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Commercial Speech: Foreclosing on the Overbreadth Doctrine

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COMMERCIAL SPEECH: FORECLOSING ON THE OVERBREADTH DOCTRINE

Bates v. State Bar of Arizona, 433 U.S. —, 97 S. Ct. 2691 (1977)

In contravention of an Arizona State Bar disciplinary rule,[1] appellant attorneys placed a newspaper advertisement listing their fees for certain routine services at their "legal clinic."[2] Disciplinary proceedings led to a recommendation that appellants be suspended from practice for one week.[3] On appeal to the Supreme Court of Arizona, appellants contended that the Bar rule was overbroad and infringed on their right of free commercial speech[4] under the first amendment. This argument was rejected by a plurality, which interpreted recent decisions of the United States Supreme Court as not extending the constitutional shelter for commercial speech to advertisements by professionals rendering services.[5] The United States Supreme Court reversed and HELD, that although restrictions on commercial speech were not voidable for over-

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1. DR 2-101(B), Rule 29(A) of the Supreme Court of Arizona, 17A ARIZ. REV. STAT. 26 (1976 Supp.).

2. The advertisement read: DO YOU NEED A LAWYER?

LEGAL SERVICES
AT VERY REASONABLE FEES

Divorce or Legal Separation — Uncontested
(both spouses sign papers):
$175.00 plus $20.00 court filing fee

Preparation of All Court Papers or Instructions
On How to Do Your Own Simple Uncontested Divorce
$100.00

Adoption — Uncontested Severance Proceeding
$225.00 plus approximately $10 publication cost

Bankruptcy — Non-Business, No Contested Proceedings
Individual
$250.00 plus $55.00 court filing fee
Wife and Husband
$300.00 plus $110.00 court filing fee

Change of Name
$95.00 plus $20.00 court filing fee

Information regarding other types of cases furnished on request.

Legal Clinic of Bates & O'Steen
617 North 3rd Street
Phoenix, Arizona 85004
Telephone (602) 252-3883

Arizona Republic, Feb. 22, 1976.

3. The suspensions of each of the clinic's two partners were to run consecutively so that appellants' law offices need not be closed.

4. Appellants also contended that DR 2-101(B) violated antitrust provisions of the Sherman Act, 15 U.S.C. §§1,2 (1970), by restraining competition between attorneys. *In re* Bates, 113 Ariz. 394, 555 P.2d 640 (1976), *rev'd*, 97 S. Ct. 2691 (1977).

5. *Id.* That court also agreed with appellee Arizona State Bar's argument that Sherman Act provisions were inapplicable to the disciplinary rule under the state action exemption of Parker v. Brown, 317 U.S. 341 (1943).

breadth,[6] the rule against attorney fee advertising,[7] as applied, impermissibly restrained the free flow of information protected by the first amendment.[8]

Until recently commercial speech had been held to stand outside the protection given by the free speech clause of the first amendment. In early challenges to statutory restrictions, regulatory prerogatives were found to outweigh the rights of advertisers.[9] In 1942, the Supreme Court decided that the Constitution did not protect exclusively commercial speech from government regulation,[10] and even during its expansion of first amendment rights to include re-

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6. 97 S. Ct. 2691, 2707 (1977). Appellants and several of the amici curiae had argued at length that DR 2-101(B) was so sweeping in compass that it should be struck down on its face. Brief of Appellant at 51-54, Brief of the United States as Amicus Curiae at 25-35, Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977). The Court held that the advertising of fees for professional services did not deserve the unusually strong protection offered by the doctrine of overbreadth. See notes 41-56 *infra* and accompanying text. Evidently the Court's intention was to prevent recourse to the doctrine in all challenges to commercial speech regulations, for the narrowing of the doctrine's applicability was justified by a characteristic common to all commercial advertising, the absence of a significant chilling factor. The language used to circumscribe the doctrine indicates the Court's intended scope: "[T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context." 97 S. Ct. at 2707.

7. The Court, limiting its holding to this aspect of attorney solicitation, specifically said that the decision did not resolve questions of advertisements of the relative quality of legal services, of radio and television advertising, and of in-person solicitation of clients. 97 S. Ct. at 2700, 2709. The Supreme Court has recently agreed to review two cases involving the constitutionality of restrictions on "capping" or in-person solicitation. *See*, Ohralik v. Ohio State Bar, 48 Ohio St. 2d 217, 357 N.E.2d 1097 (1976), *cert. granted*, 98 S. Ct. 49 (1977); *In re* Smith, — S.C. —, 233 S.E.2d 301 (1977), *cert. granted*, 98 S. Ct. 49 (1977). *Cf.* Goldman v. State Bar, 20 Cal. 3d 130, 570 P.2d 463, 141 Cal. Rptr. 447 (1977) (holding that the instant case does not bar state prohibition of solicitation of professional employment by attorneys); People v. Posner, — Mich. App. —, 261 N.W.2d 209 (1978) (holding statute prohibiting solicitation of professional employment from accident victims overbroad on its face and unconstitutional for restricting non-commercial freedom of expression).

8. 97 S. Ct. at 2709. While doubtless the practical effect of the instant decision on the legal profession will be profound, this comment will focus primarily on the overbreadth aspect of the opinion. See notes 24-56 *infra* and accompanying text. For analyses of the instant case's immediate impact on lawyers, see *Supreme Court Holds Lawyers May Advertise*, 63 A.B.A.J. 1093 (1977); Lieberman, *The ABA Misses the Mark on Advertising*, BUSINESS WEEK, Aug. 29, 1977, at 74.

9. *See, e.g.*, Packer Corp. v. Utah, 285 U.S. 105 (1932) (upholding state power to forbid billboard advertising of tobacco); *cf. Ex parte* Jackson, 96 U.S. 727 (1877) (federal statute prohibiting the mailing of lottery advertisements upheld over first amendment challenge as a reasonable exercise of the postal power). *But see* Leach v. Carlile, 258 U.S. 138 (1922) (Holmes, J., dissenting) (confirming postmaster's statutory discretion to prohibit mailed advertising of medical nostrums): "If the execution of this law does not abridge freedom of speech I do not quite see what could be said to do so." *Id.* at 140. *See generally* Redish, *The First Amendment in the Market Place: Commercial Speech and Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

10. Valentine v. Chrestensen, 316 U.S. 52 (1943). The Court upheld a New York City ordinance prohibiting handbill distribution in the face of an objection that the law disregarded the first amendment. The same ordinance was only recently struck down in light of current commercial speech decisions. People v. Remeny, 40 N.Y.2d 527, 355 N.E.2d 375, 387 N.Y.S.2d 415 (1976).

ligious and political solicitation[11] the Court remained intractable with regard to purely commercial speech.[12] In the 1960's, however, constitutional protection was extended to paid political advertisements of "the highest public interest."[13] Recently the Court has used a balancing test[14] to determine whether commercial communications warrant first amendment coverage. Applying this test to a state prohibition of abortion advertising, the Court held in *Bigelow v. Virginia*[15] that the statute violated a newspaper editor's right to commercial free speech,[16] thereby laying the foundation for a future expansion of constitutional protection in this area.[17]

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11. *See* Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. City of Irvington, 308 U.S. 147 (1939).

12. *See* Breard v. City of Alexandria, 341 U.S. 622 (1951) (upholding a municipal ordinance against door-to-door magazine sales).

13. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). An advertisement describing abuses allegedly committed against civil rights workers in Alabama solicited contributions to a defense fund for Martin Luther King, Jr. The public interest element, even in allegations contained in the advertisement that proved to be false, allowed the Court to distinguish the case from *Chrestensen*. The fact that it was a paid advertisement did not remove its first amendment safeguards. Nine years later the Court was again able to avoid resolving the question of how much protection to give commercial speech. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). In that case a suit against a newspaper charging sexual discrimination in its classified "Help Wanted" section was brought before the Court. It was held unnecessary to determine whether the first amendment encompassed advertising of limited or no public interest since the sexual discrimination was illegal. The opinion indicated, nonetheless, that there would have been some first amendment protection absent the supervening illegality. *Id.* at 389.

14. This test has also been referred to as "harm-weighing," Note, *Commercial Speech and the First Amendment: An Emerging Doctrine*, HOFSTRA L. REV. 655, 665 n.64 (1977); and as "definitional balancing," Vanasco v. Schwartz, 401 F. Supp. 87, 95 (E.D.N.Y. 1975). *See generally* Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942-43 (1968); Comment, *The Consumer's Right to Know: New First Amendment Weapon in the War on Price Advertising Bans*, 29 U. FLA. L. REV. 354, 360 n.46 (1977). It involves a comparison of the constitutional interest of the claimant with the likelihood that the challenged statute will achieve desired state goals.

15. 421 U.S. 809 (1975). Jeffrey Bigelow, managing editor of a weekly college newspaper in Charlottesville, ran the advertisement of a New York abortion referral service. He was convicted under a Virginia statute making it a misdemeanor to encourage or prompt the procuring of an abortion by the sale or circulation of any publication. Weighing the state's interest in protecting its citizens against the first amendment freedoms of both the editor and the public, the Court held that the statue, as applied to Bigelow, infringed speech that was constitutionally protected under the first amendment. *Id.* at 826-29.

16. *Id.* at 818.

17. The Court consistently declined, however, to extend the scope of first amendment coverage to broadcast commercial speech, and refused to strike down prohibitions against cigarette advertising on radio and television. See note 56 *infra* and accompanying text. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom*, Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972). This case has been referred to as the "high-water mark" of the commercial speech exception to the first amendment. *See* J. BARRON & C. DIENES, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 834 (1975). Whatever protection the media deserved was held outweighed by Congress' commerce and police powers, since cigarettes were deemed dangerous to public health. Whether this decision will

Opinions that sanctioned protection for commercial speech, however, did not clarify whether constitutional safeguards encompassed only advertising with a public interest element. The Supreme Court resolved this question in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[18] holding that purely commercial advertising of prescription drug prices fell within the ambit of the first amendment.[19] Because the freedom to speak commercially coincided with consumers' related first amendment right to receive price information,[20] the state interests involved[21] were held to be outweighed by the benefits of open channels of communication.[22] Although it extended constitutional safekeeping to exclusively mercantile speech, the opinion observed that commercial expression differs from other kinds of speech, and for that reason the Court explicitly preserved some state regulatory power over advertising.[23]

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stand in the aftermath of later commercial speech cases is ably discussed in a recent article, Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080 (1976). *Cf.* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting): "[A]pparently under the Court's holding so long as the [cigarette] advertisements are not deceptive they may no longer be prohibited." *Id.* at 789.

18. 425 U.S. 748 (1976). A drug-dependent individual and two consumers' groups sought to enjoin the enforcement of a Virginia statute that prohibited the advertisement of prescription drug prices, arguing that the statute burdened their first amendment "right to know."

19. *Id.* at 770. Writing for the majority, Justice Blackmun observed that requiring a public interest element would be pointless, since one could be added to most commercial messages with minimum effort. *Id.* at 764. *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52 (1942) (commercial exhibitor sought to transform banned handbill by printing political message on reverse side).

20. 425 U.S. at 757.

21. Interests asserted by the state to justify the prohibition included the maintenance of professionalism among pharmacists, the dangers of aggressive price competition, and the loss of a stable professional relationship between pharmacists and their customers. *Id.* at 766-68.

22. Such an unobstructed stream of data was felt vital to the efficient distribution of resources in a market economy that used as its allocative method the private purchasing choices of many consumers. *Id.* at 763-64. One commentator finds this economic thesis analogous to "the liberal democratic notion of the relationship of free speech to the achievement of optimal political choices." Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?*, 61 MINN. L. REV. 705, 717 (1977). A less favorable analysis was offered in Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 4 (1976).

23. 425 U.S. at 770. Reasonable time, place, and manner limitations exceeding those permitted on political speech were acceptable. *Id.* at 771. Commercial speech rights, compelled by necessities of health and of survival in the marketplace, were thought less likely to be chilled by governmental regulation. *Id.* at 771-72 n.24. As long as no attempt was made to regulate the content of advertisements, and while ample alternative channels of communication remained available, government restrictions of commercial speech were tolerable if in furtherance of legitimate state goals. *Id.* at 771. The Court has since further sharpened the parameters of permissible state regulation. *See, e.g.*, Carey v. Population Servs. Int'l, 97 S. Ct. 2010 (1977) (invalidating state restrictions on the advertising and display of contraceptives); Linmark Ass'n, Inc. v. Township of Willingboro, 97 S. Ct. 1614 (1977) (striking down ordinances prohibiting the display of "for sale" signs in racially-transitional neighborhoods); *accord*, Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 97 S. C. 1679 (1977) (overruling FTC order banning use of the phrase "instant tax refund" in loan company ad-

Challenges to limitations of commercial speech often have asserted that the legislative prohibitions swept farther than was necessary to achieve legitimate governmental objectives.[24] The Court has frequently accepted those arguments and nullified statutes in first amendment suits not involving advertising. In these noncommercial freedom of speech cases the Court has struck down overly broad statutes in one of two ways. A statute is held to be invalid in part, using what has been termed the as-applied method, or in its entirety, by means of the more comprehensive overbreadth doctrine.[25] The as-applied method is the more traditional and limited response to statutes that are too widely drawn. Under this method, brought to bear infrequently in free speech disputes,[26] the Court will review only the specific fact situation before it and determine whether the statute was wrongfully applied in that particular instance.[27] The overbreadth doctrine is radically different. It enables the Court, despite a historic reluctance to void legislation,[28] to hold a statute unconstitutional on its face.[29] To reach this result, rules of standing must be relaxed and some con-

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vertisements); Harris v. Beneficial Fin. Co., 338 So. 2d 196 (Fla. 1976) (public interest in proscribing debotor harassment outweighted finance company's right to inform debtor's employer of his obligation prior to final judgment).

24. Several of these cases involved access to legal services, most notably NAACP v. Button, 371 U.S. 415 (1963). The Virginia State Conference of NAACP Branches made its staff of attorneys available at no cost to individuals wishing to take action against racial discrimination. A state law forbade organizations retaining lawyers, in connection with proceedings to which they were not parties, and in which they had no pecuniary rights or liabilities, to solicit business for the retained attorneys. The Court agreed with petitioner NAACP that the statute was overbroad on its face, noting that "the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed. . . ." *Id.* at 444. *Cf.* United Transp. Union v. State Bar of Michigan, 401 U.S. 576 (1971) (statute that prohibited union from recommending attorneys to members violated members' freedoms of speech and association); United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967) (injunction of union's employment of an attorney to prosecute members' claims infringed on members' freedom of association); Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964) (court order halting union's lawyer referrals for injured members abridged members' constitutional freedoms of speech and association). Restrictions on solicitation by professionals were formerly thought necessary to protect the public. *See, e.g.*, Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963) (restrictions on optometrists' advertising upheld); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (sale of optical appliances may be prohibited); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935) (law proscribing the advertising of dental services allowed to stand).

25. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

26. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809 (1974); Spence v. Washington, 418 U.S. 405 (1974) (statute forbidding "improper use" of United States flag unconstitutional as applied to appellant's superimposition of peace symbol on flag). The as-applied technique is more commonly used in cases not connected with the Bill of Rights. *See The First Amendment Overbreadth Doctrine, supra* note 25, at 852 n.31.

27. Note, *supra* note 25, at 845-52.

28. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

29. The Court has used the overbreadth doctrine in first amendment cases to force a legislature to rewrite unconstitutional statutes, a much quicker and more forceful approach than case-by-case examination of the statute.

jecture permitted;[30] a statute is examined to determine whether it can be applied unconstitutionally under any conceivable circumstances. If a prohibited application is possible, the statute is struck down.[31] This facial overbreadth approach often has been favored over the as-applied procedure as a means of resolving first amendment conflicts.[32] The Court has justified this exceptional mode of protection by stressing the extraordinary importance of first amendment rights and their vulnerability to chilling by unrestrained legislation.[33] Consequently, overbreadth methodology has been used almost exclusively to nullify statutes that might have chilled freedom of speech.[34]

Nevertheless, the overbreadth doctrine has been severely criticized by some members of the Court,[35] and was recently restricted to challenges of regulations of pure speech.[36] The facial overbreadth approach thus is no longer an ade-

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30. It is possible when alleging facial overbreadth to assert the rights of parties not before the Court, even when claimants' own conduct could constitutionally be regulated. The Court has allowed the assertion of *jus tertii* so that its remedies can sweep as widely and as powerfully as the unconstitutional statutes enacted by legislatures do; this exception to the rules of standing gives the doctrine of overbreadth its prodigious force. *See, e.g.*, City of Madison School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1967); Barrows v. Jackson, 346 U.S. 249 (1953); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

31. United States v. Raines, 362 U.S. 17, 21-23 (1960).

32. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972) (holding unconstitutional on its face a state breach-of-the-peace statute prohibiting fighting words); Coates v. Cincinnati, 402 U.S. 611 (1972) (finding a loitering ordinance void for vagueness and overbreadth); United States v. Robel, 389 U.S. 258 (1967) (nullifying a federal regulation banning members of "Communist-action organizations" from employment in defense facilities, as restrictive of protected freedom of association); Dombrowski v. Pfister, 380 U.S. 479 (1965) (invalidating as vague and facially overbroad state subversive-activities statutes restricting the activities of civil rights organizations); Smith v. California, 361 U.S. 147 (1959) (holding that a municipal ordinance imposing strict liability for possession of obscene materials exercised a sufficient chilling effect on protected expression to be unconstitutional on its face).

33. "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." NAACP v. Button, 371 U.S. 415, 433 (1963). *See* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 822-26 (1969).

34. *But see* Berger v. New York, 388 U.S. 41, 63-64 (1967) (statute authorizing electronic eavesdropping held facially overbroad as an invasion of fourth amendment zone of protection); Aptheker v. Secretary of State, 378 U.S. 500, 515-17 (1964) (act prohibiting the issue or renewal of passports to Communist Party members ruled facially overbroad as limitation on protected fifth amendment right to travel).

35. "The 'overbreadth' and 'vagueness' doctrines, as they are now being applied by the Court, quietly and steadily have worked their way into First Amendment parlance much as substantive due process did . . . [Overbreadth is] a doctrine that reduces our function to parsing words in the context of imaginary events." Lewis v. New Orleans, 415 U.S. 130, 137-38 (1974) (Blackmun, J., dissenting). *See* Gooding v. Wilson, 405 U.S. 518, 535-37 (1972) (Burger, C.J., joined by Blackmun, J., dissenting); Saia v. New York, 334 U.S. 558, 566 (1948) (Jackson, J., dissenting).

36. Broadrick v. Oklahoma, 413 U.S. 601 (1973). *Broadrick* involved a challenge by state employees to Oklahoma's Hatch Act, which prohibited substantial participation by them in politics or their solicitation of political contributions. Despite a challenge predicated on the statute's breadth the Court upheld the Act, subordinating the overbreadth doctrine to the as-

quate means to assess a statute that regulates only conduct.[37] Advertising, however, was specifically excluded from that prohibition in the *Bigelow* case.[38] The Court in *Bigelow* said that advertising is pure speech, not conduct, and thus falls squarely within the scope of the overbreadth doctrine.[39] Since the Court in *Bigelow* sanctioned a challenge to the substantial overbreadth of a statutory restriction of newspaper advertising[40] it seemed until the present case that the overbreadth doctrine could be invoked to annul significant restrictions on commercial speech.[41]

Declining to follow the views expressed in *Bigelow*,[42] however, in the instant case the Court refrained from applying overbreadth analysis. Commercial advertising, since motivated by economic competition, was found less likely to be chilled by sweeping statutes than non-mercantile speech,[43] and not to require the extraordinary protection afforded by the overbreadth doctrine.[44] The tolerance extended to political misstatements was deemed unjustified in commerce because commercial advertisers, unlike political critics, were considered best able to verify the truthfulness of their own representations and thus de-

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applied method as a vehicle for challenging regulations of conduct. *Id.* at 615-16. The opinion also held that to be successful, a first amendment challenge relying on the doctrine must prove a substantial degree of overbreadth. This requirement probably was already implicit in the doctrine. *See* Note, *supra* note 25, at 859.

37. The Court, significantly, observed that its limitation of the overbreadth doctrine only applied in cases where the challenged statute regulated conduct; regulations on "pure speech" were still subject to overbreadth attacks. 413 U.S. at 615.

38. 421 U.S. 809 (1975). Because the Virginia legislature had subsequently amended the misdemeanor statute under which Bigelow was convicted and fined $500, the issue of its overbreadth had become moot by the time the case was decided, and the Court therefore employed the as-applied methodology. The Court made it clear, however, that the challenge could have been upheld and the statute stricken on its face had no amendment been passed, and that the state courts had erred in denying Bigelow standing to assert this claim without determining whether the alleged overbreadth was substantial. *Id.* at 815-18.

39. *Id.* at 817.

40. *Bigelow* was distinguishable from *Broadrick* in four ways: First, a substantial degree of overbreadth was proven in the Virginia case. Second, the Virginia courts had not narrowed the scope of the statute that restricted Bigelow; a narrowing construction by the Oklahoma State Personnel Board had made the degree of the *Broadrick* statute's overbreadth less substantial. Third, the Oklahoma appellants had attempted to assert the possibility of future unconstitutional applications of the state's Hatch Act as grounds for its nullification; those standing problems and problems of hypothetical injury were not present in *Bigelow* because a conviction had already been obtained against the newspaper editor. Finally, the Virginia statute, unlike the Oklahoma one, attempted to regulate pure speech rather than only conduct.

41. 97 S. Ct. at 2708.

42. See note 38 *supra*.

43. "Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." *Id.* The impact of this judicial about-face was evidently meant to prohibit overbreadth challenges to all commercial speech laws, not just those forbidding professional advertising. See note 7 *supra*.

44. *But see* Reich, *supra* note 22, at 716. Professor Reich contends that there is substantial chilling of commercial speech by trade regulations too sweeping in design, such as the impact of an FTC cease-and-desist order upon an advertiser, that may inhibit the publication of even truthful commercial information.

termine whether they are within the scope of constitutional protection.[45] Overbreadth analysis seemed unsuitable in "a context where it is not necessary to further its intended objective,"[46] and the Court held the Arizona Bar's disciplinary rule unconstitutional only as applied to the advertising of prices for routine legal services.[47]

The Court said that the instant case followed a fortiori from *Virginia Pharmacy*[48] and, as in that opinion, summarily rejected many of the arguments advanced for the regulation. A consumer-oriented balancing test similar to that in *Virginia Pharmacy* was used to weigh the arguments in favor of restricting professional advertising against the consequences of removing the prohibition.[49] The Bar Association's claim that the profession was too philanthropic to adapt to competition was dismissed: the Court found this characterization of lawyers as beneficent to be at odds with Bar allegations that attorneys might mislead clients with unconscionable claims.[50] Similarly, the Court was not persuaded by appellee's contention that the abolition of disciplinary rules like Arizona's would congest courts with litigants, raise fees, and threaten the quality of counseling; instead, it emphasized that greater access to the legal system was imperative.[51] Also rejected was the Bar's claim

45. 97 S. Ct. at 2707. *Compare* New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) (first amendment requires high tolerance of incorrect political statements in newspapers).

46. 97 S. Ct. at 2708.

47. *Id.* at 2709. As examples of routine legal services the Court mentioned uncontested divorces and adoptions, simple personal bankruptcies and changes of name. *Id.* at 2694.

48. *Id.* at 2700. This balancing test is described elsewhere. See note 14 *supra* and accompanying text.

49. 425 U.S. 748 (1976). In that case the Court had hinted at a possible exclusion of fee advertising by service professionals from the shelter of the first amendment: "Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." *Id.* at 773 n.25.

50. The majority found it "at least somewhat incongruous" for appellee to praise the Bar's spirit of public service and to warn in the same breath that attorneys would abuse free commercial speech. 97 S. Ct. at 2707. Appellee's argument that perception of lawyers as businessmen in search of a profit would cause public suspicion and loss of faith was summarily dismissed; the Bar's claim that regulation of attorneys' misrepresentations was all but impossible was ignored by placing the burden of enforcement on the Bar. The Court felt that true professionalism need not exclude the profit motive nor tolerate the duping of clients through unethical enticement. *Id.* at 2701. Current disciplinary procedures were considered sufficient. However, Justice Powell's separate opinion expressed a contrary position. (Powell, J. concurring in part and dissenting in part): "The Court seriously understates the difficulties, and overestimates the capabilities of the Bar — or indeed of any agency public or private — to assure with a reasonable degree of effectiveness that price advertising can at the same time be both unrestrained and truthful." *Id.* at 2715. *See generally* ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970).

51. The Court did not find the potential for greater utilization of the courts threatening; lack of accessibility was already a serious problem. 97 S. Ct. at 2705. *See Hearings on "The Organized Bar: Self-Serving or Serving the Public?" before the Subcommittee on the Representation of Citizens' Interests of the Senate Judiciary Committee*, 93d Cong., 2d Sess. (1974). The notion that advertising would inflate fees by increasing overhead was discredited by findings that unrestricted advertising of products lowers prices. It seemed reasonable to expect

that attorney advertising was inherently misleading to the public.[52] The five-justice majority found a great need for increased public disclosure concerning legal services and said that advertising was most appropriate in the area of routine rather than unique services, agreeing with appellees that fixed rates might at times mislead, but placing the duty of supervision on the state bar associations.[53]

Not all state regulation of legal advertising was precluded by the Court's holding, however. Utilization of the as-applied approach allowed a narrower ruling; had the Court invalidated the disciplinary rule on its face it would have remained unclear how much, if any, state regulation of commercial expression would still be permissible.[54] The minimal chilling effect of restrictions on commercial speech, and the weight of legitimate state interests in protecting the public, permitted some controls.[55] As in *Virginia Pharmacy*, misleading,

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the same effect on the advertising of services. *See* W. CODY, RESTRICTED ADVERTISING AND COMPETITION: THE CASE OF RETAIL DRUGS (1976). Appellee also contended that publicizing fixed rates for various services might induce practitioners to prefer minimal, standardized packages even where more demanding needs existed. The Court commented that slipshod practices were not discouraged by the current prohibitions on advertising. 97 S. Ct. at 2706 nn.34, 35.

52. As noted previously, the Court said that increased flow of information aids allocative efficiency. "[W]e view as dubious any justification that is based on the benefits of public ignorance." *Id.* at 2704. See note 22 *supra* and accompanying text. The Supreme Court of Florida, in recently enjoining the sale of inexpensive uncontested divorce forms by an Ocala typist, noted the emphasis on greater access to legal services in the instant case but found that the typist had engaged in the unauthorized practice of law. Because of the minimal expertise needed to prepare wills, divorce and bankruptcy forms, the typist had alleged in response to the Bar's suit that Florida lawyers were running unlicensed typing services. Florida Bar v. Brumbaugh, No. 48, 803 (Fla., filed Jan. 10, 1978).

53. Responding to the argument that some clients' needs were not particularized enough to make advance determination of prices appropriate, the instant Court emphasized that advertising best fitted "routine" legal services, which are more easily standardized than services of a unique nature. See note 46 *supra*. The Court added that there could be no misrepresentation if a client's needs were met at the published price. 97 S. Ct. at 2703. *See* Louisiana Consumer's League v. Louisiana State Bd. of Optometry Examiners, 557 F.2d 473 (5th Cir. 1977) (finding a statute prohibiting the advertising of prices for prescription eyeglasses and optical products an unconstitutional restriction of commercial speech because the state could not show that the process of filling optical prescriptions was so unique that standardized rates could not be established).

54. The Court was therefore able to outline more fully the extent of constitutionally-sound state regulation.

55. 97 S. Ct. at 2707-08. Permissible restrictions on commercial speech thus might vary considerably from state to state. The Court found this a less worrisome possibility than the consequences of totally voiding the rule on overbreadth grounds. *Id.* at 2709 n.37. Local control has been allowed in other areas of expression as well, *see, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (defamation); Miller v. California, 413 U.S. 15, 33 (1973) (obscenity). Indeed, some variation among the states in their regulation of lawyers' advertising may already be detected. Recently the ABA's House of Delegates proposed that the Code of Professional Responsibility be amended to permit legal advertising on radio. *House of Delegates Adopts Advertising D.R.*, 63 A.B.A.J. 1234, 1235 (1977). However, a special committee of the Florida Bar recommended against radio or television commercials by lawyers and for the initiation of grievance proceedings against several Florida attorneys engaged in advertising. Florida Bar News, Sept. 10, 1977, at 3. *Accord*, Talsky v. Department of Registration and Educ., 68 Ill. 2d 579, 370 N.E.2d 173 (1977); *In re* Madsen, 68 Ill. 2d 472, 370 N.E.2d 199 (1977).

false, and deceptive advertisements could be subjected to restraints. Time, place, and manner of advertising could be overseen as well,[56] and it was acknowledged that radio and television advertising posed unique problems that might warrant stricter regulation.[57]

The instant Court's refusal to apply overbreadth analysis seems appropriate, although in sharp contrast to its attitude in *Bigelow*. Findings of facial overbreadth can be justified only if a great need to protect constitutional rights exists.[58] They are an exceptional means of safeguarding first amendment freedoms, and the withholding of overbreadth protection in the instant case indicates that in the Court's judgment commercial expression still merits a lower status than political and religious speech.[59] While the lack of a significant chilling factor was cited by the Court in support of its conclusion,[60] it is possible that other, unarticulated grounds influenced the justices. One consideration that might have silently buttressed the instant decision was the possibility of erroneous decisonmaking when the rights of absent parties are asserted via the overbreadth doctrine.[61] Frequently, claimants whose speech may constitutionally be regulated will urge the invalidation of a statute because it might be applied in violation of the first amendment rights of third parties in hypothetical situations.[62] As the fact situations presented become more conjectural, the likelihood increases that statutes will be nullified for violations that might never materialize.[63] That uncertainty was eliminated by the Court's decision to examine advertising regulations only as they were in fact applied.[64]

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56. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (limiting proximity of adult theatres to residential areas or other adult theatres); Grayned v. Rockford, 408 U.S. 104 (1972) (ban on willful disturbances on grounds adjacent to schools); Cox v. Louisiana, 379 U.S. 77 (1949) (limiting the use of sound trucks).

57. 97 S. Ct. at 2709. *See* Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969): "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Id.* at 386. See note 17 *supra* and accompanying text. The holdings of *Virginia Pharmacy* and the instant case, however, may indicate a coming alteration of media regulations, as evidenced by a recent case in the Court of Appeals for the District of Columbia. Home Box Office v. FCC, 40 RAD. REG. 2d (P-H) 283 (D.C. Cir. 1977), 75-2130 (D.C. Cir. March 25), *cert. denied*, 46 U.S.L.W. 3216 (Oct. 4, 1977). (Striking down FCC rules restricting advertising and programming on pay cable television as inconsistent with first amendment protection of commercial speech).

58. See note 33 *supra* and accompanying text.

59. See note 23 *supra* and accompanying text.

60. 97 S. Ct. at 2707. *Contra*, Reich, *supra* note 22.

61. While appellants' brief did not speculate on unconstitutional future applications of the disciplinary rule, such hypothetical claims may be brought when invoking the overbreadth doctrine. See note 30 *supra* and accompanying text.

62. The Court had indicated in both the *Broadrick* and the *Bigelow* opinions that the *jus tertii* possibilities were a major problem with the doctrine. *See generally* Sedler, *supra* note 30.

63. The risk of uncertainty is equally present, of course, in any sort of facial review. *See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

64. A recent Illinois Supreme Court case illustrates the impact of the instant decision. A chiropractor, disciplined for advertising his services in violation of that state's Medical Practice Act, ILL. REV. STAT. ch. 91, §16(13) (1973), challenged the statute as an encroachment

Had the instant Court applied overbreadth methodology to commercial speech, many of the rules which regulate trade would have stood in constitutional jeopardy.[65] One of the many possibilities was presented to the Court in the amicus curiae brief of the American Bar Association,[66] which expressed concern that future overbreadth challenges, if permitted, might overturn important federal and state restrictions on the advertising of registered securities.[67] Many of these regulations seem overbroad in that they prohibit advertisements that are neither false, deceptive, nor misleading, without leaving open the "ample alternative channels" of communication required.[68] For example, a newspaper advertisement by a shareholders' group urging greater participation by holders at company meetings might become the subject of a first amendment controversy.[69] The advertisement would probably violate Securities and Exchange Commission rules regulating proxy solicitation if unregistered prior to publication, even though it might not be misleading or deceptive.[70]

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on his freedom of speech. The chiropractor argued that even if his activities could constitutionally be regulated the Act was void on its face, because it could be applied to advertisements by third parties that were protected by the first amendment. Relying on the instant case, the Illinois Supreme Court, while agreeing that the statute was overbroad, held that it was not voidable on that basis and must be judged only as applied to the chiropractor's advertisements. The Court found no infringement of his freedom of speech, and the overbroad act was allowed to stand. Talsky v. Department of Registration and Educ., 68 Ill. 2d 579, 370 N.E.2d 173 (1977).

65. *See, e.g.*, Federal Trade Commission Guides and Trade Practice Rules, 16 C.F.R. §§17-259 (1977). There also may be a substantial chilling effect on the free flow of information as a result of governmental regulation of public corporate elections. *See* Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1205-06 (1965).

66. Brief for the American Bar Association as Amicus Curiae at 31-33, Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977).

67. *See, e.g.*, Securities Act of 1933, 15 U.S.C. §77(e) (1970).

68. See note 23 *supra*.

69. In 1966 a number of advertisements were placed in The New York Times and other newspapers by Telephone Shareowners Committee, Inc., a group of AT&T stockholders. The ads criticized an FCC investigation of AT&T's interstate rates, blaming it for a $7 billion decline in the market value of the stock, and solicited new members. The SEC twice sent cease-and-desist orders to the organization, but it refused to stop running the advertisements. The shareholders claimed that an injunction of their advertising would infringe on their freedom of speech. Wall Street Journal, Sept. 28, 1966, at 10, col. 2. The conflict between SEC registration requirements, which provide the only means by which the Commission can prevent illegal statements prior to publication, and the first amendment right of corporate shareholders to the free flow of information has yet to be resolved since that right was recognized in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

70. If commercial speech is entitled to some first amendment protection, it may be that the SEC's registration requirement for proxy solicitation imposes an unconstitutional prior restraint on commercial speech, now that the commercial speech exception has been invalidated. *Cf.* Note, *Securities and Exchange Commission Regulation of Proxy Contests*, 69 HARV. L. REV. 1462, 1472-74 (1956) (which in an apologia for the registration requirements justified them in part because commercial speech at that time was not protected by the first amendment). *But see* Kupiec v. Republic Fed. Sav. & Loan Ass'n, 512 F.2d 147 (7th Cir. 1975) (Federal Home Loan Bank Board's restriction of proxy solicitations by association members was only a slight and incidental infringement of plaintiffs' alleged first amendment freedoms).