Commercial Speech and the First Amendment: An Emerging Doctrine

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COMMERCIAL SPEECH AND THE FIRST AMENDMENT: AN EMERGING DOCTRINE

The extent to which commercial advertising merits the protection of the first amendment has been debated for over forty years.¹ To this day, commercial speech issues of central concern to our market-oriented society remain unsettled.² The purpose of this comment is to trace briefly the historical development of the first amendment as it relates to commercial advertising and to analyze the approach to commercial speech problems set forth by the Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.³

I. EARLY TREATMENT OF COMMERCIAL SPEECH

Prior to 1942, the United States Supreme Court frequently examined state regulation of commercial advertising.⁴ In only a few instances, however, did the Court examine such regulation in the light of first amendment challenges.⁵

In an early decision, Ex parte Jackson,⁶ the Court upheld a federal statute which prohibited the mailing of lottery advertisements. Attempting to balance the advertiser's freedom of speech with congressional power "[t]o establish Post Offices and post Roads,"⁷ the majority opinion recognized that "[t]he difficulty

4. See, e.g., Valentine v. Chrestensen, 316 U.S. 52 (1942); Packer Corp. v. Utah, 285 U.S. 105 (1932); Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913). The consensus before the 1940's was that the first amendment protected mainly political and religious speech. Therefore, commercial advertisement was regulable as would be any other commercial activity. See text accompanying note 34 infra.
5. But see Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915); Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913).
6. 98 U.S. 727 (1877). The statute read, in pertinent part: "No letter or circular concerning lotteries, so-called gift-concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretences, shall be carried in the mail." Act of July 12, 1876, ch. 186, 19 Stat. 90 (amending original Act of June 8, 1872, ch. 335, 17 Stat. 302) (current version at 18 U.S.C. § 1302 (1970)).
7. U.S. Const. art. I, § 8, cl. 7.
attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail."

Writing for the majority, Mr. Justice Field dealt summarily with the advertiser's contention that the statute wrongly prohibited mailing advertisements of lawful lotteries:

All that Congress meant by this act was, that the mail should not be used to transport . . . corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries,—institutions which are supposed to have a demoralizing influence upon the people.9

Thus, Mr. Justice Field found advertisements of even lawful lotteries to be excludable from the mails not because they were commercial, but because they were "demoralizing." Although the regulated communication at issue in Ex parte Jackson consisted of a commercial advertisement, the Court did not discuss whether the advertisement merited first amendment protection.10

In a later mail censorship decision, Leach v. Carlile,11 the Court reviewed a postmaster's decision to prohibit appellant from advertising "miracle cures"12 by mail. Although a majority of the

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8. Ex parte Jackson, 96 U.S. 727, 732 (1877). The rights referred to consist of the first amendment rights to free speech and a free press.
9. Id. at 736.
10. Id. The Court's entire discussion of first amendment rights would have been unnecessary had the Court held commercial advertisements to be entirely regulable. The Court refrained from such a drastic measure, and proceeded on the assumption that the lottery advertisements were constitutionally indistinguishable from other mail matter.
11. 258 U.S. 138 (1922).
12. Leach v. Carlile, 267 F. 61 (7th Cir. 1920), aff'd, 258 U.S. 138 (1922). The advertisement read, in part:

"A powerful nerve-building, strength-giving tonic and invigorating treatment, such as Organo Tablets, is needed to assist lagging energy, strengthen the nerves that control the sexual organs, and bring back to normal strength those organs that are weak."

"Testicular extract is prescribed by leading physicians throughout the civilized world for Nervous Weakness, General Debility, Sexual Decline or Weakened Manhood, Urinary Disorders, Lame Back, Lack of ambition, energy and nerve force, Sleeplessness, and Run Down System."

"Organo Tablets are not an experiment, * * * are a reliable preparation for building up wasted organs and low vitality; increases the 'stamina,' the staying power, the responsive nerve force, that makes you capable of enjoying life; invigorates man's virile strength; a reliable treatment for all Nervous Affections,
Court voted to uphold the postmaster’s decision, the case is noteworthy for its dissent. Justice Holmes, with Justice Brandeis concurring in the dissent, recognized that appellant’s objection to the postmaster’s action rose to constitutional proportions. The two dissenters found that the ruination of appellant’s business by forbidding him to advertise by mail constituted an abridgement of the freedom of speech. The notion inheres in the Holmes-Brandeis dissent that commercial advertising deserves the protection of the first amendment because livelihoods depend upon the unfettered communication of commercial information.

In the preceding two mail censorship cases, both of which dealt with commercial advertising, several Justices did not distinguish between the protection afforded commercial speech and that afforded noncommercial speech. Nevertheless, in 1942 the Court ignored both cases in deciding that commercial advertisement is unprotected by the first amendment. Prior to 1942, most attacks on the governmental regulation of commercial advertising were based on due process and equal protection grounds, rather than on first amendment grounds. Although the first amendment had been held applicable to the states years earlier, it was not until Valentine v. Chrestensen that the Court began to draw

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14. Id. at 141. The majority viewed Leach as an ordinary review of administrative action. Id. at 138.
15. Id. at 141. Mr. Justice Holmes wrote:
   The question is only whether [Congress] may make possible irreparable wrongs and the ruin of a business in the hope of preventing some cases of a private wrong that generally is accomplished without the aid of the mail. Usually private swindling does not depend upon the postoffice. If the execution of this law does not abridge freedom of speech I do not quite see what could be said to do so.
a constitutional distinction between the regulability of commercial speech and that of noncommercial speech.\textsuperscript{22}

II. \textit{Chrestensen} Confusion

The first Supreme Court decision which explicitly addressed the question whether commercial advertising merits first amendment protection relied upon neither \textit{Ex parte Jackson}\textsuperscript{23} nor the Holmes-Brandeis dissent in \textit{Leach v. Carlile}.\textsuperscript{24} Indeed, with bewildering results, the majority in \textit{Chrestensen} relied upon no first amendment precedent whatsoever.\textsuperscript{25} In \textit{Chrestensen} the Court reviewed a New York City ordinance\textsuperscript{26} prohibiting distribution of all handbills except those “solely devoted to ‘information or a public protest.’”\textsuperscript{27} The defendant had been convicted of distributing handbills which were in part devoted to advertising his business. Demonstrating considerable deference to legislative judgment, Justice Roberts’ majority opinion 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 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.\textsuperscript{28}

The above-quoted propositions lead syllogistically to the conclusion that the states may “unduly burden or proscribe” commercial advertising. Thus \textit{Chrestensen} has been read to stand for the proposition that commercial advertisement falls utterly outside the ambit of first amendment protection.\textsuperscript{29}

Since its \textit{Chrestensen} decision, the Court has explained that speech is unprotected only if it is purely commercial in content.\textsuperscript{30}

\textsuperscript{22} Id. at 54.
\textsuperscript{23} 96 U.S. 727 (1877).
\textsuperscript{24} 258 U.S. 138 (1922).
\textsuperscript{25} Id. See also summary of petitioners’ briefs at 86 L. Ed. 1262 (1942).
\textsuperscript{26} \textsc{New York City, N.Y., Administrative Code} § 755(2)-7.0(5) (1970).
\textsuperscript{27} 316 U.S. 52, 53 (1942).
\textsuperscript{28} Id. at 54.
The mere fact that profit is earned by the sale of information does not rob that information of first amendment protection. Nonetheless, *Chrestensen* has been sharply criticized by several Justices because it stands firmly against any protection for speech which is commercial in content. Justice Douglas has stated: "The ruling was casual, almost offhand. . . . It has not survived reflection."

The Court's failure to enunciate the policy underlying its *Chrestensen* decision exacerbated the difficulty in distinguishing between protected and commercial speech. Perhaps an accurate statement of the judicial reason for finding commercial speech to be unprotected can be found in a lower court opinion in *Chrestensen*:

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Such men as Thomas Paine, John Milton and Thomas Jefferson were not fighting for the right to peddle commercial advertising. . . . [A]s ours is a profit economy, no business man need apologize for seeking personal gain by all legitimate means. But the constitutional limitations on legislation affecting such pursuits are not as specific and exacting as those imposed on legislation interfering with free speech.
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31. New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964). In *New York Times* the communication under review consisted of an allegedly libelous political advertisement. The majority opinion stated: "The publication here was not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*. . . . That the *Times* was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." *Id.* at 266.


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I must now say a word on the declaration of rights you have been so good as to send me. I like it as far as it goes; but I should have been for going further. For instance the following alterations and additions would have pleased me. Art. 4. 'The people shall not be deprived or abridged of their right to speak or otherwise to publish any thing but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations. . . .'
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*Id.* at 1143.
Thus, underlying *Chrestensen* was the notion that the Framers had never intended to protect commercial advertising, leaving it regulable to the same extent as other commercial activity.

III. **Erosion of the Commercial Speech Doctrine**

After handing down the *Chrestensen* decision, the Court consistently avoided applying the commercial speech "doctrine." For example, in *New York Times Co. v. Sullivan*, the Court found a putatively libelous political advertisement to be worthy of first amendment protection notwithstanding that it took the form of a commercial advertisement. The Court distinguished *New York Times* from *Chrestensen* on the ground that the advertisement in *Chrestensen* "did no more than propose a commercial transaction," whereas the content of the *New York Times* advertisement was worthy of political note.

Nine years later, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, the Court upheld an ordinance prohibiting newspapers from publishing separate layouts of male and female want ads. Respondents in *Pittsburgh Press* relied principally upon the argument that want ads are commercial speech within the meaning of the *Chrestensen* rule and are, therefore, unprotected. Appellants, on the other hand, argued that *Chrestensen* was inapplicable because the instant case involved the exercise of editorial judgment by the newspaper regarding the placement of the advertisement. Although the Court found want ads to be "classic examples of commercial speech," and "no more than a proposal of possible employment," it declined to rely upon the commercial speech doctrine in finding the want ads regulable:

Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance. We have

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35. In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the Court found only one decision besides *Chrestensen* to support the commercial speech doctrine, i.e., *Breard v. Alexandria*, 341 U.S. 622 (1951). The Virginia Pharmacy decision noted that "since the decision in *Breard*. . . the Court has never denied protection on the ground that the speech in issue was 'commercial speech.'" Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 759 (1976).

37. Id. at 265-66.
38. Id. at 266.
40. Id. at 384.
41. Id. at 386.
42. Id. at 385.
no doubt that a newspaper constitutionally could be forbidden
to publish a want ad proposing a sale of narcotics or soliciting
prostitutes. Nor would the result be different if the nature of the
transaction were indicated by placement under columns cap-
tioned "Narcotics for Sale" and "Prostitutes Wanted" rather
than stated within the four corners of the advertisement.\textsuperscript{43}

Thus the Court found the want ads to be regulable not because
they proposed commercial activity, but because they proposed
illegal activity.

In 1975 the Supreme Court decided \textit{Bigelow v. Virginia}.\textsuperscript{44} The
words of one commentator suggest that that case "severely re-
stricted, if it did not overrule, \textit{Valentine v. Chrestensen}."\textsuperscript{45} The
facts in \textit{Bigelow} were as follows: On February 8, 1971, the \textit{Virginia
Weekly} contained an advertisement\textsuperscript{46} proposing that women
travel to New York for lawful abortions. Such solicitation was
illegal under a Virginia statute.\textsuperscript{47} After weighing the virtues of the
advertisement against the commonwealth’s interest in protecting
the health of its citizens,\textsuperscript{48} the Supreme Court struck down this

\begin{verbatim}
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.

43. \textit{Id.} at 388. But see \textit{Ex parte} Jackson, 96 U.S. 727 (1877), where the Court found
that Congress was capable of banning all lottery advertisements from the mails though
the lotteries were themselves lawful.
44. 421 U.S. 809 (1975).
45. Freedman, \textit{Advertising and Solicitation by Lawyers: A Proposed Redraft of

UNWANTED PREGNANCY
LET US HELP YOU
Abortions are now legal in New York.
There are no residency requirements.
FOR IMMEDIATE PLACEMENT IN ACCREDITED
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(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.

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.”
48. For a severe criticism of \textit{Bigelow’s} summary treatment of commonwealth inter-
ests, see 42 \textit{Tenn. L. Rev.} 573, 581-83 (1975).
\end{verbatim}
application of the statute as violative of the first amendment.

The Court in Bigelow refused to commit itself to the proposition that commercial speech is fully protected under the first amendment. Instead, it declared that "commercial advertising enjoys a degree of first amendment protection."49 Since intelligent interpretations differ as to the degree of protection to be afforded commercial advertising,50 it would appear that the Court's method of analysis in Bigelow was elusive. Had the Court held commercial advertising to be fully protected under the first amendment, state abridgement of the right to free commercial speech would be struck down unless it were supported by a compelling state interest.51 To avoid foreclosing all paths of retreat, the Court avoided such a broad ruling.

It is clear that the Bigelow Court weighed the interests of the speakers against those of the state. However, the elusive test implicit in Bigelow demanded clarification. The Court attempted to clarify its test in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.52

IV. Virginia Pharmacy

Bigelow created the impression that the protection afforded the Virginia Weekly advertisement resulted solely from the direct relationship between the advertisement and the new-found right to an abortion.53 If the Court had protected the Virginia Weekly advertisement solely because it related to the exercise of a distinct constitutional right, then it would necessarily follow that ordinary advertisements, such as those for drugs or groceries, would not merit protection since they do not pertain to a distinct constitutional right. This was not an unreasonable reading of Bigelow; however, the Court recently laid to rest any such interpretation. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,54 the Court held that commerc-

52. 425 U.S. 748 (1976).
53. Bigelow v. Virginia, 421 U.S. 809, 822 (1975). The Court stated: "[T]he advertisement conveyed information of potential interest and value to a diverse audience. . . . Also, the activity advertised pertained to constitutional interests." Id. (citing Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973)).
cial advertising is entitled to some protection even if it does not pertain to the exercise of any other right:

Here, in contrast [to Bigelow], the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.55

The initial lawsuit in Virginia Pharmacy was brought not by pharmacists but by prescription drug consumers who claimed "that they would greatly benefit if the prohibition were lifted and advertising freely allowed."56 Thus, the case did not directly address the right to speak, but rather addressed the right to receive information. The Court found support in past cases for the proposition that protection is afforded to both the source and the recipients of communications.57

The Court in Virginia Pharmacy did not treat commercial advertising in the traditional terms of protected and unprotected speech. Any attempt to force the Court's analysis into those traditional categories would be to overburden a limited analytical method. The Court recognized the limitations of that labeling technique by continually referring to "some" protection58 for commercial advertising.

55. Id. at 760-61. Va. Code § 54-524.35 (1950) provided:
Any pharmacist shall be considered guilty of unprofessional conduct who
. . . (3) publishes advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms
. . . for any drugs which may be dispensed only by prescription.
Following his discussion of the development and erosion of the commercial speech doctrine, Justice Blackmun addressed the facts of the case. Focusing on the interest of consumers in receiving drug price information, he found that the harm to consumers resulting from the commonwealth’s regulation was substantial:

Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent.

Justice Blackmun then commented upon the general societal interest in the efficient operation of the market system. He found that the system runs efficiently only where buyers and sellers have full knowledge of market price. Finally, the Court examined the harms which the Virginia regulation was designed to diminish. Virginia offered the following justifications for its regulation: Unfettered price advertising destroys both a high degree of pharmaceutical professionalism and the physician-pharmacist relationship. Furthermore, advertising by some pharmacists will eventually force all pharmacists to advertise competitively, leading to higher, not lower, drug prices. Finally, the unregulated advertising of drug prices demeans the pharmacist in the public eye and thereby damages the profession.

Having analyzed the harms produced by the statute on the one hand, and those produced by free drug-price advertising on the other, the Court struck down the statute because it produced harms greater than those it eliminated. In sum, the Court addressed the following questions:

I. What harms are brought about by the instant state regulation?

II. What harms would result if the industry were permitted to advertise in an unregulated fashion?

60. Id. at 763.
61. Id. at 764.
62. Id. at 766-69.
63. Id. at 770.
III. Which set of harms is greater, and should therefore be eliminated?\textsuperscript{64}

Although the Court also discussed the public interest,\textsuperscript{65} separate inquiry into this matter in commercial speech adjudication is unnecessary and duplicative. For example, the aged and sickly, significantly harmed by the Virginia regulation, have an interest in the efficient working of the market system. Conversely, the segment of society significantly harmed by the absence of such state regulation, presumably pharmacists, has an interest in the inefficient working of that very system. The public-at-large is relatively disinterested in the outcome of this dispute, because the effect on the larger public will be minimal either way the Court decides. That “society . . . [has] a strong interest in the free flow of commercial information”\textsuperscript{66} is, therefore, a mere truism that serves only to obfuscate the issues. Since the cost of advertising will be borne by the public-at-large, the pecuniary interest of the larger public may in fact militate against striking down the regulation.

The Court, in \textit{Virginia Pharmacy}, chose not to employ the rigid protected-unprotected method of analysis. Instead, its only inquiry was whether the legislature acted reasonably in passing the statute, \textit{i.e.}, eliminated greater harms than it produced.\textsuperscript{67} \textit{Virginia Pharmacy} demonstrates that the reasonable legislature considers not only the number of citizens harmed, but also the gravity of the harm and the capability of each citizen to bear the burdens created by possible legislation.\textsuperscript{68}

Comparing the harms, as the Court did in \textit{Virginia Pharmacy}, constitutes an eminently rational approach to commercial speech litigation. First, harm-weighing focuses the Court’s attention on the factual and concrete harms created by the instant regulation, obviating the need for a discussion of metaphysical rules. Secondly, case-by-case analysis in the style of

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\textsuperscript{64} The phrasing of this three-step test is that of Professor Ronald H. Silverman of the Hofstra Law School. Professor Silverman has asserted that “harm-weighing” is an appropriate analytical tool in determining the validity of any statute under attack on constitutional grounds. Although the method may have applications outside the first amendment area, this comment deals only with its application to commercial speech adjudication.


\textsuperscript{66} Id.

\textsuperscript{67} Id. at 770.

\textsuperscript{68} See text accompanying note 60 supra.
Virginia Pharmacy permits the "mills of justice to grind exceeding fine."  

This latter point was entirely missed by Justice Rehnquist in his dissent to Virginia Pharmacy. Justice Rehnquist interpreted the majority as holding that all commercial speech is protected so long as it does not mislead. He stated that that doctrine would result in unregulated advertising by all professionals and a major upset in speech regulation under the National Labor Relations Act. The dissent found the following types of speech constitutionally indistinguishable: An employer promising benefit to his employees if they reject unionization; a pharmacist advertising the price of a standardized drug; and a lawyer advertising his fee for a title search. Justice Rehnquist also insisted that under Virginia Pharmacy, advertisements such as the following would be constitutionally protected:

Pain getting you down? Insist that your physician prescribe demerol. You pay a little more than for aspirin, but you get a lot more relief.

Mr. Justice Rehnquist failed to perceive that the majority did not employ the traditional protected-unprotected analysis. Furthermore, he failed to observe that the harms created by the commercial advertisement in each of his examples differ. For example, an obvious harm created by Justice Rehnquist's demerol advertisement would be the risk of a rise in drug dependency, a harm not caused by the advertising of prices only. As Chief Justice Burger pointed out, judicial treatment of each commercial advertisement will differ at law as a consequence of factual differences.

Chief Justice Burger, concurring with the majority, indicated that advertising by doctors and lawyers differs considerably in effect from price advertising by pharmacists. After equating the pharmacist who sells prepackaged drugs with the "clerk who sells

71. Id. at 785-86.
72. Id. at 786.
73. Id.
74. Id. at 785.
75. Id. at 788.
76. Id. at 773-75 (Burger, C.J., concurring).
Chief Justice Burger suggested that advertising by lawyers and doctors would be misleading because the professional services advertised necessarily involve a high degree of individual, professional judgment. Therefore, different services would be advertised under the same name. The majority opinion would appear to support this view, although it is uncertain whether this view will prevail when lawyers’ advertising is examined directly.

V. Recent Developments

Prior to the Supreme Court decision in Virginia Pharmacy, many lower courts had already recognized that the first amendment militates against unreasonable state interference with commercial advertisement. Very recently, federal courts have struck state bans on advertising optometric products and legal services and on advertising oleomargarine using certain dairy terms. Various state courts have followed their example; however, these cases fail to provide a proper method of analysis. Virginia Pharmacy is important primarily because it dictates such a method.

Although Virginia Pharmacy mandated harm-weighing as the proper mode of commercial speech adjudication, apparently it failed to do so clearly enough. Recently, the New York Court of Appeals misconstrued the Virginia Pharmacy test. In People

77. 96 S. Ct. 1817, 1831. This passage was deleted in the official reports.

78. 425 U.S. at 773 n.25. With regard to standardization of professional services, the question arises whether the majority is acquainted with such standardized forms as those distributed by Julius Blumberg, Inc. of New York. Mr. Justice Rehnquist found that the majority merely “toss[ed] a bone” to lawyers and doctors in footnote 25. Id. at 785.

79. Id. at 773 n.25.


84. See cases cited note 81 supra.
v. Remeny, a majority of the Court of Appeals found a New York City ordinance which entirely banned commercial handbilling to be unconstitutional under Virginia Pharmacy. The defendant there had been found guilty of violating the ordinance by having distributed handbills which named the performances and listed the times, places, and prices of certain concerts.

In Remeny the significant harms produced by the ordinance may be summarized as follows: Advertisers must use less desirable means of advertising—advertising that is more expensive and/or less effective than handbilling. The occupation of commercial handbilling is eliminated. Some would-be advertisers will not be able to create sufficient demand for their enterprises to assure economic survival. Further, that segment of the public wishing to receive the commercial information must now pay for it by purchasing a newspaper or maintaining a radio or television set. Secondly, harms which may be caused by unregulated commercial handbilling include the following: Sidewalk traffic is obstructed because handbillers purposefully choose crowded sites for distribution. Handbills litter the streets because recipients generally discard handbills immediately. The public must pay the cleanup costs. Street traffic is more dangerous because handbills tend to be lifted by the wind, obscuring the vision of drivers. Furthermore, pedestrians frequently find handbillers annoying.

The final analytical step consists of comparing the harms caused by the regulation with the harms caused by the unregulated advertisement. This is the most difficult step in the analysis. People v. Remeny does not present an easy case.

Judge Wachtler's majority opinion in Remeny refused to examine the harms at all, stating: "If an ordinance absolutely prohibiting all distribution of handbills containing constitutionally

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No person shall throw, cast or distribute, or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or courtyard, or on any stoop, or in the vestibule of any hall in any building, or in a letter box therein, provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter.

Id.
protected statements on political, social and religious topics is
invalid, then this ordinance relating to commercial speech, now
also constitutionally protected, suffers from the same infir-
nity.\footnote{Id. at 530, 355 N.E.2d at 377, 387 N.Y.S.2d at 417.}

In his dissent, Judge Jasen criticized the majority's overly broad holding in \textit{Remeny}:

\begin{quote}
In my view, the First Amendment, as the Supreme Court has now twice stated, requires that a court in passing upon the constitutionality of a legislative enactment affecting commercial speech, engage in balancing the competing societal interests represented. The court in reaching its decision does not take into consideration the relevant factors.\footnote{Id. at 536-37, 355 N.E.2d at 381-82, 387 N.Y.S.2d at 421 (Jasen, J., dissenting).}
\end{quote}

Judge Jasen's criticism is thoroughly warranted.

The Supreme Court of Florida recently passed upon the constitutionality of a statute making it civilly actionable for a collection agency to “
[\textit{c}]ommunicate or threaten to communicate with a debtor's employer prior to obtaining final judgment against the debtor, unless the debtor gives his permission."\footnote{FLA. STAT. ANN. § 559.72(4) (West Supp. 1976-77) provides: In collecting consumer claims, whether or not licensed by the division, no person shall: . . . (4) Communicate or threaten to communicate with a debtor's employer prior to obtaining final judgment against the debtor, unless the debtor gives his permission in writing to contact his employer or acknowledges in writing the existence of the debt after the debt has been placed for collection, but this shall not prohibit a person from telling the debtor that his employer will be contacted if a final judgment is obtained. 
\textit{Id.}}

Appellant Harris, debtor to appellee Beneficial Finance Co., brought an action against Beneficial as provided by the statute. Beneficial argued on appeal that the statute runs afoul of the first amendment as interpreted in \textit{Virginia Pharmacy}. The Supreme Court of Florida upheld the statute:\footnote{Harris v. Beneficial Fin. Co., 338 So. 2d 196 (Fla. 1976).}

\begin{quote}
[T]he potential recipients of the information sought to be conveyed in the [\textit{Virginia Pharmacy}] case had a striking and obvious interest in acquiring such knowledge. It is difficult for us to believe that Harris' employers have any similar interest in the information they received from Beneficial's agents.

. . . Thus the proper test in considering this statute is to weigh the individual's interest against the government's interest. . . . We hold that the public interest in proscribing harass-
\end{quote}
ment of a debtor through contact with his employer about an
obligation to a third party simply transcends a finance com-
pany's interest in choosing this particular means of collecting a
debt. 92

Thus the court found that Virginia Pharmacy mandated the bal-
cancing of the harms to the interested parties. 93

This Term, the Supreme Court of the United States will hear
an Arizona case involving lawyers' advertising. 94 In re Bates &
O'Steen 95 involved a disciplinary proceeding against two attor-
neys who advertised their fees for certain services in violation of
a disciplinary rule of the Supreme Court of Arizona. 96 A majority
of the Supreme Court of Arizona voted to censure the lawyers,
upholding their rule against numerous constitutional challenges.
Respondent attorneys Bates and O'Steen, through counsel,
argued that the advertising ban is unconstitutional under
Virginia Pharmacy. Chief Justice Cameron's majority opinion
rejected respondents' contention, 97 rooting the holding in long-
standing legal tradition and relying heavily upon Chief Justice
Burger's concurring opinion in Virginia Pharmacy. Apart from
lengthy quotations from Bigelow and Virginia Pharmacy, how-
ever, Chief Justice Cameron provided little explicit analysis of his
own. If in fact the majority weighed the harms, it failed to do so
explicitly.

Justice Holohan's dissenting opinion, on the other hand,
raises at least one harm-balancing objection to the flat ban on
lawyers' advertising:

While the majority concludes that [Virginia Pharmacy]
supports a complete ban on advertising by attorneys, I am not

92. Id. at 199.
93. Id. at 198-99. Although the court discussed the government interest in protecting
the debtor, it is clear that this interest is principally the debtor's.
94. In re Bates & O'Steen, 555 P.2d 640 (Ariz.), prob. juris. noted sub nom. Bates &
95. Id.
96. Id. at 641. The court stated:

Disciplinary Rule 2-101(B) of Rule 29(a) of the Rules of the Supreme Court
reads:

"A lawyer shall not publicize himself, or his partner, or associate, or any other
lawyer affiliated with him or his firm, as a lawyer through newspaper or maga-
azine advertisements, radio or television announcements, display advertisements
in the city or telephone directories or other means of commercial publicity, nor
shall he authorize or permit others to do so in his behalf.***"

Id.
97. Id. at 643.
inclined to such a conclusion. Certain kinds of advertising by lawyers may cause confusion and deception, but the remedy is to ban such kinds of advertising rather than any form of advertising. This appears to me to be what the Court meant in [Virginia Pharmacy].

In response to Justice Holohan’s fact sensitivity, Justice Gordon’s special concurring opinion reveals the basic dilemma of judges faced with the problem of lawyers’ advertising:

Whether a blanket ban on certain forms of advertising is unconstitutional as violative of the First Amendment is a [weighty] question which I am not yet prepared to resolve in the negative. I am concerned, however, that to impulsively discard the regulations leaving few if any guidelines in their wake, might well initiate a flood of media combat for legal business which would serve neither the best interests of the public nor the Bar.

VI. CONCLUSION

It would have been beneficial if Virginia Pharmacy had resolved the analytical confusion created by Chrestensen and the cases following, since it appears that for some time to come courts may continue to rely mistakenly on the discredited labeling technique of commercial speech adjudication. Future Supreme Court decisions would best serve to clarify the doctrinal controversy by avoiding entirely such labels as “protected” and “unprotected.” Nonetheless, Virginia Pharmacy serves as a commendable foundation for commercial speech adjudication based upon concrete fact and sound social policy.

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98. Id. at 649 (Holohan, J., dissenting) (emphasis added). Since the Bates advertisement contained standard fees, the Supreme Court will consider the harms produced by Arizona’s ban on lawyers’ price advertising. In this regard, Virginia Pharmacy dictates that the Court consider the extent to which the gravest harms produced by artificially high lawyers’ fees have been eliminated by the advent of Legal Aid Societies, and the due process right of the indigent criminal defendant to assigned counsel, see Gideon v. Wainwright, 372 U.S. 335 (1963). Recently, Maine lawyers obtained the right to advertise services and fees. N.Y.L.J., Feb. 10, 1977, at 1.
