Florida Law Review

Volume 28 | Issue 2 Article 16

January 1976

Commercial Speech: First Amendment Protection Clarified

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not actually work because discriminatory practices excluded him from employment, a result that the same courts have found to be inconsistent with the Act.[47] The Fifth Circuit's expressed disdain for both fictional seniority and reverse discrimination[48] will militate against a finding for the minority plaintiffs that would reward fictional seniority. Such a result would be in harmony with the *Waters* and *Jersey Central* opinions, wherein companywide seniority systems that gave credit only for time actually worked were deemed valid under the provisions of Title VII, and no action was taken that would have abrogated the seniority rights of incumbent workers.

The instant court has skillfully merged the status quo[49] and rightful place[50] formulas by deciding that incumbent workers' positions in the employment hierarchy shall not be terminated. Although the court seeks to guarantee every minority worker full credit for all time actually worked, it will not treat any worker preferentially because of his race. This result is fundamentally consistent with the goal of Title VII: equal employment opportunity for all.

GREGORY P. BORGOGNONI

COMMERCIAL SPEECH: FIRST AMENDMENT PROTECTION CLARIFIED

Bigelow v. Virginia, 421 U.S. 809 (1975)

Appellant, managing editor and responsible officer of a weekly newspaper, was convicted[1] of violating a Virginia statute that made it a mis-

47. See cases cited note 46 *supra.*

48. *See* Watkins v. United Steel Workers, Local 2369, 516 F.2d 41, 47 (5th Cir. 1975); Local 189, Papermakers v. United States, 416 F.2d 980, 994-95 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

49. See note 17 *supra.*

50. See note 20 *supra.*

1. Appellant was first tried and convicted in the County Court of Albemarle County. On appeal to the Circuit Court for that county, the appellant waived his right to a jury and received a trial *de novo* on stipulated facts. The court rejected appellant's claim that the statute was unconstitutional under the first and fourteenth amendments to the Constitution of the United States. He was fined $500, $350 of which was suspended on the condition of no further violations. The conviction was for publishing the following advertisement:

"UNWANTED PREGNANCY
LET US HELP YOU
Abortions are now legal in New York.
There are no residency requirements.
FOR IMMEDIATE PLACEMENT IN ACCREDITED
HOSPITALS AND CLINICS AT LOW COST

demeanor to encourage, by any means, the procuring of an abortion.[2] Appellant had published an advertisement encouraging abortion procurement on behalf of a profit making abortion referral agency based in New York where abortions had been legalized. The Virginia supreme court affirmed the conviction,[3] rejecting appellant's constitutional arguments on the grounds that the advertisement was purely commercial and thus received no first amendment protection, and held that statutory regulation was proper in the medical-health field.[4] The United States Supreme Court vacated and remanded[5] for reconsideration in light of *Roe v. Wade*[6] and *Doe v. Bolton*,[7] which decisions legalized abortions performed prior to viability of the fetus. Without hearing additional arguments from the parties, the Virginia supreme court reaffirmed the conviction,[8] holding that appellant's conviction was not for performing an illegal abortion and that nothing in *Roe* or *Doe* mentioned the subject of abortion advertisement. The United States Supreme Court reversed and HELD, the statute, as applied, violated appellant's constitutional rights in that speech is not automatically stripped of first amendment protection because it has commercial aspects, particularly when the advertisement conveys information concerning a controversial issue of public interest.[9]

The present case is the culmination of the Supreme Court's gradual efforts

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Contact
WOMEN'S PAVILION
515 Madison Avenue
New York, N.Y. 10022
or call any time
(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK
STRICTLY CONFIDENTIAL. We will make all
arrangements for you and help you
with information and counseling."

2. VA. CODE ANN. §18.1-63 (1960) states: "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourages or prompts the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." In the instant decision, the United States Supreme Court noted that at oral argument the State said the statute dated back to 1878 and that appellant's prosecution was the first under the statute "in modern times" and perhaps the only prosecution under it "at any time." 421 U.S. 809, 813 n. 3 (1975).

3. Bigelow v. Commonwealth, 213 Va. 191, 191 S.E.2d 173 (1972).

4. The court also considered the appellant's argument that the statute was overbroad. This contention was rejected because appellant's activity was "purely commercial" and lacked a legitimate first amendment interest. The court concluded that petitioner did not have standing to rely on the hypothetical rights of those in the noncommercial zone, *i.e.*, doctors, husbands, or lecturers. *Id.* at 198, 191 S.E.2d at 177-78.

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

6. 410 U.S. 113 (1973).

7. 410 U.S. 179 (1973).

8. Bigelow v. Commonwealth, 214 Va. 341, 200 S.E.2d 680 (1973).

9. 421 U.S. 809 (1975). In the opinion delivered by Mr. Justice Blackmun, the Court declined to rest its decision on the potential overbreadth of the statute. The issue had become moot for the future because the statute in question had effectively been repealed. *Id.* at 817-18. See notes 2, 4 *supra*.

to disengage itself from its ill considered[10] and over simplified[11] declarations in *Valentine v. Chrestensen*.[12] In that case the Court noted that while the state "may not unduly . . . proscribe" the exercise of freedom of speech, "[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."[13] The Virginia supreme court[14] in the instant case and lower federal courts[15] have interpreted these pronouncements broadly: whenever a communication has been classified as purely commercial in nature, the communication has summarily been denied first amendment protection.

This confusion that has existed in the area of first amendment protection for commercial speech may be viewed as a reflection of the ambiguity that has existed in interpretation of first amendment protection for noncommercial speech. Until this century, the Court was not concerned with the "true significance of the first amendment"[16] and at times has appeared to be slow and halting in its search for unifying and guiding principles.[17] Although there are opposing theories as to the meaning and purpose of the first amendment,[18] the Court has repeatedly rejected[19] the "absolute view" that would apply literally the first amendment language that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[20] Instead of a literal construction, the Court has adopted the position that the manner of expressing speech may be regulated and that the content of certain types of speech may be controlled and suppressed.[21] Speech not fully protected by the

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10. Justice Douglas has characterized the *Chrestensen* opinion, in which he took part, as "casual, almost offhand." 421 U.S. at 820 n.6, *citing* Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

11. 421 U.S. at 820.

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

13. *Id.* at 54. The Court's statement in *Chrestensen* was in reference to use of the streets as "proper places for the exercise of the freedom of communicating information and disseminating opinion." *Id.* However, there was no explicit statement that its holding was limited to the use of the streets, and dicta in later cases discussed the *Chrestensen* decision in broad terms with ostensible approval. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964). See discussion in text accompanying notes 48-51 *infra*.

14. Bigelow v. Commonwealth, 213 Va. at 195, 191 S.E.2d at 175 (1972).

15. *See, e.g.*, Howard v. State Dept. of Highways, 478 F.2d 581, 584 (10th Cir. 1973); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1306 (2d Cir. 1971); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

16. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

17. *Id.*

18. *Compare* Meiklejohn, *The First Amendment is an Absolute*, in 1961 SUP. CT. REV. 245 (P. Kurland ed. 1961) *with* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) and Black, *The Bill of Rights and the Federal Government*, in THE GREAT RIGHTS, 43 (E. Cahn ed. 1963).

19. *E.g.*, Roth v. United States, 354 U.S. 476 (1957).

20. *Id.* at 514 (discussion of the "absolute view"). (Douglas, J., dissenting). *See also* Black, *supra* note 18.

21. Brennan, *supra* note 16, at 4-5.

first amendment includes fighting words,[22] obscenity,[23] libel,[24] and incitement,[25] as well as commercial speech in some contexts.[26] The rationale for allowing the regulation of certain types of speech has been that the words were inherently offensive, or that they were without "redeeming social value,"[27] or that they created a "clear and present danger" of violent overthrow of the government.[28] Often the Court has embraced a balancing test in those cases in which the regulation was "not intended directly to condemn the content of speech but incidentally . . . [to limit] its exercise."[29] This type of test has required the Court to "balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression."[30]

In sanctioning governmental regulation of some types of speech, the Court until recently has never seemed to articulate clear guidelines defining the type of speech that is protected or the reasons for its protection. Lack of clarity created significant difficulties in anticipating the actions of the Court because "none of these limitations has been given an across-the-board application."[31] Not until 1964 in *New York Times Co. v. Sullivan*[32] did the Court examine history "to discern [that] the central meaning of the first amendment [is] 'that the censorial power is in the people over the Government, and not in the Government over the people.' "[33] In the *Sullivan* decision, the Court broadened overall first amendment protection and adopted a position that information on issues important to the process of self-government by the American electorate cannot be subject to governmental regulation. This view has been expressed best by the statement that "[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents."[34] Although the Court has not always followed the view that freedom in issues of importance to self-government must be absolute, this general approach apparently is now central to the Supreme Court's view of the types of speech that are afforded first amendment protection.

Against this backdrop, evolution of the judicial treatment afforded commercial speech can be brought into better focus. The leading commercial

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22. *See, e.g.*, Chaplinski v. New Hampshire, 315 U.S. 568, 572 (1942).

23. *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973); Roth V. United States, 453 U.S. 476, 481-85 (1957).

24. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

25. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Dennis v. United States, 341 U.S. 494, 507 (1951).

26. See text accompanying notes 37-40 and 53-54 *infra*.

27. Roth v. United States, 354 U.S. 476, 484 (1957).

28. This test was first announced in Schenck v. United States, 249 U.S. 47, 52 (1919). Subsequent decisions have modified the requirements for the test. Dennis v. United States, 341 U.S. 494, 507 (1951); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

29. Brennan, *supra* note 16, at 11.

30. Emerson, *supra* note 18, at 912.

31. Brennan, *supra* note 16, at 11.

32. 376 U.S. 254 (1964).

33. Brennan, *supra* note 16, at 15.

34. Meiklejohn, *supra* note 18, at 257.

speech case of *Valentine v. Chrestensen*[35] was decided two decades prior to *Sullivan* and clearly reflected the early development of the Court's evolving theory of the first amendment. In *Chrestensen* petitioner had been notified by local authorities that street distribution of commercial handbills was proscribed by ordinance but that the similar circulation of political material was not. As a result, the petitioner printed a protest against certain city actions on the reverse side of his advertisement and proceeded with the distribution. On appeal, following petitioner's conviction under the ordinance, the lower court reversed and expressed the view that weighing of the purpose and intent of a handbill was too subjective a test for judicial application.[36] Nevertheless, the Supreme Court held that prohibition of the blatant attempt to circumvent the ordinance could be constitutional. In its short opinion, the Court dismissed commercial speech from the sphere of first amendment protection[37] and discerned the commercial nature of the advertisement by analyzing its primary purpose.[38]

This primary purpose test again appeared in *Breard v. Alexandria.*[39] In that case, a door to door solicitor of magazine subscriptions was convicted of violating an ordinance that prohibited home canvassing. He appealed on the grounds, *inter alia,* that the ordinance violated his first amendment freedom of speech and press. Dismissing commercial matters from the sphere of first amendment protection, the Court stated that the free speech defense would not be open to "solicitors for gadgets and brushes."[40] As applied to magazine solicitation, however, it was necessary to balance the competing interests of freedom of the press and the householder's desire for privacy. In this context the privacy interest was favored.[41] Thus, commercial speech, as well as "commercial features" of otherwise protected speech,[42] was again refused the protection of the first amendment. Although the *Breard* balancing of interests approach has been followed by a few courts[43] and perhaps may be viewed as a primitive precursor of the approach adopted in the instant case,[44] most courts have continued to use the primary purpose test to classify a communication as commercial and consequently to deny it first amendment protection.[45]

35. 316 U.S. 52 (1942). See text accompanying notes 12-13 *supra.*

36. Chrestensen v. Valentine, 122 F.2d 511, 516 (2d Cir. 1941).

37. 316 U.S. at 54-55.

38. *Id.* Commentators have labeled this approach the "primary purpose test." *See,* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,* 39 GEO. WASH. L. REV. 429, 451 (1971); Resnick, *Speech and Commercial Solicitation,* 30 CAL. L. REV. 655, 657 (1942); *Developments in the Law—Deceptive Advertising,* 80 HARV. L. REV. 1005, 1028 (1967).

39. 341 U.S. 622 (1951).

40. *Id.* at 641.

41. *Id.* at 644-45.

42. *Id.* at 642.

43. *See, e.g.,* Rowan v. United States Post Office Dept., 300 F. Supp. 1036, 1039-40 (C.D. Cal. 1969); *In re* Porterfield, 28 Cal.2d 91, 104-10, 168 P.2d 706, 715-18 (1946).

44. The Court in the instant case outlined the necessity for balancing the first amendment interests served against the competing governmental interests in regulation. The primary distinction between *Breard* and the instant case is the method of gauging first amendment interests. See notes 70-77 *infra* and accompanying text.

45. *See, e.g.,* Howard v. State Dept. of Highways, 478 F.2d 581, 584 (10th Cir. 1973);

Despite the language of *Chrestensen* and *Breard*, the Supreme Court has recognized in several contexts that the primary purpose test is too simplistic an approach. The profit motivation involved in book publishing,[46] motion picture production,[47] and labor dispute picketing[48] has been held not to preclude first amendment protection. Irrespective of their motivation, these forms of expression serve first amendment interests by informing the electorate of matters of public interest. Similarly, in *New York Times Co. v. Sullivan*,[49] the Court recognized that although political advertisements are aimed at raising funds and are accepted by the newspapers for commercial reasons, this does not necessarily preclude first amendment protection.[50] Rather, the Court viewed the advertisement in question as distinct from " 'commercial' advertisement in the sense in which the word was used in *Chrestensen*" because no commercial transaction was proposed.[51] The *Sullivan* advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[52] Thus, the Court adopted the view that discussion of matters essential for self-governing receives the highest protection afforded by the first amendment.

Because the advertisement in *Sullivan* was explicitly distinguished from a communication that merely proposed a commercial transaction, *Sullivan* provided no real support for extending first amendment protection to commercial speech. Unless the product advertised was itself a traditionally protected vehicle, such as books, newspapers, magazines, and motion pictures, the sole protection for purely commercial messages was the due process protection afforded the property rights of the advertiser; moreover, these rights were subject to regulation "whenever a state legislature decided that the public interest so require[d]."[53]

Commentators have been critical of the Court's stance vis-á-vis commercial speech and have advocated first amendment protection for commercial speech for several reasons. First, unlike other types of speech subject to regulation,[54]

SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1306 (2d Cir. 1971); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

46. Ginzburg v. United States, 383 U.S. 463, 474 (1966).

47. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952).

48. Thornhill v. Alabama, 310 U.S. 88, 103-05 (1940).

49. 376 U.S. 254 (1964).

50. Respondent contended, *inter alia*, that an advertisement by a civil rights group criticizing his official conduct was not protected by the first amendment because it was a paid advertisement. He reasoned that the speech was therefore commercial and subject to the rule in *Chrestensen*. *Id.* at 265-66. "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." *Id.* at 266.

51. *Id.*

52. *Id.*

53. Redish, *supra* note 38, at 430, 448-58.

54. See text accompanying notes 22-25 *supra*.

commercial speech is not generally harmful per se.[55] Second, although some courts have recognized the need to examine commercial speech for possible first amendment issues, most have ignored the potential problem of imposing a regulation upon traditionally protected speech that may be included in an otherwise commercial message.[56]

A more basic criticism is directed by commentators at the view that purely commercial speech — that which is devoid of information of "public interest" as that term is defined by the Court — is properly outside the protection of the first amendment. The courts have generally followed the commercial speech doctrine without articulating its rationale, but one lower court has suggested that protection of commercial speech is not appropriate because product and service advertising does not affect the political process or contribute to the exchange of ideas and is generally not a form of individual self-expression.[57] Critics of this rationale have argued that the advertising of goods and services is informational and fundamental to social welfare.[58] The educational function of such advertising contributes as much to the personal self-realization essential to self-government as do the areas of traditionally protected literary and artistic expression.[59] The possible ramifications of these opposing positions were recognized by the Court in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.*[60]

In *Pittsburgh Press* the petitioner appealed an order requiring it to cease publishing classified advertisements for employment using the designations "male" and "female." This advertisement was held to be in violation of a city ordinance prohibiting employers from making use of discriminatory employment advertising and forbidding any person from aiding in such act.[61] In affirming the order, the Court retained the commercial speech distinction. The Court viewed the want ad headings as merging with the advertisements themselves to form "an integrated commercial statement"[62] and emphasized that this composite statement proposed illegal commercial activity.[63] Distinguishing *Sullivan,* the Court noted that the advertisement did not present editorial opinion on either the merits of the ordinance itself or the method of enforcement. The petitioner argued forcefully that "the exchange of information is as important in the commercial realm as in any other" and that the level of

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55. Redish, *supra* note 38, at 431.

56. *Id. See also* DeVore & Nelson, *Commercial Speech and Paid Access To the Press,* 26 HASTINGS L.J. 745, 747-55 (1975); Goss, *The First Amendment's Weakest Link: Government Regulation of Controversial Advertising,* 20 N.Y.L.F. 617, 623-24 (1975); Note, *Commercial Speech — An End In Sight To Chrestensen?,* 23 DEPAUL L. REV. 1258, 1268 (1974). See text accompanying notes 14-15 *supra.*

57. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom.* National Broadcasting Co. v. FCC, 396 U.S. 842 (1969).

58. *See* Goss, *supra* note 56, at 625-26; Redish, *supra* note 38, at 432-35.

59. Redish, *supra* note 38, at 443-48.

60. 413 U.S. 376 (1973).

61. *Id.* at 378.

62. *Id.* at 388-89.

63. *Id.* at 388. The legal-illegal dichotomy is criticized in DeVore & Nelson, *supra* note 56, at 762-63.

protection afforded commercial speech should therefore be reassessed.[64] Because the Court found petitioner's argument inapplicable when the activity in question was illegal discrimination, it left to future cases any test of the merits of petitioner's argument in other factual situations.[65] Notably, the Court did not specifically hold that all "classic examples of commercial speech" are unprotected.[66] Instead, the Court implied in dictum that a balancing approach might be used to weigh "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal . . . [against] the governmental interest supporting the regulation. . . ."[67]

Elaborately explaining the status of commercial speech, the instant case clarifies and applies the balancing test suggested in the dictum of *Pittsburgh Press*.[68] The Court stopped short of overruling *Chrestensen*,[69] but sharply narrowed that decision to its own factual situation.[70] The instant opinion announced that, despite commercial content or purpose, a communication may still be properly afforded some measure of first amendment protection. The degree of protection, however, depends on the extent to which first amendment interests are served.[71] In the instant case, the factors leading to protection were overwhelming. The advertisement provided information important to those possibly in need of the abortion service, to those with interest in the laws of another state, and to those seeking reform of current Virginia statutes.[72] Moreover, the matter "actively advertised pertained to

64. 413 U.S. at 385-89.

65. *Id.* at 388-89.

66. *Id.* at 385.

67. *Id.* at 389. The term "balancing test" was not expressly used. The complete text of the relevant portion of the Court's opinion is as follows: "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 limitation on economic activity." *Id.* at 389. Despite this ostensible concession to the argument that commercial speech may be deserving of first amendment protection in some contexts, the issue remained far from being conclusively resolved.

68. 421 U.S. 809 (1975). The Court did employ a balancing test to afford first amendment protection to the abortion referral service advertisement, but the protection was afforded primarily on the basis of the noncommercial aspects of public interest that the Court identified in the advertisement. Apparently, consumer education information as to price, quality, availability, etc. is still generally not included within the Court's notion of first amendment interests. For further explanation see text accompanying notes 71-78 *infra*.

69. See text accompanying notes 12-13 and 35-36 *supra*.

70. The *Chrestensen* holding was explained as a distinctly limited one, upholding the ordinance "as a reasonable regulation of the manner in which commercial advertising could be distributed. . . . The case obviously does not support any sweeping proposition that advertising is unprotected *per se*." 420 U.S. at 819-20. In a footnote the Court acknowledged a stream of criticism of *Chrestensen* including that of Mr. Justice Douglas, who had joined in that opinion, that "[t]he ruling was casual, almost offhand. And it has not survived reflection." 421 U.S. at 820 n.6.

71. *Id.* at 826.

72. The Court focused on the existence of the abortion referral agency itself and two lines in the advertisement in particular: "Abortions are now legal in New York. There are no residency requirements." *Id.* at 822.

constitutional interests . . . of the general public,"[73] and the appellant was a newspaper editor rather than an advertiser, which gave "more serious First Amendment overtones" to the case.[74] Unlike the discriminatory activity in *Pittsburgh Press*, the advertised abortion service was legal in the state where the abortions would be performed.[75] Also, the advertised abortions were to occur in another state and, as such, were beyond regulation by the Virginia legislature. The Court was apprehensive that through a statute similar to the one in the instant case a state could exert power over interstate media and "impair . . . their proper functioning."[76] In view of these extensive first amendment interests, the statute was viewed as an attempt by Virginia to prevent its citizens from "*hearing* or *reading* about the New York services."[77] The court concluded that this encroachment on the first amendment rights of its citizens far outweighed Virginia's alleged interest in preventing commercial exploitation of the health needs of its citizens.

Arguing that the commercial speech doctrine and the primary purpose test of *Chrestensen* should be upheld, the dissent reasoned that the conviction in the instant case should be affirmed. The dissent viewed the Court's decision as an attempt to fashion a doctrine to afford first amendment protection to a specific specimen of commercial speech without overruling its previous inconsistent decisions.[78]

The Court did explicitly limit its holding and left to future cases "the precise extent to which the First Amendment permits regulation of advertising related to activities the State may legitimately regulate or even prohibit."[79] The Court also indicated that the results of past decisions in lower courts "were not inconsistent" with the holding in the principal case;[80] however, it is unlikely the case is the aberration the dissent suggests it is. Viewed in the context of past cases, the instant case is a logical step in the evolution of the Court's first amendment theory. Faced with the proper case the Court will likely extend its holding to other types of commercial advertisements.[81] Nevertheless, the view of the dissent may well be a caveat for the future since the balancing test remains an *ad hoc* solution. The instant opinion contains

73. *Id.* The Court cited *Roe* and *Doe* in this connection. See text accompanying notes 5-9 *supra.*

74. *Id.* at 828.

75. New York subsequently barred operations by abortion referral agencies as in violation of the public interest in the ethical and professional conduct of medicine. *Id.* at 822-23 n.8.

76. *Id.* at 829.

77. *Id.* at 827. It is unclear if the Court was defining the motivation, the intent, or the effect of the statute. In this context it must be kept in mind that appellant's conviction was probably the only one in the 93-year history of the statute. See note 2 *supra.* In footnotes the Court mentioned that appellant's brief described the publication as an "underground newspaper," 421 U.S. at 811 n.1, and that appellant contended "that under the circumstances [publishing] . . . the advertisement was . . . 'an implicit editorial endorsement' of its message." *Id.* at 822 n.7.

78. *Id.* at 830 (Rehnquist, J., dissenting).

79. *Id.* at 825.

80. *Id.* at 825 n.10.

81. For application of the holding of *Bigelow* to contraceptive advertising, see Population Serv. Int'l v. Wilson, 398 F. Supp 321, 337 (S.D.N.Y. 1975).

such a multiplicity of factors termed relevant by the Court that the commercial speech doctrine may still be able to serve whatever interests the Court feels are socially desirable. There is also the hazard that lower courts may view the instant case as a decision compelled by a peculiar set of circumstances.[82] If so, the guidelines of the instant decision will have more impact on the language of lower court decisions than on their actual outcome.

Despite these shortcomings, the principal case must be viewed as a major step in recognizing that first amendment interests may accompany commercial speech. As the dissent noted, there is a major distinction between editorial advertisements such as that in *Sullivan,* and the advertisement in the instant case,[83] which, to paraphrase the Court in *Pittsburgh Press,* expressed no views as to the propriety of the Virginia abortion laws or the law under which appellant was convicted.[84] In fact, the importance of the instant case lies with this distinction: it is the first case in which the Court has found first amendment interests in an advertisement that proposes only a commercial transaction. As was observed in the *Chrestensen* opinion, the dissent argued that the effect of this holding would be to enable evasion of otherwise proper regulation by appending "a civic appeal, or a moral platitude" to a purely commercial message.[85] Although the potential for abuse may be real, such a result is unlikely. Under the balancing approach, the courts will retain considerable discretion. Although all first amendment interests accompanying commercial speech must be taken into consideration, they will not be examined in a vacuum; instead, they are to be weighed against the competing governmental interest in regulation. This decision does not limit courts to an analysis of the message itself. The Court explicitly recognized that "diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees" and that first amendment protection may vary according to the interests involved.[86] In addition, the Supreme Court has noted that "all public expression," noncommercial as well as commercial, "may be subject to reasonable regulation that serves a legitimate public interest."[87]

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82. That this hazard is real is evidenced by the language of the district court in *Population Services Int'l* suggesting that in light of *Bigelow* "it is still the law that purely commercial speech—whatever may be the scope of that term—does not enjoy constitutional protection. Therefore, as to advertisements and displays which are purely commercial, this Court concludes that these may validly be regulated by the State. We do not accept the position . . . that *any* advertisement of contraceptive products is so linked to the exercise of a protected privacy right that it is protected by the Constitution." *Id.* at 337.

In a footnote, the district court pointed out that it was aware of the language in *Bigelow* noting that the activity in question, legal abortions, " 'pertained to constitutional interests.' . . . However, this was one of many factors mentioned by the Supreme Court in reaching its conclusion that the advertisement in question was protected by the First Amendment. We do not read *Bigelow,* or any other decision of which we are aware, as standing for the absolute prohibition urged upon us by the plaintiffs." *Id.* at 337 n.24.

83. 421 U.S. at 832. (Rehnquist, J., dissenting).

84. 413 U.S. at 384-85.

85. 421 U.S. at 832.

86. *Id.* at 826.

87. *Id.*