CASE COMMENT

ORDINANCE BANNING "FOR SALE" SIGNS VIOLATES FIRST AMENDMENT *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977)

In *Linmark Associates v. Township of Willingboro*,[1] the Supreme Court strengthened first amendment protection for commercial speech.[2] The breadth of that protection is uncertain, however, due to insufficient evidence of a compelling state interest[3] and unanswered questions about the importance of commercial speech to society.[4] The Court also left unresolved analytical problems in its application of the time, place, and manner test[5] and in its use of the term "emergency."[6]

The City Council of Willingboro, New Jersey, enacted an ordinance[7] banning "For Sale" and "Sold" signs from residential property because it feared the signs would result in panic selling by white residents.[8] The

1. 431 U.S. 85 (1977).
2. *See* notes 89-92 & 110 *infra* and accompanying text.
3. *See* notes 99-102 *infra* and accompanying text.
4. *See* notes 103-09 *infra* and accompanying text.
5. *See* notes 93-98 *infra* and accompanying text.
6. *See* notes 110-12 *infra* and accompanying text.
7. Ordinance 5-1974 (amended 1974) repealed § 17-6.5 of WILLINGBORO, N.J., REV. GEN. ORDINANCES ch. XVII. The chapter operates through § 17-2 which reads:

> 17-2 *Legality*.
>
> Signs may be erected and maintained in the Township of Willingboro only when the same comply with the provisions of this chapter, and it shall be unlawful to erect or maintain any sign at any place within the sajd Township of Willingboro when the same does not comply with the provisions of this chapter.

Section 17-6.5 read:

> 17-6.5 *Rental Signs*. Signs pertaining to the lease, rental or sale of the premises on which they appear, subject to the following conditions:
>
> a. The size of the sign shall not exceed eight square feet in area.
>
> b. The sign shall be located upon the premises to which it pertains and shall not project beyond the property line of such premises.
>
> c. Such signs shall be removed within five days after the execution of any lease, rental agreement or agreement of sale for the premises in question by the occupant of the premises and/or the owner of the sign.
>
> d. Not more than two such signs are to be placed upon any property.

8. The Court defined "panic selling" of homes as "selling by whites who feared that the Township was becoming all black." 431 U.S. at 88. The Township argued the loss of white residents would lead to a decline in property values. *Id.*

District Court sustained a local realtor's claim[9] that the ordinance was unconstitutional[10] and, after the Third Circuit Court of Appeals reversed,[11] the Supreme Court *held*:[12] Absent substantial proof that it will achieve an important governmental objective,[13] an ordinance that restricts the flow of truthful and legitimate commercial information violates the first amendment.[14]

The first amendment, applied to the states through the fourteenth amendment,[15] provides that there shall be "no law . . . abridging the freedom of speech."[16] Despite the preferred position often given the amendment,[17] this prohibition is not absolute,[18] and the Court has developed a number of tests, ranging from a requirement of clear and present danger[19] to a balancing of interests[20] to determine whether the state's

9. The case was moot as to the realtor's client who had joined the realtor in challenging the ordinance in the District Court. *See id.* at 86 n.1.

10. The district court opinion which was reversed by the Third Circuit was excerpted at 535 F.2d 786, 792-93 n.5 (3d Cir. 1976), *rev'd*, 431 U.S. 85 (1977). The District Court found no evidence of panic selling, but merely a fear of declining property values, which was insufficient to justify the ordinance's restriction on speech.

11. 535 F.2d 786 (3d Cir. 1976). The Court of Appeals accepted the District Court's findings of fact but found a paramount governmental interest in preventing "panic-selling psychology." *Id.* at 797.

12. 431 U.S. at 85.

13. *Id.* at 94-96.

14. *Id.* at 96-97.

15. Malloy v. Hogan, 378 U.S. 1, 10 (1964); Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Schneider v. State, 308 U.S. 147, 160 (1939).

16. U.S. CONST. amend. I.

17. *See, e.g.*, Saia v. New York, 334 U.S. 558, 561 (1948); Thomas v. Collins, 323 U.S. 516, 530 (1945); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

18. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976); Elrod v. Burns, 427 U.S. 347, 360 (1976); Near v. Minnesota, 283 U.S. 697, 708 (1931). Justice Douglas, however, joined by Justice Black, espoused a minority absolutist position. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 720 (1971) (concurring opinion); Roth v. United States, 354 U.S. 476, 514 (1957) (dissenting opinion); Beauharnais v. Illinois, 343 U.S. 250, 285 (1952) (dissenting opinion).

19. *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 530 (1945); Schenck v. United States, 249 U.S. 47, 52 (1919). *Cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) ("grave and immediate danger"); Whitney v. California, 274 U.S. 357, 377 (1927) ("emergency").

For an interesting discussion of the use of the clear and present danger test to assure the first amendment's "preferred position," see Shaman, *Revitalizing the Clear-and-Present-Danger Test: Toward a Principled Interpretation of the First Amendment*, 22 VILL. L. REV. 60 (1976-1977). Shaman argues the Court should apply the clear and present danger test in all speech cases and focus "upon the nature and degree of danger that will justify regulation of speech." *Id.* at 70. Similarly, Fuchs attempts to answer Emerson's criticisms of the clear and present danger test, Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 910-12 (1963), and apply a "reconstructed" test. Fuchs,

regulation of speech is permissible. In a balancing analysis, the state must demonstrate a "paramount,"[21] "overriding,"[22] "compelling,"[23] "substantial,"[24] or "subordinating"[25] interest to justify the regulation.

The government may reasonably regulate the time, place, or manner of protected speech[26] to enforce its police powers[27] as long as adequate

Further Steps Toward a General Theory of Freedom of Expression, 18 WM. & MARY L. REV. 347 (1976).

Some commentators view the test in United States v. Dennis, 341 U.S. 494, 510 (1951) (" 'whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger' ") as part of the clear and present danger test, and others view it as its demise. *Compare* Shaman, *supra* at 70, *with* Emerson, *supra* at 912. The Court used the *Dennis* test in Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), to strike down a prior restraint. *See* note 112 *infra*. For a criticism of any form of balancing of prior restraints, see Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 540-42 (1977).

20. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 126 (1959) ("Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."); American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950) ("When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."); *cf.* United States v. O'Brien, 391 U.S. 367, 377 (1968) (regulation justified if within "constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental 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."); United Pub. Workers v. Mitchell, 330 U.S. 75, 96 (1947) ("[T]his Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society . . . ."). This "ad hoc balancing" has been criticized. *See generally* Emerson, *supra* note 19, at 912-14; Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

21. Elrod v. Burns, 427 U.S. 347 (1976).

22. Gibson v. Florida Legislative Investigation Comms., 372 U.S. 539, 546 (1963).

23. NAACP v. Button, 371 U.S. 415, 438 (1963).

24. *Id.* at 444.

25. Bates v. Little Rock, 361 U.S. 516, 524 (1960).

26. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 18 (1976); Grayned v. City of Rockford, 408 U.S. 104, 115-16 (1972); Adderley v. Florida, 385 U.S. 39, 46-48 (1966); Cox v. Louisiana, 379 U.S. 559, 569 (1965); Poulos v. New Hampshire, 345 U.S. 395, 405 (1953); Kunz v. New York, 340 U.S. 290, 293-94 (1951); Kovacs v. Cooper, 336 U.S. 77, 85-86 (1949); Saia v. New York, 334 U.S. 558, 562 (1948); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

27. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 118-20 (1972) (right of municipality to assure undisrupted school session); Adderley v. Florida, 385 U.S. 39, 46-48 (1966) (right of state to control use of jail property); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (right of municipality to prohibit "loud and raucous" sound trucks to protect "quiet and tranquility" of community).

alternative methods of communication are available[28] and the regulation is not intended to restrict the content of the speech.[29] In *Young v. American Mini-Theatres, Inc.*,[30] however, the Court upheld a regulation restricting the location of theatres showing "adult" films[31]—a place restriction on content—because the municipality's intent in regulating the speaker's message was neutral.[32] The plurality emphasized that the City

28. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); *see* Adderley v. Florida, 385 U.S. 39, 50-51 (1966) (Douglas, J., dissenting).

A regulation which does not allow adequate alternatives is void because it abrogates first amendment freedoms. *Compare* Kovacs v. Cooper, 336 U.S. 77, 82-83 (1949); Saia v. New York, 334 U.S. 558, 560-61 (1948); Cantwell v. Connecticut, 310 U.S. 296, 305-07 (1940); Hague v. CIO, 307 U.S. 496, 515-16 (1939); *and* Lovell v. City of Griffin, 303 U.S. 444, 451 (1938), *with* Cox v. New Hampshire, 312 U.S. 569, 574-78 (1941). *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 359-86 (1970); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1044 (1969). *See also* Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975).

29. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) ("[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."); Lehman v. City of Shaker Heights, 418 U.S. 298, 317 (Brennan, J., dissenting) ("[S]elective exclusions from a public forum must be closely scrutinized and countenanced only in cases where the government makes a clear showing that its action was taken pursuant to neutral 'time, place, and manner' regulations . . . ."); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) ("[G]overnment has no power to restrict such activity because of its message."); Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) ("[S]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."); Street v. New York, 394 U.S. 576, 592 (1968) ("[A]ny shock effect of appellant's speech must be attributable to the content of the ideas expressed. It is firmly settled under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."). *See also* T. EMERSON, *supra* note 28, at 359; Kalven, *The Concept of the Public Forum*, 1965 SUP. CT. REV. 1, 29 (when regulations "slip from the neutrality of time, place and circumstance into a concern about content," considerations of censorship come into play); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (The "heart" of the first amendment prohibits content censorship of speech.).

Prior to Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976), discussed in text accompanying notes 30-33 *infra*, the Court allowed content-based regulation only in special contexts. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (intrusion on captive audience); Rowan v. Post Office Dep't, 397 U.S. 728, 735-40 (1970) (intrusion on privacy of home); Ginzburg v. New York, 390 U.S. 629, 640-41 (1968) (protection of minors).

30. 427 U.S. 50 (1976).

31. *Id.* at 52-53 nn.3 & 4.

32. *Id.* at 67. Justice Stevens, writing for the plurality, stated the city's intent in promulgating the ordinance was neutral because the city was neither sympathetic nor hostile to the speaker's message. This was a departure from the traditional view of content

Council in *Young* was concerned with the "secondary effect" of the speech, the deterioration of neighborhoods, rather than the "primary effect," the citizens' exposure to the speech itself.[33]

Certain types of speech are unprotected by the first amendment: obscenity,[34] incitement to unlawful action,[35] libel,[36] "fighting words,"[37] and until recently, commercial speech.[38] The Supreme Court held in *Valentine v. Chrestensen*[39] that states could regulate the distribution of commercial information,[40] but failed to explain the basis for the commer-

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"neutrality," which forbids any content discrimination *per se*. *See* note 29 *supra* and sources cited therein.

Justice Stewart, joined by Justices Brennan, Marshall, and Blackmun, sharply disagreed with the plurality, stating *Young* did not involve a "content-neutral time, place, and manner restriction":

> What this case does involve is the constitutional permissibility of selective interference with protected speech whose content is thought to produce distasteful effects. It is elementary that a prime function of the First Amendment is to guard against just such interference. By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment law, which require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience.

427 U.S. at 85-86 (dissenting opinion).

Justice Stevens contended, however, that despite broad statements by the Court to the contrary, whether speech is protected often depends on its content. *Id.* at 63-66. Although the first amendment forbids total suppression of erotic materials, state regulation of such materials does not impermissibly impinge on first amendment freedoms. ("[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theatres of our choice."). *Id.* at 70-71. Justice Powell, employing a reformulation of the *O'Brien* test, *see* note 20 *supra*, found Detroit's interest significant and the burden on the first amendment interest incidental. 427 U.S. at 76-84 (concurring opinion). *See generally The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 196 (1976).

33. 427 U.S. at 71 n.34. Justice Stevens used this reasoning to distinguish a case invalidating a similar ordinance, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (ordinance regulating films displaying nudity at drive-in theatres). Justice Powell is similarly concerned with the aim of the Common Council. *See* 427 U.S. at 81-83 nn.4-6. *But see id.* at 87-88 (dissent refused to distinguish Erznoznik). *See generally The Supreme Court, 1975 Term, supra* note 32, at 201. For a discussion of the problems this approach creates, both generally and in view of Karst's thesis, Karst, *supra* note 29, at 35-43, see notes 96-98 *infra* and accompanying text.

34. Miller v. California, 413 U.S. 15 (1973).

35. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

36. Beauharnais v. Illinois, 343 U.S. 250 (1952).

37. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

38. Valentine v. Chrestensen, 316 U.S. 52 (1942).

39. *Id.*

40. *Id.* at 55.

cial speech exception;[41] thus, most subsequent decisions either ignored or misapplied *Valentine*.[42] *New York Times Co. v. Sullivan*[43] held that the first amendment protected allegedly libelous statements[44] in an advertisement because, by communicating information and expressing grievances, the advertisements contributed to valuable discussion of a public issue.[45] And in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[46] the Court refused to protect a newspaper publisher who printed help-wanted advertisements segregated by sex[47] not because the speech was commercial[48] but rather because the newspaper was engaging in illegal sex discrimination in employment.[49]

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41. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 432-48 (1971) examines various justifications for the commercial speech exception, including Alexander Meiklejohn's "self-government" theory. Meiklejohn contends the first amendment was designed to protect societal discussion of *public* issues to facilitate self-government. *Id.* at 434-38. *See* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255-66. *See generally* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). *See also* Buckley v. Valeo, 424 U.S. 1, 14 (1976); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257-58 (1974).

42. Note, *The Constitutional Status of Commercial Expression*, 3 HASTINGS CONST. L.Q. 761, 768-72 (1976) provides a useful overview of the cases following *Valentine*, and compares Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. Opelika, 319 U.S. 103 (1943); and Jamison v. Texas, 318 U.S. 413 (1943); with Breard v. Alexandria, 341 U.S. 622 (1951); and Town of Green River v. Fuller Brush Co., 65 F.2d 112 (10th Cir. 1933). *See generally* T. EMERSON, *supra* note 28, at 414-17; Redish, *supra* note 41, at 431-32, 448-73; Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775, 795 (1975); Developments in Constitutional Law, *Commercial Speech and the First Amendment: An Emerging Doctrine*, 5 HOFSTRA L. REV. 655, 660 (1977).

43. 376 U.S. 254 (1964).

44. N.Y. Times, Mar. 29, 1960, at 25 (advertisement), *reprinted in* 376 U.S. at 293.

45. 376 U.S. at 265-66. *See generally* 61 CORNELL L. REV. 640, 643 (1976); 113 U. PA. L. REV. 284, 286 (1964).

46. 413 U.S. 376 (1973).

47. *Id.* at 378-81.

48. *Id.* at 385.

49. *Id.* at 388-89. *See The Supreme Court, 1972 Term*, 87 HARV. L. REV. 153, 155 (1973); 48 TUL. L. REV. 426, 428-29 (1974); 12 URB. L. ANN. 221, 226 (1976). *But see* Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 210-13, 218 (1976) [hereinafter cited as Comment, *First Amendment Protection*].

Two recent cases have overruled the *Valentine* commercial speech exception.[50] In *Bigelow v. Virginia*,[51] a newspaper editor violated a state statute[52] forbidding the publication of advertisements encouraging abortion.[53] Even though the speech was in the form of a commercial advertisement, the Court found it conveyed information of public interest to a diverse audience[54] and was, therefore, entitled to first amendment protection. The Court applied a balancing analysis[55] and, concluding that the public's first amendment interest in the speech outweighed the state's regulatory interest,[56] invalidated the statute.[57] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[58] the Court, striking down a ban on prescription drug price advertisements,[59] determined that even purely commercial advertisements[60] were not necessarily unprotected speech,[61] thereby implicitly rejecting both the self-government theory[62] and *Bigelow's* "public interest" criterion.[63] After recog-

50. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

51. 421 U.S. 809 (1975).

52. VA. CODE § 18.1-65 (1960) (repealed 1975) 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 prompt the processing of abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor.

53. Abortions were illegal in Virginia at that time.

54. 421 U.S. at 822. The Court did consider the commercial form of the speech. *Id.* at 825-26. The advertisement read, in part: "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 . . . AVAILABLE 7 DAYS A WEEK." *Id.* at 812.

55. *Id.* at 826 ("assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation"). This test is much less rigorous than the usual first amendment balancing test which requires a showing of significant state interest. *See* notes 20-25 *supra* and accompanying text. *See generally The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 119-20 (1975).

56. 421 U.S. at 827-29. The Court found no relationship between the State's asserted interest in the quality of Virginia medical care and a ban on an advertisement for New York abortions.

57. *Id.* at 826-29.

58. 425 U.S. 748 (1976).

59. VA. CODE § 54-524.35 (1974) provided: "Any pharmacist shall be considered guilty of unprofessional conduct who . . . publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription."

60. 425 U.S. at 760-62. This differentiates the advertisement from that in *Bigelow*. *See* notes 54-57 *supra* and accompanying text.

61. 425 U.S. at 760-62.

62. *Id.* at 764-65. *See* note 41 *supra*.

63. 425 U.S. at 765. *See* notes 54-57 *supra* and accompanying text.

nizing that society's interest in the free flow of commercial information[64] and the consumers' right to receive that information[65] outweighed the state's interest in banning drug price advertising,[66] the Court held that a state may not totally ban truthful and legitimate commercial information because of the anticipated harmful effect it may have on disseminators and recipients.[67]

Linmark Associates v. Township of Willingboro[68] extended first amendment protection of commercial speech further despite defendant's assertion of compelling countervailing interests. After reviewing *Bigelow* and *Virginia Pharmacy*, the Court found that society's first amendment interest in the information conveyed by "For Sale" signs was indistinguishable from its interest in abortion and drug price advertisements, thus entitling the signs to the same first amendment protec-

64. 425 U.S. at 763-65.

65. *Id.* at 756-57. The Court had infrequently recognized the right to receive information. *See* Procunier v. Martinez, 416 U.S. 396 (1974) (right to receive mail from prisoners); Stanley v. Georgia, 394 U.S. 557 (1969) (right to receive obscene material); Lamont v. Postmaster General, 381 U.S. 301 (1965) (right to receive "communist political propaganda"); Martin v. City of Struthers, 319 U.S. 141 (1943) (right to receive religious information); *cf.* Kleindienst v. Mandel, 408 U.S. 753 (1972) (right to receive information cannot interfere with plenary Congressional power to exclude aliens); Rowan v. Post Office Dep't., 397 U.S. 728 (1970) (implicit right *not* to receive "offensive" material). For a comprehensive review of the "right to receive" doctrine and the implications of *Virginia Pharmacy* for the doctrine and commercial speech, see Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975). *See also* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1.

66. 425 U.S. at 766-70. The Court recognized the State's "strong interest in maintaining . . . professionalism" among its pharmacists, but doubted the ban achieved that end.

67. *Id.* at 773. Although the Court rejected the *Bigelow* "public interest" test and adopted a standard of truthfulness and legitimacy, the criteria for determining what type of speech is commercial and the level of first amendment protection given it remained unclear. *See The Supreme Court, 1975 Term, supra* note 32, at 145-52 (1976). *See generally* Hunter, *Prescription Drugs and Open Housing: More on Commercial Speech*, 25 EMORY L.J. 815, 826-27 (1976); Comment, *First Amendment Protection, supra* note 49, at 227-34 (1976).

The Court explicitly exempted regulation of false and misleading advertisements, proposals of illegal transactions, special problems of electronic broadcast media, and time, place or manner of commercial speech from its holding. 425 U.S. at 770-73. It retained the distinction between commercial and non-commercial speech primarily to permit regulation of deceptive or misleading commercial speech, which is less likely to be chilled than political speech. *Id.* at 771-72 n.24. *See generally Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1029 (1967) (false advertising traditionally outside protection of first amendment).

68. 431 U.S. 85 (1977).

tions.[69] The Court then used traditional first amendment standards[70] to reject Willingboro's claim that the ordinance was a reasonable time, place, or manner regulation of protected speech:[71] alternative realty advertising methods restricted the seller's autonomy, were too expensive, and were less effective in reaching potential buyers.[72] Furthermore, Willingboro enacted the ordinance to regulate the content of the communication;[73] it was not concerned with aesthetics, individual privacy, protection of a group it had a right to protect, or the "secondary effect" of the ordinance.[74] Rather, Willingboro feared the signs' "primary effect"—people would engage in panic selling as a result of the signs' message.[75]

Because Willingboro intended to regulate the content rather than the time, place, or manner of the communication, the Court adopted a balancing analysis that required Willingboro to demonstrate an interest sufficiently compelling to outweigh the heavy presumption of protection for the speech.[76] Although the township's asserted goal of stable, integrated neighborhoods was significant,[77] Willingboro did not prove a substantial incidence of panic selling[78] caused by the "For Sale" signs

69. *Id.* at 91-93. The Court also noted that it had not decided *Virginia Pharmacy* when the Court of Appeals wrote its *Linmark* opinion. *Id.* at 92 n.6.

70. 431 U.S. at 93-94. The cases the Court cited discuss the danger of potential restrictions on free exercise of religion and political speech. *E.g.*, Cohen v. California, 403 U.S. 15, 26 (1971) ("[G]overnments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."); Kovacs v. Cooper, 336 U.S. 77, 103 (1949) ("It is of particular importance in a government where people elect their officials that the fullest opportunity be afforded candidates to express and voters to hear their views."); Martin v. City of Struthers, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people.").

71. 431 U.S. at 93. Defendants in *Virginia Pharmacy* could not make this time, place, or manner argument because that ordinance banned all advertising on drug prices, whereas the *Linmark* ordinance prohibited the use of only one mode of advertising, the "For Sale" sign. *See* 425 U.S. at 771.

72. 431 U.S. at 93. The Court mentioned newspaper advertising and listing with real estate agents. *Id.*

73. *Id.* at 94.

74. *Id.* at 93-94.

75. *Id.* at 94. *See* text accompanying note 33 *supra*.

76. 431 U.S. at 95. *See* notes 20-25 *supra* and accompanying text.

77. 431 U.S. at 94. The Court accepted the Court of Appeals' assumption that Willingboro enacted the ordinance to prevent panic selling and thus promote integrated housing. 535 F.2d 786, 797-802 (3d Cir. 1976). *But see id.* at 792-93 n.5 (district court finding that Willingboro's purpose was discriminatory: to maintain a racial balance favorable to whites); *id.* at 805-13 (dissenting opinion).

78. 431 U.S. at 93-94.

and, therefore, failed to demonstrate the ordinance's necessity.[79] The Court, however, explicitly reserved judgment[80] on *Barrick Realty, Inc. v. City of Gary*,[81] a case identical to *Linmark* except that Gary provided evidence of panic selling.[82]

Even if Willingboro had demonstrated the ordinance's necessity, the Court intimated that it still would have invalidated the ordinance because of a "more basic" constitutional problem.[83] The realty information restricted by the ordinance was of vital interest to Willingboro's citizens in deciding where to live and raise their families,[84] and these citizens had a right to receive this information.[85] Although Willingboro banned the signs to protect its residents from acting against their own best interests by engaging in "panic" selling,[86] the Court concluded that " '[o]nly an emergency can justify repression' "[87] of the flow of truthful and legitimate information.[88]

The Court, by invalidating the *Linmark* ordinance, strengthened the consumers' right to receive commercial information.[89] It could have sustained the ordinance as a time, place, or manner regulation because, unlike the total bans of *Bigelow* and *Virginia Pharmacy*, the *Linmark* ordinance restricted only one mode of advertising.[90] Instead, the Court applied the rigorous criteria of political expression and religious exercise cases to closely scrutinize the adequacy of alternative modes of

79. *Id.*

80. *Id.* at 95 n.9.

81. 491 F.2d 161 (7th Cir. 1974).

82. *Id.* at 163-64. *Linmark* intimates, however, that even if panic selling were shown, these sign bans may have no reasonable relation to the asserted governmental interest. *See* 431 U.S. at 96 n.10 (citing Laska & Hewitt, *Are Laws Against 'For Sale' Signs Constitutional? Substantive Due Process Revisited*, 4 REAL EST. L.J. 153 (1975) (ban on "For Sale" signs may be ineffective or even counterproductive in eliminating panic selling)).

83. 431 U.S. at 96.

84. *Id.*

85. *Id.* at 96-97.

86. *Id.* at 97.

87. *Id.* (quoting Whitney v. California, 274 U.S. 357, 377 (1927)).

88. *Id.* at 98. The Court encouraged Willingboro to continue to promote integrated housing through alternative means such as educating citizens and erecting "Not for Sale" signs.

The last paragraph of the opinion defined commercial speech as that which " 'does no more than propose a commercial transaction' " and indicated a " 'different degree of protection' " might be required to prevent "deceptive," "false" or "misleading" signs. *See* note 67 *supra*.

89. *See* notes 64-67, 84-88 *supra* and accompanying text.

90. *See* note 71 *supra*.

communication.[91] The Court thus gave a full quantum of first amendment protection to the public's right to receive commercial information.[92]

Unfortunately, in rejecting the time, place, or manner argument, *Linmark* adopted the troublesome *Young* primary/secondary effect distinction.[93] In *Young* the city could restrict the location of adult theatres because it was concerned with the secondary effect of neighborhood deterioration rather than the primary effect of the content of the offensive speech.[94] Willingboro, however, could have argued similarly that it had enacted the ordinance to prevent the secondary effect of neighborhood deterioration caused by numerous "For Sale" signs and that the restriction on the flow of realty information—the primary effect—was only incidental. The distinction between *Linmark* and *Young*, therefore, turned on the Court's intuitive determination that Willingboro was concerned with the signs' message rather than their secondary effect.[95]

To determine the validity of a time, place, or manner regulation, therefore, the Court must now evaluate the regulator's intent.[96] In allowing content regulation as long as the intent is neutral, the Court overlooks the problem of unequal impact despite the "formal" neutrality of the intent.[97] The Court should restrict itself to the more objective evaluation of adequate alternatives.[98]

In addition, the Court's failure to resolve three important issues obscures the extent of first amendment protection for commercial speech. First, although the Court acknowledged the importance of Willingboro's interest in promoting integrated housing, it did not have to decide whether that interest would be sufficiently compelling to justify the free speech infringement, because Willingboro failed to prove the existence

91. *See* note 70 *supra* and accompanying text.

92. The breadth of this protection turns on the "vital interest" question. *See* notes 103-09 *infra* and accompanying text.

93. *See* text accompanying notes 33, 73-75 *supra*.

94. *See* note 33 *supra* and accompanying text. Only a plurality of the *Young* Court accepted the distinction. *See* note 32 *supra*.

95. *See* text accompanying notes 73-75 *supra*.

96. For discussion of the problems inherent in evaluating legislative intent, see, e.g., Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). Because the *Linmark* Court looked to the record of the Willingboro hearings, this could encourage a legislature to "pad" the record with statements about its concern over the secondary effect.

97. *See* Karst, *supra* note 29, at 35.

98. *See* note 72 *supra* and accompanying text.

of substantial panic selling.[99] By reserving judgment on *Barrick Realty, Inc. v. City of Gary*,[100] in which a district court upheld an ordinance identical to *Willingboro's* on a record containing substantial evidence of panic selling,[101] the Court implied that a proven governmental interest in integrated housing may outweigh first amendment freedoms.[102]

Secondly, the Court emphasized the significance of realty information and its vital role in the personal decision of where to live and raise a family.[103] In so doing, the Court failed to indicate whether only "vital" commercial information is entitled to full first amendment protection or whether all commercial information is vital and thus within the first amendment. As in *Virginia Pharmacy*, the Court stated its holding broadly as prohibiting impairment of the flow of truthful and legitimate commercial information.[104] And in *Bates v. State Bar*,[105] decided soon after *Linmark*, the Court struck down a ban on the advertising of legal services and stated its holding narrowly,[106] but emphasized in dictum the social value of all commercial speech.[107] *Virginia Pharmacy, Bates,* and

99. *See* notes 77-79 *supra* and accompanying text.

For a discussion of the balance of interests in a situation analogous to *Linmark*, see Note, *Freedom of Expression in the Land Use Planning Context: Preserving the Barrier of Presumptive Validity*, 28 U. FLA. L. REV. 954 (1976).

100. 491 F.2d 161 (7th Cir. 1974).

101. *See* text accompanying notes 80-82 *supra*.

102. The Court had to determine neither whether these bans have any reasonable relation to the governmental interest, *see* Laska & Hewitt, *supra* note 82, nor whether Willingboro's purpose was discriminatory: if the ordinance was invalid for the asserted purpose of promoting integrated housing, a fortiori it was invalid for the purpose of perpetuating a racial imbalance. *See* note 77 *supra*. But a racially discriminatory purpose, pattern, and practice may fundamentally change the nature of the interests. *See* note 111 *infra* ("Blockbusting" may create an emergency justifying repression of first amendment interests).

The Court also emphasized the significance of the commercial information to the recipients. If it is not vital to the recipients, *see* notes 103-09 *infra* and accompanying text, but only important to the disseminator, it may alter the balance of interests, with less weight accorded disseminator than recipient interests. *Cf.* Bates v. State Bar, 433 U.S. 350, 380-81 (1977) (first amendment overbreadth challenge rejected because problem of "chilling effect" on disseminator's speech does not arise in commercial context).

103. *See* text accompanying note 84 *supra*.

104. 431 U.S. at 96-97.

105. 433 U.S. 350 (1977).

106. "The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained . . . ." *Id.* at 384.

107. *E.g.*, "[C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Id.* at 364. *Accord*, Carey v.

Linmark also indicate that the Court's main concern in distinguishing commercial from non-commercial speech is to enable government to protect the public from false and misleading commercial speech.[108] The Court may employ this distinction to differentiate levels of protection for commercial speech depending on the relation of its subject matter to the individual's vital interests.[109]

Finally, although *Linmark* asserted that government may restrict the public's right to receive information during an emergency,[110] the Court failed to define the term.[111] The emergency language, therefore, adds a rhetorically strong but analytically weak component to the first amendment test.[112]

Population Servs. Int'l, 431 U.S. 678, 700-01 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 765.

108. *See* Bates v. State Bar, 433 U.S. at 383-84; notes 67 & 88 *supra*.

109. *Cf.* Splawn v. California, 431 U.S. 595 (1977) (over a strong dissent, Court allowed jury to consider commercial aspects of the obscene material, particularly whether defendant commercially exploited it for sake of prurient appeal, in determining whether the material was without redeeming social importance).

The Court may be reinstituting the *Bigelow* "public interest" test, *see* notes 54-55 & 67 *supra* and accompanying text, to determine the degree of protection given the particular commercial speech. In *Linmark*, the presumption of full first amendment protection is stronger than in *Bigelow*. *Bigelow* would require the Court to make case-by-case determinations. *See* Hunter, *supra* note 67, at 824.

110. 431 U.S. at 97.

111. A high level of panic selling, similar to that in *Barrick, see* notes 80-82 and accompanying text, causing destabilization of an integrated community might qualify as an emergency. For instance, a proven pattern and practice of "blockbusting," inducing whites to sell houses below value by instilling fear of complete racial turnover, may create an emergency. There was evidence of blockbusting in *Barrick, see* 491 F.2d at 164. The Civil Rights Act of 1968, § 804(e), 42 U.S.C. § 3604(e) (1970), an anti-blockbusting statute, has been upheld, albeit under the rationale that commercial speech is unprotected. *See, e.g.*, United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973); United States v. Mitchell, 327 F. Supp. 476 (N.D. Ga. 1971); United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969). *See generally* Note, *Blockbusting: A Novel Statutory Approach to an Increasingly Serious Problem*, 7 COLUM. J.L. & SOC. PROB. 538 (1971); Comment, *Blockbusting: Judicial and Legislative Response to Real Estate Dealers' Excesses*, 22 DEPAUL L. REV. 818 (1973); Note, *Blockbusting*, 59 GEO. L.J. 170 (1970).

112. The Court's failure to define this term is not a new problem. *See* sources cited in note 19 *supra*. However, reading *Linmark* with Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1977) (gag order on press is an unconstitutional prior restraint even when issued to ensure defendant's right to a fair trial), the Court appears to afford the term emergency some substance. As in *Linmark*, the state's interest could be achieved by alternative methods, *id.* at 563-65, and the perceived danger was conjectural, *id.* at 567. This delineation of "emergency" could revitalize the clear and present danger test. *See* Shaman, *supra* note 19; Fuchs, *supra* note 19.

The *Linmark* Court weakens the impact of its first amendment protection for society's right to receive commercial speech[113] by failing to define key concepts in its analysis. The Court should define emergency,[114] eliminate the *Young* primary/secondary effect distinction,[115] and state whether all commercial speech is of vital interest.[116] Furthermore, the public's right to receive commercial information may outweigh the concededly substantial governmental interest in preserving integrated neighborhoods, but the Court will not balance these interests until confronted with a case where the governmental interest is threatened by evidence of panic selling.[117]

113. *See* notes 89-92 & 110 *supra* and accompanying text.
114. *See* notes 110-12 *supra* and accompanying text.
115. *See* notes 93-98 *supra* and accompanying text.
116. *See* notes 103-09 *supra* and accompanying text.
117. *See* notes 99-102 *supra* and accompanying text.