BYU Law Review

Volume 1975 | Issue 3 Article 9

10-1-1975

Constitutional Law--Commercial Speech Doctrine--A Clarification of the Protection Afforded Under the First Amendment--Bigelow v. Virginia

Constitutional Law—COMMERCIAL SPEECH DOCTRINE—A CLARIFICATION OF THE PROTECTION AFFORDED ADVERTISING UNDER THE FIRST AMENDMENT—*Bigelow v. Virginia*, 421 U.S. 809 (1975).

Appellant Bigelow, managing editor of a Charlottesville, Virginia weekly newspaper, published an advertisement for a New York abortion referral and placement center.[1] As a result of that act, he was prosecuted and convicted for violating a Virginia statute which made it a misdemeanor to encourage or prompt the procuring of an abortion by the sale or circulation of any publication.[2] Bigelow appealed his conviction,[3] challenging the statute on

---

1. The advertisement was published in the *Virginia Weekly*, Feb. 8, 1971, at 2, under the direct responsibility of the appellant:

UNWANTED PREGNANCY
LET US HELP YOU
Abortions are now legal in New York.
There are no residency requirements.
FOR IMMEDIATE PLACEMENT IN
ACCREDITED HOSPITALS AND
CLINICS AT LOW COST
Contact
WOMEN'S PAVILION
515 Madison Avenue
New York, N.Y. 10022
or call any time
(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK
STRICTLY CONFIDENTIAL. We will make all
arrangements for you and help you with
information and counseling.

Bigelow v. Virginia, 421 U.S. 809, 812 (1975).

2. Ch. 385, § 18.1-63, [1960] Va. Acts of Assembly 428:

> 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.

This statute was amended shortly after the appellant's conviction and again after the Supreme Court's decision in the instant case. The most current version reads:

> 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 performing of an abortion or the inducing of a miscarriage *in this state* which is prohibited under this article, he shall be guilty of a class 3 misdemeanor.

VA. CODE ANN. § 18.2-76.1 (1975), *amending* VA. CODE ANN. § 18.1-63 (1972), *amending* ch. 385, § 18.1-63, [1960] Va. Acts of Assembly 428 (emphasis added).

The statute as amended would not have reached the appellant's actions since the advertisement was for a New York referral agency which provided the abortion service in New York and therefore did not encourage abortions within the State of Virginia.

3. The appellant was first tried and convicted in the County Court of Albemarle County. He then appealed to the circuit court of that county where he received a trial de novo before a judge on evidence consisting of stipulated facts. This evidence included an excerpt containing the advertisement in question and the June 1971 issue of *Redbook* magazine which was distributed in Virginia and contained abortion information. Appel-

first amendment grounds as an abridgement of freedom of press and speech, and as being overbroad. The Supreme Court of Virginia affirmed the conviction, holding that the first amendment does not prohibit government regulation of commercial advertising.[4] On review, the United States Supreme Court vacated the decision and remanded the case for reconsideration in light of recent intervening cases dealing with state anti-abortion laws.[5] Upon reconsideration, the Virginia Supreme Court affirmed its prior decision, finding nothing "which in any way affects our earlier view."[6] Bigelow again appealed. The United States Supreme Court reversed the conviction, holding that the Virginia statute infringed upon constitutionally protected speech under the first amendment.

I. BACKGROUND

A. *The Commercial Speech Doctrine in the Supreme Court*

Not all speech is protected by the first amendment.[7] One such unprotected area of speech, "purely commercial advertis-

lant was sentenced to pay a fine of 500 dollars with 350 dollars thereof suspended conditioned upon no further violation of the statute. Brief for Appellant at 5, Bigelow v. Virginia, 421 U.S. 809 (1975).

4. Bigelow v. Commonwealth, 213 Va. 191, 194, 191 S.E.2d 173, 175 (1972). The appellant was denied standing to challenge the statute as overbroad by the Virginia Supreme Court. *Id.* at 198, 191 S.E.2d at 178.

The United States Supreme Court in the instant case recognized the standing of the appellant to challenge the Virginia statute as being overbroad under the principles set forth in *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). The Court declined to base its decision on the issue of overbreath, however, because as a practical matter it was mooted by the subsequent statutory amendment and because the "commercial speech" issue was of "greater moment." 421 U.S. at 818.

5. Bigelow v. Virginia, 413 U.S. 909 (1973) (citing Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973)).

6. Bigelow v. Commonwealth, 214 Va. 341, 200 S.E.2d 680 (1973). Examination of the cases shows that the Virginia Supreme Court was correct. *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), invalidated all state statutes which prohibited abortions prior to viability. Neither case mentioned anything about advertising. The only possible application these two cases might have is to indicate the importance of abortion as a matter of "public interest" and to show the possible illegality of the law under which Bigelow was convicted. The Supreme Court ultimately noted its agreement with the Virginia Supreme Court's conclusion that this was not an abortion case. 421 U.S. at 815 n.5.

7. "Fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), "obscenity," Miller v. California, 413 U.S. 15, 23 (1973), Roth v. United States, 354 U.S. 476, 481-85 (1957), "libel," Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974), and "words of incitement," Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), have traditionally not been protected by the first amendment because such speech is considered "patently offensive." Commercial speech, while often not protected by the first amendment, is not "patently offensive" and should not, therefore, be grouped with the above-listed types of speech.

ing," was identified in *Valentine v. Chrestensen*,[8] a 1942 case in which Chrestensen sought to circumvent a New York City ordinance proscribing the distribution of commercial handbills by attaching to the reverse side of a handbill, which advertised tours of a submarine, a protest against the city for not allowing him to exhibit his submarine at a municipal pier. When the police interfered with the distribution of his handbill, Chrestensen sought an injunction, arguing that the ordinance unconstitutionally deprived him of freedom of speech. The Court rejected his claim, stating:

> This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.*[9]

The last sentence of the foregoing quotation has commonly been cited in Supreme Court and lower court opinions as the origin of the "commercial speech doctrine."[10] The *Chrestensen* Court, however, failed to articulate a rationale for its refusal to grant first amendment protection to purely commercial speech.[11] Further, the Court failed to define the scope of the doctrine.[12] Subsequent judicial attempts to reconcile the commercial speech doctrine with the "fundamental rights"[13] and the "preferred posi-

8. 316 U.S. 52 (1942).

9. *Id.* at 54 (emphasis added).

10. *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384 (1973); United States v. Hunter, 459 F.2d 205, 211 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972); Bigelow v. Commonwealth, 213 Va. 191, 193, 191 S.E.2d 173, 175 (1972).

11. Commentators often assume that the genesis of this idea comes from the power or the right of the government to regulate commercial activity. *See Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027 (1967) [hereinafter cited as *Developments in the Law*].

12. Although *Chrestensen* spoke of "purely commercial advertising," the commercial speech doctrine includes all commercial speech. This creates considerable confusion on first impression because the terms "purely commercial advertising," "purely commercial speech," "commercial advertising," "commercial speech," and "advertising" are often used interchangeably. Most cases using the commercial speech doctrine have involved commercial advertising, but other areas of commercial speech have also been denied first amendment protection by the doctrine. These include the credit rating cases, *see, e.g.*, Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 30 (5th Cir. 1973); Millstone v. O'Hanlon Reports, Inc., 383 F. Supp. 269, 274 (E.D. Mo. 1974); and symbolic speech cases, *see, e.g.*, Hodges v. Fitle, 332 F. Supp. 504, 508-09 (D. Neb. 1971).

13. *See* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

tion"[14] of speech and press in a wide variety of cases factually distinct from *Chrestensen* likewise did not provide adequate guidelines for those attempting to understand the parameters of the doctrine.[15]

The Supreme Court has generally grounded its decisions in the area on one of two tests.

1. The primary purpose test

In *Chrestensen*, the Court implicitly relied upon a test which focused on the "primary purpose" of the advertiser in determining whether the advertisement was entitled to first amendment protection. This test focused not on the speech in the advertisement itself but on the motive of the person producing the advertisement. The Court determined that Chrestensen's primary purpose in circulating his handbill was commercial and that, although he had added to the handbill a political protest which ordinarily would have received first amendment protection, the protest was attached solely to circumvent the city ordinance. Therefore, the political protest was viewed as incidental to and a part of the commercial speech and not protected by the first amendment.[16]

In *Murdock v. Pennsylvania*,[17] the Court again faced a question of mixed protected and unprotected speech. Murdock, a Jehovah's Witness who sold religious pamphlets while soliciting converts, challenged a city ordinance which required any person who solicited within the city to purchase a license. He argued that the requirement was a violation of his first amendment rights of

---

Brandeis' concurring opinion is considered a classic defense of the fundamental importance of free speech. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1044 (9th ed. 1975).

14. *See* Kovacs v. Cooper, 336 U.S. 77, 90-97 (1949) (Frankfurter, J., concurring). The concurring opinion by Frankfurter gives a summary of the preferred position arguments found in Supreme Court opinions.

15. For a discussion of the problems experienced by lower courts in using these guidelines, see text accompanying notes 42-46 *infra*. The Supreme Court has not used the commercial speech doctrine extensively. With the exception of the religious pamphleteering cases of the 1940's, *see* note 17 *infra*, the "commercial speech doctrine" surfaced only occasionally, either as dicta in decisions on other grounds or as the subject of criticism in separate opinions. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964) (decided on libel grounds); Breard v. Alexandria, 341 U.S. 622, 642 (1951) (decided on right of privacy grounds); Thomas v. Collins, 323 U.S. 516 (1945) (decided on other first amendment grounds); Cammarano v. United States, 358 U.S. 498, 513-15 (1959) (Douglas, J., concurring).

16. 316 U.S. at 55.

17. 319 U.S. 105 (1943). For other Jehovah's Witnesses cases with similar fact situations and holdings, see Martin v. City of Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Jones v. Opelika, 316 U.S. 584 (1942).

freedom of speech and religion.[18] Employing a primary purpose test to reach its decision, the Court held that an element of commercial activity does not preclude first amendment protection if the primary motivation of the activity is not commercial.[19] The Court stated:

> [T]he mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. . . . The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills.[20]

In *Breard v. City of Alexandria*,[21] the Court again applied the primary purpose test. *Breard* involved an ordinance which prohibited salesmen from soliciting door-to-door without prior authorization by the landowner or resident of the dwelling. A door-to-door salesman of national magazines, convicted for a violation of the ordinance, asserted that the ordinance abridged his first amendment right of freedom of speech.[22] The Court upheld the ordinance, stating that the petitioner's selling brought "into the transaction a commercial feature,"[23] or motive, which when weighed against the homeowner's right to privacy, was entitled to little weight.[24]

Commentators have called the primary purpose test "crude"[25] and of "little sense, either theoretically or practically."[26] Many argue that financial motive is irrelevant if it is acknowledged that an important aspect of the first amendment is the listener's interest in acquiring knowledge.[27] Furthermore, they assert that the logical extension of the primary purpose test would seriously reduce the scope of first amendment protection "accorded virtually all periodicals, books, and newspapers, since all these methods of communication are . . . primarily concerned with maximizing profits."[28] The commentators also point to the

18. 319 U.S. at 107.

19. *Id.* at 111-12.

20. *Id.* at 111.

21. 341 U.S. 622 (1951).

22. *Id.* at 625.

23. *Id.* at 642.

24. *See id.* at 644-45. *Breard* is unique in the series of cases using the primary purpose test in that the Court used a balancing approach.

25. *Developments in the Law, supra* note 11, at 1028.

26. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 452 (1971) [hereinafter cited as Redish].

27. *See, e.g., id.*

28. *Id.* Obviously, the Court has never extended the primary purpose test this far.

inadequacy of the primary purpose test when protected speech is mixed with unprotected speech. The test results in either complete protection or complete lack of protection for the communication. This "either-or" approach fails to accommodate the fact that communications fall along a continuum ranging from speech meriting no first amendment protection to speech meriting a full measure of such protection.[29]

2. The content test

In *New York Times Co. v. Sullivan*,[30] the *Times* and four clergymen were sued by Sullivan who claimed that the *Times'* publication of a full page, paid political advertisement was libelous.[31] Relying on the commercial speech doctrine of *Chrestensen*, plaintiff sought to avoid any question of first amendment protection of the libelous speech.[32] The Court, apparently relying on an approach which focused on the substantive content of the advertisement rather than the primary purpose or motive of the advertiser,[33] found the advertisement to be political and therefore protected by the first amendment.[34] The Court distinguished *Chrestensen* noting that:

See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Smith v. California, 361 U.S. 147, 150 (1959) (books); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (movies); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (newspapers).

29. *See Developments in the Law, supra* note 11, at 1027-28. The idea of a continuum of first amendment protection ranging from full protection to little or no protection is the result of the balancing technique often employed by the Court in first amendment cases. *See* note 60 *infra*. Any given first amendment interest *in a particular controversy* will, however, ultimately be either "protected" or not protected. That is, the first amendment interest will either prevail over competing interests or not prevail. Nevertheless, the term "first amendment protection," as used in this case note, is a shorthand statement for "value of the first amendment interest in free speech." In other words, when the Court is said to accord a certain quantum of first amendment protection to a particular expression, it means that the Court has ascribed a certain value or weight to the first amendment interest involved. Most judges and commentators use the term "first amendment protection" in this way. *See, e.g.*, 421 U.S. at 821; Lehman v. City of Shaker Heights, 418 U.S. 298, 314 (1974) (Brennan, J., dissenting); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384, 386 (1973); Redish, *supra* note 26, at 431, 447, 472; Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775, 797 (1975).

30. 376 U.S. 254 (1964).

31. *Id.* at 256.

32. *Id.* at 265-66.

33. The Supreme Court has never explicitly rejected the primary purpose test, but because of its limited utility it has fallen into disuse. *See* text accompanying notes 25-34 *supra*. For a recent lower court case using this test, see Hodges v. Fitle, 332 F. Supp. 504, 509 (D. Neb. 1971) (motive determines what is commercial speech); *cf.* United States v. Cerone, 452 F.2d 274, 286 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972) (intent of speaker may be dispositive in determining the level of first amendment protection).

34. 376 U.S. at 266.

> The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. 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 interest and concern. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.[35]

A content analysis was again used in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.[36] The newspaper's use of sex-designated column headings in its classified advertising section was held to be a violation of a local ordinance that prohibited sex discrimination.[37] The Court found that the content of the advertisements was purely commercial and therefore without first amendment protection.

> In the crucial respects, the advertisements in the present record resemble the *Chrestensen* rather than the *Sullivan* advertisement. None [of the advertisements] expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance . . . . Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.[38]

Commentators generally agree that the content test is preferable to the primary purpose test. Various arguments have been advanced in support of this preference. First, the content test recognizes that commercial motive does not necessarily make speech less deserving of first amendment protection.[39] Second, the content test eliminates problems of mixed motives.[40] Third, the content test has a sounder theroetical base in that it focuses not on motive but on speech, which is the preeminent value of the first amendment.[41] The effect of these characteristics of the con-

35. *Id.* (citations omitted).

36. 413 U.S. 376 (1973). *Pittsburgh Press*, a five-to-four decision, is the first Supreme Court case since *Chrestensen* to rely on the commercial speech distinction as the primary determinant of the case. Other Supreme Court cases in the interim have involved the commercial speech doctrine only incidently. *See* cases cited note 15 *supra*.

37. 413 U.S. at 378-81.

38. *Id.* at 385.

39. *Cf.* Redish, *supra* note 26, at 452.

40. *Cf.* note 33 *supra*.

41. *See* Redish, *supra* note 26, at 452-57; Note, *Commercial Speech—An End in Sight to* Chrestensen?, 23 DEPAUL L. REV. 1258, 1267 (1974); *see generally* A. MEIKLEJOHN, POLITICAL FREEDOM (1960).

tent test is to provide first amendment protection for a greater range of commercial expression.

B. The Commercial Speech Doctrine in the Lower Courts

The lower courts have not been consistent in their application and definition of the commercial speech doctrine.[42] Statements of the doctrine range from absolute declarations that "the First Amendment deals with the free exchange of ideas and not with commercial 'factual' speech,"[43] to the opposite extreme that "[e]ven advertisers enjoy first amendment rights, although it is said that product advertising is 'less vigorously protected . . . than other forms of speech.' "[44] A large number of cases adopt an approach similar to *Chrestensen* and deny protection without attempting to give a rationale or define the scope of the commercial speech doctrine.[45] As a result, many of the questions raised by *Chrestensen* remain largely unanswered.[46]

C. The Theoretical Base of the Commercial Speech Doctrine

Lower court confusion as to the relationship between commercial speech and the first amendment can, in large part, be traced to the theoretical framework generally attributed to the Supreme Court in its interpretation of first amendment cases and to the difficult choices that this framework requires in the commercial context. The Court is generally viewed as accepting Alexander Meiklejohn's interpretation of the first amendment[47] which

---

42. DeVore and Nelson, *Commercial Speech and Paid Access to the Press*, 26 HASTINGS L.J. 745, 749 (1975); *The Right to Receive and the Commercial Speech Doctrine*, *supra* note 29, at 798.

43. SEC v. Texas Gulf Sulfur Co., 446 F.2d 1301, 1306 (2d Cir. 1971); *accord*, Patterson Drug Co. v. Kingery, 305 F. Supp. 821, 825 (W.D. Va. 1969) (regulation of commercial advertising does not intrude upon first amendment rights of free speech).

44. Fur Information & Fashion Council, Inc. v. E. F. Timme & Son, Inc., 364 F. Supp. 16, 22 (S.D.N.Y. 1973); *accord*, Rowan v. United States Post Office Dep't, 300 F. Supp. 1036, 1044 (C.D. Cal. 1969), *aff'd*, 397 U.S. 728 (1970) (the commercial element does not altogether destroy its quality as protected speech).

45. *See, e.g.*, United States v. Hunter, 459 F.2d 205, 211 (4th Cir. 1972); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1306 (2d Cir. 1971); Patterson Drug Co. v. Kingery, 305 F. Supp. 821, 825 (W.D. Va. 1969). *Contra*, Fur Information & Fashion Council, Inc. v. E. F. Timme & Son, Inc., 364 F. Supp. 16, 22-23 (S.D.N.Y. 1973); Rowan v. United States Post Office Dep't, 300 F. Supp. 1036, 1039-40 (C.D. Cal. 1969). For a more complete summary of these cases, see DeVore and Nelson, *supra* note 42; Annot., 37 L. Ed. 2d 1124 (1973).

46. DeVore and Nelson, *supra* note 42; *The Right to Receive and the Commercial Speech Doctrine*, *supra* note 29, at 798; *see* Note, *The Commercial Speech Doctrine: The First Amendment at a Discount*, 41 BROOKLYN L. REV. 60, 84-90 (1974).

47. Dr. Meiklejohn's articulation of the purposes that lie behind the first amendment has received considerable attention from commentators. *See* Brennan, *The Supreme*

draws a sharp distinction between private and public speech.[48] Public speech, that is, speech vital to political decisions or of importance to the governing forces of society, receives full first amendment protection.[49] Private speech, on the other hand, of which commercial speech is a part, receives little or no first amendment protection under this interpretation.[50] The confusion sets in early because the distinction between private and public speech is difficult to make. This is particularly true in the area of commercial speech which Meiklejohn ordinarily classifies as private speech. Such a rigid categorization does not appear justified since commercial speech often conveys information essential to informed personal decisionmaking which may ultimately affect the quality of political decisions.[51]

Court and the Meiklejohn Interpretation of the First Amendment, 79 HARV. L. REV. 1 (1965); Redish, *supra* note 26, at 434-41; Comment, *Privacy, Defamation, and the First Amendment: The Implications of* Time, Inc. v. Hill, 67 COLUM. L. REV. 926, 938-42 (1967). The Supreme Court appears to have applied Meiklejohn's theory in: Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

48. A. MEIKLEJOHN, *supra* note 41, at 55-56. This distinction is drawn to prevent political speech from losing its uniqueness since it is viewed as essential to the maintenance of a free society. *Id.*

49. *See id.* at 28.

50. *See* Redish, *supra* note 26, at 432-36.

51. For a detailed discussion of these criticisms, see Kalven, *The Metaphysics of the Law of Obscenity*, 1960 S. CT. REV. 1, 15-16; Kaufman, *The Medium, the Message and the First Amendment*, 45 N.Y.U.L. REV. 761, 769 (1970); Redish, *supra* note 26, at 432-38; *The Right to Receive and the Commercial Speech Doctrine, supra* note 29, at 800-01; *cf.* Chafee, Book Review, 62 HARV. L. REV. 891, 895-96 (1949). Individual members of the Court have expressed similar criticisms. Justice Douglas, who participated in *Chrestensen*, has long been a critic of the decision, maintaining that though the decision was unanimous at the time, "it has not survived reflection." Cammarano v. United States, 358 U.S. 498, 513 (1959) (Douglas, J., concurring); *accord*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 398 (1973) (Douglas, J., dissenting); Dun & Bradstreet, Inc. v. Glover, 404 U.S. 898, 905 (1971) (Douglas, J., dissenting). In *Dun & Bradstreet v. Glover*, Justice Douglas stated his position as follows:

> 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.

Id. at 905. Justice Brennan, joined by Justices Stewart, Marshall, and Powell, expressed displeasure with the doctrine in his dissent in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314 (1974) (footnote omitted):

> [W]hile it is possible that commercial advertising may be accorded *less* First Amendment protection than speech concerning political and social issues of public importance . . . it is "speech" nonetheless, often communicating information and ideas found by many persons to be controversial.

Justice Stewart, in his dissent 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

II. INSTANT CASE

In the instant case, the Supreme Court narrowly defined *Chrestensen*, stating that "[t]he case obviously does not support any sweeping proposition that advertising is unprotected *per se*."[52] Relying on past cases to support this position, the Court noted that speech is not stripped of first amendment protection merely because it appears in commercial form.[53] Further, states are not free of constitutional restraint merely because the advertisement "involved sales,"[54] or "because the appellant was paid for printing it,"[55] or "because the appellant's motive or the motive of the advertiser may have involved financial gain."[56] Relying on *New York Times* and *Pittsburgh Press*, the Court stressed that the content, not the commercial setting, determines the degree of first amendment protection which an advertisement is to receive.[57]

Contrasting the content of the abortion advertisement with the purely commercial advertisements of *Chrestensen* and *Pittsburgh Press*, the Court stated that the abortion advertisement did more than simply propose a commercial transaction.[58] The information contained in the abortion advertisement, viewed in its entirety, conveyed factual information of clear public interest and value to a diverse audience including those in need of such services, those interested in the subject in general, those interested in laws of other states, and those interested in reforming Virginia law.[59]

The Court then balanced the state interest served by the regulation against the first amendment interest of the appellant.[60]

---

of a newspaper are outside the protection given the newspaper by the First and Fourteenth Amendments.

413 U.S. at 401. Joining with Justice Stewart in his dissent was Justice Douglas. Justice Blackmun joined with Justice Stewart in all of his dissent except the paragraph where Justice Stewart criticized balancing as a judicial technique. *Id.* at 404. This fact is illuminating since Justice Blackmun wrote the majority opinion in the present case and used a balancing approach.

52. 421 U.S. at 820.

53. *Id.* at 818.

54. *Id.* (citing Murdock v. Pennsylvania, 319 U.S. 105, 110-11 (1943), discussed in text accompanying notes 17-20 *supra*).

55. 421 U.S. at 818 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964), discussed in text accompanying notes 30-35 *supra*).

56. 421 U.S. at 418 (citing Thomas v. Collins, 323 U.S. 516, 531 (1945)).

57. *See* 421 U.S. at 820-21.

58. *Id.* at 822.

59. *Id.*

60. *Id.* at 826-27. The Court states:

[T]he task of balancing the interests at stake here was one that should have

In support of the statute, the state had argued that the regulation was necessary to maintain quality medical care within the state.[61] Although recognizing this as a legitimate state interest, the Court gave it little or no weight since "[n]o claim has been made . . . that this particular advertisement in any way affected the quality of medical services within Virginia."[62] Turning next to the appellant's alleged free speech interest, the Court noted five considerations leading to the conclusion that the free speech interest must prevail over countervailing interests of the state. First, since newspapers have consistently been singled out for special first amendment protection, the regulation here, if allowed, might impair the proper functioning of a free national press.[63] Second, the advertisement contained factual information of clear public interest to a diverse audience.[64] Third, the advertisement contained no "patently offensive" elements which have traditionally been excluded from first amendment protection.[65] Fourth, the activity advertised was not illegal in either Virginia or New

---

been undertaken by the Virginia courts before they reached their decision. We need not remand for that purpose, however, because the outcome is readily apparent from what has been said above.

Id.

For the factors the Court considered, see text accompanying notes 61-67 *infra*. A balancing approach follows naturally from the Court's position that all advertising enjoys a degree of first amendment protection, but it is unclear whether the Court used ad hoc balancing or definitional balancing. Ad hoc balancing weighs the interests of the parties in the particular case before it, while definitional balancing takes a particular type of speech, *e.g.*, commercial speech, and by balancing larger public policy factors, determines the degree of first amendment protection to be afforded a particular category of speech. Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 944 (1968).

61. 421 U.S. at 827. The State of Virginia argued that allowing advertisements by commercial abortion referral and placement centers produced fee splitting with and solicitation of patients for doctors by the agencies, practices which professional standards condemn as lowering the quality of care ultimately given the patient. *See* Brief for Appellee at 14, Bigelow v. Virginia, 421 U.S. 809 (1975). The state supported this argument by noting that New York has, since this case arose, prohibited advertising of the type in issue here. *Id.* at 13. The New York statute withstood constitutional attack in *S. P. S. Consultants, Inc. v. Lefkowitz*, 333 F. Supp. 1373 (S.D.N.Y. 1971). For other cases in which the statute was enforced, see New York v. Abortion Information Agency, Inc., 323 N.Y.S.2d 597 (Sup. Ct. 1971); New York v. Mitchell, 321 N.Y.S.2d 756 (Sup. Ct. 1971).

62. 421 U.S. at 827. The Court felt there was little justification for a Virginia statute which attempts to prevent Virginians from using services in New York, which are legal in New York, by erecting an information shield. The Virginia statute was viewed by the Court as an improper use of Virginia's police power. *Id.* at 824-25.

63. *Id.* at 828-29. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257-58 (1974). Part of the evidence in the *Bigelow* case was a similar advertisement published in *Redbook*. *See* note 3 *supra*.

64. 421 U.S. at 822.

65. *Id.* at 828.

York.[66] Fifth, the advertisement did not impinge upon other important individual rights such as the right to privacy.[67] The Court concluded that the statute as applied impermissibly violated the appellant's first amendment rights of freedom of speech and press.[68]

The dissenting Justices argued that the advertisement in the present case was entitled to little or no first amendment protection since it, like the ads in *Chrestensen* and *Pittsburgh Press*, was merely an offer of services,[69] and was therefore outweighed by the state's interest in preventing medical practices "inimical" to the health of its citizens.[70]

III. Analysis

A. Commercial Advertising and the First Amendment

The present case represents a significant attempt by the Supreme Court to reconcile the commercial speech doctrine with the guarantees of the first amendment. The Court, using Meiklejohn's private-public speech dichotomy, could have decided the present case in one of two ways. By stressing the controversial nature of the subject of the advertisement and the intense public debate surrounding that subject as it related to political reform,[71] the Court could have found the ad to be political and therefore entitled to full first amendment protection. On the other hand, the Court could have found that the ad was merely an offer of services—clearly private speech—and without first amendment protection. Instead, the Court recognized that the advertisement published by the appellant contained both private and public speech which when viewed in its entirety conveyed factual information of "public interest"[72] and therefore deserved some, though

66. *Id. See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973).

67. 421 U.S. at 829.

68. *Id.*

69. *Id.* at 831 (Rehnquist, J., dissenting).

70. *Id.* at 830-31. For a recital of the practices "inimical to the public interest," see note 61 *supra*.

71. Brief for Appellant at 9, Bigelow v. Virginia, 413 U.S. 909 (1973). The Court in its preface to *Roe v. Wade*, 410 U.S. 113, 116 (1973), acknowledged its

> awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusion about abortion.

72. *See* text accompanying note 59 *supra*.

perhaps not a full degree of, first amendment protection. Indeed, the Court stated in *dictum* that even purely commercial advertising is entitled to a degree of constitutional protection.[73] The Court therefore, by affording at least some first amendment protection to commercial speech, took a significant step away from Meiklejohn's generalization that commercial speech is included in the private speech category and merits no such protection. A question remains, however, concerning the degree or scope of protection the Court will afford commercial speech under the new approach of the present case.

B. The Scope of Protection

The present case does not stand for the proposition that all commercial advertising is to receive full first amendment protection; the language of the Court is explicit in stating that purely commercial speech enjoys only a degree of such protection.[74] It appears, however, that each particular advertisement will receive a *varying* degree of protection depending on the value or importance the Court ascribes to the message or informational content of the ad. This thesis is supported by a comparison of the present case with *New York Times* and *Pittsburgh Press*, two cases representing the extremes of a continuum of protection. The ad in *New York Times*, representing a solely political advertisement, falls at one extreme and receives full first amendment protection.[75] The *Pittsburgh Press* ads, representing purely commercial advertisements, fall at the other extreme and receive a minimal degree of protection.[76] The ad in the present case was like the advertisement in *New York Times* in that it conveyed to a diverse audience information which was vital to important personal decisionmaking at both the private and public levels. But it was also similar to the *Pittsburgh Press* ads in that it was intended as an offer of services and did not explicitly advocate or express a position on matters of public policy. Since the abortion ad contains elements found in both the *New York Times* and the *Pittsburgh Press* advertisements, it falls somewhere between these two extremes

73. 421 U.S. at 821. The proposition that all advertising, including "purely commercial" advertising, receives a degree of first amendment protection is strongly supported by dicta in the opinion. *Id.* Since the Court held that the abortion advertisement was not purely commercial, however, it is not possible to state the exact position the Court would take when faced with a purely commercial advertisment, if such a category of advertisements continues to exist. *See* text immediately following note 80 *infra*.

74. 421 U.S. at 821.

75. *See* text accompanying notes 30-35 *supra*.

76. *See* text accompanying notes 36-38 *supra*.

and was so treated by the Court.[77] Indeed, it can be argued that the Court in the present case created and applied an approach that permits a limitless number of intermediate treatments: the Court evaluates each advertisement on an ad hoc basis and affords each ad a varying degree of protection depending on the relative importance of its message or informational content.

The present case, like *New York Times* and other prior cases, ascribes importance to commercial messages of "public interest."[78] The Court, however, appears to have expanded the scope of the term "public interest." The term was used in *New York Times* to refer to information vital to political decisionmaking.[79] As used in the present case, however, the term includes not only information vital to the political processes but information of interest to a diverse audience for other than political reasons.[80] Significant consequences flow from this expanded definition of "public interest." Since nearly all advertising is of some "public interest," as the term is used in the present case, the category of *purely* commercial speech becomes relatively insignificant or even nonexistent. The end result is that a greater number and variety of advertisements qualify for a greater measure of first amendment protection. Indeed, it can be argued that with its expanded definition of "public interest," the Court is moving toward greater first amendment protection for all commercial speech.[81]

---

77. *See* 421 U.S. at 818-22, 826.

78. 421 U.S. at 822.

79. *See* text accompanying note 35 *supra*.

80. *See* 421 U.S. at 822.

81. The instant case is already having an impact on lower court treatment of the commercial speech doctrine with a resultant increase in protection afforded advertising. In Terminal-Hudson Electronics, Inc. v. Dep't of Consumer Affairs, 44 L.W. 2337 (C.D. Cal. Jan. 6, 1976), a three judge federal district court struck down as violative of the first amendment California statutes prohibiting advertisements of the cost of commodities furnished or services performed, by optometrists. In reaching its decision, the court stated:

> The state, however, contends that news media paid informational advertisements of price structures for commodities and services are "commercial" speech and enjoy no First Amendment protection under the rationale and rule of Valentine v. Chrestensen, 316 U.S. 52 (1942). The *Chrestensen* rational has been criticized for nearly 20 years and was lately sent into oblivion by the Supreme Court's decision in Bigelow v. Virginia, 421 U.S. 809, 43 LW 4734 (1975). *Bigelow* involved commercial advertising of an abortion referral service, while the issue before this court is commercial advertising of eyeglasses. But both involve commercial advertising and this court sees no significant distinction between the two.

Id.

IV. Conclusion

The present case, while not defining the boundaries of the commercial speech doctrine in all circumstances, substantially clarifies the Court's position on commercial speech and the first amendment and gives viable guidelines to those lower courts which have been divided on the issue. It should now be clear that a per se exclusion of commercial speech from first amendment protection is unacceptable. A free speech interest, though perhaps limited, inheres in all commercial messages. That interest must be evaluated and balanced against any competing state interest and afforded an appropriate degree of protection from restrictive measures.