. The majority briefly examined and summarily dismissed the importance of this notice to the issue of the case. *Id.* at 381 n.7.

Chief Justice Burger seemed to imply in his dissent that the existence and content of the "Notice to Job Seekers" should have been considered by the majority as an alternative remedy to the restrictive ban of sex-designated column headings imposed by the Commission's order. Although this position was rejected by the *Pittsburgh Press* majority, a methodology for accommodating first amendment interests, remarkably similar to that proposed by the Chief Justice, has been utilized by another court in dealing with deceptive advertising, another commercial speech exception to the first amendment.[112]

Regulation of Deceptive Commercial Advertising

Both the majority opinion and Chief Justice Burger's dissent in *Pittsburgh Press* provide valuable guidance as to how courts might deal with regulations imposed on deceptive commercial advertising. For example, deceptive advertising could be excepted from first amendment protection based on its commercial content, its tendency to deceive, and its lack of truth. As with advertising concerning illegal transactions, a court would first have to determine whether the deceptive or false speech was commercial. Noncommercial speech, even when false, is generally entitled to substantial first amendment protection.[113] But deceptive commercial speech might be regulated without regard to first amendment interests. This would be consistent with the treatment of ads concerning illegality in *Pittsburgh Press.*

On the other hand, even if it recognized that deceptive commercial speech should be treated as excepted from first amendment protection, a court might still find it appropriate to conduct some balancing of interests in order to find the least restrictive remedy for the deception. This would be consistent with Burger's *Pittsburgh Press* dissent. The main difference between the majority opinion and the dissent in *Pittsburgh Press* is the failure of the majority to perceive the existence of an important constitutional interest; if there is no constitutional interest, there need be no balancing. The Chief Justice, however, identified an important interest in preserving editorial discretion and, therefore, felt compelled to balance that interest against the Commission's desire to prevent sex discrimination.

112. Beneficial Corporation v. FTC, 542 F.2d 611 (3d Cir. 1976), *cert. denied,* 97 S. Ct. 1679 (1977).

113. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Since the *Pittsburgh Press* decision, the Supreme Court cases previously discussed have identified at least one important constitutional interest at stake in every commercial speech case—the right of consumers to obtain information necessary for constitutionally protected economic decision-making. If the presence of this interest requires a balancing, as implied by the Chief Justice's dissent in *Pittsburgh Press,* courts might treat deceptive commercial speech as generally excepted from first amendment protection, yet conduct some type of balancing in determining the validity of the remedy proposed by the state for the deception. This type of analysis would be consistent with both the majority and the dissent in *Pittsburgh Press.*

Permissible Remedies for Deceptive Advertising

The United States Court of Appeals for the Third Circuit recently relied upon *Virginia Board* in revising a cease-and-desist order issued by the Federal Trade Commission to remedy deceptive advertising practices. In *Beneficial Corporation v. FTC,*[114] the Third Circuit found the FTC order more restrictive than the first amendment interests associated with commercial speech would allow. Although the Court did not principally rely upon *Pittsburgh Press* for its conclusion, the logic of *Beneficial* is entirely consistent with the preceding analysis of *Pittsburgh Press.*

Beneficial Corporation was engaged in the business of making consumer loans through the local loan offices of its wholly owned subsidiary, the Beneficial Finance System. In 1969, the Beneficial companies entered the consumer income tax return preparation business. The management felt that the loan business of the offices would be enhanced because of the convenience to taxpayers with balances due to the Internal Revenue Service to borrow money for tax payments from Beneficial. Experience, however, proved that most taxpayers receive refunds rather than pay additional tax. Therefore, in a new effort to use the tax return business to generate a demand for loans, Beneficial began to advertise its "Instant Tax Refund" in 1969. After this slogan had been in use in various campaigns promoting Beneficial's tax service for more than four years, the FTC filed a complaint alleging that the "Instant Tax Refund" slogan deceived customers as to the nature of the service provided.[115]

114. 542 F.2d 611 (3d Cir. 1976), *cert. denied,* 97 S. Ct. 1679 (1977).

115. *Id.* at 614. The FTC also challenged, as an unfair trade practice, Beneficial's use of the tax return information received from customers to facilitate solicitation of

An administrative law judge convened an evidentiary hearing and determined that the ads utilizing the slogan violated section five of the Federal Trade Commission Act.[116] The Commission affirmed the decision and entered a cease-and-desist order prohibiting Beneficial from using the offending language in future ads. Beneficial, which had made substantial expenditures in publicizing the slogan, appealed the order.

The FTC's conclusion that the ads were deceptive was largely based on the fact that the "refund" offered by Beneficial was no more than the regular consumer credit loan offered to the general public. All loan applicants were required to meet the same qualifications. No consideration was given to whether Beneficial prepared that applicant's tax return, and qualification was in no way dependent upon whether an applicant would receive a tax refund. The Commission also concluded that subsequent changes in the company's advertising copy[117] could not correct the deceptive effect of the "Instant Tax Refund" slogan because the phrase was "inherently contradictory to the truth of the offer."[118]

On appeal, the Third Circuit began its analysis of the issues by defining the nature of the offense. Under section five of the FTC Act, deceptive advertising is a strict liability offense.[119] Moreover, advertising is judged based on its propensity to deceive.[120] A finding of a deceptive tendency by the trial authority is to be treated, for purposes of review, as a question of fact.[121] Also, the scope of review is limited by the FTC Act[122] to the standard of "substantial evidence in the record as a whole. . . ."[123]

The Third Circuit held there was substantial evidence to support the Commission's finding that the slogan, as used in Beneficial's ads,

loan business. The portion of the Commission's cease-and-desist order entered to remedy that practice was affirmed without modification by the Third Circuit.

116. 15 U.S.C. § 45 (1973).

117. Between the time of the first "Instant Tax Refund" advertisement in 1969 and February, 1970, Beneficial's advertising agency reported that the ads were resulting in "fairly widespread confusion" over whether the service being offered was a loan. 542 F.2d at 617. Beneficial began to make changes in the ads in February, 1970, and by the time the FTC entered its cease-and-desist order in July, 1975, the ads clearly stated that the recipient of an "Instant Tax Refund" must "qualify" before "Beneficial will lend you the equivalent of your refund, in cash, instantly." 542 F.2d at 614.

118. *Id.* at 618.

119. *See generally* Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963).

120. *See, e.g.*, Resort Car Rental Sys. v. FTC, 518 F.2d 962 (9th Cir. 1974).

121. FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965).

122. *See* 15 U.S.C. § 45(c) (1973).

123. 542 F.2d at 616.

had a tendency to deceive. Therefore, the court found that the Commission had not abused its discretion in determining that some remedy was appropriate.[124]

Although the *Beneficial* decision was made in light of the Supreme Court's earlier decision in *Virginia Board,* the Third Circuit did not consider the possible effect of first amendment interests on the power of the FTC to regulate Beneficial's advertisements. The court apparently assumed that deceptive commercial speech falls within an exception to the first amendment. This rationale is consistent with the Supreme Court's treatment in *Pittsburgh Press* of commercial advertising concerning illegal transactions.[125]

The Third Circuit also recognized that, in spite of the government's legitimate interest in regulating deceptive advertising, the first amendment nevertheless places limitations on the permissible scope of such regulation. The court noted that the constitutional protection extended to commercial speech by the *Virginia Board* decision required a departure from the usual deference an appellate court gives to an informed exercise of discretion by an administrative agency.[126] Therefore, although no constitutional interests need be considered in determining whether a particular ad has a tendency to deceive, the remedial order based on that determination must be scrutinized to insure that the order goes no further than necessary to prevent deception.[127]

The result of this conclusion is to prevent regulation of the language of advertisements, so long as the ad as a whole is not deceptive or where the addition of text is sufficient to overcome the deceptive character of other text. This is consistent with Chief Justice Burger's conclusion in his *Pittsburgh Press* dissent that in light of the interest of editors in formating their own paper, the "Notice to Job Seekers" heading served to cure any tendency the column headings might otherwise have to aid employers in placing ads which discriminated on the basis of sex.[128]

Considering the constitutional interest at stake in *Beneficial,* the consumer's right to know, it might be preferable to allow an advertisement to be published whenever its deceptive tendency could be cured

124. *Id.* at 618.
125. *See* notes 92-112 *supra* and accompanying text.
126. *See* FTC v. National Lead Co., 352 U.S. 429 (1957).
127. 542 F.2d at 619.
128. *See* note 110 *supra* and accompanying text.

by the addition or deletion of material.[129] Therefore, the Third Circuit remanded the remedial portion of the FTC's order for reconsideration by the Commission of Beneficial's argument that the ads could be drafted in a completely nondeceptive manner and still employ the slogan "Instant Tax Refund".[130]

Conclusions on Deceptive Advertisements and Advertisements Concerning Illegal Transactions

The foregoing analysis suggests a methodology which would allow courts to give substantial deference to state regulation of deceptive commercial speech while accommodating the constitutional interest of providing first amendment protection to commercial speech. The test would be applied as follows: (1) A finding by the trier of fact of a tendency to deceive or content concerning an illegal transaction is conclusive; (2) Such a fact finding will support the conclusion that the state has a compelling interest in regulating that commercial speech; (3) However, the state still must justify the regulation it chooses to impose as the least restrictive means of eliminating the deception or of divorcing the content of the advertisement from the illegality of the transaction proposed.

There is no guarantee, of course, that the Supreme Court will utilize this analysis when it is presented with a case involving deceptive commercial speech.[131] But this approach does provide a framework for considering the constitutional interests at stake in one area where the Supreme Court has explicitly stated that regulations based on content are "clearly permissible."[132]

129. Having identified the constitutional interest at stake, the Court in *Beneficial* relied, in its subsequent analysis, on a line of FTC Act cases which established a preference for requiring a qualifying explanation to remedy a deceptive advertisement, rather than requiring excision of the offending matter. These earlier cases were based on the advertiser's property interest in tradenames and advertising copy, rather than on first amendment grounds. *See generally* Jacob Siegal Co. v. FTC, 327 U.S. 608 (1946); FTC v. Royal Mining Co., 288 U.S. 212 (1933).

130. The court gave two examples of what it considered to be permissible ads: (1) "Beneficial's everyday loan service can provide to regularly qualified borrowers an Instant Tax Refund Anticipation Loan whether not the borrower uses our tax service." (2) "Beneficial's everyday loan service can provide to any regularly qualified borrower an instant loan in anticipation of his tax refund. We call it an Instant Tax Refund Anticipation Loan." 542 F.2d at 619.

131. In *Bates*, the Court examined the Bates Ad to determine whether it was deceptive. This scrutiny was required by the Court's holding that the overbreadth doctrine was inapplicable to commercial speech. The only conclusion which can be drawn from the brief treatment of the deception issue in *Bates* is that the burden of proving the factual element of "tendency to deceive" is on the state and the burden was not met in *Bates*. 97 S. Ct. at 2708.

132. *Id.*

OTHER POSSIBILITIES FOR REGULATIONS BASED ON THE CONTENT OF COMMERCIAL SPEECH

In *Bates* and *Virginia Board*, the Supreme Court indicated that time, place and manner regulations were constitutionally permissible because they could only be imposed without reference to the content of the speech. Similarly, deceptive advertising or commercial speech concerning illegal acts can be regulated because these areas are excepted from first amendment protection. The Court in these cases expressly reserved questions of in-person solicitation, representations of quality in commercial advertising, and broadcast advertising for future consideration. Although the Court did not directly address the reserved questions, there are hints in *Bates* and other recent cases that the Supreme Court might allow regulation of commercial speech which refers to the content of the expression, even where there is no allegation that the commercial speech is deceptive or concerns an illegal transaction.

The hints that content-directed regulation of commercial advertising might, in some cases, be applicable to nondeceptive advertising are underscored by language used by the Court in *Young v. American Mini Theatres*.[133] In that case, the Supreme Court sustained a Detroit ordinance prohibiting "adult" movie theatres, "adult" bookstores, and other establishments from operating within one thousand feet of each other.[134]

It seems clear that the restriction in *Young* was imposed based on the content of the materials regulated. Furthermore, absent a finding that the materials were obscene, there would appear to be no grounds for finding that the regulated uses were excepted from first amendment protection. However, the regulation was allowed to withstand first amendment attack despite its reference to the content of the controlled speech.[135]

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133. 427 U.S. 50 (1976).

134. The ordinance was a zoning regulation which classified eleven different kinds of establishments as "regulated uses" and prohibited any such establishment from operating within 1000 feet of any two other "regulated uses" or within 500 feet of a residential area. Some of the regulated uses were bars, pawnshops, pool halls, motels and dance halls. 427 U.S. at 52.

135. Although the majority opinion by Justice Stevens attempts to justify the ordinance as a valid regulation of the "secondary effects" resulting from concentration of "regulated uses," the analysis fails to stand up in light of the clear content-control orientation of the ordinance as evidenced by statutory definitions of "adult book store" and "adult motion picture theatre." *See* 427 U.S. at 54 n.4-5.

Based on the willingness of the Supreme Court to permit content-oriented regulation of certain types of expression in *Young* and other recent cases,[136] the Court could sustain regulations of commercial speech based on references to content, even though the ad was truthful and nondeceptive.[137] The likelihood that the Court may adopt such an approach to commercial speech in the future is supported by Justice Blackmun's citation in *Bates* to *Capital Broadcasting Co. v. Mitchell.*[138]

Capital Broadcasting involved a challenge by several broadcasters to an act of Congress prohibiting the advertisement of cigarettes on any medium subject to Federal Communications Commission jurisdiction. The prohibition was premised entirely on the content of the forbidden ad. Because *Capital Broadcasting* antedates the Supreme Court decisions in *Virginia Board, Bates,* and even *Pittsburgh Press,* the district court discerned no first amendment interest and never considered whether the prohibition might be void based on an impermissible reference to content.[139] In light of these later decisions, however, there is a serious question as to what Justice Blackmun intended by his citation to *Capital Broadcasting* in *Bates.*

Justice Blackmun may well have intended to indicate that an inquiry into the content of certain types of commercial speech would be appropriate in order to determine the permissible scope of regulation of that speech, even where the expression is conceded to be truthful and nondeceptive. If that was the intended meaning, however, the opinion nonetheless provides no guidance on how to evaluate such a content-oriented regulation in light of the constitutionally protected interest of the consumer at stake in every commercial speech case.

One possible approach to this problem was indicated by the Florida Supreme Court in *Harris v. Beneficial Finance Co. of Jacksonville.*[140] In that case, a local finance office challenged a state consumer protection statute prohibiting anyone attempting to collect a consumer

136. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

137. In light of the Court's predictable reluctance to create new constitutional doctrine, it may be expected that most justices will prefer to treat commercial speech regulations as permissible because of presently recognized exceptions to the first amendment. For example, on the question of in-person solicitation by lawyers reserved by *Bates,* the Court would be more likely to allow regulation of such lawyer/client contacts by finding an inherent tendency of deception than to allow regulation based on some previously unrecognized content-oriented justification.

138. 333 F. Supp. 582 (D.D.C. 1971). The case was cited to support the belief of the majority that a decision on the validity of broadcast advertising should be reserved because of the peculiar problems associated with regulation of broadcast media.

139. *Id.* at 584.

140. 338 So. 2d 196 (Fla. 1976), *cert. denied,* 97 S. Ct. 1591 (1977).

debt from communicating with the debtor's employer prior to obtaining a final judgment.[141] The regulation was based on the content of the prohibited communication. In addition, Beneficial argued that the creditor's right to contact an employer about an employee's debt was protected by the first amendment under the *Virginia Board* rationale.

The Florida court interpreted *Virginia Board* as providing first amendment protection only because of the public interest in, and peculiar consumer need for, the information contained in the retail prescription advertisements. In *Harris*, however, there was no consumer need to know that the debtor was in default. Furthermore, the court did not believe that a debtor's employer had a desire or need for such information which was so substantial as to require constitutional protection.[142] The court held, in effect, that the constitutional interests which generally protect some commercial speech were not present in the case. Because the expression regulated was excepted from the first amendment's protection, regulation based on its content was permissible.[143]

To summarize, the Supreme Court has not yet clearly stated that truthful and nondeceptive commercial speech may nonetheless be subject to regulation, justified by the content of the speech. But there have been broad hints in a number of cases, including *Bates*, that such regulation might be permissible under some circumstances. At least one court has implied a standard of review for content-oriented regulation of commercial speech, based on a public need to know, which could leave much commercial speech beyond the protection of the first amendment.

CONCLUSION

In the wake of the *Virginia Board* decision, one writer noted that: "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."[144] Moreover, the note in the American Bar Association Journal which heralded the end of the total ban on lawyer advertising, as a result of *Bates*, agreed with Justice Powell's dissent in the case that the decision would "effect profound changes in the practice of law."[145] Nevertheless, careful scru-

141. FLA. STAT. ANN. § 559.72(4).
142. 338 So. 2d at 199.
143. *Id.* *See also* note 84 *supra.*
144. Note, 34 WASH. & LEE L. R. 245 (1977).
145. Note, *Supreme Court Holds Lawyers May Advertise,* 63 A.B.A.J. 1093 (1977), *quoting* 97 Sup. Ct. at 2712 (Powell, J., dissenting).

tiny of these and other recent commercial speech cases indicate that the scope of the state's power to regulate commercial speech without regard to first amendment interests is still quite broad.

It is true, of course, that some ads must now be permitted where previously the state could have imposed a total prohibition. But it is equally true that the cases demarcate large areas which, because commercial speech is the subject of regulation, are excepted from first amendment protection. These exceptions are certainly not consistent with the premise that the commercial speech doctrine is dead.

Furthermore, notwithstanding Justice Powell's comments in his *Bates* dissent, the Supreme Court has yet to indicate that it will permit so much leeway in professional advertising as to alter the nature of the legal profession. In fact, *Bates* is a giant step sideways for the commercial speech doctrine. The decision merely determines that the facts are so similar to *Virginia Board* as to require the same result. Except for its treatment of the overbreadth issue, *Bates* in no way extends the *ratio decidendi* of the *Virginia Board* decision. If the Supreme Court had desired to place additional limits on commercial speech exceptions to the first amendment, *Bates* provided the Court with an opportunity to do so. That the opportunity was passed over indicates that the Court will continue to allow broad discretion in state regulation of commercial speech.

At one time, characterization of a communication as commercial speech eliminated any necessity for balancing the state regulatory interest against the limitations on regulatory power imposed by the first amendment. After *Virginia Board, Bates* and other recent commercial speech cases, such a characterization is now only the first step in an analysis which may result in the extension of a "second class" protection to a particular advertisement or other commercial expression. However, commercial speech is still subject to a number of restrictions which could not constitutionally be imposed on other varieties of speech. It would be a mistake to assume that the Supreme Court will not continue to permit states broad latitude in regulating all types of commercial expression. *Bates* and *Virginia Board* point the way down a very narrow path and the Supreme Court has not as yet demonstrated any inclination to further widen it.

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