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Constitutional Law-Freedom of the Press-Prohibition of Abortion Referral Service Advertising Held Unconstitutional

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CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—PROHIBITION OF ABORTION REFERRAL SERVICE ADVERTISING HELD UNCONSTITUTIONAL

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

Commercial advertising is omnipresent in today's society because it provides information to coordinate our material wants with our productive capabilities.[1] An important role of the first amendment[2] is to guarantee the widest possible flow of information[3] so that the public will make intelligent decisions on matters affecting the general welfare.[4] Consumer decisions based on advertising deeply affect this general welfare. Nevertheless, although the first amendment generally protects the public's right to be informed and the speaker's right to be heard on "public issues," purely private commercial advertising has not traditionally received first amendment protection.

In *Bigelow v. Virginia*,[5] the Supreme Court modified its nonprotection of commercial advertising, and declared that an advertiser's first amendment interests were to be balanced against reason-

[1] In 1973 over one million people were employed in the advertising industry and more than $25 billion was spent on advertising. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 766, 772 (1974). In R. HARRIS & A. SELDEN, ADVERTISING AND THE PUBLIC 251 (1962) it was stated:

> Advertising can raise living standards by spreading knowledge of desirable commodities and services and sharpening the incentives to acquire them. It is misguided to condemn it for encouraging emulation or for emphasizing consumption.

[2] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

[3] New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964), *quoting* Associated Press v. United States, 326 U.S. 1, 20 (1945). The Supreme Court has consistently acknowledged the first amendment's role as furthering the free flow of information. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). For commentary examining the relationship between advertising and the first amendment, see Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Note, *Freedom of Expression in a Commercial Context*, 79 HARV. L. REV. 1191 (1965).

[4] Professor Emerson has delineated four functions of the first amendment freedom of expression: (*1*) freedom of expression stimulates self-realization and development of character; (*2*) freedom of expression is invaluable in attaining the truth; (*3*) freedom of expression allows all members of society to participate in the democratic decision-making process through open debate; and (*4*) freedom of expression aids the achievement of the compromises necessary for the operation of a viable democracy. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

[5] 421 U.S. 809 (1975).

able governmental interests. In so balancing, the Court found that a state's interest in prohibiting abortion advertising was unreasonable, largely because the abortion agencies were located outside of the state, and therefore beyond the scope of its police powers. In a vigorous dissent, Justice Rehnquist, joined by Justice White, viewed the advertisement as purely commercial, without any first amendment interests, and subject to reasonable regulation.

I

PRIOR LAW: THE COMMERCIAL-SPEECH DOCTRINE

In 1942, in *Valentine v. Chrestensen*,[6] the owner of a submarine exhibit was warned that advertising handbills could not be distributed in the streets unless they contained a political or religious message. Frustrated in his attempts to advertise, the owner tried to evade the ordinance by printing a new handbill that contained information concerning his submarine on one side, and a protest against the prohibitive ordinance on the other side. To check this evasion, the Supreme Court formulated the "commercial-speech" doctrine, declaring that the first amendment "imposes no . . . restraint on government as respects purely commercial advertising."[7] In subsequent cases, the Court defined "commercial speech" as

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[6] 316 U.S. 52 (1942).

[7] *Id.* at 54. The *Chrestensen* Court never explained why commercial speech was not entitled to first amendment protection. It did, however, explain why the doctrine was employed:

> If that evasion were successful, every merchant who desires to broadcast advertising leaflets on the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command.

316 U.S. at 55. In Cammarano v. United States, 358 U.S. 498 (1959), Justice Douglas, concurring, said of *Chrestensen*: "The ruling was casual, almost offhand. And it has not survived reflection." *Id.* at 514. In *Bigelow*, reference was made to doubts of at least six members of the Court as to the remaining vitality of the commercial-speech doctrine: "There is some doubt concerning whether the 'commercial speech' distinction announced in Valentine v. Chrestensen . . . retains continuing validity." 421 U.S. at 820 n.6, *citing* Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n.6 (1974) (dissenting opinion, Brennan, Stewart, Marshall & Powell, JJ.). The majority opinion in Pittsburgh Press v. Human Relations Comm'n, 413 U.S. 376 (1973) (discussed in text accompanying notes 14-16 *infra*), was termed "a disturbing enlargement of the 'commercial speech' doctrine . . ." by Chief Justice Burger. *Id.* at 393 (dissenting opinion). In the same case, Justice Douglas stated "I believe that commercial materials also have First Amendment protection." *Id.* at 398 (dissenting opinion, Douglas, J.). And Justice Stewart, also in *Pittsburgh Press*, stated:

> Whatever validity the *Chrestensen* case may still retain when limited to its own facts, it certainly does not stand for the proposition that the advertising pages of a newspaper are outside the protection given the newspaper by the First and Fourteenth Amendments.

Id. at 401 (dissenting opinion, Stewart & Douglas, JJ.) (footnote omitted).

speech primarily motivated by profit.[8] However, this profit-motive test, which focuses only on the rights of the speaker, was not consistently applied.[9]

Recognizing that no logical limits existed for the commercial-speech doctrine in a society built upon private enterprise, the Court

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[8] *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943), where the Court distinguished the fund-raising activities of Jehovah's Witnesses from commercial speech, thus framing the "primary-purpose" test: "[Their] selling activities [were] 'merely incidental and collateral' to their 'main object which was to preach. . . .' " *Id.*, *quoting* State v. Mead, 230 Iowa 1217, 1220, 300 N.W. 523, 524 (1941).

In the *Chrestensen* case before the Second Circuit Court of Appeals, (122 F.2d 511 (2d Cir. 1941)), Judge Frank argued, in dissent, for a balancing of first amendment interests against state interests, and declared that, because Chrestensen had been motivated by profit to protest the statute and because alternative means of advertising existed, the handbill was entitled to less than absolute first amendment protection. *Id.* at 517-26. To date, Judge Frank's reasoning in *Chrestensen* remains the most thorough judicial justification for the commercial-speech doctrine. Essentially, Judge Frank saw the first amendment as only protecting "free expression of ideas" (*Id.* at 522) and "the right to disseminate opinion." (*Id.* at 524). Judge Frank argued that to extend first amendment protection to advertising because it is a form of speech

> would be to "thingify" the words "free speech" and "free expression," and to become forgetful of the vital ideas—"the defense of liberty" and the functioning of "the processes of popular rule"—for which they stand.

Id. at 525 (footnote omitted).

There is highly respected academic authority for Judge Frank's position. Professor Alexander Meiklejohn has described the first amendment as protecting only "ideas" relating to self-government and being at odds with private enterprise. *See generally* A. MEIKLEJOHN, POLITICAL FREEDOM(1960). Professor Emerson has stated:

> Communications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression. The principles governing commercial speech, and the relations between this sector and the area of free expression, have never been worked out. . . . Up to the present, the problem of differentiating between commercial and other communication has not in practice proved to be a serious one.

Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 948-49 n.93 (1963).

One point should be emphasized in connection with the *Chrestensen* case. At that time, first amendment jurisprudence was still in its infancy, and the first amendment was often considered "absolute." Thus, the decision facing the Court was full protection or no protection. Indeed, Judge Frank characterized this in *Chrestensen* as a "ruthless dogma fight to the finish between the city's so-called 'police power' . . . and the constitutional right of the individual to free speech and free expression of ideas." 122 F.2d at 522.

[9] *Cf., e.g.*, Breard v. Alexandria, 341 U.S. 622, 641-45 (1951); Thomas v. Collins, 323 U.S. 516, 531 (1945).

In *Breard*, the Court considered a statute prohibiting door-to-door solicitation of magazine subscriptions. Although the solicitors had a primary motive of profit, the Court declined to directly invoke the commercial-speech doctrine: "We agree that the fact that periodicals are sold does not put them beyond the protection of the First Amendment. The selling, however, brings into the transaction a commercial feature." 341 U.S. at 642 (footnote omitted). Nevertheless, the Court found no infringement of freedom of expression and upheld the statute. *Id.* at 642-45. In *Thomas*, the Court struck down a statute barring unregistered labor organizers from speaking in Texas. The Court stated: "The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity." *Id.* at 531. Both cases disclaim the commercial-speech doctrine, yet one reached a commercial-speech result, while the other did not.

began to reexamine this doctrine,[10] and in *New York Times Co. v. Sullivan*,[11] the Court ruled that an advertisement communicating opinion and information on public issues was entitled to full first amendment protection. This holding appeared to limit the commercial-speech doctrine to "purely commercial" advertisements, and to extend constitutional protection to commercial messages conveying valuable information to the public.[12] Although the Court's "public-interest" test emphasized the public's right to know, as opposed to the speaker's right to be heard, its focus on content does have dangerous implications for freedom of expression.[13]

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[10] In 1959, the Supreme Court, striking down a strict-liability statute prohibiting the possession of obscene books, noted that the fact that books are sold does not strip them of all first amendment protection. *See* Smith v. California, 361 U.S. 147, 150 (1959).

[11] 376 U.S. 254 (1964). In *Sullivan*, the City Commissioner of Birmingham, Alabama, brought suit against a newspaper for libel based on an advertisement accusing the Montgomery police of brutality and racism. The profit-motive test of *Chrestensen* had assumed that commercial speech did not "communicate information or disseminate opinion." 316 U.S. at 54-55. In *Sullivan*, however, the Court was clearly faced with an advertisement that did communicate opinion and information. The *Sullivan* Court therefore distinguished the advertisement before it as being more than "purely commercial" and developed a supplemental "public-interest" test for identifying commercial speech deserving of first amendment protection. Thus, the Court extended first amendment protection to the advertisement because it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public concern." 376 U.S. at 266. To afford adequate protection for "uninhibited, robust, and wide-open" discussion of public issues (*Id.* at 270), the Court required public officials to prove actual malice (knowledge or reckless disregard of falsity prior to publication) to recover any libel damages. *Id.* at 283.

[12] By denying protection on the basis of the speaker's motives alone, a strict profit-motive test unduly sacrifices the public's right to be informed. The Court has recoguized in the past not only the right to speak but also the right to listen. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

The *Sullivan* public-interest test attempts to grant first amendment protection on the basis of widespread audience reaction and controversy, as well as the motives of the speaker. *See* 376 U.S. at 266, 270-71; note 11 *supra*.

[13] *See* note 12 *supra*. The implication of the public-interest test is that those messages that the Court deems to be uninteresting, uncontroversial, or uninformative may be totally banned. This is directly contrary to accepted first amendment doctrine barring all content restraints on freedom of expression. *See* note 36 *infra*. As Justice Black declared in New York Times Co. v. United States, 403 U.S. 713 (1971):

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people.

Id. at 717 (concurring opinion).

The public-interest test allows the government to censor unpopular advertisements. Yet, critics have noted that the values of advertisements merely reflect the American value system itself: "Sociologically speaking, it would be impossible for advertising to be in conflict with the

More recently, in *Pittsburgh Press v. Human Relations Commission*,[14] the Court upheld an application of the commercial-speech doctrine to suppress advertisements promoting illegal sex discrimination in hiring. In dicta, however, the Court suggested that commercial advertising for a legal activity might be entitled to some, if not full, first amendment protection.[15] The profit motive behind the advertisement was the crucial factor in *Pittsburgh Press*, for the Court specifically stated that the newspaper nevertheless was free to advocate sex discrimination in its editorials.[16]

II

Bigelow v. Virginia AND THE COMMERCIAL-SPEECH DOCTRINE

On February 8, 1971, Jeffrey Bigelow, editor of the *Virginia Weekly*, ran an advertisement for a New York abortion referral service,[17] in violation of Virginia's broad statutory ban on the en-

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value system .... It is the value system which determines the nature and significance of social institutions, not the other way around." N.Y. Times, Oct. 19, 1962, at 42, col. 4. Any repression of advertising, then, would seem to be actually aimed at repressing specific values.

[14] 413 U.S. 376 (1973) (sexually discriminatory want-ads enjoined by the Pittsburgh Human Relations Commission).

[15] The relevant dicta appears in 413 U.S. at 388-89. Under this formulation, presumably noncommercial speech advocating illegal activity would still retain greater protection than commercial speech and would be subject to a more traditional first amendment analysis. *See* New York Times Co. v. United States, 403 U.S. 713 (1971). Using illegality as a justification for shackling speech, however, bas dangerous implications for all freedom of expression. As Justice Stewart noted in bis dissent in *Pittsburgh Press*:

> After this decision, I see no reason why government cannot force a newspaper publisher to conforin in the same way in order to achieve other goals thought socially desirable. And if government can dictate tbe layout of a newspaper's classified advertising pages today, what is there to prevent it from dictating the layout of the news pages tomorrow?

413 U.S. at 403.

Moreover, illegality has little to do with the public-interest aspect of the advertisement. In *Pittsburgh Press*, it was suggested in dicta that an advertisement reading "Prostitutes Wanted" could be suppressed. 413 U.S. at 388. Yet, prostitution is legal in Nevada. 9 NEV. REV. STAT § 269.175 (1973). In 1971, local county commissioners licensed Nevada's first legal brothel. N.Y. Times, Feb. 14, 1971, at 41, col. 3. Presumably, an advertisement for Nevada brothels would not be suppressible under the Court's stated rationale because of its public interest and the legality of the advertised activity. The Court's attitude towards prostitution in *Pittsburgh Press*, however, suggests it might support a ban on such advertising. One can infer therefore that the illegal-legal distinction, like the commercial-speech doctrine and public-interest test, does not isolate the value the Court is actually testing.

[16] 413 U.S. at 391.

[17] The advertisement, appearing in the VIRGINIA WEEKLY, Feb. 8, 1971, at 2, in relevant part stated:

> UNWANTED PREGNANCY
> LET US HELP YOU
> Abortions are now legal in New York.

couragement of abortion.[18] After being charged, tried, and convicted,[19] Bigelow appealed to the Virginia Supreme Court, which affirmed his conviction.[20] Summarily disposing of Bigelow's statutory[21] and first amendment overbreadth defenses,[22] the majority opin-

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There are no residency requirements.
FOR IMMEDIATE PLACEMENT IN ACCREDITED
HOSPITALS AND CLINICS AT LOW COST
Contact
WOMEN'S PAVILION
515 Madison Avenue
New York, N.Y. 10022

[18] At that time the statute, Act of March 14, 1878, ch. 311, § 8, [1877-78] Va. Acts of Assembly 281, *as amended,* 4 VA. CODE ANN. § 18.2-76.1 (1975), provided:

> If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor.

In response to Bigelow's appeal to the United States Supreme Court on overbreadth grounds, the statute was amended. Act of April 10, 1972, ch. 725, [1972] Va. Acts of Assembly 1019 (effective July 1, 1972), to provide:

> 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, encourage or promote 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.

In 1975, Virginia revamped its entire criminal codification. However, this statute, in substantially the same language, can be found at 4 VA. CODE ANN. § 18.2-76.1 (1975).

[19] Bigelow was charged with violating the statute on May 13, 1971. He was tried and convicted in the County Court of Albermarle County. In a trial de novo before the Circuit Court of that County, he waived a jury, and was again convicted. The Circuit Court rejected Bigelow's first amendment claims without comment. He was sentenced to pay a fine of $500.00, $350.00 of which was suspended pending no further violations. 421 U.S. at 813-14. At this time, abortion referral agencies for profit were legal in New York. *Id.* at 822 n.8.

[20] Bigelow v. Commonwealth, 213 Va. 191, 191 S.E.2d 173 (1972). The court voted 4-2 to affirm, with Judges I'Anson and Cochran dissenting.

[21] Bigelow argued that the advertisement was merely informational and thus not within the scope of the "encourage or prompt" language of the statute. The majority disagreed: "The language of the advertisement clearly exceeded an informational status when it offered to make all arrangements for immediate placement in accredited hospitals and clinics at low cost." *Id.* at 193, 191 S.E.2d at 174. *See* note 17 *supra.*

[22] The court held that because Bigelow's activities were purely commercial, traditional first amendment overbreadth doctrine (*See* NAACP v. Button, 371 U.S. 415, 432 (1963)) would not apply. Instead, Bigelow was denied standing to raise "the hypothetical rights of those in the non-commercial zone." 213 Va. at 198, 191 S.E.2d at 178.

On appeal, the United States Supreme Court overruled the Virginia Supreme Court's ruling denying defendant standing to raise overbreadth claims, and, indeed, found the statute overbroad despite subsequent amendment. 421 U.S. 809, 815-18 (1975). *See* note 18 *supra.* Because of the first amendment's preferred status (Kovacs v. Cooper, 336 U.S. 77, 88 (1949)), standing requirements to challenge overbreadth have been traditionally more relaxed when dealing with first amendment issues. *See, e.g.,* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). It is likely that the lengthy discussion of overbreadth in *Bigelow* was due to Virginia's insistent clash with settled law. The Supreme Court found overbreadth because of "the statute's potential for sweeping and improper applications." 421 U.S. at 817. For example, the original statute would clearly reach a husband's "encouraging" his wife to get an abortion. *See* note 18 *supra.* Because the statute had been amended, however, the Court rested its decision on other grounds. 421 U.S. at 818.

ion found that the advertisement was commercial speech,[23] and therefore not entitled to any first amendment protection.[24] The statute was held to be a valid exercise of the state's police power.[25] On the first appeal to the United States Supreme Court, the case was remanded for consideration in light of *Roe v. Wade*,[26] which held that, within broad limits, a woman's constitutional right to privacy guaranteed her right to an abortion. The Virginia Supreme Court reaffirmed Bigelow's conviction,[27] stating that this was strictly "a First Amendment case"[28] and was therefore unaffected by *Roe*.

Although the advertisement in *Bigelow* was primarily motivated by profit, and therefore "commercial,"[29] the United States Supreme Court on a further appeal also applied the *Sullivan* "public-interest" test.[30] Because the *Bigelow* advertisement "contained factual material of clear 'public interest,' "[31] it was granted first amendment protec-

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[23] The Virginia Supreme Court found that because the advertisement offered abortion referrals "at low cost," it was a "patently" commercial advertisement. 213 Va. at 193, 191 S.E.2d at 175. *See* note 8 and accompanying text *supra*.

[24] The court relied heavily on the case of United States v. Hunter, 459 F.2d 204 (4th Cir. 1972), in which the government was granted an injunction against racially discriminatory housing advertisements in a newspaper. *Hunter*, in turn, relied on Valentine v. Chrestensen, 316 U.S. 52 (1942), for the proposition that the first amendment did not restrain the government from prohibiting "purely commercial advertising." 459 F.2d at 211.

[25] Once the first amendment objections were surmounted, the Virginia Supreme Court easily found a legitimate state interest behind the statute:

> It is clearly within the police power of the state to enact reasonable measures to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder. And the state is rightfully interested in seeing that Virginia women who do decide to have abortions obtain proper medical care and do not fall into the hands of those interested only in financial gain, and not in the welfare of the patient.

213 Va. at 196, 191 S.E.2d at 176.

[26] 410 U.S. 113 (1973). Both *Roe* and its companion case, Doe v. Bolton, 410 U.S. 170 (1973), found that the right to privacy was a fundamental right, which could only be abridged if the state could show a compelling interest. 410 U.S. at 156.

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

[28] *Id.* at 342, 200 S.E.2d at 680. The Virginia Supreme Court insisted that neither abortion case "mentioned the subject of abortion advertising" and that this was strictly "a First Amendment," and not an abortion case. *Id.* The United States Supreme Court agreed. 421 U.S. at 815 n.5.

[29] 421 U.S. at 818. Justice Rehnquist, in dissent, termed the advertisement a "classic commercial proposition directed towards the exchange of services rather than the exchange of ideas." *Id.* at 831. In New York, profit-based abortion referral agencies were eventually prohibited. N.Y. PUB. HEALTH LAW § 4501 (McKinney 1971); S.P.S. Consultants, Inc. v. Lefkowitz, 333 F. Supp. 1373 (S.D.N.Y. 1971); State v. Abortion Information Agency, Inc., 69 Misc. 2d 825, 323 N.Y.S.2d 597 (Sup. Ct. 1971). Justice Rehnquist found it incongruous that New York could prohibit such advertising for resident abortion agencies, but that Virginia's ban was struck down. 421 U.S. at 832-34.

[30] *See* notes 11-13 and accompanying text *supra*.

[31] 421 U.S. at 822.

tion. In so doing, the Court dramatically expanded the definition of possible first amendment interests served by advertising. The advertisement in the *Sullivan* case sought to raise funds for a civil rights group by condemning racism in the South.[32] It was thus a patently political advertisement for a political group. The *Bigelow* advertisement, on the other hand, offered abortion at a price.[33] It was thus a more purely commercial advertisement for a distinctly apolitical medical service. In *Sullivan*, the Court found a political tinge to an advertisement that "expressed opinion, recited grievances, protested claimed abuses."[34] In *Bigelow*, the Court found a "public interest":

> The advertisement . . . did more than simply propose a commercial transaction. . . . Portions of its message, most prominently the lines, "Abortions are now legal in New York. There are no residency requirements," involve the exercise of the freedom of communicating information and disseminating opinion.
>
> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.[35]

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[32] *See* notes 11-13 *supra.*

[33] States usually prohibit any advertising by health professionals. *See* Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935); notes 80-84 and accompanying text *infra.*

[34] 376 U.S. at 266.

[35] 421 U.S. at 822.

In dealing with commercial speech, the Court has not yet openly recognized that product information is worthy of first amendment protection in and of itself. Justice Blackmun's general language in the majority opinion may seem to indicate otherwise, but implicit in his statement that the advertisement "did more than simply propose a commercial transaction" is the notion that such a simple proposition would still be unworthy of first amendment protection. In contrast to the Supreme Court treatment, in Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom.* Tobacco Institute Inc. v. FCC, 396 U.S. 842 (1969), the court of appeals specifically recognized that cigarette commercials implicitly set forth a public position on the issue of cigarettes and health, and thus were subject to first amendment considerations. "[C]igarette commercials 'present the point of view that smoking is "socially acceptable and desirable, manly, and a necessary part of a rich full life;' " and, as such, invoke the [first amendment] fairness doctrine." *Id.* at 1086, *quoting* Television Station WCBS-TV, 8 F.C.C.2d 381 (1967). *See* note 12 *supra.*

In other contexts, the Court has gone so far as to provide nonverbal "symbolic" speech comprehensive first amendment protection. *See* Spence v. Washington, 418 U.S. 405 (1974) (American flag with peace symbol is proper exercise of freedom of expression by virtue of being sufficiently "communicative"); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (student's first amendment right to protest the Vietnam War by wearing black arm-band upheld). However, the Court's attitude towards the nonverbal aspects of advertisements (one of implicit disapproval) closely resembles the condemnation of nonrational persuasion in advertisements generally in V. PACKARD, THE HIDDEN PERSUADERS (1957). At least one observer has questioned the wisdom of insisting on a strictly verbal or written

Possibly, under *Chrestensen*, the information in Bigelow's advertisement also would be discounted as evasive. Clearly, by including such factors as information satisfying one's "general curiosity about . . . the subject matter or the law of another State" as part of the new public-interest test, the Court expanded its first amendment protection of advertising. The public-interest test, however, remains as subject-matter oriented as the profit-motive test, and therefore is potentially inimical to freedom of expression.[36]

Bigelow also limited the application of the commercial-speech doctrine when advertisements for *legal* activities were involved, holding that such advertisements were entitled to at least "some degree of First Amendment protection."[37] In so holding, the Court adopted a position suggested in dicta in *Pittsburgh Press*, namely that a "First Amendment interest . . . served by advertising . . . might arguably outweigh the governmental interest supporting the regulation."[38] *Pittsburgh Press*, however, had also stressed that in addition to the illegality of the advertised activity, the government restrictions involved in that case were only incidental to regulating economic activity and were as narrowly tailored as possible.[39]

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framework for analyzing information. *See* H. MCLUHAN, UNDERSTANDING MEDIA 200-06 (1964). And Justice Douglas has stated:

> Nor, in my view, should commercial *content* be controlling. The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. W. Baumol, Economic Theory and Operations Analysis 249-256 (1961); A. Braff, Microeconomic Analysis 259-75 (1969); R. Dorfman, Prices and Markets 128-136 (3d ed. 1967).

Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 905-06 (1971), *denying cert. to* 438 F.2d 433 (2d Cir.) (Douglas, J., dissenting) (footnotes omitted) (emphasis in original).

[36] Constitutional protection does not turn upon "the truth, popularity, or social utility of ideas and beliefs which are offered." NAACP v. Button, 371 U.S. 415, 445 (1963). *Accord,* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964). The government may regulate as to time, place, and manner of speech, but not as to content. *See* Cox v. New Hampshire, 312 U.S. 569, 576 (1941). In Police Dep't v. Mosley, 408 U.S. 92 (1972), the Court declared: "[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. *Accord,* Thomas v. Collins, 323 U.S. 516, 531 (1945). In Justice Rehnquist's dissenting opinion in *Bigelow*, he stated: "If the Court's decision does indeed turn upon its conclusion that the advertisement . . . was protected by the First and Fourteenth Amendments, the subject of the advertisement ought to make no difference." 421 U.S. at 831.

The Court's position, then, is somewhat ironic in light of its condemnation of Virginia for "really asserting an interest in regulating what Virginians may *hear* or *read* about the New York services." 421 U.S. at 827 (emphasis in original).

[37] *Id.* at 821.

[38] 413 U.S. at 389. *See* notes 14-16 and accompanying text *supra*.

[39] 413 U.S. at 389, 391.

Bigelow therefore invites future assessments of the degree of commerciality within a particular speech, but its modified commercial-speech doctrine makes no reference to the "narrowly tailored" analysis of *Pittsburgh Press*,[40] nor to the distinction between incidental regulation and direct prohibition of an activity or the advertisement thereof.[41] If prohibitions and regulations are equivalent, and if advertising of a regulated activity can itself be regulated, or prohibited, then the underlying legality of the advertised activity actually accounts for very little first amendment protection.[42] The problem in *Bigelow* is that the Court presents New York abortion agencies not only as legal, but as beyond Virginia's jurisdiction, and therefore totally nonregulatable by Virginia.[43] If this is so, then the illegal-legal activity distinction, without more, is not very helpful in determining how much first amendment protection a particular advertisement will receive once it receives "some" protection.

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[40] The overbreadth argument of *Bigelow* nevertheless is related to the "narrowly tailored" or "least drastic means" analysis of *Pittsburgh Press*. In *Bigelow*, when discussing overbreadth, the issue was standing—whether or not the plaintiff could raise the hypothetical first amendment rights of others to constitutionally impeach the statute. 421 U.S. at 815-16. In *Pittsburgh Press*, the ordinance was upheld because, among other reasons, it was "narrowly drawn to prohibit placement in sex-designated columns of advertisements." 413 U.S. at 391. In other words, there were no alternative methods of achieving the government's goal less burdensome to individual freedoms. *See* Dunn v. Blumstein, 405 U.S. 330 (1972); Shelton v. Tucker, 364 U.S. 479 (1960). However, by striking down Virginia's total ban on abortion advertising and simultaneonsly suggesting that advertisements can be reasonably regulated, while failing to distingnish regulation from prohibition, the Court in *Bigelow* raises doubts about the applicability of a "least drastic means" analysis in future commercial speech cases. *Cf.* Procunier v. Martinez, 416 U.S. 396, 413 (1974).

Once the Court has found a valid first amendment interest, it normally affords this interest the fullest protection possible consistent with a substantial governmental interest. *See* Police Dep't v. Mosley, 408 U.S. 92, 102 (1972); United States v. O'Brien, 391 U.S. 367, 376 (1968). As Justice Black stated in NLRB v. Fruit Packers Local 760, 377 U.S. 58, 79-80 (1964) (concurring opinion):

> I cannot accept my Brother HARLAN's view [in dissent] that the abridgment of speech and press here does not violate the First Amendment because other methods of communication are left open. This reason for abridgment strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop.

[41] Although the Virginia statute prohibited "prompting an abortion," the Court characterized the statute as a regnlatory measure only, and used a "reasonable-regulation" test as its constitutional standard, thus implicitly equating this prohibition with regulation. 421 U.S. at 826. This distinction was not crucial to the result reached in *Bigelow*; nevertheless, it is important to future balancing of first amendment interests against governmental interests. *See* text accompanying notes 46-59 *infra*.

[42] Judge Clark, speaking for the majority of the Second Circuit in *Chrestensen*, considered the distinction between regulation and prohibition crucial to affording commercial advertising proper first amendment protection. 122 F.2d 511, 514-15 (2d Cir. 1941).

[43] 421 U.S. at 822-25.

Despite the *Bigelow* Court's desire to protect freedom of expression in this specific instance and dictum stating that "commercial activity, in itself, is no justification for narrowing the protection of expression . . . ,"[44] it is clear that the public-interest test and the legality of the activity, at best, can serve only to provide some, as opposed to full, first amendment protection to commercial speech.[45]

III

BALANCING THE FIRST AMENDMENT INTEREST

In *Bigelow*, having found a first amendment interest to be protected, Justice Blackmun announced the appropriate balancing test: "Advertising, like all public expression, may be subject to *reasonable* regulation that serves a legitimate public interest."[46] Even for regulation aimed primarily at conduct, the standard normally used to counterbalance incidental abridgment of freedom of expression requires that the statute in question be not only reasonable, but also narrowly tailored to the particular governmental interest.[47] Therefore, in examining a regulation directly aimed at freedom of expression, *i.e.*, a particular message, such as abortion, a more rigorous balancing standard should be necessary.[48] Indeed, in both *Pittsburgh*

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[44] *Id.* at 818, *quoting* Ginzberg v. United States, 383 U.S. 463, 474 (1966).

[45] *Bigelow* advanced justifications for granting commercial speech "some" protection, but did not explain why such speech should be given less than full protection. *Id.* at 818-25.

[46] 421 U.S. at 826 (emphasis added).

[47] In United States v. O'Brien, 391 U.S. 367 (1968), the Court announced the following criteria for evaluating the governmental interest in regulating conduct that has both "speech" and "nonspeech" elements:

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. . . . [A] government regulation is sufficiently justified . . . if it furthers . . . [a] substantial governmental interest; if the . . . interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376-77 (footnotes omitted).

[48] C. BLACK, JR., THE PEOPLE AND THE COURT 221 (1960):

> Most laws suppressing free speech . . . have a rational basis, in the sense that some rational men may believe their enforcement would do good. The suppression of free speech seems quite evidently rational to all but a small fraction of humanity. The framers of the First Amendment were not foolish enough to be unaware of this. They committed our nation to take a chance on a higher rationality.

In Erznoznik v. Jacksonville, 422 U.S. 205 (1975), a statute prohibiting screen nudity at drive-in movie theaters was struck down. Speaking for a 7-2 majority, Justice Powell stated:

> [W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.
>
> . . . .

Press and *Lehman v. Shaker Heights*,[49] cited by the Court in support of the reasonableness standard, the first amendment interests were compromised only because of equally compelling, but conflicting, interests.[50] Moreover, in *Sullivan*, upon which *Bigelow* relied to test for a first amendment interest, the compelling-interest standard was implicit in the Court's requirement that only "actual malice" could override the newspaper's and the public's interest in freedom of expression.[51] Yet Bigelow's first amendment interest, unlike those above, was subject to "reasonable regulation."

The notion that advertising can be reasonably regulated confuses the business aspects of advertising with its speech aspects. Business activity is normally subject to reasonable economic regulation, but the weak due process standard traditionally used in that context is insufficient to limit directly first amendment freedoms.[52]

> . . . We hold . . . that the present ordinance does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression.

Id. at 209, 217. *See also* Rowan v. Post Office Dep't, 397 U.S. 728 (1970) (right to privacy necessary to override freedom of speech); NAACP v. Button, 371 U.S. 415, 438 (1963) (only compelling interest can justify limiting first amendment freedoms); Bates v. Little Rock, 361 U.S. 516, 524 (1960) (compelling interest necessary to encroach upon freedom of association).

[49] 418 U.S. 298 (1974).

[50] In *Pittsburgh Press*, the first amendment interest was abridged only because the government was trying to prevent invidious sex discrimination, an interest that is arguably compelling. 413 U.S. at 387-89. *Cf.* Frontiero v. Richardson, 411 U.S. 677 (1973). In *Lehman*, the Court upheld a city policy of not selling advertising space in buses to campaigning politicians. Because the *Lehman* Court found that the complaint "[did] not rise to the dignity of a First Amendment violation," the case provides minimal guidance for determining which balancing test to use with the first amendment. 418 U.S. at 304. Furthermore, the Court ultimately rested its decision on the rights of the commuters, as a captive audience, to privacy, free of the "blare of political propaganda"—a compelling interest with roots in the first amendment itself. *Id.*

Where, however, first amendment and equal protection interests intersect, the government almost never prevails. *See* Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (footnotes omitted):

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas. . . ."

This statement also bears on the public-interest test, discussed in notes 11-13 *supra*. If there is an "equality of status in the field of ideas," it is incongruous to select some forms of expression and protect them for their public interest, while rejecting others.

[51] *See* note 11 *supra*. *See also* Erznoznik v. Jacksonville, 422 U.S. 205, 209-11 (1975) (rigorous constitutional standards apply when government attempts to regnlate expression); Police Dep't v. Mosley, 408 U.S. 92, 102 (1972) (only a substantial government interest can restrict first amendment freedoms); NAACP v. Button, 371 U.S. 415, 444 (1963) (no substantial regnlatory interest in prohibiting advocacy of racial equality).

[52] Thomas v. Collins, 323 U.S. 516, 530 (1945). Justice Rutledge, speaking for the Court, declared:

In light of the Court's designation of the advertisement in *Bigelow* as "pure speech,"[53] it would appear that the government is severely restricted in regulating the content of advertising.[54] Yet a due process standard has been employed instead of a more rigorous first amendment standard.[55] Therefore, although *Bigelow* purports to recognize that "commercial activity, in itself, is no justification for narrowing the protection of expression,"[56] what has happened, in fact, is that the unexamined taint of "commercial speech" has been allowed to attach to the first amendment interest. What the Court has granted in terms of protection, by limiting the commercial-speech doctrine and affording "some" first amendment protection, it has withdrawn by insisting on a due process standard of balancing what would have been applicable even without *any* first amendment interest.[57]

> For these reasons any attempt to restrict [first amendment] liberties must be justified by clear public interest . . . . The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice.

Id. *See* note 48 *supra*.

[53] 421 U.S. at 817. *See* Smith v. Goguen, 415 U.S. 566 (1974): "Although neither written nor spoken, an act may be sufficiently communicative to invoke the protection of the First Amendment . . . ." *Id.* at 589 (concurring opinion, White, J.). If communication is the key to first amendment protection, it is difficult to see why the sexually discriminatory information in the *Pittsburgh Press* advertisements was not sufficiently communicative while abortion information in *Bigelow* in effect was. In Spence v. Washington, 418 U.S. 405 (1974), the Court provided first amendment protection because the "message was direct, likely to be understood, and within the contours of the First Amendment." *Id.* at 415.

[54] *See* notes 47-48, 53 *supra*. The federal government, in policing advertising in the national press incidental to its economic regulation of interstate trade, empowers the Federal Trade Commission to regulate only for *truth* in product advertising. As the least drastic method of preventing consumer fraud, this test is acceptable even under rigorous standards. Compared to the profit-motive or public-interest test, it is by far the least intrusive upon first amendment freedoms because it remains indifferent to any particular subject matter. *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (calculated falsehoods not subject to first amendment protection). *See also* Gertz v. Welch, 418 U.S. 323 (1974); Dun & Bradstreet, Inc. v. Grover, 438 F.2d 433 (2d Cir.), *cert. denied*, 404 U.S. 898 (1971).

The authority empowering this agency to test national advertisements for truth is contained in 15 U.S.C. § 41 (1970). It is significant that the only initial penalty imposed by this agency is a cease-and-desist order. Lower courts have occasionally implied that constitutional protection strictly hinges on whether the commercial expression is "true." *See, e.g.*, L.G. Balfour Co. v. FTC, 442 F.2d 1, 24 (7th Cir. 1971).

[55] In Cammarano v. United States, 358 U.S. 498 (1959), Justice Douglas, concurring, declared:

> The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive.

Id. at 514.

[56] 421 U.S. at 818.

[57] Without first amendment protection, *Bigelow* would be an abortion case. Yet the

The Court noted that the "diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees,"[58] and invited the lower courts to use the "public-interest" test coupled with a reasonableness standard to protect or not protect commercial speech on a case-by-case basis.[59] It is disappointing that these standards afford little predictability, and even less protection, for admittedly valid first amendment interests.

A better way to pursue this balancing would have been to follow the technique used by the district court in *Mitchell Family Planning, Inc. v. City of Royal Oak.*[60] On similar facts, the district court held that a statutory ban on abortion-referral-service advertising was not due the usual strong presumption of constitutionality because it limited speech.[61] Moreover, initially the court required at least a strong state interest to override freedom of expression.[62] However, because the statute had not been narrowly tailored to the state interest,[63] the court further required the government to advance a compelling state interest to support the statute.[64] This analysis more accurately balances freedom of expression by increasing protection of commercial speech in response to greater governmental infringement. In comparison, the *Bigelow* reasonableness standard remains relatively one-sided. Furthermore, by upgrading the protection of commercial speech, the *Mitchell Family Planning* analysis increases the flow of information in the "private sector," which in turn helps to improve our overall material welfare.[65]

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abortion cases have been considered as evidencing the resurgence of an active, noneconomic substantive due process analysis by the Court. *See* Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937-43 (1973).

[58] 421 U.S. at 826.

[59] *Id.*

[60] 335 F. Supp. 738, 740-41 (E.D. Mich. 1972).

[61] *Id.* at 741. In Thomas v. Collins, 323 U.S. 516 (1945), the Court declared that "the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Id.* at 529-30. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 429 (1963).

[62] 335 F. Supp. at 741. *See* note 64 *infra*.

[63] 335 F. Supp. at 742. *See* Police Dep't v. Mosley, 408 U.S. 92, 101 (1972): "[S]tatutes affecting First Amendment interests [must] be narrowly tailored to their legitimate objectives."

[64] 335 F. Supp. at 742-43. In NAACP v. Button, 371 U.S. 415 (1963), the Court declared:

> The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms .... [A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.

Id. at 438-39. It is worth noting that *Bigelow* applied the reasonableness standard to a prohibition, not a regulation. *See* note 42 and accompanying text *supra*.

[65] *See* notes 1 & 35-36 and accompanying text *supra*.

IV

APPLYING THE COMMERCIAL-SPEECH STANDARDS

The application of the standards developed in *Bigelow* to a Virginia publication of a New York abortion referral service advertisement raises doubts about the relevancy and adequacy of these standards because of the Court's primary focus upon the lack of a legitimate interest on the part of Virginia, rather than upon the strength of Bigelow's first amendment interests.

The basic rationale of the Court's decision seems to be that Virginia could exert no police power over medical care beyond its borders.[66] Until this case, however, it was clear that a state could exert some power over activities beyond its borders.[67] For example, although a broker resides in New York, if he advertises and sells securities in Virginia, Virginia can require the broker to register for

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[66] The State, of course, has a legitimate interest in maintaining the quality of medical care provided within its borders . . . . No claim has been made, however, that this particular advertisement in any way affected the quality of medical services within Virginia. As applied to Bigelow's case, the statute was directed at the publishing of informative material relating to services offered in another State and was not directed at advertising by a referral agency or a practitioner whose activity Virginia had authority or power to regulate.

421 U.S. at 827.

[67] Justice Rehnquist states in his dissent:

> The Court . . . relies on *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892), for its major premise that Virginia could not regulate the relations of the advertiser with its residents since these occurred in New York. To the extent that the Court reads *Huntington* to impose a rigid and unthinking territorial limitation, whose constitutional source is unspecified, on the power of the States to regulate conduct, it is plainly wrong. The passage referred to by the Court in the *Huntington* opinion is dictum and appears to be a statement of then-prevalent common-law rules rather than a constitutional holding. And the attempt to impose such a rigid limitation on the power of the States was first rejected by Mr. Justice Holmes, writing for the Court in *Strassheim* v. *Daily*, 221 U.S. 280, 285 (1911): "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect . . . ." See, *e.g.*, *Skiriotes* v. *Florida*, 313 U.S. 69, 74-75 (1941); *Ford* v. *United States*, 273 U.S. 593, 620-621 (1927). To the extent that the Court's conclusion that Virginia has a negligible interest in its statute proceeds from the assumption that the State was without power to regulate the extraterritorial activities of the advertiser involving Virginia residents, it is quite at war with our prior cases.

421 U.S. at 834 n.2. On this point, Justice Rehnquist has the weight of authority in agreement with him. *See, e.g.*, Skiriotes v. Florida, 313 U.S. 69 (1941) (state has extraterritorial power over conduct of its citizens on high seas if it can assert legitimate governmental interest not in conflict with federal regulation); Ford v. United States, 273 U.S. 593 (1927) (conspiring alien bootlegger properly seized on high seas because United States has jurisdiction over conspiracies with overt act in United States); Strassheim v. Daily, 221 U.S. 280 (1911) (state can punish perpetrator of fraud having impact within its territory despite perpetrator's absence from state at time of fraud).

It is worth noting that under the *Bigelow* interpretation of jurisdiction and state police power, Virginia could not suppress an advertisement by a Nevada brothel. *See* note 15 *supra*.

service of process and to register his sales literature.[68] Similarly, under established long-arm principles, Virginia can assert jurisdiction over the abortion agency for purposes of tort liability.[69] By narrowly defining Virginia's interest as concerned with the "health care within its borders" rather than "the health of Virginia residents," the Court unnecessarily stripped Virginia of jurisdiction:

> Virginia is really asserting an interest in regulating what Virginians may *hear* or *read* about the New York services. It is . . . advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach. This asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances.[70]

Clearly, without jurisdiction, any interest asserted by Virginia would be illegitimate.

The only significant first amendment interest advanced by the Court in its final balancing is that upholding the statute might give Virginia undue influence over the content of national magazines and newspapers, and thus abridge freedom of the press.[71] However, this argument obliquely raises interstate commerce questions. Basically, a state may impose regulations that burden interstate commerce only if the burden is outweighed by a health or safety interest of the state.[72] In this case, the burden was a prohibition, as opposed

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[68] Any state can require foreign dealers of securities to register with its Secretary of State for purposes of guaranteeing service of process and evaluating sales literature. *See, e.g.*, N.Y. GEN. BUS. LAW § 359(e), (eee) (McKinney 1968). In the context of a mere reasonableness standard justifying an absolute prohibition on certain kinds of advertising, however, the implications here reach much further.

[69] *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[70] 421 U.S. at 827-28 (emphasis in original). Justice Rehnquist, in his dissenting opinion, found this to he a legitimate state interest. *Id.* at 832-36.

[71] 421 U.S. at 828-29. Also in evidence was a June 1971 issue of *Redbook* magazine with a similar advertisement. *Id.* at 814.

[72] In Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959), the Court stated:

> Unless we can conclude on the whole record that "the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it" . . . we must uphold the statute.

Id. at 524, *quoting* Southern Pac. Co. v. Arizona, 325 U.S. 761, 775-76 (1945). In *Southern Pacific*, the Court announced a broader range of criteria in considering interstate commerce burdens:

> Hence the matters for ultimate determination here are the nature and extent of the burden which the state regnlation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule . . . that the free flow of interstate commerce and its freedom from local restraints in matters

to a regulation.[73] Had the Court acknowledged settled law pertaining to extraterritorial jurisdiction, it is clear that in the interest of the health of its residents, Virginia could have imposed some minimal regulation on the New York abortion agency. For example, Virginia could have required the agency to register for service of process, to register its sales literature, and to be subject to Virginia's malpractice standards.[74] However, by implicitly equating regulations and prohibitions and ignoring the settled law on extraterritorial jurisdiction, the Court has only delayed, and not avoided, dealing with the interstate commerce questions implicit in *Bigelow*.[75] Moreover, by emphasizing, in its final analysis, Virginia's lack of jurisdiction, by diluting the remaining first amendment argument with interstate commerce aspects, and by ignoring earlier, stronger points made in favor of commercial speech, the *Bigelow* Court continues to raise serious doubts about future first amendment protection of advertising.

V

ASSESSING THE IMPACT

Bigelow represents the first case to hold squarely that commercial speech is just a factor, and not a dispositive one, in assessing first amendment protection.[76] The value of this protection, however, is quite limited. As previously mentioned, the public-interest test for a first amendment interest is at best a benevolent censorship, inimical to the principles of the first amendment,[77] and, when coupled with a

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requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.

325 U.S. at 770-71.

The criteria for deciding whether or not federal laws will "preempt" the application of state law altogether are comparable. *See* Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959). *See also* Note, *Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005, 1134-39 (1967).

[73] *See* note 42 *supra*.

[74] *See, e.g.*, N.Y. GEN. BUS. LAW § 359(e), (eee) (McKinney 1968). *See also* Watson v. Employers' Liability Assur. Corp., 348 U.S. 66 (1954). In Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963), discussed in notes 81-83 and accompanying text *infra*, the Court rejected the interstate commerce burden claims of a Texas optician prohibited from advertising in New Mexico. *Id.* at 429. *See* note 81 *infra*.

[75] 421 U.S. at 825 n.10. "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit." *Id.* at 825. The Court thus invites lower courts to balance first amendment interests against governmental interests on a case-by-case basis and without reference to burdens on interstate commerce.

[76] *See id.* at 826.

[77] *See* note 36 and accompanying text *supra*.

reasonableness balancing test,[78] it is extremely doubtful that there has been any substantial increment in protection over the harsh doctrine of *Chrestensen*. In fact, although the narrow holding of *Bigelow* protects a commercial advertisement, it represents a tacit retreat from the protection afforded such speech in *Sullivan* and *Pittsburgh Press*, because these cases implicitly required the government to advance a compelling interest to abridge freedom of expression.[79]

The conclusion that *Bigelow* is meant to be limited to its facts is reinforced by the Court's refusal to cast doubt on previous inconsistent cases.[80] In *Head v. New Mexico Board of Examiners*,[81] a New

[78] *See* notes 46-57 and accompanying text *supra*.

[79] *See* notes 10-16 & 50-51 and accompanying text *supra*.

[80] "We have no occasion, therefore, to comment on decisions . . . in readily distinguishable fact situations. Wholly apart from the respective rationales that may have been developed . . . in those cases, their results are not inconsistent with our holding here." 421 U.S. at 825 n.10. In this regard, see notes 81-83 and accompanying text *infra*.

[81] 374 U.S. 424 (1963). The Court first examined prohibitions against medical and health professional advertising in Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935). The petitioner in *Semler* had advertised as to the quality, painlessness, and general efficiency of his work. Citing "bait advertising" by "the charlatan and the quack" and demoralization induced by "unseemly rivalries," the Court upheld the Oregon ban on such promotions. 294 U.S. at 612-13. It should be noted that *Semler* concerned an intrastate practice involving advertising in Oregon by a resident in Oregon. In the next case to consider a similar fact situation involving opticians, Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955), the Court reached the same result. In both cases, however, only equal protection or due process arguments were advanced, and the first amendment aspects of the problem were left untouched. In Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963), the first amendment issues were not raised at the trial level and thus were not before the Supreme Court. Nevertheless, the Court characterized the situation as involving only a local affair, and in concurrence, Justice Brennan noted that "nationwide" advertisements could not be restricted by one state. 374 U.S. at 447. Because Head could legally advertise under Texas law, the interest that New Mexico asserted was identical to that asserted by Virginia in *Bigelow*: protecting the health of its citizens by censoring what they "may *hear* or *read*" about out-of-state health services. 421 U.S. at 827 (emphasis in original).

It is questionable whether bans on "professional" advertising retain their original justifications unscathed. As to preventing quacks and charlatans from swindling unsuspecting victims, it seems that the licensing procedures and sanctions for misuse already provide "less drastic means" for combating this evil. *See* note 40 *supra*. The other justification supporting such a ban, the prevention of "unseemly competition," has been gravely called into question by Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). In that case, a unanimous Court struck down the minimum fee schedule circulated by the local bar for searching real property titles. The Court found that such a schedule was in restraint of interstate trade and that lawyers were not exempted by virtue of a "learned profession" exemption. *Id.* at 783-92. Given a policy in favor of competition, the next logical step is advertising. For a comment that examines the beneficial effects of such a potential development, see Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Services Available*, 81 YALE L.J. 1981 (1972). Moreover, a three-judge court has been convened under 28 U.S.C. §§ 2281 and 2284 (1970) to consider whether bar association rules prohibiting lawyer advertising are unconstitutional. Person v. New York City Bar Ass'n, No. 75 C 987 (S.D.N.Y., filed Nov. 19, 1975). Recently, both doctors and opticians have also been brought under pressure to advertize by the FTC. N.Y. Times, Dec. 23, 1975, at 1, col. 7; *id.*, Dec. 24, 1975, at 24, col. 2.

Mexico radio station was barred from advertising out-of-state optician services, in accordance with New Mexico's prohibitions against "professional" advertising.[82] Because this case also involved a health professional legally advertising under the laws of his home state, there is no straightforward way to reconcile *Head* and *Bigelow*. Such an inconsistency, expressly preserved, suggests that *Bigelow* is meant to be strictly limited to its facts. Indeed, Justice Rehnquist, in dissent, drew this conclusion:

> The Court's opinion does not confront head-on the question which this case poses, but makes contact with it only in a series of verbal sideswipes. The result is the fashioning of a doctrine which appears designed to obtain reversal of this judgment, but at the same time to save harmless from the effects of that doctrine the many prior cases of this Court which are inconsistent with it.[83]

For the advertising industry as a whole, *Bigelow* may or may not foreshadow greater state regulation. Although the narrow holding of *Bigelow* struck down an advertising ban, the broad dicta concerning "reasonable regulation" amounts to an invitation to the states to regulate advertisements concurrently.[84]

One area of law soon to be affected by *Bigelow* involves pharmacists' advertising of prescription drug prices. In a case recently argued before the Supreme Court, *Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy*,[85] Virginia's Board of Pharmacy advocated a ban on such advertising as a means of keeping drug prices down.[86] Virginia's consumer union, however, contended that such a ban violated the consumer's first amendment "right to know" and that such advertising could not possibly pose a health hazard by stimulating desire for such drugs because neither the patient nor the pharmacist has any discretion over their use.[87] Because a total ban is involved, as opposed to a reasonable regulation, and because a ban

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[82] *Cf.* note 70 and accompanying text *supra*.

[83] 421 U.S. at 829-30 (dissenting opinion, Rehnquist, J.).

[84] *Id.* at 826. *See* note 66 and accompanying text *supra*.

A close reading of Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), suggests that state action, in the form of a statute legislating lawyers' fee schedules, would not be struck down as anticompetitive because of the continuing vitality of Parker v. Brown, 317 U.S. 341 (1943), which held state action exempt from the Sherman Act. 421 U.S. at 788-92. This exemption and *Bigelow*'s "reasonable-regulation" standard may still present serious obstacles to professional advertising. *See* note 81 *supra*.

[85] No. 74-895 (Sup. Ct., filed Jan. 20, 1975). The opinion of the three-judge district court is reported at 373 F. Supp. 683 (E.D. Va. 1974).

[86] 373 F. Supp. at 686-87.

[87] *Id.* at 685-87.

on advertising is unlikely to exert a downward pressure on prices,[88] the logical result in this case is to find the regulation unreasonable.

Another pharmacist's advertising case, however, may force the Court to distinguish between regulation and prohibition of advertising. In *Terry v. California State Board of Pharmacy*,[89] a state statute required that pharmacists post drug prices in their stores, but prohibited any mass media advertising of such prices in an effort to combat artificial demand for such drugs, prescription forgery, and misleading advertisements. Focusing on the consumer's right to know and the statute's failure to use the least drastic means of advancing arguably compelling interests, the district court declared the statute unconstitutional.[90] On appeal, this case will offer the Supreme Court the opportunity to review its reasonableness balancing standard and to distinguish regulable from nonregulable advertising for first amendment purposes. Given the Court's willingness to adopt a more flexible review of commercial speech, thereby providing "some" protection, and advertising's lack of an effect on *demand* for prescription drugs, the only logical result would be for the Supreme Court to affirm the district court's decision.

CONCLUSION

In the aftermath of *Bigelow*, it is clear that profit-oriented advertisements, or commercial speech, will now be afforded limited first amendment protection if these advertisements contain potentially valuable information. Although this protection may be abridged by reasonable governmental interests, a state's interest in regulating advertisements for activities beyond its borders will be held unreasonable where the state's police powers do not reach these activities. Despite indications that *Bigelow* is intended to be confined to its facts, the Court has nevertheless invited the lower courts to use its standards to examine commercial speech on a case-by-case basis.

In so deciding, the *Bigelow* Court has given little protection to admittedly valid first amendment interests. It is not the offensiveness of the profit motive that inspires the government to suppress certain advertisements any more than the presence of "potentially valuable" information cures the advertisement. Rather, the offensiveness is to be found in the various values of American society that

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[88] *Id.*

[89] 395 F. Supp. 94 (N.D. Cal. 1975), *appeal pending*, No. 75-336 (9th Cir., filed Sept. 2, 1975).

[90] *Id.* at 105-06.

all advertising merely reflects. Yet, the first amendment insists that no message be repressed, and its enlightened function is to guarantee the greatest possible diversity of values in our society. Because commercial speech adds much to this diversity, it should be granted full, and not just "some," first amendment protection consistent with compelling governmental interests.

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