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The End of the "Commercial Speech" Exception—Good Riddance or More Headaches for the Courts?

By FRANCIS H. HELLER*

"Clearly established in the law of the First Amendment is the proposition that 'commercial expression' is not entitled to the protection, or perhaps the same degree of protection of the Amendment as other expression is entitled, although the rationale and the ramifications of this distinction have never been worked out." ¹ These rather categorical words may be found in an authoritative annotated edition of the Constitution compiled only six years ago. Less than four years later, the Supreme Court dispensed with any need to work out the "rationale and ramifications" by discarding the exception.² This article will review the short and somewhat uneventful life of the "commercial speech" exception and will then, in light of some recent decisions, address itself to an emerging consequence of the elimination of this exception from "clearly established" first amendment law.

I. ESTABLISHMENT OF THE EXCEPTION

The commercial speech exception had its beginning in the 1942 case of Valentine v. Chrestensen,³ which involved a New York ordinance prohibiting distribution of commercial and business advertising matter in the streets. Chrestensen, who owned an old Navy submarine, distributed handbills which, on one side, invited the public to visit this attraction and, on the other side, protested the city's refusal to let him use city-owned dock facilities for his display. Upon being restrained by the police from passing out his leaflets, Chrestensen sought an in-

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³ 316 U.S. 52 (1942).
junction, arguing that the police action violated his first amendment rights.

When the case reached the Supreme Court, Justice Roberts, speaking for a unanimous court, announced:

This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.¹

The Court did not elaborate on this conclusory statement, nor did it support it with authority or reasoned argument; this declaration is reminiscent of the almost casual way⁵ in which Justice Sanford announced that the first amendment would henceforth apply against the states.⁶

The Chrestensen decision attracted little attention at the time. Along with two California cases decided the same year,⁷ it was the subject of one law review article⁸ which lauded the support it gave to local governments and the municipal police power. Only three case notes were published,⁹ two of them critical, fearing an undermining of contemporary decisions such as Schneider v. Irvington,¹⁰ which had sharply limited police power to regulate handbill distribution.

At the time of Chrestensen, first amendment law was still relatively undeveloped.¹¹ The major cases growing out of World

¹ Id. at 54 (emphasis added).
⁶ Note, Prohibition of Commercial Advertising by Handbills and the Right of Free Speech, 2 Bill of Rights Rev. 222 (1942); Recent Cases, 26 Minn. L. Rev. 895 (1942); Comment, Governmental Power to Regulate Distribution of Handbills, 8 Ohio St. L.J. 331 (1942).
⁷ 308 U.S. 147 (1939).
⁸ Brennan, The Supreme Court and the Meiklejohn Interpretation of the First
War II and the "Red Scare" of the twenties addressed the conflict between national security considerations and the individual's right to freedom of expression. In the late thirties and early forties, the first amendment issues came primarily in the context of labor-management disputes and at the instigation of a much-bedeviled religious minority, the Jehovah's Witnesses. These decisions, important as they were, did not mark out legal doctrine beyond the specific issues of the cases. Other statements from this period such as the one which excluded from constitutional protection "the lewd and obscene, the profane, the libelous" were, in spite of the frequency with which such pronouncements have since been quoted, most often dicta. As Valentine v. Chrestensen demonstrates, first amendment law was still in a period of gestation.

II. HISTORY OF THE EXCEPTION

"In the years following Valentine the commercial speech exception's use by the Court was so infrequent that it has a history but barely any development." Only one case, Breard v. Alexandria, clearly reinforced the exception. The Court there upheld an ordinance prohibiting door-to-door solicitation for magazine subscriptions despite a prior case, Martin v. Struthers, which had voided a similar prohibition of religious solicitation.


19 319 U.S. 141 (1943).
Justice Reed conceded that "the fact that periodicals are sold does not put them beyond the protection of the First Amendment," but he found that "[t]he selling . . . brings into the transaction a commercial feature" and it was this factor that distinguished Breard from Martin. But what about other for-profit communications? If it was the profit motive that removed Chrestensen and Breard from the protection of the first amendment, what about books which are sold for profit, motion pictures which are exhibited to those who pay admission to the theater displaying them, advertisements for which the newspaper printing them is paid? Subsequently, the Court declared all these activities to be under the protective umbrella of the first amendment.

It is useful to consider the confused state of first amendment law during this period. As Justice Brennan observed in his Meiklejohn lecture, the effort to define the scope and limits of first amendment protection was being pursued in three different ways: by the assertion that the amendment covered all forms of expression (Justice Black's persistent view); by the advocacy of a balancing process; and by Alexander Meiklejohn's contention that the amendment should absolutely protect speech related to the governmental process but need not extend in the same fashion to other kinds of speech. The concept of a "commercial speech" exception is closely related to this third approach.

The Supreme Court's decisions of the fifties and sixties present no clear-cut acceptance of any one of these three approaches. One need not go as far as Professor Emerson, who asserted in 1970 that first amendment law was in a "chaotic state," to recognize that this lack of clarity produced a measure of confusion and contradiction for the bench and bar.

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20 341 U.S. 622, 642.
21 Id.
23 Brennan, supra note 11.
26 A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948).
In practical terms, the Supreme Court found ways to place most civil rights movement activities within the first amendment but shied away from embracing the absolutist view urged by Mr. Justice Black. Yet the Court’s language time and again sounds chords of a broad, general nature, invoking the grand phrases of an earlier day in a manner suggesting that they contain the answers to specific, vexing questions. However, rarely were lines drawn with the specificity that would enable one to predict what the courts would do in any given fact situation.

Increasingly, judges and commentators noted that the notion of a “marketplace of ideas” involved not only a purveyor of ideas but also a recipient. By 1969, this notion had developed to the point where the Court could say: “It is now well established that the Constitution protects the right to receive information and ideas.” Although the “right to know” may have answered some first amendment questions, did this obliterate the commercial speech exception? In 1964, the Court still found it necessary to distinguish the New York Times’ acceptance of advertising copy from Mr. Chrestensen’s distribution of handbills. In Ginzburg v. United States, decided in 1966, it was commercialism (“pandering”) that spelled the difference between conviction and acquittal. One commentator in 1969 deplored Chrestensen as “wrong” and “unwise,” but acknowledged that the commercial speech exception was still the law.
III. THE END OF THE EXCEPTION

A. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations

Between 1973 and 1976 the Court faced a succession of cases which eventually led it to disavow the commercial speech exception. In the first case in the series, Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, a 5 to 4 majority held that a city ordinance forbidding newspapers to carry "help-wanted" advertisements in sex-designated columns did not violate the newspapers' first amendment rights. Justice Powell characterized want ads as "classic examples of commercial speech," and thus distinguishable from the political advertisement involved in New York Times v. Sullivan.

The dissenters not only questioned the practical difficulties of the commercial speech doctrine, they sought to narrow Chrestensen to its facts, and one dissenter, Justice Douglas, wanted to abrogate Chrestensen altogether.

B. Bigelow v. Virginia

In Bigelow v. Virginia the Court had an opportunity to dispose of the commercial speech exception. One year prior to Bigelow, four justices had expressed some doubt about the continuing validity of the exception. Thus, with Justice Douglas added to this group (whose misgivings about Chrestensen were already on record), it seemed that Bigelow presented a perfect opportunity to discard the exception. However, the Court failed to do so.

The Virginia Weekly, a Charlottesville publication distributed mainly to students at the University of Virginia, carried an advertisement by a New York City organization offering to

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35 Id. at 385.
36 Id. at 395-97 (Burger, C.J., dissenting).
37 Id. at 401 (Stewart, J., dissenting).
38 Id. at 398 (Douglas, J., dissenting).
assist persons desiring an abortion with placement in accredited hospitals and clinics in New York where, the ad pointed out, abortions were legal. Bigelow, the paper's editor, was charged with violation of the statute and, upon conviction, sentenced to pay a fine of $500. The Supreme Court of Virginia affirmed, relying specifically upon the commercial speech exception. Upon appeal, the United States Supreme Court reversed.\(^4\)

Part III of Justice Blackmun's majority opinion opens with an extensive discussion of the commercial speech exception, leading the reader to expect that *Chrestensen* was about to be overruled. However, the Court was not quite ready to take that step. It chose instead to announce that *Chrestensen* was not "authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge" and that "[t]he case obviously does not support any sweeping proposition that advertising is unprotected per se."\(^4\)

The Court found that the advertisement, like the one in *New York Times v. Sullivan*, contained information on an issue of interest to the general public and did not advertise something that was illegal per se, as had been the case in *Pittsburgh Press*.\(^4\) The conclusion was that the Virginia statute infringed first amendment rights, but that "we need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."\(^4\) Only Justice Rehnquist and Justice White dissented. Once again the commercial speech exception had survived but it was now clear that its days were numbered.

\(^a\) 421 U.S. at 812.
\(^b\) The Court had first remanded the case for reconsideration in light of Roe v. Wade, 410 U.S. 113 (1973) (which had been decided after the appeal had been filed), but the Virginia court found no reason to change its mind and a second appeal was taken. 421 U.S. at 815.
\(^c\) *Id.* at 820.
\(^d\) *Id.* at 820-22. The Court took note of the fact that, subsequent to the publication that gave rise to this case, New York outlawed for-profit abortion referral services. *Id.* at 822 n.8.
\(^e\) *Id.* at 825.
C. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council

The occasion for the abandonment of the commercial speech exception came the following year.\textsuperscript{47} The plaintiff-appellees challenged a Virginia statute which prohibited the advertising of the prices of prescription drugs, primarily on the ground that it violated potential drug purchasers' "right to know." Of course, this right to know could prevail only if the information involved was a form of speech protected by the first amendment. This led to a review of the commercial speech exception.

Justice Blackmun, speaking for himself and Justices Brennan, Marshall, Powell, and White,\textsuperscript{48} noted that, since Breard, "the Court has never denied protection on the ground that the speech in issue was 'commercial speech.'"\textsuperscript{49} The commercial speech exception was, he continued, "simplistic," and had been questioned by several members of the Court, and had "all but passed from the scene" in Bigelow v. Virginia.\textsuperscript{50} But Bigelow had also involved the issue of the public's right to know about "newsworthy" services.\textsuperscript{51} The case now under review presented nothing more than the dissemination of economic information, i.e. prices.\textsuperscript{52}

Justice Blackmun took note of the Meiklejohn view that the first amendment was "primarily an instrument to enlighten public decisionmaking in a democracy," and stated that "we could not say that the free flow of information does not serve that goal."\textsuperscript{53} The effect of this decision was that speech would no longer be denied protection merely because it is, either partially or completely, commercial. Valentine v. Chrestensen was, \textit{sub silento}, overruled.\textsuperscript{54}

\textsuperscript{48} Mr. Justice Stevens did not take his seat until after the case had been argued and accordingly did not participate. The Chief Justice and Justice Stewart each wrote concurring opinions; Justice Rehnquist was the sole dissenter.
\textsuperscript{49} 425 U.S. at 759.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} 421 U.S. at 822.
\textsuperscript{52} 425 U.S. at 760-61.
\textsuperscript{53} \textit{Id.} at 765.
\textsuperscript{54} Schiro, \textit{supra} note 17, at 96, states that "Valentine avoided being overruled . . .
But Justice Blackmun was careful to point out that "[s]ome forms of commercial speech regulation are surely permissible." Just as other varieties of speech are subject to restrictions, "time, place and manner" restrictions would still apply as would constraints on untruthful or illegal expression. A state does violate the first amendment, however, when it attempts to "completely suppress the dissemination of concededly truthful information about entirely lawful activity." In spite of this careful statement of the decision's scope, Justice Stewart perceived the decision as "call[ing] into immediate question the constitutional legitimacy of every state and federal law regulating false or deceptive advertising," and wrote his separate opinion primarily to emphasize his belief that laws against false or deceptive advertising were not precluded by the decision. For Stewart, it was important to note that the majority opinion adhered to the distinction between commercial and ideological information. It is pertinent, he observed, that, in the latter category, "under the First Amendment there is no such thing as a false idea," while statements about prices and products are susceptible to empirical testing. Thus, while restraint on ideological communication may inhibit the operation of the marketplace of ideas, eliminating deceptive advertising would tend to improve the flow of information necessary for making decisions, public or private.

Like Justice Stewart's, the Chief Justice's concurring opinion served primarily to emphasize a point already made by the majority. Justice Blackmun had specifically noted that Virginia Pharmacy should not be read as deciding the question of the constitutional validity of advertising by lawyers or physicians. The Chief Justice deemed it desirable to elaborate on

by being reread as a method-of-distribution case." I find nothing in the Court's opinion that would indicate that, even so construed, Valentine v. Chrestensen remained a viable precedent. Or, as another author termed it, Virginia Pharmacy "sent the Chrestensen rationale to oblivion." Note, The Constitutional Status of Commercial Expression, 3 Hastings Const. L.Q. 761, 763 (1976).

425 U.S. at 770.
41 Id. at 771.
42 Id. at 773.
43 Id. at 776.
44 Id. at 780 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974)).
45 Id. at 780-81.
46 Id. at 773 n.25.
this reservation at some length. \(^{62}\) It was generally assumed that this was an issue which the Court would soon face. \(^{63}\)

IV. THE AFTERMATH OF THE EXCEPTION'S DEMISE

A. Linmark Associates, Inc. v. Willingboro

May a community ban the display of "for sale" or "sold" signs in front of residential property as a means for reducing property turnover and enhancing community stability? A unanimous Court held, on the authority of Virginia Pharmacy, that such an ordinance was in violation of the first amendment. \(^{64}\)

Justice Marshall's opinion rejected respondents' claim that the Willingboro ordinance could be distinguished from the Virginia Pharmacy statute. The respondents had maintained that, unlike Virginia Pharmacy, the Willingboro ordinance sought to promote a vital societal objective: stable, racially integrated housing. Justice Marshall, while acknowledging the importance of the goal, held that even an important governmental goal would not justify state interference with the free flow of truthful information. In any case, the respondents had failed to establish that this particular regulation was necessary in order to achieve that goal—or, for that matter, that it would serve to do so. \(^{65}\)

The Linmark decision mentioned, but did not decide, the question Justice Stewart had raised earlier. In reaffirming Virginia Pharmacy the opinion specifically noted that "[l]aws dealing with false or misleading signs . . . would raise very different constitutional questions." \(^{66}\)

B. Bates v. State Bar of Arizona

As previously noted, the issue of advertising by practicing

\(^{62}\) Id. at 773-75.


\(^{65}\) Id. at 93-96.

\(^{66}\) Id. at 98.
attorneys, although not before the Court in Virginia Pharmacy, was in the Justices’ minds when they decided that case. When the Court’s next term began, an appeal from a decision of the Supreme Court of Arizona\(^7\) presented the issue in clear-cut fashion.

John Bates and Van O’Steen had listed the fees which their legal clinic charged for certain specified legal services in an advertisement in a Phoenix newspaper. Because this action violated Disciplinary Rule 2-101(B) of the American Bar Association, which had been incorporated in the rules of the Supreme Court of Arizona, the two lawyers were censured by that court after disciplinary proceedings by the state bar.

The issue before the Court was “whether lawyers ... may constitutionally advertise the prices at which certain routine services will be performed.”\(^8\) To support the prohibition on advertising the state bar had offered six justifications,\(^9\) all of which the majority rejected. The state bar had also contended that, even if attorney advertising were permissible, Bates and O’Steen’s advertisement should be proscribed because it was misleading.\(^0\) Justice Blackmun found this line of argument unpersuasive and concluded that “it has not been demonstrated that the advertisement at issue could be suppressed.”\(^1\)

But, as he had done in Virginia Pharmacy, Justice Blackmun then proceeded to note what had not been decided. False, deceptive, or misleading advertising could, “of course,” be controlled. Advertising claims as to the quality of service “may be so likely to be misleading as to warrant restriction,” and the same was probably true of in-person solicitation. It might even be permissible to require some specific warning or disclaimer to protect the consumer. Regulations as to time, place and manner of advertising were, of course, permissible if not una-

\(^7\) In re Bates, 555 P.2d 640 (Ariz. 1976).
\(^9\) Id. at 368-79.
\(^0\) Id. at 382.
\(^1\) Id. at 381.
There were three dissenting opinions, by the Chief Justice, Justice Powell (joined by Justice Stewart), and Justice Rehnquist. Justice Rehnquist was the only Justice who would still maintain the commercial speech exception. The Chief Justice’s brief opinion argued, in the main, that it had been his understanding that Virginia Pharmacy had been strictly limited to the facts of that case. In fact, his concurring opinion in that case had already signaled the position he was now taking: that legal services, by necessity, varied so greatly from case to case that any indication of costs would not only be difficult but also often misleading. “[I]ncomplete information could be worse than no information at all. It could become a trap for the unwary.”

The longest and most elaborate of the dissenting opinions was authored by Justice Powell. In addition to the points made by the Chief Justice, Justice Powell meticulously argued that it is virtually impossible to establish what is “reasonable” with respect to legal services; the subjectivity of the categorization, description, and rates of legal services makes it difficult to ascertain “empirically” when lawyer advertising is “misleading.”

The organized bar, Justice Powell noted, is aware of the fact that low- and middle-income citizens experience difficulty obtaining legal services at prices they can afford. Many problems still remain, but the “imposition of hard and fast . . . rules . . . [is not] likely to serve the public interest.” The first amendment interests asserted, i.e., the right to know, were, to Justice Powell, “marginal,” and should not be deemed sufficient to impose a remedy which, the Justice feared, might actually result in the public being victimized.

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72 Id. at 383-84.
73 Id. at 397.
74 Id. at 403-04.
75 Id. at 403-04.
C. *Ohralik v. Ohio State Bar Association*

One question specifically reserved in *Bates* was whether and how far a state might regulate “in-person” solicitation.\(^8\) In its next term the Court encountered this question in *Ohralik v. Ohio State Bar Association.*\(^7\)

*Ohralik*, a practicing lawyer, had received word of an automobile accident and called on the victims of the collision, two eighteen-year-old women, and prevailed upon them to retain him as counsel on a contingency fee basis. Although his services were, in the end, not used by either of the women, he sued them for one-third of the amounts they had received from the insurance company. Following complaint and grievance procedures, the Supreme Court of Ohio suspended Ohralik from the practice of law.\(^8\)

On appeal, Ohralik argued that, for purposes of constitutional analysis, his conduct could not be distinguished from that of *Bates* and *O'Steen* and was thus protected by the first amendment. The Court agreed that in-person solicitation by a lawyer contained elements of protected speech but considered them “subordinate” and hence subject to a lower level of judicial scrutiny than that applied in either *Virginia Pharmacy* or *Bates*.\(^8\) "A lawyer’s procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State’s proper sphere of economic and professional regulation."\(^8\)

Ohralik had also contended that his conduct had been free of any of the evils which a state might wish to prevent or suppress. However, the Court indicated that the state is entitled to adopt regulations of a preventive nature whose application is not conditioned upon the actual occurrence of the prescribed harm.\(^8\) Justice Marshall’s concurring opinion\(^4\) is rele-

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\(^7\) Id. at 366.

\(^8\) 436 U.S. 447 (1978).

\(^9\) Id. at 449-52.

\(^10\) Id. at 457.

\(^11\) Id. at 459.

\(^12\) Id. at 464.

\(^4\) Id. at 468-77. The concurrence covered both *Ohralik* and *In re Primus*, 436 U.S. 412 (1978), decided the same day. In *Primus*, the Court reversed the disciplinary action taken by the Supreme Court of South Carolina against an attorney who had advised prospective clients of the availability of free legal assistance from the American Civil
vant in this context because of its insistence that the state's legitimate interest in the solicitation area should be no different than that applying to advertising, i.e., actual fraud, over-reaching, deception, and misrepresentation. Thus he took particular exception to the Court's statement that in-person solicitation is entitled to less protection under the first amendment than is "the kind of advertising approved in Bates." His footnote at this point is worth quoting:

The Court may mean simply that conducting solicitation in person presents somewhat greater dangers that the State may permissibly seek to avoid. But if instead the Court means that different forms of "commercial speech" are generally to be subjected to different levels of First Amendment scrutiny, I cannot agree. The Court also states that "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services." The relevant comparison, however, at the least, is between truthful in-person solicitation of employment and truthful advertising.

D. First National Bank v. Bellotti

Another recent decision of the Supreme Court bearing on commercial speech is First National Bank of Boston v. Bellotti. At issue was the constitutionality of a Massachusetts statute that prohibited business corporations from making contributions or expenditures to influence the outcome of a vote on any question submitted to voters other than questions materially affecting the property, business, or assets of the corporation. The statute had been upheld by the Supreme Judicial Court of Massachusetts against charges that it abridged speech in violation of the first and fourteenth amendments. The Supreme Court reversed, with Justice Powell writing for himself...
and Justices Blackmun, Stevens, and Stewart; the Chief Justice writing a concurring opinion; Justice White, in dissent, writing for himself and Justices Brennan and Marshall; and Justice Rehnquist dissenting separately.

Justice Powell’s opinion, after reviewing the broad sweep of first amendment theory, noted that the Court’s recent commercial speech decisions illustrate that the First Amendment . . . prohibit[s] government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller’s business as because it furthers the societal interest in the “free flow of commercial information” [citing Virginia Pharmacy and Linmark].

Although Justice Powell’s views did not command a majority of the Court, it is pertinent to note his emphasis on the “right to know” as the underlying rationale for the protection of certain kinds of commercial speech. Yet it was Justice Powell who had maintained in Bates that some kinds of information, specifically advertising by attorneys, could be constrained if the danger of deception outweighs the potential benefits of dissemination.

If there is to be analysis of the “worth” of certain kinds of speech, what is the role of the marketplace of ideas? Is this concept of the value of “uninhibited, robust and wide open” speech inconsistent with the screening of commercial expression for “truth”? The concluding section of this article will address itself to this question, using a recent state court decision and a Supreme Court opinion as vehicles of analysis.

V. MUST THE COURTS BECOME ARBITERS OF ADVERTISING?

The Aetna Life Insurance Company placed two advertisements in New York and Newsweek magazines captioned, respectively, “Too Bad Judges Can’t Read This to a Jury” and “And Now, The Big Winner in Today’s Lawsuits.” The thrust

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435 U.S. at 783. None of the other opinions discussed commercial speech.

11 Who is to make the decision that there is such a danger of deception is an interesting question which has not yet been definitively resolved.

of these advertisements was to point out that the tendency to award large sums as damages in personal injury suits resulted in increases in insurance premiums charged. The ads included such language as:

Every payer of liability insurance is a loser. . . . The jury is cautioned . . . to bear in mind that money does not grow on trees. It must be paid through insurance premiums from uninvolved parties such as yourselves. . . . We can ask juries to take into account a victim’s own responsibility of [for?] his losses. . . . Insurers, lawyers, judges—each of us shares the blame for this mess. But it is you, the public, who can best begin to clean it up.93

Quinn v. Aetna Life & Casualty Co.94 was the case that tested the degree of protection that this advertisement’s “speech” should be afforded. Quinn and two other women were plaintiffs in personal injury actions. They sought to enjoin the publication of the advertisements on the grounds that they were calculated to influence potential jurors and would thus deprive the plaintiffs of their constitutional right to an impartial jury. The company asserted that the publication of the advertisements was protected by the first amendment (and the corresponding section of the state constitution) and asked that the complaint be dismissed.

Justice Graci of the New York Supreme Court reviewed the state of first amendment law, noting that the recent trend of decisions had been to employ a “balancing mechanism” and that the present case specifically required such a balancing of the right to an impartial jury and first amendment rights. This led him to an analysis of the commercial speech cases from Chrestensen to Ohralik and Linmark. Justice Graci concluded that the most recent cases taught that “while commercial speech is ‘protected’ under the First Amendment from prior restraint, the protection afforded is less than that provided for noncommercial speech, so that when commercial expression is false or misleading it is afforded no protection whatsoever.”95

94 Id.
95 Id.
COMMERCIAL SPEECH

The advertisements in question, Justice Graci found, were misleading because they failed to indicate that excessive personal injury awards may be reduced or set aside if they are in fact excessive and unwarranted. Being misleading, the advertisements were not entitled to the protection of the first amendment. Accordingly, he granted plaintiff's prayer for a preliminary injunction and dismissed the company's cross motion to dismiss.

Similar results were reached in *Friedman v. Rogers*. At issue in *Friedman* was a Texas statute that prohibited the practice of optometry under a trade name. The Supreme Court first found that the use of trade names is "commercial speech and nothing more," just as the advertisements were in *Virginia Pharmacy*. However, unlike the advertisements of services and prices in *Virginia Pharmacy*, which were "self-contained and self-explanatory," a trade name has "no intrinsic meaning" and is thus capable of being "manipulated," leading to the "possibility that trade names will be used to mislead the public." The Court envisioned several possible ways that trade names could be deceptive and concluded that the Texas statute, which still permitted the type of factual information permitted in *Virginia Pharmacy* and *Bates*, actually "ensure[d] that information regarding optometrical services will be communicated more fully and accurately" than with the use of "ambiguous associations with a trade name."

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98 99 S. Ct. 887 (1979). The entire discussion of *Friedman* was added by the editors.

99 Id. at 895. The Court distinguished the *Belotti* case as involving the "free discussion of governmental affairs." Id. at n.10. The Court carefully segregated speech into commercial and non-commercial speech: "Our decisions dealing with more traditional First Amendment problems do not extend automatically to this [the commercial speech] as yet uncharted area." Id. at n.9.

100 Id. at 895-96.

101 Id. at 896-97. The Court felt that a trade name might "remain unchanged" even though those optometrists whose reputation the trade name reflects are no longer associated with it. Also, the Court felt that a trade name permitted an optometrist to separate himself from his personal reputation and change names if he acquired a bad reputation. Different names could be given to shops under common ownership and thus create the "false impression of competition." Finally, trade names facilitate "the advertising essential to large-scale commercial practices with numerous branch offices." Id.
The dissent by Justice Blackmun, joined by Justice Marshall, heartily disagreed with the majority's finding of the potential for deception in the Texas statute.102 Pointing out that commercial (as opposed to professional) optometry had never been made illegal in Texas,103 Justice Blackmun felt that the use of trade names "serves a distinctly public interest."104 In addition, the dissent felt that the Court's holding actually encouraged deception since it forbade commercial optometrists from conveying the fact that they were commercial optometrists.105 Also, Justice Blackmun felt that the services of an optometrist are so "highly standardized" and "mechanical" as to render unnecessary the Court's "highly paternalistic"106 approach, since consumers could make decisions based on "their own best interests."107 Finally, Justice Blackmun felt that the Texas statute prohibited "the dissemination of truthful information about . . . wholly legal commercial conduct."108

These cases suggest that the present state of the law of commercial speech requires the courts to determine whether and when speech, usually advertising, is in fact, or has the potential to be, misleading. The burden that this inquiry places on the courts reminds one of the analogous area of church-state relations: after the first two modern cases had been decided by the Supreme Court,109 the distinguished constitutional scholar Edward S. Corwin warned that the Court was about to become the nation's "super" school board.110 The rash of cases on church-state relations on the Court's docket in recent years demonstrates that Professor Corwin's prediction

102 Id. at 899.
103 Id.
104 Id. at 901. Among the values enhanced by the use of trade names, Justice Blackmun noted that commercial optometry results in uniformity and speed of service; that trade names result in valuable product identification; and that trade names serve to bring legal activity into public view. Id. at 900-01.
105 Id. at 902.
106 Id. at 903.
108 Id.
110 Corwin, The Supreme Court as National School Board, 14 L. & CONTEMP. PROB. 3 (1949).
was not far off target. Is the Supreme Court now about to become the nation's super review board for advertising?

Edward Levi has pointed out that the movement of concepts into and out of the law can be perceived as consisting of three stages:

The first stage is the creation of the legal concept which is built up as cases are compared. . . . The second stage is the period when the concept is more or less fixed, although reasoning by example continues to classify items inside and out of the concept. The third stage is the breakdown of the concept, as reasoning by example has moved so far ahead as to make it clear that the suggestive influence of the word is no longer desired.

The evolution of the commercial speech exception fits Levi's description. By the time Virginia Pharmacy came before the Court, the third stage had clearly been reached. It was time to acknowledge that the phrase had outlived its usefulness.

But where are we now? Arguably a new first stage, as indicated by the Court's division in the most recent cases, is unfolding in the area of commercial speech. This new state is perhaps characterized by the Court's inquiry into the "misleading" nature of advertising. Has the Court established an empirical standard of review for commercial speech that would examine advertising with a view toward whether the assertions made in such advertising are susceptible of proof as to the truth therein? Such a standard would guarantee that only the purest form of advertising—that which can be empirically tested, such as price advertising—would enjoy the degree of first amendment protection available to noncommercial speech. This approach leaves subjective areas, such as the quality of legal or optometry services, open to state regulations. Perhaps such factors as the tremendous size of certain massive areas of communication, e.g., the electronic media, would render those areas more susceptible to misleading statements and

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thus open for state regulation. The variables regarding what is susceptible of proof of truthfulness are many, thus rendering this "uncharted" area difficult indeed to chart.

What appears to be needed is a reformulation which, without returning to the notion of the commercial speech exception, recognizes the basic distinction Meiklejohn advanced: the marketplace of ideas is essentially dedicated to the effective functioning of free government. Meiklejohn (and those who followed his lead) did not speak of the right to know; perhaps that term had not yet gained currency. But the recent commercial speech cases point up the need for a clearer understanding of the weight to be given this factor in first amendment analysis. Is the right to know the pros and cons of public issues really no more important than the right to know drug prices or attorneys' fees? Certainly it would seem to be. A focus on Meiklejohn's premise will, in Professor Levi's terms, assist the Court in moving beyond the first stage.

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113 Friedman v. Rogers, 99 S. Ct. 887, 894 n.9 (1979) (see note 96 supra).
114 Meiklejohn, supra note 26.