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Advertisements for Contraceptives as Commercial Speech in the Broadcast Media

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Notes

ADVERTISEMENTS FOR CONTRACEPTIVES AS COMMERCIAL SPEECH IN THE BROADCAST MEDIA

Since 1935, the Federal Communications Commission has prohibited the advertisement of contraceptives on radio and television. Traditionally, the banning of such purportedly "distasteful" advertising presented no consitutional difficulty. The emerging "commercial speech doctrine," however, may provide first amendment protection to such advertising, as it has to other forms of commercial persuasion. This Note analyzes the issue of contraceptive advertising under the first amendment by discussing traditional first amendment theory, the evolving commercial speech doctrine, and the special problems presented by the pervasiveness of electronic broadcasting and widespread government regulation of broadcasting. After noting the interplay of these doctrines, the Note concludes that the advertisement of contraceptives cannot be constitutionally banned from the public airwaves.

INTRODUCTION

ADVERTISING of contraceptives has been banned from the broadcast media since 1935 when the Federal Communications Commission (FCC) labeled one such advertisement distasteful.[1] Since 1935, there has been significant development in the area of constitutionally protected speech, a development that affects all commercial advertising. Such commercial expression is now granted some first amendment protection under the commercial speech doctrine.[2]

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public deci-

1. *In re* Knickerbocker Broadcasting Co., 2 F.C.C. 76 (1935).
2. *See* notes 27–70 *infra* and accompanying text.

> sionmaking in a democracy, we could not say that the free flow of information does not serve that goal.[3]

The constitutional protection given advertising is less than the full protection given to other forms of speech; it is a partial protection based on a balancing of the state's interests against the individual's interest.[4]

Additionally, advertising in the electronic media[5] is treated differently from advertising in print. Regulation has been more tolerable in the broadcast sector.[6] At the inception of broadcasting, the government intervened to control signal interference, and has remained in the area of broadcast regulation without public complaint.[7] Radio and television offer special problems:

> [R]adio and television are probably the most influential media of communication in our society today. They present, on a selective basis, as all communications do, not only information but ideas, attitudes, impressions and fantasies. They pervade the home, the automobile and many public places. Secondly, radio and television are by unanimous agreement, a "wasteland." The economic, political and social factors that make them so are sufficiently entrenched to discourage expectation of change on the initiative of the industry itself. Thirdly, [G]overnment movement in radio and television has always, and necessarily been extensive.[8]

The problem is whether government regulation abridges freedom of expression in the area of broadcasting. This Note discusses the constitutionality of banning contraceptive advertising from the broadcast media, and analyzes this restriction within the context of the first amendment. The Note first presents a general synopsis of the first amendment tests used to judge the constitutionality of speech restrictions.[9] This Note then examines two relevant streams of constitutional analysis: the cases and principles involving the status of product advertising under the first amendment,[10] and the cases dealing with the constitutional limitations on the broadcast media.[11] The Note concludes that the constitu-

3. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976) (citations omitted).

4. *See* notes 78–106 *infra* and accompanying text.

5. "Electronic media" and "broadcast media" are terms used interchangeably by the courts and in this Note.

6. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 22 (1976).

7. *Id.*

8. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 653–54 (1970).

9. *See* notes 12–50 *infra* and accompanying text.

10. *See* notes 52–57 *infra* and accompanying text.

11. *See* notes 109–49 *infra* and accompanying text.

tionality of banning contraceptive advertising from the broadcasting media is doubtful.

I. FIRST AMENDMENT STANDARDS

Advertising, as speech, is protected by the first amendment when the constitutionality of its regulation is in question. "As a general rule, any attempt by government to suppress speech or regulate its content is subject to the 'strict scrutiny' test: government must show a compelling state interest in order to overcome the presumption that a regulation is unconstitutional."[12] Certain types of speech, however, are not afforded full first amendment protection.[13] The regulations affecting the free flow of such less protected speech must satisfy only a "reasonable basis" test.[14] Thus, there are two categories of government restraint and two methods of analysis for determining the extent of first amendment protection.

A. *Communicative Impact: Content Regulation*

The first category of regulation is that aimed at the suppression or regulation of the content, or "communicative impact," of speech. Unconstitutional restraint of speech occurs if the regulatory action, on its face, seeks to suppress specific information or ideas,[15] or if the regulation, though neutral on its face, is motivated by an intent to single out constitutionally protected speech for control.[16]

Regulations directed at controlling the communicative impact of speech are unconstitutional because they contravene the principle that government may not prescribe the content of individual expression.[17] Ordinarily, "government has no power to restrict

12. Comment, *The New Commercial Speech Doctrine and Broadcast Advertising*, 14 HARV. C.R.-C.L. L. REV. 385, 394 (1979). *See* Buckley v. Valeo, 424 U.S. 1, 64–68 (1976) (disclosure requirements of federal campaign regulations upheld as essential to intelligent use of the right of the franchise).

13. *See* note 20 *infra*.

14. *Id.*

15. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 584-85 (1978). *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (statute directed at punishing the mere advocacy of criminal syndicalism held unconstitutional under the first and fourteenth amendments).

16. L. TRIBE, *supra* note 15, at 585. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (a teacher could not be dismissed from public employment for writing a letter to a newspaper, absent proof of knowingly or recklessly written false statements, except upon a showing that the expression interfered with the teacher's performance of classroom duties or with the operation of the school).

17. *See* L. TRIBE, *supra* note 15, at 581.

expression because of its message, its ideas, its subject matter or its content."[18] To establish that particular expressive activities may be legitimately regulated, it must be shown either that the regulation controlling the communicative impact is necessary to further a compelling state interest,[19] or that the expression falls within an established exception to presumed constitutionality.[20] The Supreme Court requires an especially close nexus between the means and the ends of the regulation for it to be upheld as constitutionally permissible. The means used must be narrowly drawn regulations, and the ends must be permissible government objectives.[21] Moreover, if the feared harm could be averted by a further exchange of ideas, the regulation is unnecessary and will be struck down as an unconstitutional restriction of speech.[22]

Cohen v. California[23] exemplifies an impermissible regulation of content,[24] and the manner in which the Supreme Court deals with such restrictions. Cohen was convicted for violating section 415 of the California Penal Code, which prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."[25] Cohen's alleged "offensive conduct" was wearing a jacket bearing the words "Fuck the Draft" while he was in a hallway of the Los Angeles courthouse.[26]

Analyzing the constitutionality of his conviction, the Court examined the California court's basis for convicting Cohen. The state court had defined "offensive conduct" under the statute to include "behavior which has a tendency to provoke *others* to acts

18. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

19. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), discussed at notes 61-68 *infra* and accompanying text.

20. The categories that are traditionally unprotected because they are not an essential part of any exposition of ideas are illustrated by the following cases: Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

21. *See* L. TRIBE, *supra* note 15, at 602.

22. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Constitutional freedom of expression is intended to remove governmental restraint from public discussion, and to let each individual decide what will be heard. The purpose of this freedom is to produce a more capable citizenry and a "more perfect polity." Cohen v. California, 403 U.S. 15 (1971). *See also* note 72 *infra* and accompanying text.

23. 403 U.S. 15 (1971).

24. *Id.* at 18, 26.

25. CAL. PENAL CODE § 415 (West 1973).

26. 403 U.S. at 25-26.

of violence or to in turn disturb the peace."[27] According to the California court, the public display of the four-letter expletive satisfied this statutory requirement.[28] The Supreme Court pointed out that Cohen's conviction was based on the words which he displayed on his jacket. His conduct, though "offensive," was a communication. Accordingly, the Court reasoned that Cohen's conviction rested solely on speech and not merely upon conduct which, although intended to be expressive, did not convey a message.[29] If the Court had found that Cohen's conviction had been premised on the latter basis, his conduct could have been constitutionally regulated because it would not have restricted his ability to express himself. The Court concluded that the State lacked power to punish Cohen for the underlying content of the message absent proof of intent to incite disobedience to or disruption of the draft.[30]

The Court also dismissed any possible arguments that the words on Cohen's jacket were traditionally unprotected forms of speech, or that the State's action was justified because it served a compelling state purpose.[31] The applicable unprotected categories of obscenity and fighting words did not fit Cohen's statement. The expression was neither erotic, nor was it likely to "conjure up psychic stimulation" to justify the label of obscene.[32] The expression on the jacket was not a personally abusive epithet directed at anybody and thus, could not be labelled fighting words.[33] California therefore could not regulate the content of speech by claiming that Cohen's statement fell within an unprotected category.

Since the State of California did not present a compelling reason for regulating the content of Cohen's speech, and since no one was violently aroused by his statement, the Court held that the

27. *Id.* at 17.

28. *Id.* In defining "offensive conduct" to include Cohen's public display of the four-letter expletive, the California court did not need to analyze the freedom of speech doctrine. Cohen, however, had consistently asserted that his constitutional right to free speech was being infringed upon, thereby providing the Supreme Court with jurisdiction to review his state court conviction.

29. *Id.* at 19. The Court noted:

> Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys.

Id.

30. *Id.* at 18.

31. *Id.* at 20–22.

32. *Id.* at 20.

33. *Id.*

State could not validly use its police power to prevent Cohen from expressing himself in the way he did.[34] Likewise, the Court found that Cohen's perhaps distasteful mode of expression was not forced upon unwilling or unsuspecting viewers.[35] Although government may properly prohibit unwelcome intrusion of ideas which cannot be totally banned from the public dialogue, the Court noted that people must often be subject to objectionable speech outside the home unless the state can show that "substantial privacy interests are being invaded in an essentially intolerable manner."[36] In Cohen's case, it was observed that persons in the courthouse could have avoided seeing the jacket merely by averting their eyes.[37] Moreover, it was noted that the conviction could not stand, even if it were construed in consonance with the California court's interpretation, since there was no evidence that anyone unable to avoid Cohen's conduct objected to it.[38] "[A]bsent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourth Amendments, make the simple display here involved of this single four-letter expletive a criminal offense."[39]

Cohen, then, illustrates the Supreme Court's conviction that the communicative impact of speech must ordinarily stand inviolate. It shows the breadth of the category of "protected speech," including within its ambit vulgar epithets, and demonstrates that only in sharply limited circumstances—when there is a compelling state interest—may government regulate the content of protected speech.

B. *Noncommunicative Impact: Form and Manner Regulation*

Government restraint of speech may occur when a regulation is not directed at the content of speech, but regulates the form and manner of the communication, and indirectly restricts the flow of ideas and information.[40] Abridgement results when rules limit activities through which ideas are conveyed and thereby discourage or chill the free flow of information. Thus, the problem is decid-

34. *Id.*
35. *Id.* at 21.
36. *Id.*
37. *Id.*
38. *Id.* at 22.
39. *Id.* at 26.
40. *See, e.g.*, Schneider v. State, 308 U.S. 147 (1939) (restrictions on distributions of circulars door-to-door and in the street invalid; indirect restraint on communication not justified).

ing when a regulation unduly constricts speech. To this end, the Court employs a balancing test, weighing the inhibition of expression against the governmental interests sought to be furthered by the regulation.[41]

Unless the restriction inhibits speech in a public forum[42] or is shown to be substantial, the Court's scrutiny of the government's justification for the regulation is minimal, rather than strict. Thus, the government must show only a rational justification for its choice of regulatory means so long as other means through which the speaker's views may be made known, and other ways by which the listener may receive the ideas are available.[43]

United States v. O'Brien,[44] involving the burning of draft cards, aptly illustrates this balancing approach.[45] O'Brien, by burning his draft card, allegedly frustrated the government's interest in maintaining the smooth functioning of the Selective Service System. He was punished for the noncommunicative impact of his act.[46] *O'Brien* was not treated as a case where the governmental interest in regulating conduct arose because the communication itself was thought to be harmful.[47] Rather, the Court viewed the case as involving a content-neutral regulation of speech and, employing a relaxed standard of scrutiny, concluded that the governmental purpose of preserving draft cards was served least re-

41. *See* Lloyd Corp. v. Tanner, 408 U.S. 551 (1972); Street v. New York, 394 U.S. 576 (1969); United States v. O'Brien, 391 U.S. 367 (1968).

42. The term "public forum" historically includes places such as public streets, sidewalks, and parks because of their role for people who lack access to more elaborate channels of communication. Government cannot regulate speech-related conduct in these places except in narrow ways necessary to serve significant state interests. *See generally*, Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1 (P. Kurland ed. 1965).

43. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976) (rejecting argument that there exists a first amendment right to make political speeches at Fort Dix; government's interest in maintaining military discipline and availability of offbase political rallies outweigh communicative interest).

44. 391 U.S. 367 (1968). O'Brien burned his draft card before a crowd in an attempt to influence them to adopt his antiwar stance. He was tried and convicted for violating the 1965 Amendment to the Selective Service Act which applies to anyone "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes" his draft card. 50 U.S.C. § 462(b)(3) (1965), Pub. L. No. 89-152, 79 Stat. 586 (amending 50 U.S.C. § 462(b) (1948)). The Court found the Amendment to be constitutional on its face, and concluded that the government can regulate the destruction and mutilation of draft cards without infringing the individual's freedom of speech. 391 U.S. at 375, 377-78.

45. For a more detailed explanation of this sort of balancing, see Note, *Attorney Advertising is Commercial Speech Protected by the First Amendment*: Bates v. State Bar, 37 MD. L. REV. 350 (1977).

46. 391 U.S. at 382.

47. *Id.*

strictively by the statutory provision.[48]

The Court upheld O'Brien's conviction because it found "a sufficiently important governmental interest in regulating the nonspeech element" that was "unrelated to the suppression of free expression" and that had only an "incidental restriction on alleged First Amendment freedoms . . . no greater than [was] essential to the furtherance of that interest."[49] The *O'Brien* Court articulated a four-part test by which government regulation of the noncommunicative impact of speech is examined:

> [I]f it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest.[50]

Under this test, a regulation of conduct is constitutional if it has an incidental rather than a direct impact on speech. To uphold a direct restriction on speech, however, it is necessary to prove that the restriction furthers a compelling state interest.[51]

II. First Amendment Analysis as Applied to Commercial Speech

Commercial speech does not fit cleanly into first amendment analysis. Although the Court has never explicitly placed commercial speech within the selected categories of unprotected speech,[52] it has historically treated commercial speech as having very little first amendment value.[53] Early cases did not recognize constitutional protection for commercial speech, even where regulations were directed at its communicative impact.[54] Recently, however,

48. *Id.* "When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted."

49. *Id.* at 376–77.

50. *Id.* at 377.

51. First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978). *See* L. Tribe, *supra* note 15, at 602–08.

52. *See* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429, 431 (1971) (stating that the Court "seems to" apply the protected–unprotected approach to commercial speech). *See also* Bigelow v. Virginia, 421 U.S. 809, 818–19 (1975), where the Court states that it has never included commercial speech in the unprotected categories that it has noted.

53. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942), discussed at notes 56–60 *infra* and accompanying text.

54. *See, e.g.*, Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney Gen., 405 U.S. 1000 (1972) (*mem.*), discussed at notes 136–46 *infra* and accompanying text.

the Court reevaluated the first amendment interests implicated in commercial speech and found that commercial speech contains valuable ideas and information that place it within the ambit of first amendment protection.[55] In its analysis of commercial speech, the Court appears to use elements of both streams of first amendment analysis — communicative impact and noncommunicative impact — while emphasizing the rights of individuals to receive the information.

Valentine v. Chrestensen[56] was the first case to state the commercial speech doctrine. There the Supreme Court refused to enjoin the enforcement of an ordinance that prohibited the distribution of commercial advertising in the streets. The leaflet distributed by the respondent contained two statements: on one side he advertised an exhibit of a submarine, entry to which required the payment of a fee; on the other, he printed a protest against the city for refusing him wharf facilities for the exhibition.[57] The Court held that the first amendment imposed no restraint on government with respect to the regulation of commercial advertising,[58] and that the defendant's ancillary protest against official conduct did not change the character of his speech.[59] Consequently, enforcement of the ordinance was constitutional.[60]

The first step toward the modern theory of commercial speech was taken in *New York Times Co. v. Sullivan*,[61] where the Court distinguished between commercial speech and editorial advertising,[62] and defined commercial speech in terms of its content rather than the speaker's purpose.[63] The *New York Times* ran an advertisement which solicited contributions for the cause of Dr. Martin Luther King and implied that police took unlawful action against participants in the civil rights movement.[64] The Court stated that the publication "communicated information, expressed opinion,

55. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), discussed at notes 78–95 *infra* and accompanying text.

56. 316 U.S. 52 (1942).

57. *Id.* at 53.

58. *Id.* at 54.

59. *Id.* at 55.

60. *Id.* at 54–55.

61. 376 U.S. 254 (1964).

62. *Id.* at 266.

63. The earlier cases were decided on the "primary purpose" test which looked to the purpose of the speech and speaker. If it was a commercial purpose, then the speech was unprotected. *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52 (1942), discussed at notes 56–60 *supra* and accompanying text.

64. 376 U.S. at 256–59.

recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[65] Thus, the Court looked to the advertisement's content rather than the publisher's reason for printing it, and held that speech containing information and opinions on matters generally concerning the public is fully protected by the first amendment, even when it appears in the form of paid advertising.[66] The advertisement was distinguished from a "commercial" advertisement as used in *Valentine*, where opinions were appended to purely commercial advertising for the sole purpose of avoiding the ordinance.[67]

The importance of *Sullivan* is that it classified one form of commercial speech as constitutionally protected. The Court examined the content of the advertisement, and found that it conveyed more than a commercial purpose; because the advertisement contained information of the "highest public interest and concern," it was constitutionally protected.[68] Thus, a new standard was introduced: the content of commercial speech would be scrutinized for publicly useful information, which could bring it within the protection of the first amendment.

The next significant case on the question of commercial speech continued using content analysis. The advertisements in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*[69] were want ads, separated into columns by sex, thereby violating a Pittsburgh ordinance prohibiting the practice of employment discrimination. The Court labelled such advertisements "classic examples" of commercial speech because they did no more than propose a commercial transaction.[70] This content-based analysis then revealed that the sex-separated advertisements did not fall under the protection of the first amendment, for there is a compelling state interest in prohibiting advertisements which promote

65. *Id.* at 266.

66. *Id. See also* Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080, 1089.

67. 376 U.S. at 266.

68. *Id.*

69. 413 U.S. 376 (1973).

70. *Id.* at 385.

> None [of the want ads] 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 does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.

Id.

sex-based discrimination in employment.[71]

After *Pittsburgh Press*, the Court continued to hold that speech was not entitled to first amendment protection merely because it took the form of paid commercial advertisement. The Court, however, departed from its strict content-based analysis and established more flexible standards for deciding when to protect commercial speech. These standards have been used in cases where the speech is initially found to be protected because its content is not purely "commercial" advertising.

The first indication of this new approach appeared in *Bigelow v. Virginia*,[72] where the advertisement in question provided information regarding the availability of abortions in New York. Under Virginia law, publishing such advertising constituted a misdemeanor, and the publisher, Bigelow, challenged his conviction under the statute.[73] The Court began its analysis by noting that advertising may be subject to reasonable regulation serving legitimate public interest—an observation which apparently rejected strict scrutiny, and instead integrated the reasonable basis test traditionally employed for regulations aimed at the indirect impact of speech.[74] One commentator has summarized this new test:

> A government regulation directly suppressing commercial speech is valid if (1) upon a balancing of the various interests, the state's justification prevails under close scrutiny, (2) the regulation substantially furthers a legitimate, albeit not compelling, state purpose, and (3) the regulation, narrowly tailored to accomplish its designed purpose, constitutes the least restrictive alternative.[75]

Applying its new approach in *Bigelow*, the Court held that Virginia's asserted interest in shielding its citizens from activities in

71. The Court also considered whether the editorial judgment used by the paper in the presentation of its advertising was distinguishable from the content of the advertisements, and decided that the presentation was not entitled to first amendment protection. *Id.* at 387. Placing headings over columns of advertising, an exercise of editorial judgment, does not necessarily strip commercial advertising of its commercial nature and bring it within first amendment protection. *Id.* Since nothing in the headings differentiated them from the want ads themselves, the entire package constituted illegal discrimination, and judged on content, the advertisements were not protected by the first amendment. *Pittsburgh Press* thus presents an example of a regulation which, though directed at the communicative impact of speech, is nevertheless allowable because the regulation furthered a compelling state interest—avoiding employment discrimination.

72. 421 U.S. 809 (1975).

73. VA. CODE § 18.1-63 (1960), *construed in* 421 U.S. at 814–15.

74. *See* notes 40–50 *supra* and accompanying text.

75. Roberts, *Toward a General Theory of Commercial Speech and the First Amendment*, 40 OHIO ST. L.J. 115, 126 (1979).

other states did not outweigh the individual's interest in access to useful information brought into the "marketplace of ideas;"[76] thus, the Virginia statute violated the first amendment.[77]

Although *Bigelow* was the first intimation of the Court's new commercial speech doctrine, its decision one year later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[78] stands as the most important of the commercial speech cases. In *Virginia Pharmacy*, the consumers asserted that the first amendment entitled them to any information which pharmacists wanted to communicate to them. Thus, they challenged a Virginia statute[79] prohibiting pharmacists from advertising prices of prescription drugs. Holding that the content of commercial speech is not entirely outside the first amendment,[80] the Court struck down the statute for failing to serve the state's interest in maintaining the professionalism of pharmacists; absent such a compelling state interest, the content of the speech could not be regulated.[81]

Although the Court gave first amendment protection to truthful commercial advertisements, it also reaffirmed the state's authority to regulate time, place, and manner of speech.[82] The state, however, would have to show that, regardless of the content of the

76. The "marketplace of ideas" theory of first amendment protection, as interpreted by the Supreme Court, has had a substantial impact upon the area of commercial speech. The theory holds that discovery of truth justifies and defines the scope of protection given to speech. Using this theory, the rationale behind the first amendment is to promote ascertainment of truth and exposure of falseness. For a critical examination of this concept, see Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978).

77. 421 U.S. at 829.

78. 425 U.S. 748 (1976).

79. *See* VA. CODE ANN. § 54–524.35 (1978) (provision prohibiting advertisements of prices repealed in 1980, *see* VA. CODE ANN. § 54–524.35 (Supp. 7A 1980)).

80. 425 U.S. at 761-62. "If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject . . . . Purely factual matter of public interest may claim protection." *Id.*

81. *Id.* at 769. Virginia defined its interest to include (1) protecting expertise of pharmacists to keep them from becoming mere retailers; (2) supporting the relationship between each pharmacist and his or her customers so that pharmacists could continue to monitor drug consumption of regular customers; and (3) protecting the ability of pharmacists to supply professional services which, in the advent of price competition, would be drastically reduced in order to cut costs. *Id.* at 766–68.

82. Time, place, and manner restrictions were defined in public forum cases where speakers sought to use public facilities which the government must allocate as the public's trustee. *See, e.g.*, Schneider v. State, 308 U.S. 147, 160 (1939) (bans on door-to-door and street distribution of circulars invalidated where governmental purposes could be achieved by less restrictive means). The first amendment requires that time, place, and manner regulation affecting protected expression be imposed without reference to the content of the speech, except in the limited context of "captive audiences." Police Dep't v. Mosley, 408

speech, the regulations both serve a significant government interest and leave open other channels of communication.[83] Thus, the *Virginia Pharmacy* Court did not hold that the state could never regulate truthful commercial advertisements.[84]

In refusing to analyze commercial speech strictly on the basis of its content, as it does with other types of speech,[85] the Court said that "a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired."[86] The Court reasoned that commercial speech may be more "durable" than other types of speech because it is an important factor in making profits, and thus, it is less likely to be chilled by regulation.[87] Furthermore, "the truth of commercial speech . . . may be more easily verifiable by its dissemination than . . . news reporting . . ., in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else."[88] Therefore, the Court concluded, there is not so great a need to give commercial speech the absolute, content-based protection given other types of speech.

Ultimately, the difference in "degree of protection" recognized in *Virginia Pharmacy* means that after initial examination as to content, regulations will be subjected to less severe scrutiny in the subsequent analysis of the state's justification—a scrutiny similar to that given to regulations affecting noncommunicative impact.[89] The Court's analysis in *Virginia Pharmacy* thus continues the "mixed scrutiny" analysis begun in *Bigelow*: refusing to grant full protection based solely on content, but once content is found to be protected, scrutinizing the regulations according to the less strict noncommunicative standard.[90] Herein lies the difference between

U.S. 92, 99 (1972) (because labor picketing had previously been allowed, ordinance prohibiting picketing near school invalidly applied on basis of content).

83. Rotunda, *supra* note 66, at 1097.

84. 425 U.S. at 770-71.

85. *See* notes 14–22 *supra* and accompanying text.

86. 425 U.S. at 772 n.24.

87. *Id.*

88. *Id.*

89. *See* notes 40–51 *supra* and accompanying text.

90. The Court summarized its approach this way:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

commercial speech and other forms of speech. Under the second part of the analysis, regulations may still be found constitutional even though the content of commercial speech enjoys some first amendment protection.

In *Virginia Pharmacy*, the Court granted first amendment protection partly because of the consumer's interest in the free flow of information.[91] After recognizing this interest, the Court inquired into whether the legislature had acted reasonably in passing the statute, and concluded that the statute did substantial harm to the consumer.[92] The Court suggested that before enacting such paternalistic regulations, the legislature must consider the gravity of this harm, the capability of each citizen to bear the burdens created, the number of people harmed and an alternative which the first amendment demands:

> That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists. . . . But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.[93]

The Court also left the state the power to regulate advertisements in the broadcast media,[94] indicating that it might not treat broadcast advertising in the same manner as print advertising.[95]

After *Virginia Pharmacy*, the Court reaffirmed the rule that commercial speech which serves some individual and societal interests in assuring informed and reliable decisionmaking will probably be entitled to some constitutional protection.[96] Subsequently, however, in *Ohralik v. Ohio State Bar Association*,[97] the

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Central Hudson Gas & Elec. v. Public Serv. Comm'n, 100 S. Ct. 2343, 2350 (1980).

91. 425 U.S. at 765.

92. *Id.* at 763.

93. *Id.* at 770.

94. *Id.* at 773.

95. *Id.*

96. *See, e.g.*, Bates v. State Bar, 433 U.S. 350 (1977) (holding that truthful advertising of "routine legal services" is protected against blanket prohibition by a state, but reserving the question of permissible scope of regulation of "in-person solicitation of clients").

97. 436 U.S. 447 (1978).

Court limited the definition of protected commercial speech, while maintaining its theory of commercial speech analysis as developed in *Virginia Pharmacy.*

In *Ohralik*, the Ohio State Bar Association brought disciplinary action against an attorney who solicited personal injury business from two eighteen-year-olds who had been hospitalized as a result of a car accident.[98] The action was heard by the Disciplinary Board of the Ohio Supreme Court, and, subsequently, the Ohio court adopted the Board's findings that the attorney's conduct constituted a breach of certain Disciplinary Rules.[99]

The United States Supreme Court reiterated that the State does not lose the power to regulate commercial activity deemed harmful to the public simply because speech is a component of that activity.[100] The Court found "a legitimate and indeed 'compelling' "[101] state interest in *Ohralik*: because lawyers have special duties as "trusted agents of their clients, and as assistants to the court in search of a just solution to disputes,"[102] the state may prevent attorneys from engaging in "those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.' "[103] The in-person solicitation did not serve "the individual and societal interest, . . . in facilitating 'informed and reliable decisionmaking,' "[104] and therefore it did not qualify for the protection given in *Virginia Pharmacy* to informative commercial speech.

Ohralik exemplifies the Court's present first amendment theory of commercial speech.[105] Content of speech, in this case in-person client solicitation, though protected by the first amendment,[106] is not guaranteed first amendment protection on that basis. Rather, it is subject to a second analysis and a standard of less-than-strict scrutiny. If a court finds a "legitimate," though not necessarily a compelling, state interest in regulating commercial speech, the regulation will be upheld even where it is directed at the content of speech.[107]

98. *Id.* at 449–50.
99. *Id.* at 452–53.
100. *Id.* at 456.
101. *Id.* at 462.
102. *Id.* at 460.
103. *Id.* at 462.
104. *Id.* at 458.
105. *See* Comment, *supra* note 12, at 397–99.
106. *See* Bates v. State Bar, 433 U.S. 350 (1977).
107. 436 U.S. at 455–57.

In sum, the Court has embraced a hybrid theory of first amendment protection in the area of commercial speech. The government may regulate the content of the message where there is a rational basis for doing so. This treatment may allow for regulations that would be impermissible if directed at other forms of speech. However, where listeners' rights to receive information are paramount, all viewpoints must be accorded a reasonable opportunity to be heard. Thus, when commercial speech is protected, it is because of its value to both consumers and society, and government is obliged to allow reasonable means for its communication.

III. BROADCASTING AND THE FIRST AMENDMENT

Although commercial advertising has been held to be constitutionally protected, there are different considerations in the context of the broadcast media.[108] Thus while the commercial speech doctrine protects the advertisement of contraceptives outside the broadcast media,[109] such advertising has been specifically excluded from broadcasts.[110] The constitutionality of this ban must be analyzed in light of more recent developments in the area of broadcasting.

Congress created the FCC in 1934,[111] and its jurisdiction embraces all "wire communications" including both radio and television broadcasts.[112] Congress empowered the FCC to regulate broadcasting "as public convenience, interest, or necessity requires,"[113] thereby giving the FCC a broad mandate to regulate many facets of the broadcast industry, including advertising.[114]

Broadcast regulation arose from the early need to monitor the distribution of the available broadcast frequencies so as to prevent interference among them. From this narrow rationale, however, a doctrine developed whereby those who were permitted to use the public airwaves were selected on the basis of criteria and sub-

108. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 773; *see generally* Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 233–35, 251–53 (1976).

109. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). *See* note 157 *infra* and accompanying text.

110. *See In re* Knickerbocker Broadcasting Co., 2 F.C.C. 76 (1935) (FCC found contraceptive advertising on the radio to be "unconscionable").

111. Communications Act of 1934 § 1, 47 U.S.C. § 151 (1976).

112. 47 U.S.C. § 153 (1976).

113. *Id.* § 303.

114. *Id.* § 303(g), (i), (r). *See* National Broadcasting Co. v. United States, 319 U.S. 190 (1943) discussed at notes 115–28 *infra* and accompanying text.

jected to controls that would be unacceptable under the first amendment if applied to the print media.

A. *Development of FCC Regulatory Power*

In *National Broadcasting Co. v. United States*,[115] NBC sued to enjoin FCC enforcement of regulations concerning "chain broadcasting," or the simultaneous broadcasting of an identical program by two or more affiliated stations.[116] At issue was whether Congress had authorized the FCC to exercise the power asserted by the chain broadcasting regulations, and if it had, whether the Constitution prohibited such delegation of legislative authority. In support of the regulations, it was argued that the duties of the FCC include both ensuring that the public receives the benefits of broadcast facilities, and eliminating any practices adversely affecting the ability of the licensee stations to operate in the public interest.[117]

The importance of the *NBC* decision lies in Justice Frankfurter's statement of the constitutionality of the comprehensive regulatory powers granted by Congress to the FCC.[118] Congress did not authorize the FCC to choose among license applicants on the basis of broadcast content,[119] but rather gave the Commission a fixed standard of "public interest, convenience or necessity."[120] The Court examined the regulations and, finding them to be within the statutory criterion of public interest, held that the denial of licenses under this standard did not constitute a denial of free speech.[121] Therefore, the FCC was within its delegated authority.

In *NBC* the Court applied a traditional first amendment analysis to the regulations. Finding that content was not the object of the regulation, the Court applied the noncommunicative impact test with its lower standard of scrutiny. The Court recognized that because the licensing agency necessarily excluded some speakers from the broadcast media, its licensing standard necessarily had some impact on speech. Nevertheless, the Court found a legiti-

115. 319 U.S. 190 (1943).

116. *Id.* at 193 (construing 47 U.S.C. § 153(p) (1976)).

117. *Id.* at 196–98 (discussing the 1941 Report of the FCC on chain broadcasting).

118. *Id.* at 216–17.

119. "But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis." *Id.* at 226.

120. *Id.* at 227.

121. *Id.* at 226–27.

mate state interest, ensuring a wider program selection to the general public, which was sufficient to uphold the regulations.[122] Thus, the Court supported the FCC's determination that those who engaged in specified network practices, such as chain broadcasting, were acting contrary to the public interest, convenience, or necessity.[123]

Even though it held that the FCC licensing standard, and the regulations promulgated thereunder, were constitutional, the Court also articulated a second reason for strict regulation of the broadcast media: the scarcity rationale. The Court reasoned that the limited facilities of radio, unlike other modes of expression, were not available to everyone. Thus, by definition, freedom of speech was denied to many who desired media access.[124] The Court found this denial to be radio's "unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied."[125]

The Court's scarcity rationale is premised on the limited number of frequencies available for use by those who wish to broadcast — not everyone can physically be accommodated. The government must bring order into the arena of broadcasting by regulating access to these limited facilities.[126] The *NBC* Court acknowledged this premise,[127] and opined that such regulation was not limited to the technical aspects of broadcasting, but extended to the composition of the broadcast traffic itself.[128]

This scarcity rationale is still used to justify extensive regulation of the broadcast media; for example it has been used to regulate the conduct of broadcasters.[129] It has been held that the right

122. *Id.* at 227.

123. *Id.* at 224–26.

124. *Id.* at 226.

125. *Id.*

126. One author has stated that this argument is based on two fallacies. First, economic, not technical, restrictions limit the saturation of the radio broadcast spectrum. Second, because there are more radio and television outlets than there are newspapers, the former offer *more* opportunities for expression. Robinson, *The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 88 (1968).

127. 319 U.S. at 213.

128. *Id.* at 215–16.

129. In one case, the author of a book was personally attacked in a radio broadcast, and the radio station refused to grant him reply time. The Court, relying on the scarcity rationale, held that broadcasters must grant reply time because there is an affirmative obligation on the broadcaster to see that both sides of issues are presented. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375–79 (1969). As used in this Note, the term

of free speech for broadcasters does not embrace the right to block out the free speech of others,[130] for it is the right of the viewers or listeners which is paramount. It seems that the public has a right to have the media function consistently with the ends and purposes of the first amendment.[131] Due to the scarcity of frequencies[132] and public ownership of the airwaves, the government can affirmatively promote diversity by regulating access in the public interest.[133] The broadcaster as an individual has only the first amendment rights of a "proxy or fiduciary,"[134] with an obligation "to present those views and voices which are representative of his community"[135] so as to alleviate the problems of scarcity.

B. *Regulation of Advertising in the Broadcast Media*

Capital Broadcasting Co. v. Mitchell,[136] a challenge to the FCC's ban on cigarette advertisements from the electronic communications media, provides a convenient point of departure for analysis of advertising on the public airwaves. In *Capital*, the court upheld the ban, reasoning that product advertising was less vigorously protected by the first amendment than other speech.[137] The court also cited *NBC* for its view that the uniqueness of the electronic media makes it "especially subject to regulation in the public interest."[138]

According to the court, the ban did not deprive Capital of any

"broadcaster" means those who manage broadcasting facilities and are responsible for what is seen or heard by the public.

130. *Id.* at 387. The Court analogized the ability of the government to limit the use of broadcasting equipment to its ability to limit the use of sound amplifying equipment which drowns out civilized private speech. *See* Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding a municipal ordinance forbidding the use of sound trucks which emit "loud and raucous noises").

131. 395 U.S. at 390. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by government itself or a private licensee." *Id.*

132. One commentator has noted that scarcity should not be measured by the number of stations that are allowed to broadcast, but by the number of individuals or groups who wish to use the facilities, or would use them if they were more readily available. This conception of scarcity would be labelled scarcity of opportunity, not scarcity of frequencies. T. EMERSON, *supra* note 8, at 662.

133. 395 U.S. at 388–90.

134. *Id.* at 389.

135. *Id.*

136. 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney Gen., 405 U.S. 1000 (1972) (*mem.*).

137. *Id.* at 584. This argument has been considerably weakened by more recent commercial speech cases. *See* notes 72–107 *supra* and accompanying text.

138. 333 F. Supp. at 584.

first amendment rights; the network could still air its views on cigarettes. The network lost only the opportunity to collect revenue from cigarette advertising.[139] Thus, the ban had only a noncommunicative impact on the right of free speech and, accordingly, required only a rational basis to meet the test of constitutionality.[140]

The court explained that there is a rational basis for the congressional ban on cigarette advertisements over broadcast facilities, even though such advertisements are allowed in print.[141] First, broadcast advertisements are more persuasive, and the audience for them consists largely of young people.[142] The government has a reasonable interest in regulating advertising to which young people are exposed.[143] Second, since the airwaves are publicly owned, radio and television may be rationally distinguished from other, privately owned, media.[144] Broadcast facilities must therefore operate in the public interest. The court implied that the government must guard the public interest by promulgating regulations concerning broadcast advertising:[145] "Thus, Congress had information quite sufficient to believe that a proscription covering only the electronic media would be an appropriate response to the problem of cigarette advertising."[146] Congress, therefore, could prohibit such advertisements in the public interest.

The public interest, however, may dictate *not* regulating advertising. Justice White, in *Red Lion Broadcasting Co. v. FCC*,[147] maintained that the public's right to know extended first amendment protection to the broadcast industry: "It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here.[148] This statement implies that broadcast messages which provide information needed by the public to make knowledgeable decisions should not be restricted. This concept, however, does not undercut the rationale for the *Capital* decision — cigarette advertise-

139. *Id.*

140. *Id.* at 585.

141. 333 F. Supp. 582, 585 (1971).

142. *Cigarette Labeling and Advertising—1969: Hearings on H.R. 643, 1237, 3055 & 6543 Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 456–57 (1969) (statement of Paul Rand Dixon, chairman of the FTC).

143. *See also* Note, *supra* note 108, at 247.

144. 333 F. Supp. at 586. *See also* Kunz v. New York, 340 U.S. 290, 293–94 (1951).

145. *See* H.R. REP. No. 281, 88th Cong., 1st Sess. 31 (1963).

146. 333 F. Supp. at 586.

147. 395 U.S. 367 (1969).

148. *Id.* at 390.

ments, as they were then aired, contained no information useful to the public in making consumer decisions,[149] and the state interest in reducing the hazardous effects of smoking could prevail in the balance. Still, in other areas, such as contraceptives, the public's right to information may be more substantial.

C. *Contraceptive Advertising as Commercial Speech in the Broadcast Media*

Certain types of product advertisements do not appear in the broadcast media. The National Association of Broadcasters (NAB), a self-regulating body, promulgates restrictions on some advertising subjects. Advertising standards are set forth in both its Television Code[150] and its Radio Code.[151] Unlike the ban on hard liquor advertising, the Codes do not specifically ban contraceptive advertising.[152] Contraceptive advertising is probably classified under the personal products subsection which requires that advertisements for personal products conform to a general standard of good taste.[153]

The FCC has traditionally concerned itself with excessive advertising, ruling infrequently on the advertising of particular products;[154] in the case of liquor advertising for example, the FCC has confined itself to approval of the NAB's self-regulatory standards.[155] The FCC, however, has ruled on the subject of contraceptive advertising.

In re Knickerbocker Broadcasting Co. [156] determined that a radio advertisement for contraceptives was both offensive and con-

149. In 1969, the Public Health Smoking Act banned cigarette advertisements in the electronic media, 15 U.S.C. § 1335 (1976). Notably, the Department of Health, Education and Welfare and the Federal Trade Commission had recommended that consumer information, such as tar and nicotine content, be included in all cigarette advertisements. S. REP. No. 91-556, 91st Cong., 2d Sess. 21 (1969), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 2652, 2655-57.

150. NAB, The Television Code 4-15 (20th ed. 1978) [hereinafter cited as Television Code].

151. NAB, The Radio Code 13-18 (21st ed. 1978). All references are to the Television Code because the advertising regulations are substantially identical.

152. Television Code, *supra* note 150, § IX, ¶ 7.

153. "Because all products of a personal nature create special problems, acceptability of such products should be determined with special emphasis on ethics and the canons of good taste. Such advertising of personal products as is accepted must be presented in a restrained and obviously inoffensive manner." *Id.* § IX, ¶ 11.

154. Robinson, *supra* note 117, at 109.

155. *See Developments in the Law — Deceptive Advertising*, 80 HARV. L. REV. 1005, 1155 (1967).

156. 2 F.C.C. 76 (1935).

trary to the public interest. The FCC has neither overruled this decision nor deferred to regulations from the NAB.

The Supreme Court's decision in *Carey v. Population Services International*,[157] however, may undercut the *Knickerbocker* decision. *Carey* is the sole commercial speech case in which the Supreme Court directly addressed the contraceptive advertising controversy. Population Planning Associates, Inc. (PPA), one of the appellees with Population Services International, is a North Carolina mail order firm which sold nonprescription contraceptives to customers of any age. The firm advertised in New York, which had a law prohibiting the sale of contraceptives to persons under the age of sixteen.[158] The statute permitted only licensed pharmacists to sell or distribute contraceptives, but forbade them from advertising or displaying these products in any manner.[159] Addressing this prohibition of contraceptive advertising, the Court invoked *Virginia Pharmacy*, which, it was maintained, prevents states from completely suppressing the dissemination of truthful information regarding a lawful activity "even when that information could be categorized as 'commercial speech.' "[160] According to the Court, "the prohibition of any advertisement or display of contraceptives that seeks to suppress completely any information about the availability and price of contraceptives cannot be justified. . . ."[161]

The Court's analysis of the state's interests[162] indicates that it applied the traditional first amendment "strict scrutiny" standard to the state's ban on contraceptive advertising.[163] The state's arguments were that the advertisements were offensive, that such advertisements would incite illicit behavior in minors, and that such advertisements would lead the state's minors to believe that the state endorsed their sexual activity.[164] The Court held these argu-

157. 431 U.S. 678 (1977).

158. N.Y. EDUC. LAW § 6811(8) (McKinney 1972). The Court held that the statute's restrictions on sales to minors violated constitutionally protected rights of decisionmaking in matters of childbearing because the state did not demonstrate a compelling interest. 431 U.S. at 690–91.

159. 431 U.S. at 690–91.

160. *Id.* at 700.

161. *Id.* at 679.

162. The Court referred to the "substantial individual and societal interests" in the suppressed information. *Id.* at 700–01.

163. Justice Brennan noted: "Appellants contend that advertisements of contraceptive products would be offensive and embarassing to those exposed to them . . . [b]ut these are classically not justifications validating the suppression of expression protected by the First Amendment." 431 U.S. at 701. *See also* Comment, *supra* note 12, at 389–90.

164. 431 U.S. at 707.

ments failed to justify the total suppression of contraceptive advertising:[165] "[W]here obscenity is not involved, [the Court has] consistently held that the fact that protected speech may be offensive to some does not justify its suppression."[166] Furthermore, none of the advertisements were "directed to inciting or producing imminent lawless action," nor were they "likely to incite or produce such action;"[167] the advertisements "merely state the availability of products and services that are not only entirely legal, but constitutionally protected."[168] Since New York did not demonstrate a compelling state interest for regulating the advertising of contraceptives, the Court held the New York statute unconstitutional.[169]

Virginia Pharmacy seems still to be the most important decision concerning commercial speech even though it was decided before *Carey*, since it gave the most expansive definition of the term and since the Court noted it was *not* holding that commercial speech can never be regulated in any way.[170] It is this latter pronouncement that has been applied in later cases.[171] The advertising in *Carey* fits into the category of commercial speech serving some societal interest in informed decisionmaking, the category held to be constitutionally protected in *Virginia Pharmacy*.[172] The information suppressed by the New York statute was related to activity in which, "at least in some respects, the State could not interfere,"[173] — the "fundamental rights" of privacy[174] and con-

165. *Id.* at 701–02. On the question of advertising restrictions, Justice Powell, in concurrence, noted that carefully tailored restrictions may be especially appropriate for contraceptive advertisements on television and radio. "The Court does leave open the question whether this or other state interests would justify regulation of the time, place or manner of such commercial advertising. In my view, such carefully tailored restrictions may be especially appropriate when advertising is accomplished by means of the electronic media." *Id.* at 712 n.6 (Powell, J., concurring).

166. *Id.* at 701. *See* Cohen v. California, 403 U.S. 15 (1971), discussed at notes 22–37 *supra* (refusing to classify a four-letter word on the back of a jacket in a public courthouse as a "fighting word").

167. 431 U.S. at 701. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (reversing the conviction of a Ku Klux Klan leader under Ohio's Criminal Syndicalism statute).

168. 431 U.S. at 701.

169. *Id.* at 700–01.

170. 425 U.S. 748, 770 (1976).

171. *See, e.g.*, Ohralik v. State Bar Ass'n, 436 U.S. 447 (1978); *see also* notes 97–104 *supra* and accompanying text.

172. 431 U.S. at 700.

173. *Id.* at 701 (citing *Virginia Pharmacy*, 425 U.S. at 760).

174. *See* Roe v. Wade, 410 U.S. 113, 152 (1973) (holding that a woman's right to decide whether or not to end a pregnancy is fundamental, encompassed by the right of privacy).

traception.[175] *Carey*, then, leads to the conclusion that informed decisionmaking with regard to constitutional rights should be protected because the Court stated that the consumer's right to information concerning marketed contraceptives must be considered in determining whether a regulation abridges the first amendment.[176]

Still, commercial speech is treated differently in the broadcast media. There are established rationales for the special treatment of broadcasting — and hence broadcast advertising — which must be considered, including the scarcity of broadcast frequencies[177] and, as recently announced, the intrusiveness of the broadcast media.

It is the intrusiveness rationale which could have the greatest impact on broadcast advertising of contraceptives, for it arose from an allegedly "offensive" broadcast. *FCC v. Pacifica Foundation*[178] involved the afternoon radio broadcast of a satire on profanity, including words that the public may find offensive. Although the Court did not mention the scarcity rationale employed in *NBC*, it relied upon the intrusiveness rationale for the first time: "the broadcast media have established a uniquely pervasive presence in the lives of all Americans;"[179] and "prior warnings cannot completely protect the listener . . . from unexpected program content."[180]

Justice Stevens, writing for the Court, stated that offensive material broadcast on the radio confronted the citizen at home "where the individual's right to be left alone plainly outweighs the First Amendment rights of the intruder,"[181] and the option of turning off an offensive broadcast "does not give . . . a constitutional immunity."[182] The Court justified the regulation of broadcasts containing profanity, a traditionally disfavored form of speech,[183] on two grounds: first, the broadcast media are readily

175. *See* Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972) (invalidating a regulation making contraceptives less available to unmarried than to married couples, stating that if "the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

176. 431 U.S. at 700–01. *See* notes 91–93 *supra* and accompanying text.

177. *See* notes 86–100 *supra* and accompanying text.

178. 438 U.S. 726 (1978).

179. *Id.* at 748.

180. *Id.*

181. *Id.*

182. *Id.* at 749. Justice Stevens drew an analogy: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." *Id.* at 748–49.

183. *Id.*

accessible to children, and the state has an interest in the well-being of its youth; second, there is a need to support the "parents' claim to authority over their own household."[184]

Carey, however, may dictate a different result for contraceptive advertising. That case established that the right to receive information concerning contraceptives is constitutionally protected. Moreover, the Court's invalidation of the statute, which prohibited the sale of contraceptives to persons under sixteen may imply that age cannot be a legitimate barrier to receiving commercial information regarding contraceptives. Hence, parents cannot control access to contraceptives through state regulations requiring parental consent for their distribution,[185] and, arguably, the state's interest in the well-being of its youth does not outweigh the individual's right to use contraceptives. Therefore, the two major justifications for the intrusiveness doctrine, which supported *Pacifica* are much weaker under *Carey's* implications. Intrusiveness as a justification for prohibiting commercial advertising of contraceptives in the broadcast media should not survive a constitutional challenge.

The Court in *Carey* ruled that the content of contraceptive advertising may not be regulated,[186] unless the state demonstrates a compelling state interest for doing so.[187] Still, the commercial speech cases have held that once speech has been cleared on content, the courts should proceed to scrutinize the regulation with a less strict standard.[188] Similarly, in the broadcast area, the courts use the congressionally given standard of regulation, and subject FCC regulations to a rational basis test.[189] Thus, the less strict

184. *Id.* at 747.

185. In *Carey*, a plurality of justices felt that since a state can not require parental consent for minors choosing to abort, "the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed." 431 U.S. at 694.

186. *Id.* at 700–01. The FCC, however, can regulate the form of advertising because of its noncommunicative impact. For example, the short length of advertisements and the need to compete with other commercials for consumer attention has led advertisers to design advertisements to make an immediate impact. Advertisers use techniques such as loud music, which may be offensive to some individuals. Comment, *supra* note 7, at 439. The FCC is already empowered to regulate offensive advertising techniques, using the standard of public convenience, interest, and necessity. *See* notes 79–100 *supra* and accompanying text. The FCC may regulate these aspects of advertising because they have a noncommunicative impact on speech.

187. 431 U.S. at 686.

188. *See* notes 106–07 *supra* and accompanying text.

189. *See* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (1971), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney Gen., 405 U.S. 1000 (1972) (*mem.*), discussed at text accompanying notes 136–46 *supra*.

standard is used for both commercial speech and broadcasting.

In a case involving contraceptive advertising, the FCC would have to show at least a reasonable state interest to justify prohibiting the broadcast. This showing, however, is made difficult by *Carey* because the most frequently asserted state interests were dismissed as neither reasonable nor compelling.[190] One interest that might be asserted for the prohibition of broadcast contraceptive advertisements is the need to protect minors. In *Carey*, however, the Court summarily rejected this asserted interest[191] even though, in *Capital*, it was the primary reason for the removal of cigarette advertisements from the air.[192] Although *Carey* did not specifically address the problems of the broadcast media, its assumption — that the protection of minors from the effects of contraceptive advertisements was not a compelling state interest — certainly weakens the *Capital* rationale that protection of minors justifies banning certain advertising from the airwaves when such advertising is deemed harmful to the nation's youth.[193]

It seems clear, then, that so long as contraceptive advertisements cannot be characterized as "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action,"[194] they should be constitutionally protected; there is no apparent reason for the courts or the FCC to prohibit the advertising of contraceptives in the broadcast media. The FCC may regulate only the noncommunicative aspects of advertisements to make them conform to the generally accepted standards of broadcast media advertising. Thus, it should not use its power to prohibit the advertisements because of their content.

IV. CONCLUSION

Commercial speech has developed from an unprotected form of speech to one which is afforded some, although not full constitutional protection. In framing advertising regulations, the state may generally refer to the content of the message where there is a rational basis for doing so; however, where the listeners' rights to receive information are paramount, all views must be given a rea-

190. 431 U.S. at 690–91.

191. 431 U.S. at 701. The Court dismissed this reason as "classically" not a justification for validating a regulation of speech.

192. *See* notes 136–46 *supra* and accompanying text.

193. In *Capital*, the district court said that the government's interest in protecting its youth from the persuasiveness of broadcasting advertisements for cigarettes constituted a rational basis for banning such advertisements from the airwaves. 333 F. Supp. at 585–86.

194. 431 U.S. at 701.

sonable opportunity to be heard. When commercial speech is protected, it is because of its value to consumers.

Similarly, broadcasting has been subjected to regulations to which the courts have applied less-than-strict scrutiny. Yet, as in commercial speech, broadcasting may not be curtailed when the broadcast adds to the information needed by the public to make knowledgeable decisions.

Regulations prohibiting the broadcast of advertisements for contraceptives which conform to the generally imposed standards for other broadcast advertisements, should not survive a constitutional challenge. The right of an individual to receive information concerning contraceptives regardless of his or her age has been established, and the rationales previously used for validating restrictions on the broadcast media have been accordingly weakened. Neither a compelling nor a reasonable state interest has been articulated for justifying the prohibition of advertisements for contraceptives from the broadcast media.

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