

THE COMMERCIAL SPEECH DOCTRINE: *BIGELOW v. VIRGINIA*

In *Bigelow v. Virginia*,¹ the United States Supreme Court declared unconstitutional, as applied to a newspaper editor, a Virginia statute that made it a misdemeanor to advertise for abortions.² It held an abortion advertisement to be protected first amendment speech since it contained “factual material of clear ‘public interest’.”³ Although *Bigelow* referred to, and applied, the “commercial speech” doctrine, the opinion is disappointing because it failed to establish long-awaited guidelines for this “large gray area”⁴ of the first amendment.

Appellant Bigelow was director, editor and responsible officer of *The Virginia Weekly*.⁵ After printing an advertisement for an abortion referral service,⁶ Bigelow was charged with violating a Virginia statute that

1. 421 U.S. 809 (1975).

2. Act of March 30, 1960, ch. 358, § 18.1-63, [1960] Va. Acts 428 (repealed by amendment 1972).

3. 421 U.S. at 822.

4. Kaufman, *The Medium, The Message, and The First Amendment*, 45 N.Y.U.L. REV. 761, 769 (1970).

5. There is some disagreement as to whether this was an “underground newspaper.” As the Court notes, 421 U.S. at 811 n.1, appellant’s brief describes it as such. Brief for Appellant at 3, *Bigelow v. Virginia*, 421 U.S. 809 (1975). Presumably an editor of an underground newspaper exercises more editorial discretion in the acceptance of advertisements than an “above ground” editor. The underground editor endorses most products that are advertised since the paper is small-scale and a vehicle for his personal views. To restrict the kind of products or services he can advertise is more of an infringement of his freedom of expression than in the case of a large metropolitan daily.

6. The text of the advertisement was the following:

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 anytime
(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK

prohibited publications from encouraging or prompting the procurement of an abortion.⁷ His conviction and fine⁸ were affirmed by the Supreme Court of Virginia.⁹ While his appeal to the Supreme Court was pending, *Roe v. Wade*¹⁰ and *Doe v. Bolton*¹¹ were decided. The Court remanded for further consideration in light of these two landmark cases,¹² but the Virginia Supreme Court affirmed Bigelow's conviction¹³ distinguishing the performance of an abortion from advertising a commercial abortion agency.¹⁴ On appeal, the United States Supreme Court reversed,¹⁵ holding the statute an unconstitutional infringement of Bigelow's first amendment rights.

Extensive Supreme Court analysis of first amendment rights began with the "clear and present danger" cases of the World War I era.¹⁶

STRICTLY CONFIDENTIAL. We will make
all arrangements for you and help you
with information and counseling.

421 U.S. at 812.

The federal government prohibits abortion advertising in interstate commerce. 18 U.S.C. § 1461 (1970). Abortion advertising is also "nonmailable" under the federal obscenity statute. 39 U.S.C. § 3001(a) (1970). Two federal courts, however, have declared the statute unconstitutional. *Comprehensive Family Planning & Therapeutic Abortion Ass'n v. Mitchell*, Civ. No. 71-725 (W.D. Okla. 1973), reported in 2 FAM. PLANNING POPULATION REP. 86 (1973); *Atlanta Cooperative News Project v. United States Postal Serv.*, 350 F. Supp. 234 (N.D. Ga. 1972).

7. The statute at that time read, "If any person by publication, or by sale or circulation of any publication, or in any other manner, encourages or prompts the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." Act of March 30, 1960, ch. 358, § 18.1-63 [1960] Va. Acts 428. The statute was amended after the original prosecution but before the case reached the Supreme Court. The amended statute only bans those advertisements which are for illegal abortions to be performed within Virginia. VA. CODE ANN. §§ 18.2-71 to -76.1 (1975).

8. Bigelow was convicted and fined in the county court and in a de novo trial in the circuit court of the county. Both courts set the fine at \$500, of which \$350 was suspended "upon condition that he not further violate" the statute. *Bigelow v. Commonwealth*, 213 Va. 191, 192, 191 S.E.2d 173, 174 (1972).

9. *Id.*

10. 410 U.S. 113 (1973) (state criminal statutes prohibiting abortions within the first trimester held unconstitutional).

11. 410 U.S. 179 (1973) (statute requiring that abortions be conducted in hospitals, that abortion decisions be made by a hospital committee with confirmation by other physicians, and that the women seeking abortions be residents held unconstitutional).

12. 413 U.S. 909 (1973).

13. 214 Va. 341, 200 S.E.2d 680 (1973). (*Roe* and *Doe* were found inapplicable since "[n]either mentioned the subject of abortion advertising").

14. *Id.* The Supreme Court noted probable jurisdiction, 418 U.S. 909 (1974), "in order to review the important First Amendment issue presented." 421 U.S. 809, 815 (1975).

15. 421 U.S. 809 (1975).

16. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (pamphlets circulated to encourage citizens to refuse to fight in World War I are not protected by first amendment).

Specific forms of expression, libel,¹⁷ obscenity¹⁸ and "fighting words,"¹⁹ have been denied the protection of the first amendment. At one time it appeared certain that "commercial speech" was also within this category of unprotected expression.

The "commercial speech" doctrine,²⁰ established in *Valentine v. Chrestensen*,²¹ apparently exempted "purely commercial advertising" from first amendment protection. Unfortunately, the *Chrestensen* Court gave little basis for distinguishing unprotected commercial speech from protected "pure" speech.²² The Court has since attempted to establish

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

18. *Roth v. United States*, 354 U.S. 476 (1957).

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

20. In a series of cases referred to as the "Handbill Cases," *Lovell v. City of Griffin*, 303 U.S. 444 (1938) and *Schneider v. State*, 308 U.S. 147 (1939) (a consolidation of four state court cases), the Supreme Court first considered the limits of the police power to restrict the distribution of handbills in light of first amendment guarantees and struck down ordinances prohibiting street distribution of any handbill. Although the Court did not assert that the amount of protection to be conferred depended on the content of the speech, it does seem that the Court was influenced by the type of messages involved. In the four *Schneider* cases, each appellant had been passing out handbills not for a purely commercial motive, but for what has now come to be thought of as "protected speech," e.g., distributing the Jehovah Witness magazine *The Watchtower*, passing out bills to announce political protest meetings (over the Spanish civil war and state unemployment insurance), and leafletting to urge a boycott in a labor dispute. The Court held that the anti-littering objective of the ordinances could be achieved by less burdensome restrictions. See generally Note, *The Commercial Speech Doctrine: The First Amendment at a Discount*, 41 BROOKLYN L. REV. 60, 60-64 (1974) [hereinafter cited as Note, *The Commercial Speech Doctrine*].

21. 316 U.S. 52 (1942). *Chrestensen's* request to exhibit a former Navy submarine for profit at a city wharf was denied. He was also denied permission to distribute handbills advertising his venture because of an anti-littering ordinance that applied only to "commercial and business advertising matter." *Id.* at 53 n. 1. In a ruse to fall outside the statute's proscription, he printed on both sides of the handbill; on one side was the original advertisement, and on the other was a political statement—protesting the city's denial of the use of the wharf. The district court relied on *Lovell* and *Schneider*, see note 20 *supra*, to enjoin the police commissioner from interfering with distribution of the handbill. The ordinance was struck down for making a distinction that had no basis in fact, commercial handbills cause litter but other handbills do not. The United States Court of Appeals affirmed. 122 F.2d 511 (2d Cir. 1941). The Supreme Court unanimously reversed. 316 U.S. 52 (1942). The rule was stated:

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

Id. at 54. This holding has since been disparaged by one who was a member of the Court at the time. "The ruling was casual, almost offhand. And it has not survived reflection." *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

22. For various theories to explain the commercial speech exception see Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 949 n.93 (1963)

guidelines for determining the point at which advocacy becomes advertising. One consideration has been whether the speaker seeks financial gain.²³ This distinction, however, is not totally satisfactory.²⁴ The Court

(commercial speech relates to "property rights rather than free expression"); *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027-28 (1967) [hereinafter cited as *Developments in the Law—Deceptive Advertising*]; 48 TUL. L. REV. 426, 429-31 (1974).

23. See *Breard v. Alexandria*, 341 U.S. 622 (1951), involving a challenge to an ordinance prohibiting door-to-door commercial solicitation by a company in the business of soliciting magazine subscriptions. Although *Martin v. City of Struthers*, 319 U.S. 141 (1943), held a similar prohibition invalid as applied to religious solicitors who distributed free materials, the *Breard* court found that "selling . . . brings into the transaction a commercial feature." 341 U.S. at 642. The Court found this commercial element to be the main distinguishing feature between *Martin* and *Breard*, *id.* at 643, and upheld the ordinance. *Accord*, *Associated Students for the Univ. of Cal. at Riverside v. Attorney General*, 368 F. Supp. 11, 24 (D.C. Cal. 1973) (mailing pamphlets on birth control and abortion procedures held not to be advertising because "[p]laintiffs have no financial stake in the distribution . . . [since] the mailing was free"). The federal "blockbusting" statute, which is to prevent realtors from inducing persons to sell or rent their homes by alleging that "persons of a particular race, color, religion, or national origin" are about to move into the neighborhood, specifically applies only to such representations which are made "[f]or profit." 42 U.S.C. § 3604(e). See also *United States v. Mintzes*, 304 F. Supp. 1305, 1312 (D. Md. 1969).

In some cases financial gain has not been considered significant. See *Murdock v. Pennsylvania*, 319 U.S. 105; 111 (1943) *overruling Jones v. Opelika*, 316 U.S. 584 (1942) ("the mere fact that the religious literature is 'sold' . . . rather than 'donated' does not transform evangelism into a commercial enterprise"); *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (state can not forbid the distribution of handbills which are admittedly intended to raise funds for religious purposes). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (Court rejected the argument that payment for the allegedly libelous advertisement placed it within the realm of unprotected commercial speech); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (the fact that "books, newspapers, and magazines are published and sold for a profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment").

24. Many commentators have expressed the opinion that the profit motive should not be a consideration at all, arguing that a consumer's need for informed decisions in the economic marketplace is just as important as informed decisions in the political process, and that the goals of those who advertise are of no less social value than the goals of those who espouse a cause. See *Grove v. Dun & Bradstreet, Inc.*, 404 U.S. 898, 905 (1972) (Douglas, J., dissenting), *denying cert. to* 438 F.2d 433 (3d Cir. 1971); Gardner, *Free Speech in Public Places*, 36 B.U.L. REV. 239, 240 (1956); Goss, *The First Amendment's Weakest Link: Government Regulation of Controversial Advertising*, 60 WOMEN LAW. J. 112 (1974); Messerman, *Abortion Counselling: Shall Women Be Permitted to Know?*, 23 CASE W. RES. L. REV. 810, 822 (1973); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 437-38 (1971); *Developments in the Law—Deceptive Advertising*, *supra* note 22; Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775, 801-802 (1975) [hereinafter cited as Comment *The Right to Receive*]; Comment, *The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech*, 50 ORE. L. REV. 177, 196 (1971); 12 DUQUESNE L. REV. 1000, 1004 (1974); 5 U. CHI. L. REV. 675 (1938) (arguing against a commercial speech distinction before *Chrestensen*). *But see Chrestensen v. Valentine*, 122 F.2d 511, 524 (2d Cir. 1941)

has also used a "motive" or "primary purpose" test, examining the motive of the advertiser to determine whether the primary purpose of the advertisement is to achieve economic gain or to disseminate constitutionally protected information or opinion.²⁵ Lower courts have applied this test,²⁶ but both commercial and informational elements are often present and mutually dependent.²⁷ In these cases, the courts have exercised broad discretion in their inquiry into motive,²⁸ appearing to be very result-oriented.²⁹ Commercial speech has thus been subject to divergent treatment by the courts.³⁰

(Frank, J., dissenting) ("Thomas Paine, John Milton and Thomas Jefferson were not fighting for the right to peddle commercial advertising"); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) ("Constitutional protection should be accorded only to speech that is explicitly political"); Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234, 262 (1966) ("to exert a claim upon our constitutional protections, a social undertaking must become identified with a political undertaking"); Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1195 (1965) (since commercial advertising is not discussed or rebutted, it "results to a lesser degree in a conscious choice among differing views").

25. The "motive test" is derived from *Valentine v. Chrestensen*, 316 U.S. 52 (1942). See note 21 *supra*. Chrestensen's handbill advertised primarily a commercial enterprise; the political statement was appended just to evade the ordinance. The "motive test" explains the anomalous results reached in *Breard v. Alexandria*, 341 U.S. 622 (1951) and *Martin v. City of Struthers*, 319 U.S. 141 (1943). See note 23 *supra*.

26. See *Hodges v. Fitle*, 332 F. Supp. 504, 509 (D. Neb. 1971) (topless dancing in bars held to be a "purely commercial advertisement" because it is used "not to disseminate opinion or communicate information, but to sell a product or service"). See also *United States v. Cerone*, 452 F.2d 274 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972).

27. The word "advertorial" has become popular in describing advertisements which combine commercial and informational elements. See *Devore & Nelson, Commercial Speech and Paid Access to the Press*, 26 HASTINGS L.J. 745, 747 (1975); 85 HARV. L. REV. 689, 692 (1972). See generally *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (a paid advertisement in the *New York Times* which expressed concerned citizens' anger over police action in a civil rights strife was distinguished from *Chrestensen* because "[i]t 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").

28. Compare *Rockville Reminder, Inc. v. United States Postal Serv.*, 480 F.2d 4 (2d Cir. 1973) (advertising circular also containing community news was found to be unprotected commercial speech) with *United Interchange, Inc. v. Harding*, 154 Me. 128, 145 A.2d 94 (1958) (real estate periodicals which contained some news and commentary but primarily advertising were held entitled to first amendment protection).

29. See *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972) (statute banning all cigarette advertising from electronic media no violation of broadcasters' first amendment rights).

30. Some courts hold that commercial speech is entitled to no first amendment protection. See, e.g., *Carpets by Carload, Inc. v. Warren*, 368 F. Supp. 1075 (E.D. Wis. 1973); *Holiday Magic, Inc. v. Warren*, 357 F. Supp. 20 (E.D. Wis. 1973), *vacated and remanded*, 497 F.2d 687 (7th Cir. 1974); *Weaver v. Jordan*, 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537, *cert. denied*, 385 U.S. 844 (1966). See generally 23 DE PAUL L. REV. 1258, 1263-64 n.31-32 (1974). Other courts have given commercial speech full protection. See,

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,³¹ the Supreme Court had an opportunity to clarify the commercial speech quagmire but did not do so. The Court affirmed the city commission's injunction prohibiting a newspaper from listing jobs in sex-designated columns.³² It acknowledged that "speech" is not rendered commercial by the mere fact that it relates to an advertisement³³ but asserted that the advertisements in question were "classic examples of commercial speech"³⁴ because they did not express an opinion or assume a political posture; they were "no more than a proposal of possible employment."³⁵ It is unclear, however, whether the Court denied the newspaper the right to print the advertisements in sex-designated columns because the advertisements were commercial speech or because discriminatory advertising had been outlawed.³⁶ It was hoped that the Court's equivocation in *Pittsburgh Press* regarding

e.g., *United States v. Pellegrino*, 467 F.2d 41, 45 (9th Cir. 1972) ("We cannot agree . . . that advertising . . . is less deserving of first amendment protection than the substance of that which is advertised."); *People v. Orser*, 31 Cal. App. 3d 528, 107 Cal. Rptr. 458 (1973). Some courts have refused to decide what protection should be accorded commercial speech even though they have had an opportunity to do so. *See, e.g.*, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 n.12 (1971). *See also Comment, The Right to Receive*, *supra* note 24, at 798 n.141. Most often courts find commercial speech to be "less protected," but do not establish guidelines for deciding when speech is commercial. *See, e.g.*, *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974); *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), *aff'g* 324 F. Supp. 529 (D. Md. 1971), *cert. denied*, 409 U.S. 934 (1972); *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 136 (9th Cir. 1971); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); *Capital Broadcasting v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972); *Pent-R-Books, Inc., v. United States Postal Serv.*, 328 F. Supp. 297 (E.D.N.Y. 1971); *New York Times Co. v. City of New York Comm'n on Human Rights*, 76 Misc. 2d 17, 349 N.Y.S.2d 940 (Sup. Ct. 1973). *But see Fur Information & Fashion Council, Inc. v. E.F. Timme & Son, Inc.*, 364 F. Supp. 16, 22 (S.D.N.Y. 1973) (court established guidelines reasoning that even though advertising is less vigorously protected, the limitations on it "must be drawn narrowly, so as to meet the perceived evil, without unnecessary impingement on the right of free speech").

31. 413 U.S. 376 (1973).

32. *Pittsburgh Press* had listed jobs under column heads which read, "Jobs—Male Interest" and "Jobs—Female Interest," in derogation of a city ordinance. *Id.* at 391.

33. *Id.* at 384.

34. *Id.* at 385.

35. *Id.*

36. *Id.* at 390. ("discrimination in unemployment is not only commercial activity, it is illegal commercial activity"). *See generally Joyner v. Whiting*, 477 F.2d 456, 463 (4th Cir. 1973) ("freedom of the press furnishes no shield for discrimination in advertising"); *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972) (newspaper publisher's first amendment rights not violated by prohibition against rental advertisements expressing a racial preference); *Chicago Real Estate Bd. v. City of Chicago*, 36 Ill. 2d 530, 552-53, 224 N.E.2d 793, 807 (1967) ("Where speech is an integral part of unlawful conduct, it has no constitutional protection.").

the commercial speech doctrine meant that the time was ripe for a definitive statement and that the Court would either establish the boundaries of the doctrine or abrogate it altogether, at the next opportunity.³⁷ The next opportunity appeared with *Bigelow v. Virginia*.³⁸

Courts have struck down laws prohibiting abortion advertising under various rationales. One approach permits certain abortion advertisements by finding them to be informational and not commercial.³⁹ A second approach allows abortion advertising by declaring that commercial speech is as protected as any other form of expression.⁴⁰ A third approach ignores the commercial speech doctrine entirely, invalidating the statute on other grounds.⁴¹ In *Bigelow*, however, the Virginia Supreme Court rejected the first amendment arguments, and held that the advertisement was unprotected commercial speech.⁴²

The United States Supreme Court rejected "the central *assumption* made by the Supreme Court of Virginia . . . that the First Amendment guarantees of speech and the press are inapplicable to paid commercial

37. See Devore & Nelson, *supra* note 27, at 774 ("Before *Pittsburgh Press* there may have been an element of false optimism among media lawyers . . . that the Supreme Court was moving away from the commercial speech doctrine and would, if invited, eventually overrule *Chrestensen*. That opportunity has now been presented and declined by the Court in such a way as to invite resolution of many of the issues left unanswered by the lower courts."); 23 DE PAUL L. REV. 1258, 1275 (1974); 8 U. RICHMOND L. REV. 292, 293 (1974). See also Note, *The Commercial Speech Doctrine*, *supra* note 20, at 90; Comment, *The Right to Receive*, *supra* note 24, at 799 n.143.

38. 421 U.S. 809 (1975).

39. See *Planned Parenthood Comm. v. Maricopa County*, 92 Ariz. 231, 375 P.2d 719 (1962) (court distinguished abortion information from abortion advertising and found that the statute prohibiting abortion and birth control device advertising did not apply to informational pamphlets distributed by Planned Parenthood or other public interest groups or by doctors to their patients). See also *Mitchell Family Planning, Inc. v. City of Royal Oak*, 335 F. Supp. 738 (E.D. Mich. 1972) (billboard reading "Abortion Information" and listing two New York telephone numbers disseminated information and thus did not violate ordinance banning abortion advertising).

40. See *Atlanta Cooperative News Project v. United States Postal Serv.*, 350 F. Supp. 234 (N.D. Ga. 1972) (a three-judge court declared 39 U.S.C. § 3001(a) (1970) (*see note 6 supra*) unconstitutional as a prior restraint); *People v. Orser*, 31 Cal. App. 3d 528, 535, 107 Cal. Rptr. 458, 462 (1973) ("A person is as much entitled to the protection of the First Amendment when the speech he utters or prints is for profit as when it is expressed altruistically.").

41. See *State v. New Times, Inc.*, 20 Ariz. App. 183, 511 P.2d 196 (1973) (invalidating state law prohibiting abortion advertisements based on *Roe and Doe*).

42. *Bigelow v. Commonwealth*, 213 Va. 191, 191 S.E.2d 173 (1972), *aff'd on remand*, *Bigelow v. Commonwealth*, 214 Va. 341, 200 S.E.2d 680 (1973). The court rejected *Bigelow's* argument that his advertisement was not covered by the statute because it was informational rather than an encouragement to procure abortions, finding that the mention of a fee made it commercial speech and within the *Chrestensen* rule, 213 Va. at 193, 191 S.E.2d at 175. See 60 VA. L. REV. 154 (1974).

advertisements."⁴³ The Court then undermined the commercial speech doctrine by according *Chrestensen* a novel holding,⁴⁴ criticizing the commercial speech doctrine in a footnote,⁴⁵ and stressing that the holding in *Pittsburgh Press* was as much due to the illegality of the advertised activity as its commerciality.⁴⁶ The Court did not, however, abrogate the commercial speech doctrine entirely, but instead found that this abortion advertisement was not commercial since it "did more than simply propose a commercial transaction. . . . It contained factual material of 'clear public interest.'"⁴⁷

The Court proposed a balancing test to handle future cases: "the First Amendment interests at stake" are weighed against "the public interest allegedly served by the regulation."⁴⁸ In *Bigelow*, the Court weighed the state's interest in the quality of medical care provided within its borders⁴⁹ against appellant publisher's interest in freedom of

43. 421 U.S. at 818 (emphasis added). The Court first found that the Virginia court had erred in denying *Bigelow* standing to challenge the statute's overbreadth. Since *Bigelow*'s lower court conviction, however, the Virginia legislature had amended the statute, and the amended statute only outlawed advertisements for illegal abortions performed in Virginia. VA. CODE ANN. § 18.2-76.1 (1975). The issue of overbreadth had thus become moot; the Court did not rest its decision on that issue.

44. The Court found that the holding of *Chrestensen*, that purely commercial advertising is not constitutionally protected speech, was "distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed." 421 U.S. at 819 (emphasis added).

45. *Id.* at 820 n.6, quoting *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring): "There is some doubt whether the 'commercial speech' distinction announced in *Valentine v. Chrestensen* . . . retains continuing validity."

46. 421 U.S. at 821.

47. *Id.* at 822. The part of the advertisement which read "Abortions are now legal in New York. There are no residency requirements." was referred to by the Court as being informational. The Court also noted that the advertised activity pertained to constitutional interests, citing *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973). See also *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Unemployed Workers Union v. Hackett*, 332 F. Supp. 1372 (D.R.I. 1971); *United States v. Polak*, 312 F. Supp. 112 (E.D. Pa. 1970); *Brown v. City of Albany*, 108 Ga. App. 647, 134 S.E.2d 566 (1963).

The Court further held that Virginia could not regulate New York activities "merely because the welfare and health of its own citizens may be affected when they travel to that state," nor could Virginia "bar a citizen from another state from disseminating information about an activity that is legal in that state." 421 U.S. at 824-825. Justice Rehnquist dissented, arguing that the Court misplaced reliance on *Huntington v. Attrill*, 146 U.S. 657, 669 (1892), to support the proposition that Virginia could not regulate the advertiser, since his activity was in New York. 421 U.S. at 834 n.2. Justice Rehnquist stated the correct rule: if an act is done in State A which foreseeably has an impact or inflicts injury in State B, then State B can regulate it, and sanction the actor. *Id.* at 836, citing *Young v. Masci*, 289 U.S. 253 (1933).

48. 421 U.S. at 826. See Emerson, *Toward a General Theory of the First Amendment*, *supra* note 22, at 912.

49. 421 U.S. at 827. It seems the Court tips the scales by summarizing Virginia's

speech and the press.⁵⁰ The balance was in favor of freedom of speech for the newspaper publisher.⁵¹ The Court felt that Virginia could not legally prevent its citizens from using medical services outside the state since Virginia did not claim that this advertisement affected the quality of medical services within the state.⁵²

In spite of the expressed hopes of first amendment theorists,⁵³ the Supreme Court in *Bigelow* clearly stated that it was not delineating the controvertible contours of the commercial speech doctrine.⁵⁴ The Court instead applied a balancing test,⁵⁵ claiming to treat advertising like all other types of public expression.⁵⁶ The balancing test is not

interest in this way. Virginia could be said to have an interest in the medical care of any of its citizens, whether the treatment is within or without its borders.

50. *Id.* at 828.

51. *Id.* at 829.

52. *Id.* at 827. Justice Rehnquist, joined by Justice White, dissented, finding this advertisement to be "a classic commercial proposition" with only slight informational content. *Id.* at 831. He stated that the Court has "always refused to distinguish for First Amendment purposes on the basis of content," *id.* at 831, and thus the fact that this advertisement disseminated abortion information did not remove it from the realm of unprotected commercial speech. Justice Rehnquist was also concerned with the majority's finding that Virginia's interest was insufficient to sustain the regulation. Advertising in the medical health field has traditionally been regulated, *id.* at 832, citing *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) (advertising of prescription drug prices prohibited); *Williamson v. Lee Optical Co.*, 384 U.S. 483 (1955) (advertising of the sales of eyeglasses and frames regulated); *Semler v. Dental Exam'rs*, 294 U.S. 608 (1935) (advertising for dental services regulated, stating the rule that states are free to establish such strict regulations in this area as they deem necessary to preserve high professional standards). Virginia's concern over the health of its citizens was far from a hypothetical one in view of the unsavory reputations of abortion referral agencies. See *S.P.S. Consultants 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); *State v. Mitchell*, 66 Misc. 2d 514, 321 N.Y.S.2d 756 (Sup. Ct. 1971).

53. See note 37 *supra*.

54. "We need not decide here the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation." 421 U.S. at 826.

55. *Id.*

56. "Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest." *Id.* This statement, while elevating the status of advertising, certainly denigrates other public expression. In the past, courts have required much more than "reasonableness" to regulate first amendment rights. The government interest must be extremely strong before speech can be regulated. See, e.g., *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963) (government interest must be "compelling"); *N.A.A.C.P. v. Alabama ex rel Patterson*, 357 U.S. 449, 464 (1958) (state interest must be "substantial"); *Hiatt v. United States*, 415 F.2d 664, 671 (5th Cir. 1969) (public interest must be "overwhelming"). See generally Kaufman, *supra* note 4, at 774-75. Not every member of the Court is a proponent of the balancing test. Justice Stewart, dissenting in *Pittsburgh Press*, railed against it: "So long as Members of this Court view the First

new,⁵⁷ even in the realm of commercial speech cases.⁵⁸ But a balancing test does not help clarify the commercial speech doctrine since it does not distinguish commercial from non-commercial speech.⁵⁹

Recent cases demonstrate that judicial reliance upon the commercial speech doctrine may produce totally irreconcilable results.⁶⁰ The Court did nothing to ameliorate this in *Bigelow*. Advertising in general is highly regulated.⁶¹ The constitutionality of such regulations, however, can be assessed without reliance upon the traditional commercial speech doctrine. One suggestion is for the Court to articulate a commercial speech doctrine coupled with a "right to receive."⁶² Another is to abandon the

Amendment as no more than a set of 'values' to be balanced against other 'values,' that Amendment will remain in grave jeopardy." 413 U.S. at 402.

57. The first appearance of the balancing test in the Supreme Court is usually attributed to *Schneider v. State*, 308 U.S. 147 (1939). See generally Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1425 (1962).

58. See *Breard v. Alexandria*, 341 U.S. 622 (1951) (homeowners' right to privacy deemed more important than salesman's right to solicit door to door); *Hiett v. United States*, 415 F.2d 664 (5th Cir. 1969) (addressee's right to receive information on foreign divorces through the mail outweighs government interest in prevention of fraudulent divorces); *Lowan v. United States Post Office Dep't*, 306 F. Supp. 1036 (C.D. Cal. 1969), *aff'd*, 397 U.S. 728 (1970) (postal regulations on unsolicited erotic materials upheld because unwilling recipient's right of privacy is more important than plaintiff's right of free speech).

59. *Compare* *Population Serv. Int'l v. Wilson*, 398 F. Supp. 321, 337 (S.D.N.Y. 1975) (state law prohibiting advertisement of contraceptives and their sale to persons under sixteen held unconstitutional because the state interest of discouraging sexual activity among unmarried persons was not strong enough to outweigh minors' rights of privacy, especially in the absence of evidence that teenage sexual activity was a variable dependent on the availability of contraceptives) with *Planned Parenthood Comm. v. Maricopa County*, 92 Ariz. 231, 357 P.2d 719 (1962) (state interest of decreasing sexual activity among unmarried persons is sufficient to justify the ban against abortion advertising by all except doctors and public interest groups).

60. See note 30 *supra*. *Compare* *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821, 825 (W.D. Va. 1969) (statute prohibiting advertising of prescription drug prices does not violate first amendment) with *Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy*, 373 F. Supp. 683 (E.D. Va. 1974), *aff'd*, 96 S. Ct. 1817 (1976), (statute prohibiting advertising of prescription drugs invalid as violation of consumers' first amendment right to know). *Compare also* *Linmark Associates v. Township of Willingboro*, 535 F.2d 786, 794-96 (3d Cir. 1976), with *Terminal-Hudson Electronics v. Department of Consumer Affairs*, 407 F. Supp. 1075 (C.D. Cal. 1976).

61. See Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1097-1111 (1956).

62. See *Hiett v. United States*, 415 F.2d 664 (5th Cir. 1969) (federal statute prohibiting use of mails for distributing material on foreign divorces unconstitutionally vague since the right to be informed of available services was more important than the alleged government interest in preventing fraudulent divorces). See also Comment, *The Right to Receive*, *supra* note 24, at 803. If a right to receive is established, the burden should shift to the government to show why communication should be restricted. "The right to receive thus becomes not so much a theoretical bulwark in its own right, but rather a tool for demonstrating the weakness of the commercial speech doctrine." *Id.* There may be standing barriers to relief using "right to receive" theories. See *Atlanta Cooperative News*

doctrine altogether and decide cases on a due process rationale.⁶³ The reasons articulated for denying advertising any protection are unclear, as some courts have acknowledged.⁶⁴ It is difficult to justify the prohibition on advertising products or services which are not themselves prohibited.⁶⁵ Thus the doctrine itself is an unnecessary legal tool.

Although *Bigelow v. Virginia* does not meet all the expectations of commentators,⁶⁶ it provides some guidance for the future. State laws against the advertising of abortions will probably be found unconstitutional under *Bigelow*. Indeed, any statute prohibiting the advertisement of a product or service which is illegal within the state, but legal in the state from which the advertisement is sponsored, may be struck down. Commercial advertising is no longer per se unprotected speech, but will be accorded first amendment protection if it is found to contain factual materials "of clear public interest." Courts may well use a balancing test in the future to determine whether regulation of the advertising should be upheld.

But *Bigelow* leaves many questions unanswered. It is not clear how much protection is to be accorded commercial speech nor at what point speech becomes commercial since all advertising has some informational content.⁶⁷ The problem with *Bigelow v. Virginia* is not its result,

Project v. United States Postal Serv., 350 F. Supp. 234 (N.D. Ga. 1972) (two newspaper subscribers, who claimed a denial of their right to receive if the publisher was not allowed to mail newspapers containing the forbidden advertisements, were dismissed as plaintiffs because they were unable to establish the requisite nexus between their status and the constitutional claim).

63. Resnick, *Freedom of Speech and Commercial Solicitation*, 30 CALIF. L. REV. 655, 661 (1942) (the validity of the ordinance as a regulatory measure should be determined according to the due process clause of the fourteenth amendment as it defines the limits of the police power of the state because the distinction between commercial and non-commercial speech is artificial and difficult to apply as a practical matter).

64. See, e.g., *Holiday Magic, Inc. v. Warren*, 357 F. Supp. 20, 24-25 (E.D. Wis. 1973) ("the rationale for the distinction is seldom made explicit, and the tests for distinguishing between commercial and non-commercial expression would never survive evenhanded application").

65. Prohibiting abortion advertisements might be a way for states to collaterally prevent their citizens from using constitutionally permissible services. See LA. REV. STAT. ANN. § 14:87.4 (Supp. 1974) (statute enacted after *Roe v. Wade*, 410 U.S. 113 (1973), prohibiting advertisements for abortions). See generally Messerman, *Abortion Counseling: Shall Women Be Permitted to Know?* 23 CASE W. RES. L. REV. 810 (1972).

66. See note 37 *supra*.

67. Since *Bigelow* the Supreme Court has again had an opportunity to resolve these questions. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817 (1976), the Court invalidated a Virginia statute prohibiting pharmacists from advertising prices of prescription drugs. Although the Court made general statements which implied that the commercial speech doctrine had been abrogated, *id.* at 1825, it carefully framed the ultimate issue: "Our question is whether speech which does 'no

but that the Court did not avail itself of the opportunity to exert control over an undisciplined legal theory. Until such a time comes, both advertisers and consumers may suffer at the hands of this shabbily treated “stepchild of the first amendment.”⁶⁸

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more than propose a commercial transaction’ . . . lacks all protection. Our answer is that it [does] not.” *Id.* at 1826. The Court went on to acknowledge that “some forms of commercial speech regulation are surely permissible.” *Id.* at 1830. The Court’s opinion in *Virginia State Bd. of Pharmacy* adds little to its *Bigelow* decision. *Bigelow* established that commercial speech is not wholly outside the protection of the first amendment.

68. *Developments in the Law—Deceptive Advertising*, *supra* note 22, at 1027 (“no court has undertaken to explain why commercial advertising does not deserve the title ‘speech’ which ennobles and protects political, social, and religious advocacy”).