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COMMERCIAL SPEECH: THE SUPREME COURT SENDS ANOTHER VALENTINE TO ADVERTISERS

INTRODUCTION

For the 33 years since it first considered the question,¹ the Supreme Court has consistently declined to hold that "commercial speech"² is protected by the first amendment. Last term, however, in *Bigelow v. Virginia*,³ the Court held that the commercial advertisement there involved was entitled to some first amendment protection. Nonetheless, the Court's decision may afford protection for few commercial advertisements. Furthermore, these advertisements may enjoy a lesser degree of protection than normally accorded first amendment interests.

Jeffrey Bigelow edited a weekly newspaper which was circulated in the University of Virginia area.⁴ On February 8, 1971, the paper carried an advertisement for an abortion referral service in New York City. The item promised arrangements at "low cost" and noted that "[a]bortions are now legal in New York [and] there are no residency requirements."⁵ Bigelow was convicted of advertising for abortions, a misdemeanor in Virginia.⁶

In upholding the conviction, the Virginia Supreme Court, on the

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

2. Since the Court did not define "commercial speech," the expression has lacked the kind of meaning which lends itself to analysis. See text accompanying notes 23-33 *infra*.

3. 421 U.S. 809 (1975).

4. *Id.* at 811.

5. The text of the advertisement read as follows:

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.

Id. at 812, citing *Virginia Weekly*, Feb. 8, 1971, at 2.

6. Act of March 30, 1960, ch. 358, § 18.1-63, [1960] Va. Acts 428 amended and reenacted, Act of April 10, 1972, [1972] Va. Acts II 1019, ch. 725 (repealed 1975): "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt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."

The present law prohibits only encouragement of abortions to be performed in Virginia. VA. CODE ANN. § 18.2-76.1 (1975).

strength of *Valentine v. Chrestensen*,⁷ a 1942 Supreme Court case, held that the advertisement was commercial speech and therefore not protected by the first amendment.⁸ It held that it was within the state's police power to prevent a woman's decision to have an abortion from becoming subject to "commercial advertising pressure usually incidental to the sale of a box of soap powder."⁹

In a 7-2 decision, the Supreme Court reversed.¹⁰ In an opinion by Justice Blackmun, the Court rejected "[t]he central assumption made by the Supreme Court of Virginia . . . that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements."¹¹

The Court noted three aspects of the advertisement in *Bigelow* which distinguished it from the purely commercial advertising which had been held unprotected. First, the advertisement did more than simply propose a commercial transaction. It contained "factual material of clear 'public interest.'"¹² On this point, the Court cited the references in the advertisement to the New York abortion law and the fact that a referral agency existed in New York.¹³ Second, the activity advertised "pertained to constitutional interests,"¹⁴ that is, to abortion. Third, the advertised activity was legal in New York.¹⁵

The Court asserted that all advertising "may be subject to reasonable regulation that serves a legitimate public interest."¹⁶ It therefore applied a balancing test and determined that the public's interests in the speech¹⁷ outweighed the "little, if any"¹⁸ legitimate interest which

7. 316 U.S. 52 (1942).

8. *Bigelow v. Commonwealth*, 213 Va. 191, 191 S.E.2d 173 (1972).

9. *Id.* at 196, 191 S.E.2d at 176.

10. 421 U.S. 809 (1975). In 1973, the Supreme Court vacated the conviction, 413 U.S. 909 (1973). It remanded for consideration in light of the abortion cases, *Doe v. Bolton*, 410 U.S. 179 (1973), and *Roe v. Wade*, 410 U.S. 113 (1973). The Virginia Supreme Court reinstated the conviction, saying that *Bigelow* was a first amendment case, not an abortion case. 214 Va. 341, 200 S.E.2d 680 (1973).

11. 421 U.S. at 818.

12. *Id.* at 822.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 826.

17. In the section of its opinion which balanced the interests at stake, the Court did not state whose interests in the speech it was considering. However, it had earlier identified the interests of the general public in obtaining information about abortion laws and the interests of those who might wish to have an abortion. *Id.* at 822. The Court noted that appellant's case was strengthened by the fact that he was prosecuted as a member of the press. *Id.* at 828.

18. *Id.*

the state had in regulating the advertisement of services provided in New York.¹⁹

Justices Rehnquist and White, dissenting, argued that the advertisement was no more than a simple commercial proposition,²⁰ that Virginia did have a legitimate interest in regulating it,²¹ and that the regulation was reasonable.²²

I. HISTORY OF THE COMMERCIAL SPEECH DOCTRINE

The seminal case in the commercial speech area, and the principal obstacle for the *Bigelow* court, was *Valentine*.²³ In that case, the Court upheld the conviction of a submarine tour promoter under a New York City ordinance which prohibited the distribution of commercial handbills in public areas.²⁴ Citing no authority, the Court found that commercial handbills were not protected by the first amendment.²⁵

Valentine did not define commercial speech or articulate a rationale for banishing it from the first amendment. Later Supreme Court cases indicated that "commercial speech" must include, at a minimum, proposal of a transaction for profit, even if the transaction is related to constitutional interests. In *Martin v. Struthers*,²⁶ an ordinance banning solicitation at residences without prior permission of the owner was held unconstitutional as applied to a defendant selling religious tracts at cost. In *Breard v. Alexandria*,²⁷ however, the same type of ordinance

19. Before discussing the commercial speech issue, the Court considered the contention that the statute was facially overbroad. It declined to rest its holding on this point because there had been no prosecution other than *Bigelow's* and because the statute had subsequently been amended to cover only illegal abortions to be performed in Virginia. *Id.* at 815-18.

In its discussion of commercial speech, the Court was careful to note that the advertisement was not "deceptive or fraudulent" and that it did not invade the privacy of readers. *Id.* at 828. It also noted that the Virginia law could seriously interfere with interstate publications. *Id.* at 828-29.

20. *Id.* at 831.

21. *Id.* at 832-33.

22. *Id.* at 836.

23. 316 U.S. 52 (1942).

24. *Valentine* was convicted of violating § 318 of the Sanitary Code of the City of New York, now CITY OF N.Y. ADMINISTRATIVE CODE § 755(2)-7.0(5) (1970). A conviction for distributing handbills for a jazz concert was reversed recently by the New York courts. *People v. Remyen*, 79 Misc. 2d 160, 359 N.Y.S.2d 504 (N.Y.C. Crim. Ct. 1974), *rev'd*, 367 N.Y.S.2d 146 (Sup. Ct. App. T. 1975).

25. 316 U.S. 52, 54 (1942).

26. 319 U.S. 141 (1943).

27. 341 U.S. 622 (1951).

was held constitutional as applied to a defendant selling magazine subscriptions for profit.²⁸

In 1973, in *Pittsburgh Press v. Pittsburgh Commission on Human Relations*,²⁹ the Court focused on the limited content of the speech in *Valentine* as justification for its treatment as commercial speech. The Court said: "The critical feature of the advertisement in *Valentine v. Chrestensen* was that, in the Court's view, it did no more than propose a commercial transaction, the sale of admission to a submarine."³⁰ Recent lower court decisions have also listed the profit motive³¹ and proposals of a transaction³² as factors in determining the scope of commercial speech.

These criteria for identifying commercial speech seem to be merely definitional expressions for the most often-stated rationale for denying protection to commercial speech. The rationale is that such speech is unrelated to the expression of opinions and grievances which the first amendment was intended to protect. As the District of Columbia Circuit stated in *Banzhaf v. FCC*:

[P]roduct advertising . . . is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression.³³

28. The importance of the profit motive in the definition of commercial speech is weakened, however, by the Court's frequent statement that the presence of commercial activity alone is not enough to deprive speech of first amendment protection. See, e.g., *Ginzburg v. United States*, 383 U.S. 463, 474-75 & nn.16-19 (1966). The *Bigelow* Court cited *Ginzburg* for this proposition. 421 U.S. at 818. This reference is somewhat ironic, since *Ginzburg* was convicted of obscenity on the basis of pandering, the commercial exploitation of sex. 383 U.S. at 467.

29. 413 U.S. 376 (1973).

30. *Id.* at 385.

31. *United States v. Bob Lawrence Realty*, 474 F.2d 115, 121-22 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973); *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972); *Stevenson v. Board of Regents of the Univ. of Tex.*, 393 F. Supp. 812, 819 (W.D. Tex. 1975); *United States v. Mintzes*, 304 F. Supp. 1305, 1312 (D. Md. 1969). See also *Virginia Citizens Consumer Council v. State Bd. of Pharmacy*, 373 F. Supp. 683 (E.D. Va. 1974), *prob. juris. noted*, 420 U.S. 971 (1975), *citing and comparing with Patterson Drug Corp. v. Kingery*, 305 F. Supp. 821 (W.D. Va. 1969).

32. *United States v. Hunter*, 459 F.2d 205, 212 n.9 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972) (expressions of discrimination protected unless made in the context of a commercial transaction).

33. *Banzhaf v. FCC*, 405 F.2d 1082, 1101-02 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). *Banzhaf* presented a peculiar problem because smoking had been found an issue of public interest by the FCC. Given this, how could statements on that issue not be protected by the first amendment? The court was able to duck the issue

While *Valentine* flatly held that commercial speech was unprotected by the first amendment, dictum in *Pittsburgh Press* suggested that commercial speech might be entitled to some protection.³⁴ Degrees of protection accorded commercial speech in the lower courts ranged from extreme deference to the regulation,³⁵ to "balancing tests,"³⁶ to strongly protective standards.³⁷

by noting that its holding, requiring equal time for counter-advertisements, would mean "the first amendment gain is greater than the loss." 405 F.2d at 1102. (The "loss" feared was deterrence of cigarette advertisements.) See also *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973): "None [of the advertisements in question] 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 do any of them criticize the Ordinance or the Commission's enforcement practices."

The FCC has modified its stand on the application of the fairness doctrine to product advertising. Now, only an advertisement which presents "a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance" requires a fairness response. *Fairness Doctrine and Public Interest Standards*, 39 Fed. Reg. 26372, 26381 (1974). This change has been upheld in the context of snowmobile advertisements. *Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975).

34.

Pittsburgh Press goes on to argue that if this package of advertisement and placement is commercial speech, then commercial speech should be accorded a higher level of protection than *Chrestensen* and its progeny would suggest. . . .

Whatever the merits of this contention may be in other contexts it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity.

Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973) (footnote omitted).

35. *United States v. Hunter*, 324 F. Supp. 529, 534 (D. Md. 1971), *aff'd*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972): "Whether the homeowner should be denied the right to intimate his [racial] preference or limitation in an advertisement is a matter for the Congress . . ."

36. *United States v. Bob Lawrence Realty*, 474 F.2d 115, 122 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973) ("informational value" of prohibited speech is "clearly outweighed" by governmental interest in preventing blockbusting); *cf. Banzhaf v. FCC*, 405 F.2d 1082, 1102 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (promoting the sale of a product is "a form of merchandising subject to limitation for public purposes like other business practices"). See also *Rowan v. United States Post Office Dep't*, 300 F. Supp. 1036, 1044 (C.D. Cal. 1969), *aff'd*, 397 U.S. 728 (1970) ("commercial element" of speech "does substantially reduce the weight of the expression on the constitutional scales") (Hufstedler, J., concurring).

37. *Hiatt v. United States*, 415 F.2d 664, 671 (5th Cir. 1969) ("overwhelming public interests" would be required to support law regulating solicitation of Mexican divorces); *Mitchell Family Planning v. City of Royal Oaks*, 335 F. Supp. 738, 742 (E.D. Mich. 1972) (clear and present danger test applied to abortion billboard advertisement); *cf. Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs*, 459 F.2d 676 (3d Cir. 1972) (compelling governmental interest in preventing currency flow to certain countries justifies registration provisions of the Trading with the Enemy Act); *Concerned Consumers League v. O'Neill*, 371 F. Supp. 644, 647 (E.D. Wis. 1974) (consumer picketing of store held protected; state restriction of protected modes of expression "can never be justified by the content of the expression").

II. THE BIGELOW OPINION

The Court in *Bigelow* might have chosen to abandon the nebulous distinction between commercial speech and other speech. It had left open that possibility in *Pittsburgh Press*.³⁸ However, the *Bigelow* Court continued the distinction but afforded more first amendment protection to some commercial speech than it had formerly given.

A. *The Definitional Problem in Bigelow*

"Commercial speech" is one of the few areas of speech which have in the past been denied first amendment protection. Others include fighting words,³⁹ obscenity,⁴⁰ libel,⁴¹ and incitement.⁴² The Court has justified exclusion of libel and fighting words on the grounds that they do not contribute to the exposition of ideas and inflict injury by their very utterance.⁴³ The Court has not confronted as thoroughly the rationale for excluding obscenity; this may be one reason why obscenity is such a troublesome area for the Court.⁴⁴ As mentioned above,⁴⁵ the courts in defining "commercial speech," have often used criteria which are seemingly irrelevant to first amendment values, and which have been held irrelevant in other contexts.⁴⁶ In *Bigelow*, the Court came closer to making the definition fit the rationale for protecting some speech and denying protection to other speech. That is, the Court examined the speech to see if, contrary to the speech involved in *Banzhaf*,⁴⁷ it "communicated information, expressed opinion, recited

38. See note 34 *supra*.

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

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

41. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *cf. Gertz v. Robert Welch Inc.*, 418 U.S. 323, 340 (1974).

42. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

43. See, *e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

44. G. GUNTHER, *CONSTITUTIONAL LAW, CASES & MATERIALS* 1282 (9th ed. 1975); Note, *More Ado About Dirty Books*, 75 *YALE L.J.* 1364 (1966).

45. See text accompanying notes 26-28 *supra*.

46. The profit motive of publishers and distributors, respectively, had been held irrelevant to protection in *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964), and *Smith v. California*, 361 U.S. 147, 150 (1959). As noted, frequent dicta suggest that the profit motive of the speaker is irrelevant. See, *e.g.*, *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

47. *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); see note 33 *supra*.

grievances, protested claimed abuses”⁴⁸ The Court’s means of making this examination, however, are open to criticism.⁴⁹

In determining whether the advertisement fell within the area of protected speech, the Court first noted the factual material of interest to the public contained therein.⁵⁰ The “public interest” test has been tried and discarded in the context of libel.⁵¹ “Public interest” may include either those items in which the public is interested, or those which the public should know. If it means the former, it affords no method for distinguishing cases—the public may be interested in almost anything.⁵² If it means the latter, it puts judges in the position of deciding “what information is relevant to self-government.”⁵³ Though criticized, this seems to be what the Court has done in other instances where it has refused protection to categories of speech.⁵⁴ This is especially true in the area of obscenity, which, unlike fighting words, libel, and incitement, does not inflict harm by its mere utterance.⁵⁵ If one accepts the obscenity decisions, one cannot object to courts deciding what people should see and hear.⁵⁶

A second objection to the public interest standard was that it would lead to constant ad hoc balancing of the state interest in regulation against the first amendment interest. This kind of ad hoc balancing in

48. 421 U.S. at 821, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

49. The Court first avoided *Valentine* by noting it concerned only regulation of the manner of expression. 421 U.S. at 819. This is arguably true, but it seemed to have gone unnoticed by the Supreme Court in upholding the content regulation in *Pittsburgh Press*, and by the lower courts in cases cited at note 36 *supra*.

50. 421 U.S. at 822. The Court’s reference to “factual” material is interesting. In other contexts, statements of opinion have been given paramount protection, perhaps on the theory that there are no truths in, for example, the area of politics. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The fact that commercial speech is factual, apparently meaning “verifiable,” has been given as a reason for excluding it from first amendment protection. *SEC v. Texas Gulf Sulphur*, 446 F.2d 1301 (2d Cir. 1971); Developments in the Law, *Deceptive Advertising*, 80 HARV. L. REV. 1005, 1030 (1967). The “factual” reference in *Bigelow* may mean “truthful”; the Court may be steering clear of the problem of deceptive advertising. See *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817, 1830 n.24 (1976).

51. *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974).

52. See, e.g., Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722 (1963).

53. *Rosenbloom v. Metromedia*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting).

54. See text accompanying notes 43 & 44 *supra*.

55. That is, it does not inflict a regulable harm by its utterance. See *Stanley v. Georgia*, 394 U.S. 557 (1969); *Katz, Privacy & Pornography, Stanley v. Georgia*, 1969 SUP. CT. REV. 203, 204. But see *United States v. Reidel*, 402 U.S. 351 (1971).

56. The “public interest” test has been applied in two cases since *Bigelow*; in neither instance was the speech protected. See text accompanying notes 108 & 109 *infra*.

the libel area, it was believed, would lead to a lack of predictability and to self-censorship.⁵⁷ However, the need for certainty is not as great in the area of commercial speech, for both practical and legal reasons. Practically, advertisements generally are not written under the same kind of deadline pressures as news stories; there is time to assess their legal implications and even to ask for an opinion of counsel. Legally, under the "reasonable regulation" standard of protection enunciated in *Bigelow*, the degree of protection will depend on ad hoc balancing anyway.⁵⁸ Some additional balancing in the definitional area should not result in significantly greater uncertainty.

The Court in *Bigelow* also noted that the statements in the advertisement "pertained to constitutional interests," and cited the 1973 abortion cases, *Roe* and *Doe*.⁵⁹ If reference to constitutional interests is necessary for first amendment protection of an advertisement, however, the scope of the protection could be either very broad or very narrow. The subjects of constitutional litigation are diverse but few interests are afforded great protection. It is difficult to see this argument as anything more than a makeweight. Strictly construed, the constitutional interest found in *Roe* and *Doe* was privacy.⁶⁰ Arguably, the freedom from intrusion is hindered, not helped, by the protection given the advertisement in *Bigelow*. Those finding abortion a distasteful subject now may be forced to see it advertised on billboards. Those considering having an abortion may have their decisions influenced by advertising pressure "usually incidental to the sale of a box of soap powder."⁶¹ Therefore, the "constitutional interest" argument can only help support first amendment protection for the advertisement if it is seen as an aspect of the "public interest" test, a way of bringing the speech into the more traditional first amendment category of speech related to government.

In sum, the Court concentrated on the content of the advertisement and found that it contained items of sufficient value to warrant protection. The dissent questioned whether the protection should differ if

57. See generally *Rosenbloom v. Metromedia*, 403 U.S. 29, 78 (1971) (Marshall, J., dissenting); Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547 (1972).

58. 421 U.S. at 825-26; see text accompanying notes 71-78 *infra*.

59. 421 U.S. at 822, citing *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).

60. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

61. *Bigelow v. Commonwealth*, 213 Va. 191, 196, 191 S.E.2d 173, 176 (1972).

such public interest information were added to an otherwise unprotected advertisement.⁶² The majority did not deal with this point; the opinion therefore leaves open the possibility that future courts may find the advertisement unprotected despite the attempted evasion of the regulation.

By concentrating on the content of the advertisement, the Court implicitly rejected the publisher's argument that the advertisement was entitled to first amendment protection as a result of his "implicit editorial endorsement" of its content.⁶³

The Court's focus on the text of the advertisement also bodes ill for efforts by commentators to find theoretical justifications for protection of commercial speech.⁶⁴ In the most extensive of the comments,⁶⁵ Martin Redish argued that commercial advertising is an effective means of furthering the first amendment interest of individual self-fulfillment.⁶⁶ Advertisements, he argued, provide information which enables an individual to solve problems which to him may be more important and interesting than those discussed in much traditionally protected speech.⁶⁷ Such a theory would extend protection even to advertisements which do no more than propose a commercial transaction. While the Court did not adopt this view in *Bigelow*,⁶⁸ it did move toward such a position in a recent case involving advertising of drug prices.⁶⁹

62. 421 U.S. at 832. This problem was presented to the *Valentine* Court, which ignored the "public interest information." 316 U.S. at 55. In that case, however, it was clear that the information was added "with the intent, and for the purpose of, evading the prohibition of the ordinance." *Id.*

63. 421 U.S. at 822 n.7. The Court also did not consider whether the transaction really "related to . . . social activity involving the system of property rights rather than free expression." T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST ADMENDMENT* 105 n.46 (1966). An abortion is hardly a typical example of commercial activity by a woman. It may have been commercial activity on the part of the referral service, but it was the public's interest in the speech that was being considered. See note 17 *supra*.

64. Bird, Goldman & Lawrence, *Corporate Image Advertising*, 51 J. URBAN L. 405 (1974); DeVore & Nelson, *Commercial Speech and Paid Access to the Press*, 26 HASTINGS L.J. 745 (1975); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971) [hereinafter cited as Redish]; Comment, *The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech*, 50 ORE. L. REV. 177 (1971).

65. Redish, *supra* note 64.

66. *Id.* at 438-41, 443-47.

67. *Id.* at 441.

68. 421 U.S. at 821-22.

69. 96 S. Ct. 1817 (1976). The Court held that a state law banning drug price advertising by pharmacists violated the first amendment. Although it noted individual customers' interests in drug prices, it ultimately tied the first amendment protection to a "public" interest. According to the Court, the "free flow of commercial information"

Given the Court's concentration on the text in *Bigelow*, and its efforts to compare the advertisement to traditionally protected speech and to distinguish it from the typical commercial advertisement, the case could be characterized as one not based upon the "commercial speech" doctrine at all. Instead, it may simply be the converse of *Valentine*.⁷⁰ *Valentine*, simply put, held that the presence of some protected speech could not save an otherwise regulable handbill from regulation. *Bigelow* may be said to hold merely that where there is otherwise protected non-commercial speech, its use in a commercial context will not strip it of all protection. The *commercial* speech alone—the offer of services, statement of price, and praise of the product—was not protected by *Bigelow*.

The New York Court of Appeals recently adopted this reasoning in upholding the constitutionality of the state's ban on drug price advertising.⁷¹ In *Urowsky v. Board of Regents of the State University*,⁷² the court discussed *Bigelow*, despite holding that the appellant, a pharmacist, had no standing to assert his customers' first amendment rights.⁷³ Judge Gabrielli, writing for five members of the court, construed *Bigelow* as not affording first amendment protection to purely commercial speech.⁷⁴ He also noted *Bigelow's* explicit preservation of cases involving regulation of professions.⁷⁵ An alternative rationale for the court's holding was touched upon briefly in the opinion: since price information is required to be made available at pharmacies,⁷⁶ only the manner of speech, not the content, is regulated.⁷⁷ Even without *Bigelow*, this would allow a balancing of interests.⁷⁸ The court's upholding of such a severe restriction on manner of speech emphasizes that it found no

is "indispensable to the proper allocation of resources in a free enterprise system [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Id.* at 1827.

70. 316 U.S. 52 (1942).

71. 8 N.Y.C.R.R. §§ 63.3(c), (m) (1971).

72. 38 N.Y.2d 364, 342 N.E.2d 583, 379 N.Y.S.2d 815 (1975). This case was overruled by *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817 (1976). See note 69 *supra* and accompanying text.

73. 38 N.Y.2d at 369, 342 N.E.2d at 586, 379 N.Y.S.2d at 819.

74. *Id.* at 370, 342 N.E.2d at 587, 379 N.Y.S.2d at 820.

75. *Id.* at 370, 342 N.E.2d at 586-87, 379 N.Y.S.2d at 820.

76. 8 N.Y.C.R.R. § 63.3(m) (1971).

77. 38 N.Y.2d at 371, 342 N.E.2d at 587, 379 N.Y.S.2d at 821. This characterization of the regulation is not quite accurate, since the regulation was directed at advertising with a particular content. See, e.g., Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497 (1975) [hereinafter cited as Ely].

78. See notes 82-84 *infra* and accompanying text.

weighty first amendment interest in drug price information. The court criticized the dissent for failing to make the distinction between speech regarding the availability of drugs and that regarding only the price of drugs.⁷⁹ It did not address the question of whether a drug which a consumer cannot afford is really "available" to the consumer. While most of the opinion is dictum, *Urowsky* clearly means that *Bigelow* will not be used in New York to narrow the category of unprotected speech.

In dissent, Judge Fuchsberg argued that the majority was following *Valentine*, and that "*Bigelow* plainly disavowed *Valentine*."⁸⁰ He urged a test of "real necessity" rather than "rational basis" for regulation of commercial speech.⁸¹

Even if the New York court had found drug price advertising within the ambit of *Bigelow*, the "balancing" test adopted by the *Bigelow* Court might not have required a much higher standard of review.

B. *The Degree of Protection Afforded Commercial Speech*

Free speech cases may be divided roughly into two classes: those involving restrictions of content and those involving restrictions of time, place or manner of speech. The Court generally has voided regulations of expression aimed at content, unless the content is within a category that has been held unprotected.⁸² (It can also be argued that in such cases the Court has balanced the interests in the speech against the interests in the regulation.)⁸³ Regulations involving the

79. 38 N.Y.2d at 371, 342 N.E.2d at 587, 379 N.Y.S.2d at 821.

80. *Id.* at 374, 342 N.E.2d at 590, 379 N.Y.S.2d at 824.

81. *Id.* at 374, 342 N.E.2d at 589, 379 N.Y.S.2d at 824.

82. See *Cohen v. California*, 403 U.S. 15, 18-22 (1971); *Konigsberg v. State Bar*, 366 U.S. 36, 49-51 (1961); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *Ely*, *supra* note 77, at 1491-93. See also notes 39-42 *supra*.

83. See, e.g., *Healey v. James*, 408 U.S. 169, 171 (1972). For an interesting contrast in views, compare *Gunther*, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1006-08 (1972), with *Ely*, *supra* note 77, at 1492-93, 1497 n.59. Both cite *Cohen v. California*, 403 U.S. 15 (1971). *Ely* contends it is an example of the categorization technique; *Gunther* says it is an example of balancing. *Ely* seems to provide the more satisfactory explanation of what the Court has been doing. *Gunther*, for example, cites *Healey* as an example of balancing. In that case, a college sought to deny recognition to a local chapter of the Students for a Democratic Society. The Court spoke of the first amendment "strick[ing] the required balance." 408 U.S. at 171. But the only valid state interest found was freedom from disruptive conduct—an interest not related to the content of expression. 408 U.S. at 191. The case, then, is consistent with the "categorization" approach. See text accompanying note 82 *supra*.

As *Bigelow* shows, however, categorization cannot explain all of the Court's decisions in similar recent cases. See also the "debate" between Laurent Frantz and Prof. Wallace

manner of expression have been upheld if they further a substantial governmental interest, the interest is unrelated to the suppression of free expression, and the restriction of expression is no greater than necessary.⁸⁴

The regulation in *Bigelow* was clearly aimed at the content of the speech. The Court first invoked a categorization approach,⁸⁵ and purported to find advertising a protected category.⁸⁶ Yet the Court asserted that advertising, "like all public expression, may be subject to reasonable regulation that serves a legitimate public interest,"⁸⁷ and applied a balancing test more appropriate to incidental restrictions on the manner of speech. Even the dissent indicated that the Court's weighing of the value of speech in a protected category was improper.⁸⁸ The Court held that the public's interests in the speech outweighed the state's interest in regulating it.⁸⁹

The cases cited in support of the Court's test include one involving a restriction on content,⁹⁰ an ambiguous case,⁹¹ and several involving restrictions on the manner of speech.⁹² The citation, in a

Mendelson in Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962).

84. *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (Harlan, J., concurring); *Konigsberg v. State Bar*, 366 U.S. 36, 49-51 (1961).

85. 421 U.S. at 818-19.

86. *Id.* at 820.

87. *Id.* at 826.

88. The dissent argued:

If the Court's decision does indeed turn upon its conclusion that the advertisement here in question was protected by the First and Fourteenth Amendments, the subject of the advertisement ought to make no difference. . . . [W]e have always refused to distinguish for First Amendment purposes on the basis of content . . .

421 U.S. at 831. (Rehnquist, J., dissenting).

89. *Id.* at 826-29. Invalidation without "balancing" would seem mandated by the "categorization" approach. See *Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974), citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968); Ely, *supra* note 77. A reasoning process parallel to that in *Bigelow* can be seen in *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817 (1976). The Court found commercial speech not "wholly outside the protection of the First Amendment." *Id.* at 1825. It discounted the state's interest in regulation, and held the speech protected. *Id.* at 1828-30.

90. *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

91. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

92. *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Kunz v. New York*, 340 U.S. 290 (1951); *Cox v. New Hampshire*, 312 U.S. 569 (1941).

case involving content, of cases that concerned restrictions of the manner of speech reinforces the impression that the Court continues to give commercial speech less than full first amendment protection.

It is impossible to ascertain from the facts of the *Bigelow* case, however, what state interests would be weighty enough to justify the regulation of commercial speech. Over a strong dissent,⁹³ the Court held that Virginia's interest "in shielding its citizens from information about activities outside Virginia's borders"⁹⁴ was entitled to "little, if any, weight under the circumstances."⁹⁵

Some indication of the Court's attitude, however, may be gained by examining its preservation, in a footnote, of earlier decisions involving advertising.⁹⁶ The Court noted:

Wholly apart from the respective rationales that may have been developed by the courts in those cases, their results are not inconsistent with our holding here. In those cases there usually existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating.⁹⁷

Two of the cases, *United States v. Bob Lawrence Realty*⁹⁸ and *United States v. Hunter*,⁹⁹ involved direct prohibitions of speech concerning race in connection with a real estate transaction.¹⁰⁰ If commercial speech were receiving full first amendment protection, either the restrictions would have to be stricken outright, or there would have to be an analysis of the state interests and possible alternatives less detrimental to free speech.¹⁰¹ Both cases relied on *Valentine*,¹⁰² and the court in *Bob Lawrence* held that "[t]he only 'speech' proscribed . . . is commercial speech."¹⁰³ From the Court's preservation of these cases, one can only conclude that commercial speech is still receiving

93. 421 U.S. at 834-35.

94. *Id.* at 827-28.

95. *Id.* at 828.

96. *Id.* at 825 n.10.

97. *Id.*

98. 474 F.2d 115, (5th Cir.), *cert. denied*, 414 U.S. 826 (1973).

99. 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

100. In *Bob Lawrence*, the statute prohibited blockbusting, that is, representing that blacks are moving into the neighborhood, in order to induce whites to sell. See Civil Rights Act of 1968 § 804(e), 42 U.S.C. § 3604(e) (1970). In *Hunter*, advertising indicating racial preference in the rental of housing was prohibited. See Civil Rights Act of 1968 § 804(c), 42 U.S.C. § 3604(c) (1970). The advertiser in the case fell within the "Mrs. Murphy" exemption. 459 F.2d 213 n.10.

101. See Ely, *supra* note 77, at 1197; text accompanying note 82 *supra*.

102. See 474 F.2d at 122; 459 F.2d at 211.

103. 474 F.2d at 122.

far less protection than is usually accorded by the first amendment to other types of speech.¹⁰⁴

In footnote ten, the Court stated that its holding was not in conflict with earlier cases concerning regulation of broadcasting and regulation of business advertising.¹⁰⁵ One case already has held that *Bigelow* does not require a change in the treatment of broadcast regulations.¹⁰⁶ Suits now pending will test the constitutionality of regulations concerning professional advertising.¹⁰⁷

CONCLUSION

While *Bigelow* may be viewed as dealing with "commercial speech," its real emphasis is on non-commercial speech in a commercial context. This approach, and the Court's concentration on the text of the advertisement, will necessarily limit its impact. The revival of the "public interest" test, although a potential tool for broadening *Bigelow's* scope, may not have that effect in practice. Two courts already have rejected arguments based on this test.¹⁰⁸ In one case, the California Court of Appeal held that maps showing the location of movie stars' homes were not protected:

[T]o gain the protection of the First Amendment over its dissemination, commercial speech must contain (in good faith) at least some information or opinion on sociological, educational, religious

104. The dissent read footnote 10 to imply that the Court "does not intend the results which might otherwise come from a literal reading of its opinion." 421 U.S. at 836.

It would be hard to conclude that the advertisement in *Hunter* and the statements in *Bob Lawrence* were not the kind of commercial speech which should be protected under the Court's rationale in *Bigelow*. Both were information of public interest and pertained to constitutional interests. The advertisement in *Hunter* was also an implicit endorsement of a position on a controversial issue.

105. *Id.* at 825 n.10. On regulation of broadcasting, the Court cited, *inter alia*, *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

106. *Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975).

107. *See, e.g.*, *Consumers Union v. State Bar of Cal.*, No. 75-2385SC (N.D. Cal., filed Nov. 13, 1975); *Niles v. Loewe*, No. CV75-322 (D. Hawaii, filed Sept. 24, 1975); *Person v. Association of the Bar of the City of N.Y.*, No. 75C-987 (E.D.N.Y., filed June 23, 1975); *Hirschkop v. Virginia State Bar*, Civil No. 75-629A (E.D. Va., filed Sept. 29, 1975); *Consumers Union of the United States v. ABA*, No. 75-0105-R (E.D. Va., filed Feb. 27, 1975); *Cairo v. State Bar of Wis.*, No. 75-C-606 (E.D. Wis., filed Oct. 21, 1975).

108. *Wortham v. Dun & Bradstreet*, 399 F. Supp. 633, 638 n.2 (W.D. Tex. 1975) (libel suit based on credit report; report was for a "strictly limited subscription audience"); *Welton v. City of Los Angeles*, — Cal. App. 2d —, 124 Cal. Rptr. 480 (2d Dist.), *accepted for hearing*, — Cal. 3d —, No. 75-188, 75-189 (1975).

or political matters—generally the kind of discourse upon public questions the founding fathers sought to protect as fundamental to the effective functioning of the participatory democracy. (See *Bigelow*)¹⁰⁹

If other lower courts adopt this reading of *Bigelow*, it will have only minimal impact on advertising.¹¹⁰

Bigelow's "reasonable regulation" standard may actually result in less protection for some commercial advertising. As noted above, some courts had already adopted a higher standard of protection for commercial speech than is now required by *Bigelow*.¹¹¹ The standard could also encourage arguments proposing the regulation of speech now protected by the first amendment. If traditionally protected speech could be shown to have a commercial aspect, the standard for first amendment protection might be lowered to the "reasonable regulation" standard.

Consideration of further cases by the Court is necessary before the impact of *Bigelow's* "balancing" test can be determined. It is not clear at present whether this test represents a new means of first amendment analysis or whether the case will become merely a sport in free speech doctrine.

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109. *Welton v. City of Los Angeles*, — Cal. App. 2d —, —, 124 Cal. Rptr. 480, 483 (2d Dist.), *accepted for hearing*, — Cal. 3d —, No. 75-189 (1975).

110. *Bigelow's* importance also is diminished by the fact that some restrictions on commercial advertising are coming under attack on grounds other than the first amendment. For example, the American Bar Association has voted to allow some advertising for lawyers. *A.B.A. Clears Way for Lawyers' Ads*, N.Y. Times, Feb. 18, 1976, at 13, col. 1. The Supreme Court's latest pronouncement on commercial speech is small comfort to those seeking a first amendment basis for advertising of professional services. The majority in *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, reserved the question. 96 S. Ct. 1817, 1831 n.25 (1976). Chief Justice Burger, concurring, suggested that advertising of prices for professional services may be "inherently misleading." *Id.* at 1832.

111. See note 37 *supra*.

