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THE BURGER COURT AND INDIVIDUAL RIGHTS: COMMERCIAL SPEECH AS A CASE STUDY

Robert E. Riggs*

I. INTRODUCTION

If judicial liberalism is identified with concern for preserving individual rights against governmental encroachment, the Burger Court has by no means been illiberal. The school desegregation cases, the judicial assault on sex-based discrimination, and a host of other decisions attest to its liberalism. Nor has the addition of four Nixon appointees made judicial activism a thing of the past. While some Burger Court decisions reflect a willingness to leave controversial social issues to the political processes,1 others—such as the abortion cases—find the court resolving great social issues with only the vaguest constitutional warrant. The dominant aspect of the Court's performance is neither conservatism nor judicial restraint, but the absence of a strong sense of direction.2

Particularly when compared with the Court during the Warren years, which is the most commonly used yardstick, the Burger Court appears uncertain of where it is going. No ideological bloc dominates the Court. Justice Rehnquist is consistently more conservative than the others, particularly in his deference to state legislatures. Justices Brennan and Marshall vote a consistently liberal point of view that includes equality, individual rights, and governmental aid for the un-

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2. One recent commentator stated, "Overall, the picture of the Burger Court's jurisprudence is one of ad hoc, episodic decision-making. Sometimes a more conservative point of view prevails, sometimes a more liberal. Here there is a decision to abdicate an issue to the political process, there a willingness to rush in and supply a judicial solution." Howard, Pragmatism, Compromise Marks Court, NAT'L L.J., Feb. 18, 1980, at 28, col. 3.
derdog. The other justices are scattered at intermediate points along the ideological continuum, the precise locations varying with the nature of the issue and apparently over time as well. A penchant for pragmatism rather than ideology may be a more appropriate characterization of their judicial behavior. The overall result is nine strong men pulling in different directions. The splintering effect of ideological diversity might be mitigated by agreement on common principles of constitutional interpretation or even by a strong commitment to stare decisis, but in recent years there has been precious little of either. It is understandable that such a Court seems uncertain of its institutional direction.

Another circumstance, largely beyond the control of the Court, greatly magnifies the impact of the Court's pragmatism and ideological heterogeneity. Though some justices might be philosophically inclined toward judicial restraint, the litigation explosion of recent decades demands that the Court consider a wide range of disputes that in bygone decades would have been resolved in the political arena. Once the civil rights groups demonstrated that political losers might become win-

3. Maltz lists 47 cases decided from 1960 to 1979 where the Supreme Court overruled a previous decision—23 in the last ten years of the Warren Court and 24 since Chief Justice Burger assumed office. His list "does not include those instances in which the Court has harmonized its decisions with earlier case law only by a strained reading of prior cases, or where the Court has simply ignored precedent which strongly suggested a contrary result." Maltz, Some Thoughts On The Death Of Stare Decisis In Constitutional Law, 1980 Wis. L. Rev. 467, 494-96. This contrasts with 28 precedents overruled by the Supreme Court from the founding of the Republic to 1932, as tabulated by Justice Brandeis in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-11 (1932) (Brandeis, J., dissenting). Of the recent decline of stare decisis, Maltz comments, "It seems fair to say that if a majority of the Warren or Burger Court has considered a case wrongly decided, no constitutional precedent—new or old—has been safe." Maltz, supra, at 467.

4. The internal differences are reflected in the increased output of separate opinions by the Burger Court. In its last ten years, the Warren Court produced 1139 full opinions of the Court, 424 concurring opinions, and 866 dissenting opinions. With the increased number of full opinions, more dissents and concurrences might be expected, but the Burger Court output has increased more than proportionately. During the last ten years of the Warren Court, concurring and dissenting opinions exceeded the number of full court opinions by 13.3%; the figure for the Burger Court was 41.3%. Data are from tables in the Supreme Court survey published annually in the Harvard Law Review. See also Frank, The Burger Court—The First Ten Years, 43 Law & Contemp. Prob. 101 (Summer 1980), which attributes this phenomenon to slightly different causes. "Partly, the flood of pages is due to clerks turning in law review articles to their superiors, but the rain of concurrences and dissents is also due to the absence of time to reason together." Id. at 123-24. Frank also recognizes the effect of ideological differences. Id. at 128-29.
ners in the judicial forum, the lesson could not be unlearned. The litigious society had come to stay. This expanding demand for judicial problem-solving further exaggerates the centrifugal pressures generated by the Court's lack of consensus on consistent modes of constitutional interpretation, ideology or substance. These conditions help to explain the somewhat unsteady course of the High Court during the past decade.¹

II. INDIVIDUAL RIGHTS: AN APPRAISAL

An established means of assessing the overall record of past Courts has been to explore their attitude towards individual rights. That approach will now be briefly undertaken to provide necessary reference points for comparison with the Burger Court's treatment of commercial speech.² As the following survey shows, the record is one of vacillation and uncertainty. In addition, the elan and the liberal image of the Warren Court in this area are missing. Nevertheless, the status of individual liberties during the Burger era is far from the disaster that some critics have alleged.³ The net result

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¹ Nowak, on the contrary, finds a consistent pattern in the Burger Court's behavior. "[A]t least since its transition period ended in 1973 or 1974," it represents a "Court which is dedicated to the promotion of a libertarian political philosophy." By "libertarian" he means "a political philosophy which places freedom of the individual above values of egalitarianism or fairness . . . . Today the position is often called conservatism and associated with economists as often as philosophers." Nowak, Foreword: Evaluating the Work of the New Libertarian Supreme Court, 7 Hastings Const. L. Q. 263, 284-85 (1980). For another attempt to find a pattern in the decisions, see Marks & Greenwood, The Burger Court and Substantive Rights, An Analytical Approach, 57 U. Det. J. Urb. L. 751 (1980).

² At first blush the characterization of commercial speech as a species of "individual" rights may appear anomalous, since commercial advertising in the United States is primarily the province of business corporations. The characterization, however, is appropriate for a number of reasons. Corporations have long been treated as "persons" within the meaning of the fourteenth amendment guarantees of due process and equal protection. See Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886). The Court has recently reaffirmed that corporations as well as natural persons are protected by first amendment guarantees of individual freedom of expression. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). Natural persons can and do engage in commercial speech. Furthermore, first amendment protection of commercial speech, as other speech, is premised not only upon the speaker's rights but also upon the rights of the recipients. See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976).

may still fall on the side of increased protection for the rights of individuals. 8

In dealing with school desegregation, the Burger Court moved well beyond the decision of the Warren years. The Court implemented desegregation with firmness in the South and extended the mandate to northern school districts where purposeful discrimination, historically, was not statutorily mandated. 9 This broad advance was tempered by several limitations placed upon the reach of judicial desegregation decrees. Specifically, the Court banned bussing beyond the boundaries of the offending district, 10 refused to require annual readjustment of school zones to compensate for normal population migration, 11 and refused to order desegregation in any district unless intentional discrimination was shown. 12

In dealing with other questions of racial equality, the Court's record is somewhat more equivocal. The Court was generally unwilling to apply judicial scrutiny in situations where racial minorities appeared to be placed at a disadvantage by the effect, but not the purpose, of a local regulation. Thus standardized police examinations 13 and local zoning ordinances 14 were upheld though their effect was

8. See, Choper, The Burger Court: Misperceptions Regarding Judicial Restraint and Insensitivity to Individual Rights, 30 Syracuse L. Rev. 767 (1979). With extensive case citations, Professor Choper argues that the Burger Court has not been insensitive to individual rights, although less sympathetic than the Warren Court. Mishkin is even more forthright: "In my judgment, the present Court has shown itself to be clearly committed on the side of efforts to achieve racial and sexual equality." Mishkin, Equality, 43 Law & Contemp. Prob. 51, 64 (Summer 1980). And, more broadly, Swindler asserts, "This writer believes that the record of the Burger Court, both in the areas of constitutional decision making and the administration of the nation's courts, will show more continuity than contrast with the Warren Court." Swindler, The Burger Court, 1969-1979: Continuity and Contrast, 28 Kan. L. Rev. 99, 100 (1979).


disproportionately to exclude minorities from public service and from certain residential neighborhoods.\textsuperscript{15} In a situation of "reverse discrimination," the Court used the equal protection clause to outlaw racial quotas favoring minorities in medical school admission policies, but not to prevent the consideration of race as a factor in admissions.\textsuperscript{16} In contrast to this equivocation, the Court was generous in upholding statutory preferences for minorities regarding employment,\textsuperscript{17} voting rights,\textsuperscript{18} and procurement contracts for federally funded local public works.\textsuperscript{19}

The sex discrimination cases demarcate another area where the Burger Court substantially broadened the constitutional protection of individual rights. By elevating sex-based classifications to a level requiring heightened judicial scrutiny, the Burger Court by judicial fiat accomplished much of what equal rights proponents hope to do through a constitutional amendment.\textsuperscript{20} The early Burger Court decision of Reed v. Reed,\textsuperscript{21} invalidating an Idaho law giving preference to male applicants for letters of administration, was the first Supreme Court decision to hold a sex-based classification in violation of the equal protection clause. This initial commitment to sexual equality was reiterated in decisions invalidating sex-based classifications involving military benefits,\textsuperscript{22} minimum age for the purchase of intoxicants,\textsuperscript{23} age of majority,\textsuperscript{24} jury selec-

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\item \textsuperscript{15} The search for discriminatory purpose had long preceded the Burger Court. See Strauder v. West Virginia, 100 U.S. 303 (1880).
\item \textsuperscript{16} University of California Regents v. Bakke, 438 U.S. 265 (1978). See also Palmer v. Thompson, 403 U.S. 217 (1971), where the closing of public swimming pools in Jackson, Mississippi, following a court order to desegregate, was held not to violate equal protection.
\item \textsuperscript{19} Fullilove v. Klutznick, 448 U.S. 448 (1980).
\item \textsuperscript{20} "Nearly eight years after its submission to the states, the ERA has yet to be adopted, but the effort to obtain an interpretation of the equal protection clause prohibiting gender discrimination by government has been sufficiently successful to raise a serious question whether adoption of the ERA would serve any but a symbolic purpose. Significantly, the doctrinal development has occurred entirely during the past decade." Sandalow, \textit{Federalism and Social Change}, 43 \textit{Law \\& Contemporary Prob.} 29, 31-32 (Summer 1980).
\item \textsuperscript{21} 404 U.S. 71 (1971).
\item \textsuperscript{22} Frontiero v. Richardson, 411 U.S. 677 (1973).
\item \textsuperscript{23} Craig v. Boren, 429 U.S. 190 (1976).
\end{itemize}
tion, adoption laws, award of alimony, management of community property, and entitlement to various public benefits. Employment discrimination against pregnant women was also struck down. In Title VII cases, the Court invalidated height and weight standards for prison guards as discriminatory and banned discrimination in awarding retirement benefits. The few sex-based classifications that have survived the Court's heightened scrutiny have generally shown preference to women.

The sex discrimination cases show a degree of consistency unusual for the Burger Court. Perhaps more typical are the equal protection decisions relating to alienage and illegitimacy. In a 1971 decision, Graham v. Richardson, the Burger

33. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). In Manhart, the Court required the pension fund to award equal benefits to men and women in disregard of actuarial tables showing that women, as a class, live longer and therefore receive pension payments for a longer time than men; see also Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), involving male employees of the state of Connecticut.
35. 403 U.S. 365 (1971).
Court held that classifications based on alienage are inherently suspect and subject to strict judicial scrutiny. There, the Court struck down a state law denying welfare benefits to aliens. Subsequently the Court invalidated state laws excluding non-resident aliens from the practice of law, from permanent employment in the state classified service, and from eligibility for state scholarships. Recent decisions, however, carved out an exception to strict scrutiny by permitting the states "to exclude aliens from participation in its democratic political institutions." Under this exception, aliens were denied the right to be employed as New York state troopers and as teachers in New York state public schools. Such decisions mark a retreat from strict scrutiny, but only in terms of a departure from the high standard set by the Burger Court in *Graham*.

The Court has pursued an uncertain course in dealing with illegitimacy. The Court's wavering approach is attributable to its intermittent desire to accord illegitimate children a greater degree of protection from discriminatory state action than that afforded by a mere rationality requirement, juxtaposed with its refusal to label illegitimate children as a suspect class. The failure of the Court to articulate the proper standard of review for classifications based on illegitimacy has led to irreconcilable holdings. In *Labine v. Vincent*, the Court permitted the rights of acknowledged illegitimate children to be subordinated to those of legitimate children in matters of intestacy, while in *Weber v. Aetna Casualty & Surety Co.*, the death benefit claims of illegitimate children could not be so subordinated. Similarly, while New York may deny an illegitimate child the right of intestate succession from the

39. 413 U.S. at 648. This exclusion is known as the *Dougall* exception.
42. In contrast to state legislation, the Court has applied an extremely deferential standard of review to congressional enactments relating to aliens, on the theory that constitutional responsibility for regulating the status of aliens is committed to the political branches of the national government. See *Matthews v. Diaz*, 426 U.S. 67 (1976).
child's father in the absence of a judicial order of filiation issued during the father's lifetime, Illinois may not deny an illegitimate child the right to inherit by intestacy from the child's father.

The abortion and contraception cases revealed the Court's most liberal and active posture as substantive due process was resurrected to protect certain non-economic, personal liberties. Even here, however, the Court struggled to find limits to the newly found rights of privacy and autonomy. The Warren era decision of *Griswold v. Connecticut* initiated this development with its discovery of emanations from the Bill of Rights that barred states from penalizing the use of contraceptives. The Burger Court gave momentum to the concept by overturning a criminal conviction for the distribution of contraceptives, and then vastly expanded the rights of privacy and autonomy in a series of abortion cases beginning with *Roe v. Wade*. The Burger Court found the Constitution to prohibit most state regulation of abortions prior to the third trimester, including state requirements concerning residence, use of an accredited hospital and approval by a hospital staff committee, consent of parent or husband, and state efforts to protect, by means of criminal penalties, a potentially viable aborted fetus. The Court, however, fell short of finding a constitutional right to a publicly funded abortion.

The rights of privacy and autonomy were applied outside the narrow area of abortion and contraception to other as-

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48. 381 U.S. 479 (1965).
51. *Id.*
pects of family relations. Privacy grounds were used to strike down an East Cleveland zoning law that forbade a grandmother from sharing her home with two grandsons who were first cousins. A similar rationale supplemented the Court’s equal protection reasons for invalidating a Wisconsin prohibition on marriage by any resident failing to meet current child support obligations. The Court was cautious in probing the outer limits of these privacy and autonomy guarantees, and protection has thus far been denied to homosexual relationships, adultery, and policemen’s personal preferences in hair styles.

If the abortion cases represent the Burger Court’s liberal activism at its peak, the state action cases illustrate the nadir—a clear reversal of the Warren era trend toward expansive interpretation of what conduct is sufficiently state-connected to come within the protection of the fourteenth amendment. Criminal justice is frequently cited as another area of decline for personal liberties in the Burger era, but all the cases do not point the same way. Lack of direction, rather than hostility to the rights of the accused, is a better description of the cases. The same is true of voting

63. For illustrative decisions upholding rights of the accused see, e.g., Edwards
rights\textsuperscript{64} and the interests of the poor.\textsuperscript{65} Rather than rolling back previous advances on a broad front, the Burger Court carried on a vacillating search for reasonable limits with considerable sensitivity to fact variations.

The Burger Court's directional uncertainty is also apparent in addressing the first amendment freedom of expression. Genuine concern for first amendment values is evident, but countervailing considerations sometimes prevail in the balancing process.\textsuperscript{66} More often than not, the Court has shown solici-
tude for the rights of solicitors and canvassers, demonstrators, and picketers. Nevertheless, the legitimate legislative objectives of the nondiscriminatory regulation of access to nontraditional public forums such as schools, transportation facilities, and military bases, were found to outweigh the interests of free speech in several decisions. Accordingly, Mr. Grayned's conviction under an anti-noise ordinance for participating in a mass demonstration in front of a high school was upheld, while Dr. Spock was found to have no right to distribute peace pamphlets on an army base, and State Representative Harry Lehman could not force the City of Shaker Heights to place his political advertisement on municipal buses. The Burger Court also recognized and extended the right to use offensive language in public, even in circumstances where the words might be regarded as personally abusive or even threatening. On the other hand, in the special environment of the air waves, the Federal Communication
Commission was permitted to censor George Carlin's "seven dirty words" without running afoul of the first amendment. In two cases of "symbolic expression," the Court refused to enforce criminal sanctions. One case involved a peace symbol displayed on the United States flag, while in the other case, a representation of the flag was worn on the seat of the defendant's jeans.

In the preceding encounters with first amendment values, the Burger Court took at least two steps forward for each step backward, if it is assumed that freedom of expression is the paramount value. In some areas, however, backward steps may have outnumbered the strides forward. The Court curtailed, but did not abandon, the use of overbreadth analysis to invalidate statutory strictures on free speech. Retrenching from the Warren Court decade, the Court now purports to require not just overbreadth but "substantial overbreadth." Also, first amendment access to private property was narrowed by decisions repudiating the right of individuals to picket or pamphleteer in a privately owned shopping center. The right to engage in obscene expression was constricted by denying first amendment protection to sexually oriented


78. The assumption abviously begs the central question the Court is compelled to decide when free speech interests collide with other important constitutional and social values. No Court has given priority to free speech values at all costs. At the very least, the right of "falsely shouting fire in a theatre and causing a panic" has not yet been conceded. Schenck v. United States, 249 U.S. 47, 52 (1919).

79. The overbreadth doctrine holds that "a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980).


81. Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). The Warren Court had discovered such a right in Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). But see Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980), where the Court held that federal guarantees of property rights did not bar states from granting broader access to shopping centers than the first amendment required.
materials that lack "serious literary, artistic, political, or scientific value," and by permitting obscenity to be judged by local rather than national community standards.\textsuperscript{83} The Burger Court further held that the right to possess obscene matter in the privacy of one's home\textsuperscript{83} does not imply a correlative right to sell, distribute, or otherwise purvey it to others.\textsuperscript{84}

The first amendment rights of publishers and reporters raised especially difficult balancing problems for the Burger Court. The decisions turned on the particular facts of each case and the nature of the asserted right, with no overall clear sense of direction.\textsuperscript{85} The Court was unsympathetic to press claims of a constitutional privilege to withhold information from courts, grand juries, and law enforcement officials.\textsuperscript{86} Conversely, the Court was very sensitive to claims of prior restraint in refusing to enjoin publication of the \textit{Pentagon Papers},\textsuperscript{87} and in striking down lower court gag orders in criminal


\textsuperscript{87} New York Times Co. v. United States, 403 U.S. 713 (1971).
proceedings. Demands by the press for access to government information resulted in a mixed bag of decisions. The Burger majority upheld state and federal rules prohibiting press interviews with specific prison inmates, but granted relief to reporters seeking access to information about jail conditions generally. Fine lines were drawn with respect to press coverage of judicial proceedings. A trial court may constitutionally bar the press and public from pre-trial hearings on suppression of evidence in a murder case, but the first amendment requires that the criminal trial itself be open to the public "absent an overriding interest" to the contrary. In its most recent term, the Court held that a criminal defendant's rights were not violated by state laws permitting television cameras in the courtroom.

III THE COMMERCIAL SPEECH CASES

The preceding broad survey of Burger Court decisions reveals a Court genuinely concerned with individual rights, yet more inclined than its predecessor to balance competing claims and values. In the more detailed discussion of commercial speech which follows, the same dynamics are apparent, including the agonizing over competing values, the hesitation, the leap forward, and the vacillating search for viable limits on the application of a constitutional guarantee. Despite the rivers of printer's ink already devoted to law review commentary on commercial speech, the topic remains of current interest because the constitutional law is still in a state of fluid development. In the present context, a reexamination is of additional value because of the light it throws on the Burger Court's mode of operating.

94. The legal indexes reveal more than 135 entries dealing with some aspect of commercial speech for the period of 1976-1980.
A. The Commercial Speech Exception

The concept of commercial speech first emerged in Supreme Court jurisprudence as an exception to the coverage of the first amendment. Traditionally, speech guarantees were associated with political expression rather than economic activity. It was not until Valentine v. Chrestensen that the High Court specifically excluded commercial advertising from the ambit of the first amendment. The unlikely subject matter of the decision was a criminal conviction for circulating handbills advertising tours of an old former navy submarine moored in New York harbor. Local law forbade distribution of any "advertising matter whatsoever in or upon any street," and the Court upheld the conviction against a first amendment attack because the amendment had no application to "purely commercial advertising." Thus was launched the "commercial speech" exception. The following year, without reference to Valentine v. Chrestensen, the Court reversed the conviction of Jehovah's Witnesses for door-to-door distribution of leaflets advertising religious meetings. Nevertheless, in a 1951 decision, Breard v. Alexandria, the Court again

95. See, e.g., W. Berns, The First Amendment and the Future of American Democracy (1976); Z. Chafee, Jr., Free Speech in the United States (1941); A. Meiklejohn, Political Freedom (1948); B. BeVier, The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle, 30 Stan. L. Rev. 299 (1978); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1 (1971). Over the years, however, the first amendment guarantee of freedom of expression has come to be associated with other values not necessarily involving the individual's relationship with the polity. Professor Emerson categorizes "the traditional values underlying the system of freedom of expression" as follows: (1) individual self-fulfillment; (2) the advance of knowledge and the discovery of truth; (3) participation in decisionmaking by all members of society; and (4) maintenance of the proper balance between stability and change." Emerson, supra note 62, at 423. For a fuller discussion of these values, see T. Emerson, The System of Freedom of Expression (1970); T. Emerson, Toward a General Theory of the First Amendment (1966). Emerson, however, does not believe commercial speech is entitled to first amendment protection. Emerson, supra note 66, at 481.

96. 316 U.S. 52 (1942).
97. Id. at 53 n.1.
98. Id. at 54-55.
99. Justice Douglas, who participated in the unanimous decision of Valentine v. Chrestensen, commented some sixteen years later, "The ruling was casual, almost offhand. And it has not survived reflection." Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring). Justice Douglas was several years ahead of the Court in reaching this conclusion.

100. Martin v. City of Struthers, 319 U.S. 141 (1943).
applied the *Chrestensen* doctrine in upholding a local ordinance barring door-to-door solicitations of magazine subscriptions. The Jehovah’s Witness case was distinguished as having involved “no element of the commercial.”

Although no subsequent case denied first amendment protection because the speech in question was “purely commercial,” several opinions observed that the first amendment was applicable because the communications were *not* strictly commercial in nature. The seminal case in this group, *New York Times Co. v. Sullivan,* involved a libel action resulting from a paid political advertisement by a southern civil rights group. In finding the advertisement protected, the Court took great pains to distinguish it from *Chrestensen.* The political advertisement at issue, Justice Brennan stated,

was not a “commercial” advertisement in the sense in which the word was used in *Chrestensen.* It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. . . . 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.

This argument, however, cut both ways. If it preserved the concept of a commercial speech exception, it also distinguished a class of paid advertisements that fell outside the exception.

The Burger Court’s first significant encounter with commercial speech doctrine was *Pittsburgh Press Co. v. Human Relations Commission.* The Court, in a 5-4 decision, upheld a city regulation of employment discrimination that prohibited the publication of help-wanted advertisements in sex-designated columns. Justice Powell, speaking for the Court, ac-

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102. *Id.* at 642-43.
105. *Id.* at 265, 266.
accepted the New York Times Co. v. Sullivan rationale that "speech is not rendered commercial by the mere fact that it relates to an advertisement." 107 The advertisement in Pittsburgh Press, however, "did no more than propose a commercial transaction," 108 and therefore could not be distinguished from Chrestensen. Justice Powell hinted broadly that the entire commercial speech concept might bear reexamination, but not in this context:

Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity. 109

Thus the initial Burger Court response was to invoke the commercial speech exception while questioning its broader applicability. This limited application of the rule still evoked strong dissent. Chief Justice Burger called the regulation an "impermissible prior restraint" 110 and complained that the decision for the first time extended the commercial speech exception "to reach the layout and organizational decisions of a newspaper." 111 Justices Stewart and Blackmun felt Chrestensen should be limited to its own facts—government regulation of the use of streets to promote gainful activity 112—while Justice Douglas was ready to give commercial speech the full protection of the first amendment. 113

This initial Burger Court encounter with the commercial speech exception may have validated Chrestensen in a very narrow context, but the questions raised by both Justice Powell and the dissenters did not augur a bright future for the doctrine. 114 These intimations of change were reinforced two

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108. Id. at 385.
109. Id. at 389.
110. Id. at 396 (Burger, C.J., dissenting).
111. Id. at 393.
112. Id. at 401-02 (Stewart, J., dissenting).
113. Id. at 398-99 (Douglas, J., dissenting).
114. Legal scholars also became increasingly critical of the commercial speech exception. For a much cited critique of that period, see Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 GEO. WASH. L. REV. 429 (1971). For a good review of the commercial speech excep-
years later in *Bigelow v. Virginia*, a 7-2 decision reversing the conviction of a newspaper publisher whose weekly journal carried an advertisement for a New York abortion referral agency in violation of Virginia law. Justice Blackmun distinguished *Chrestensen* on the ground that the *Bigelow* advertisement went beyond the mere proposal of a commercial transaction to include factual material of clear interest to the public. But Justice Blackmun was not content to distinguish; he was also determined to undercut. The *Chrestensen* holding, he insisted, spoke only to the manner of distributing commercial advertising. He noted further that the *Pittsburgh Press* opinion would have justified some degree of first amendment protection for the help-wanted advertisements had the commercial proposal been legal. Indeed, for advertising generally, the relationship of speech to commercial activity was just one relevant factor "in weighing the First Amendment interest against the governmental interest alleged." Justice Blackmun, with dicta, was obviously attempting to place commercial speech within the reach of the first amendment. Only Justices Rehnquist and White dissented.

**B. Repudiation of the Exception**


116. *Id.* at 822.
117. *Id.* at 819. This was the position taken by the Stewart dissent in *Pittsburgh Press*, in which Justice Blackmun agreed in part.
118. *Id.* at 821.
119. *Id.* at 826.
mun acknowledged, "the notion of unprotected 'commercial speech' . . . [had] all but passed from the scene"\(^{120}\) with the Bigelow decision. The Virginia Pharmacy case offered a better context for repudiating the Chrestensen doctrine, because the facts were more squarely within the Pittsburgh Press definition of commercial speech as an advertisement that proposed no more than a commercial transaction. The question, posed directly, was answered directly; purely commercial speech is protected by the first amendment.

The Court supported this conclusion by a painstaking examination of competing interests. Because the action was brought by a consumer group rather than by pharmacists, the Court gave special emphasis to the first amendment rights of recipients of information.\(^{121}\) The Court also found first amendment interests that reached farther. The advertiser, as well as the consumer, has a strong economic interest in the free flow of commercial information—the advertiser to promote sales, and the consumer to learn where his scarce dollars are best spent.\(^{122}\) Society also has a collective interest:

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.\(^{123}\)

As a persistent advocate of balancing in first amendment situations, Justice Blackmun proceeded to weigh these individual and societal interests against state justifications for the advertising ban. The societal interests, relating mostly to the alleged impact on the professionalism of licensed pharmacists, were found wanting.

\(^{121}\) Id. at 756-57.
\(^{122}\) Id. at 762-63.
\(^{123}\) Id. at 765. The Court also found such information was 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 decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

\(\text{Id.}\)
Chief Justice Burger concurred in the judgment with a separate opinion, stressing the difference between advertising largely pre-packaged prescription drugs and the advertising of services by doctors or lawyers, in an obvious attempt to hold the learned professions immune from the implications of Virginia Pharmacy. In a separate concurrence, Justice Stewart detailed reasons why government regulation of false or misleading advertising was still permissible. Only Justice Rehnquist dissented. Justice White, who had joined Justice Rehnquist in a Bigelow dissent, was now with the majority.

This near-unanimity was made possible by a part VI of the opinion, which hedged and qualified the decision in typical Burger Court fashion. The Court, it appears, was not holding that commercial speech “can never be regulated in any way.” Justice Blackmun listed several permissible forms of regulation. The list, although not exhaustive, included the regulation of the time, place and manner of speech, false or misleading advertising, advertisement of illegal transactions, and regulation relating to unspecified “special problems of the electronic broadcast media.” Perhaps even more significant were the extensive qualifications appearing in the footnotes to part VI. The Court explicitly recognized that commercial speech has “commonsense differences” from other varieties, so that “a different [and lesser] degree of protection is necessary.” Because the truth of commercial speech is more easily verified and more durable, there is less likelihood of “chilling” protected speech, less need to tolerate inaccurate statements, and possibly less need to forego prior restraints. Furthermore, the analysis of Virginia Pharmacy may not govern advertising by physicians and lawyers because of the greater “possibility for confusion and deception.” What began as a clear-cut rejection of the commercial speech exception was converted to a half-way measure leaving a multitude

124. Id. at 773-75.
125. Id. at 775-81.
126. Id. at 781.
127. Justice Douglas had retired prior to this decision and his successor, Justice Stevens, did not participate. Id. at 773.
128. Id. at 770.
129. Id. at 773.
130. Id. at 771-72.
131. Id.
132. Id. at 773 n.25.
of unresolved questions and a great potential for confusion.

Opportunities to clarify the dimensions of the newly-extended first amendment coverage were presented in three cases decided during the 1976 term. In *Linmark Associates, Inc. v. Township of Willingboro*, the Court was asked whether a township might constitutionally ban "For Sale" and "Sold" signs from residential property for the purpose of stemming a perceived "white flight" from a racially integrated community. The Court's answer was a unanimous no. The interests of buyer, seller, and society in the free flow of commercial information were as strong as the first amendment interests protected in *Virginia Pharmacy*. Moreover, the township's interest in the ordinance was not sufficiently compelling when weighed with other interests. The Court rejected the argument that the ordinance was a valid time, place, or manner regulation. The regulation did not leave open satisfactory alternative channels of communication, and the ban was directed to message content—not the size, shape, or other features of the sign. In its discussion of the "content" element of the regulation, the Court invoked by implication a first amendment standard no different from that applied to ordinary speech. The force of the implication was undercut, however, by Justice Marshall's reaffirmation of the *Virginia Pharmacy* footnote alluding to the "commonsense differences" between commercial speech and other speech which permitted "a different degree of protection."

In the second commercial speech decision of the 1976 term, *Carey v. Population Services International*, the Court invalidated a New York law regulating the distribution of contraceptives and prohibiting their advertisement. Relying on *Virginia Pharmacy*, Justice Brennan's majority opinion held that truthful advertising could not be completely suppressed because of its content, again implying a single standard for all kinds of speech. Separate opinions by other jus-

134. Justice Rehnquist did not participate. *Id.* at 98.
135. *Id.* at 93-94.
136. *Id.* 96-97.
137. *Id.* at 98.
139. The Court also found that the case fell within the *Bigelow* ruling because it "related to activity with which, at least in some respects, the State could not interfere." *Id.* at 701 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Con-
tices, however, tended to weaken the force of the holding. Justice Powell agreed that the advertisement of contraceptives could not be completely suppressed, but insisted that state regulations might be designed to minimize the impact of advertising on children. Justice Stevens, joined by Justice White, also argued that first amendment protection “does not deprive the State of all power to regulate such advertising in order to minimize its offensiveness,” including restrictions on content. The Chief Justice dissented without opinion, and Justice Rehnquist’s dissent dealt only with the right to distribute contraceptives.

C. Protection of Attorney Advertising

The third case of the 1976 term, Bates v. State Bar of Arizona, was unquestionably the most difficult. In a 5-4 decision, the Court, speaking through Justice Blackmun, held that a state could not prohibit truthful newspaper advertising “concerning the availability and terms of routine legal services.” The question of lawyer advertising had been specifically reserved in Virginia Pharmacy, and the divided Court extended first amendment protection to this hitherto closely regulated area with some trepidation. The holding was carefully limited to the type of advertising at issue. It was specifically narrowed to exclude “advertising claims relating to the quality of legal services . . . [and] problems associated with in-person solicitation of clients.” The Court further indicated that even truthful advertising of routine services might be subjected to a requirement of warning or disclaimer as to quality. The Court also used Bates as a vehicle for limiting overbreadth analysis by specifically declining to apply it to professional advertising. Since protected commercial speech was unlikely to be crushed or chilled by overbroad regulation, “the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial trade setting.”

140. Id. at 711-12 (Powell, J., concurring).
141. Id. at 717-18 (Stevens, J., concurring).
143. Id. at 384.
144. Id. at 366.
145. Id. at 384.
Sharp divisions within the Court were manifest in three opinions submitted by the four dissenting justices. The Chief Justice, Justice Powell, and Justice Stewart, argued that *Virginia Pharmacy* was not controlling because legal services were vastly different from the dispensing of pre-packaged, standardized, name-brand drugs. Price advertisement of legal services was likely to be inherently misleading. Legalizing some but not all price advertising would also create unmanageable problems of enforcement. Justice Rehnquist vehemently reiterated his opposition to extending any first amendment protection to commercial speech.

The limits of attorney advertising were further explored in two cases decided the following term. In *Ohralik v. Ohio State Bar Association*, the court unanimously held that a state might discipline a lawyer for in-person solicitation of clients for pecuniary gain under circumstances likely to pose dangers of fraud, undue influence, intimidation, or overreaching. In a second decision, *In re Primus*, the Court held that a lawyer working with the American Civil Liberties Union could not be disciplined for writing a letter soliciting non-paying clients for the American Civil Liberties Union (ACLU). *Primus* did not involve purely commercial speech because clients were not solicited for profit. The Court found Primus had acted out of political conviction in support of ACLU civil liberties objectives, and not for financial gain. In fact, the Court treated the letter of solicitation as falling within a line of decisions protecting rights of political expression and association, thus invoking core first amendment rights calling for exacting scrup-

146. *Id.* at 380.
147. *Id.* at 386 (Burger, C.J., dissenting).
148. *Id.* at 389 (Powell, J., joined by Stewart, J., concurring in part and dissenting in part).
149. *Id.* at 404 (Rehnquist, J., dissenting).

I continue to believe that the First Amendment speech provision, long regarded by this Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to protect advertisements of goods and services. I would hold quite simply that the appellants’ advertisement, however truthful or reasonable it may be, is not the sort of expression that the Amendment was adopted to protect.

*Id.* at 405.

The Court reviewed the commercial speech precedents, however, because the case involved solicitation of clients by lawyers which, in other contexts, was likely to have commercial implications.

Ohralik fell squarely within the realm of commercial speech, but Ohralik's behavior was such an egregious violation of accepted standards that the decision could provide little guidance in borderline situations. Ohralik, on his own initiative, approached two eighteen year old girls, one of whom was in the hospital in traction, and obtained contingent fee agreements to represent them in personal injury claims. Although both discharged him before he had performed substantial services, he subsequently sued for his contingent fee. In a settlement with one of the girls, he obtained one-third of her ultimate recovery. Upon complaint by the two girls to the Bar Association, Ohralik was suspended from the practice of law. Justice Powell delivered a unanimous opinion upholding the suspension.

Briefly stated, the rationale was as follows. Commercial speech is entitled to less first amendment protection than noncommercial speech. Within the former category, in-person solicitation is entitled to less protection than public advertising of the kind approved in Bates. Furthermore, the state has a "compelling" interest in regulating in-person solicitation because of the possibility of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" Mr. Ohralik was properly disciplined because his conduct created the potential for such harm whether or not

153. In re Primus, 436 U.S. at 427-33, 438-39. In Ohralik v. Ohio State Bar Ass'n, decided the same day, the Court characterized its holding in Primus as follows: "We hold today in Primus that a lawyer who engages in solicitation as a form of protected political association generally may not be disciplined without proof of actual wrongdoing that the State constitutionally may proscribe." 436 U.S. at 462 n.20.

154. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Id. at 456.

155. Id. at 455, 457, 459.

156. Id. at 462.
there was actual injury.\textsuperscript{157} On its face, the decision left unan-
swered the question of whether a state could ban all in-person
solicitation by lawyers for pecuniary gain or whether such
conduct could be proscribed only under circumstances having
potential for abuse. This was clarified in \textit{Primus}, decided the
same day, where Justice Powell characterized \textit{Ohralik} as hold-
ing that “the State may proscribe in-person solicitation for
pecuniary gain under circumstances likely to result in adverse
consequences . . . .”\textsuperscript{158}

D. \textit{Recent Decisions: The Search for a Rule}

Through its 1980 term, the Court did not rule again on
lawyer advertising, but in 1979, \textit{Friedman v. Rogers}\textsuperscript{160}
provided an opportunity to examine a Texas statute prohibiting
the practice of optometry under a trade name. In a 7-2 deci-
sion, the Court held that this form of commercial speech
might be banned as potentially deceptive. A trade name, the
Court reasoned, “conveys no information about the price and
nature of services offered by an optometrist until it acquires
meaning over a period of time by associations formed in the
minds of the public between the name and some standard of
price or quality.”\textsuperscript{160} Further, because such “ill-defined associa-
tions” are subject to manipulation by the trade name users to
mislead the public, the use of trade names is not entitled to
first amendment protection.\textsuperscript{161} This decision involved no obvi-
ous departure from \textit{Virginia Pharmacy} since the Court held
open the right to regulate deceptive and misleading advertis-
ing, but no deceptive use of trade names by Rogers had been
found, and the threat of deception did not seem serious.\textsuperscript{162}
The Court, of course, was balancing interests, a rough and
ready process at best. In striking the balance, the Court
seemed less deferential of first amendment interests than in

\textsuperscript{157} Id. at 464-68.
\textsuperscript{158} In re \textit{Primus}, 436 U.S. at 434. Justice Marshall’s concurring opinion in
\textit{Ohralik} took a similar position. Solicitation could be proscribed only “under circum-
stances—such as those found in this record—presenting substantial dangers of harm
to society or the client independent of the solicitation itself . . . .” 436 U.S. at 470
(Marshall, J., concurring).
\textsuperscript{159} 440 U.S. 1 (1979).
\textsuperscript{160} Id. at 12.
\textsuperscript{161} Id. at 12-13.
\textsuperscript{162} Id. at 19 (Blackmun, J., dissenting).
the earlier cases.163

In Central Hudson Gas & Electric Corp. v. Public Service Commission,164 a commercial speech decision made during the 1979 term, the Court struck down a state prohibition of advertising by electric utilities to promote the use of electricity. The decision was unanimous, except for Justice Rehnquist's dissent, but only a bare majority agreed on the rationale. In an attempt to reduce commercial speech rules to a more manageable formula, Justice Powell presented a four-part analysis for testing the validity of government regulation of commercial speech:

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 is necessary to serve that interest.165

Applying this schema, the Court found that Central Hudson's advertisements were not inaccurate or related to unlawful activity, and hence were within the first amendment's coverage. The asserted government regulatory interests in conserving energy and promoting fair utility rates were found to be substantial, and this called for inquiry into the linkage between the state interests and the advertising ban. The relationship with the utility's rate structure was found to be tenuous, but the interest in energy conservation was felt to be directly advanced by the Commission order. The ban did not survive the final hurdle, however, since the regulation for the complete suppression of advertising was broader than necessary. "In

163. The tone of the decision is captured in a footnote to Justice Powell's analysis of previous commercial speech cases:
Because of the special character of commercial speech and the relative novelty of First Amendment protection for such speech, we act with caution in confronting First Amendment challenges to economic legislation that serves legitimate regulatory interests. Our decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area.

Id. at 10 n.9.
165. Id. at 566.
the absence of a showing that more limited speech regulation would be ineffective," the Court refused to approve the Public Service Commission's order. The first amendment was thus extended to cover promotional advertising of a closely regulated, state-created corporate utility having a monopoly within its service area.

As a distillation of prior decisions, the four-part test fell somewhat short of a perfect fit. The requirement that the regulation be "not more extensive than necessary" to serve the governmental interest was a more stringent test than anything previously stated. The Court cited Primus for the proposition that speech restrictions must be narrowly drawn, but Primus concerned political expression and association, not commercial speech. Bates, Virginia Pharmacy, and Carey were also cited for their dicta suggesting that a more narrowly drawn statute, falling short of complete suppression, might withstand the Court's scrutiny. But that is a far cry from the Central Hudson rule invalidating any regulation of commercial speech that is "more extensive than necessary" or one that does not "directly advance" a "substantial" governmental interest. In dissenting, Justice Rehnquist observed, with some justification, that the test elevated "the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech."

In a concurring opinion joined by Justice Brennan, Justice Blackmun alleged a poor fit for the opposite reasons that the opinion undercut guarantees of commercial expression established in prior cases. The intermediate level of scrutiny used by the Court was "appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech." The four-part test was not a proper rule "when a State seeks to suppress information

166. Id. at 571.
167. Id. at 565.
168. 433 U.S. at 384.
169. 425 U.S. at 773.
170. 431 U.S. at 701-02.
171. 447 U.S. at 591 (Rehnquist, J., dissenting). Justice Powell still insisted, however, that the Constitution "affords a lesser protection to commercial speech than to other constitutionally guaranteed expression." Id. at 563.
about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly." In that situation the precedents dictated that commercial speech should be treated on a par with non-commercial speech.

At the close of its 1980 term, the Court announced one more decision implicating commercial speech, *Metromedia, Inc. v. City of San Diego.* The decision, however, ultimately turned on general first amendment issues rather than the commercial speech aspects of the case. At issue was a San Diego ordinance banning, with specified exceptions, outdoor advertising display signs. A plurality of four, speaking through Justice White, concluded that the ordinance satisfied the four-part *Central Hudson* test insofar as it related to commercial advertising. In the Court's opinion, the ordinance directly advanced substantial governmental interests in traffic safety and esthetics and was no broader than necessary to serve these interests. Nevertheless, the ordinance was declared facially invalid because it reached "too far into the realm of protected speech." Specifically, noncommercial messages were banned in some locations where commercial billboards were permitted and some types of noncommercial messages were allowed as exceptions to the ban. Insofar as the city permitted billboards at all, it could not favor commercial over noncommercial messages or prefer some types of noncommercial messages to others. The plurality expressly refused to decide whether a total prohibition of all outdoor advertising would be consistent with the first amendment. Justices Brennan and Blackmun concurred in the judgment because

172. *Id.* at 573 (Blackmun, J., concurring).
173. *Id.* at 577-79.
176. 453 U.S. at 521.
177. *Id.* at 512-17.
178. *Id.* at 515.
they believed the ordinance was unconstitutional in its application to commercial and noncommercial speech. Justices Burger, Rehnquist and Stevens dissented, finding the ordinance consistent with the first amendment as to both commercial and noncommercial advertising.

IV. DOCTRINAL EVOLUTION AND UNCERTAINTY

The Central Hudson decision remains the Court's latest reformulation of the law of commercial speech. In view of the conflicting analyses in that case, and its inconclusive application by only a plurality in Metromedia, it obviously leaves some unanswered questions. The tenor of past decisions does not suggest, however, that the forebodings of Justice Blackmun are likely to be realized. From Breard, which upheld a local ordinance barring door-to-door magazine sales, to Virginia Pharmacy, the only decision actually denying protection to commercial speech was Pittsburgh Press. Moreover, the local regulation in Pittsburgh Press did not ban the help-wanted advertisements, but only prohibited their placement in sex-designated columns. In only two cases since Pittsburgh Press has protection been denied. Ohralik was a particularly outrageous case of in-person solicitation of legal business, fraught with great potential for overreaching. In the other, Friedman v. Rogers, the majority persuaded itself that the use of trade names by optometrists was sufficiently deceptive to warrant suppression by the state.

In view of this record, the likelihood is not great that any governmental attempt to suppress commercial speech will be validated unless the case fits one of the specified exceptions to

179. Id. at 524 (Brennan, J., concurring).
180. Id. at 540-70 (Burger, C.J., Rehnquist, J., Stevens, J., dissenting.)
181. Justices Stevens and Brennan saw the ban on "promotional advertising" as reaching a range of communication extending well beyond commercial speech. Thus the issue was not commercial speech, but rather an attempt by the Public Service Commission to suppress ordinary speech without any clear and present danger to justify it. 447 U.S. at 579-80 (Stevens, J., concurring). Cf. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), where the Court invalidated a Massachusetts law prohibiting corporations from spending money to influence public decisions on issues not directly related to the business of the corporation; Consol. Edision Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980), where the Court struck down a New York regulation prohibiting a public utility from including a statement of its views on public issues in the monthly billing envelopes sent to its customers. While the rights of corporations rather than private persons were involved, the speech at issue was political rather than commercial.
first amendment protection. As articulated by the Court at various times, these include time, place, and manner regulations, misleading or deceptive speech, speech relating to an unlawful activity, "coercive" speech (a code word presumably designating the kind of expression associated with Ohralik's offensive conduct), and regulation of the electronic broadcast media.

The major Burger Court decisions relating to commercial speech appear in Table 1, which shows the voting position of each justice on each case and indicates by asterisks the authorship of majority, concurring, and dissenting opinions. The table includes Primus and Metromedia, which discussed the commercial speech precedents, but ultimately were decided as cases of noncommercial speech. The voting pattern suggests a distinct commitment of the Court to continue first amendment protection in this area. Eight of the eleven decisions point clearly in that direction. The other three cases simply illustrate the tendency of the Court to move with caution and recognize the differences in fact situations.

**TABLE 1**

VOTING ALIGNMENT ON COMMERCIAL SPEECH CASES DECIDED BY THE BURGER COURT

<table>
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<tr>
<th></th>
<th>Pittsburg Press</th>
<th>Bigelow Pharmacy</th>
<th>Virginia Pharmacy</th>
<th>Linmark</th>
<th>Carey Bates</th>
<th>Primus</th>
<th>Ohralik</th>
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The pattern of voting and decision outcomes gives a useful overall view of the Burger Court's approach to commercial speech, but it suggests more consensus than actually exists. A better index of doctrinal dispute is the number of separate opinions. In eleven cases there are thirty separate dissenting or concurring opinions, a ratio well above the Burger Court's generally high rate of opinion proliferation. The five separate opinions produced in each of the two most recent cases, *Central Hudson*, and *Metromedia*, indicate that the doctrinal differences are not diminishing with time.

Nor are the problems presented in commercial speech cases diminishing. Despite the efforts of Justice Powell in *Central Hudson* to set forth a precise standard of review, the scope of first amendment protection accorded commercial speech still remains uncertain. May truthful, "non-coercive" commercial speech be totally banned because of its content? *Central Hudson* seems to say that it can be suppressed if the regulation directly advances a substantial governmental interest and no narrower measure will suffice. This does not, however, altogether resolve the uncertainty. The Burger Court has yet to sustain a total ban directed at the content of truthful commercial speech, and the state regulation in *Central Hudson* did not survive the Powell formula. Justice Rehnquist may well have been correct in his assessment that the test "leaves room for so many hypothetical 'better' ways that any ingenious lawyer will surely seize on one of them to secure the invalidation of what the state agency actually did."

If so, the rule may simply mean that a total ban could be sustained in theory, but in practice it never will be. In all likelihood, this formula would not command a majority in a situation where it could be used to sustain a content-based ban on

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182. See note 4 supra.

183. For thoughtful discussion of problems raised by the commercial speech cases, written before the *Central Hudson* decision, see Barrett, "The Uncharted Area"—Commercial Speech and the First Amendment, 13 U.C.D. L. Rev. 175 (1980).

184. 447 U.S. at 600 (Rehnquist, J., dissenting). The plurality in *Metromedia*, however, thought the San Diego ordinance could survive the test in *Central Hudson*. 453 U.S. at 512.
commercial speech. Formulating a rule in the context of protecting expression is one thing, but applying it to achieve the opposite purpose is quite another. The potential instability of the Central Hudson formula is increased by its tenuous relation to previous decisions, at least as applied to the total suppression of speech. What the precedents say in this regard is by no means clear; clearly they do not add up to the Central Hudson formula. Virginia Pharmacy, Linmark, Bates, and Ohralik all use a balancing process, weighing first amendment interests against the states interest in the regulation, to determine whether protection should be granted. In the balancing process, the Court has examined the relationship between the asserted state purposes and the proposed regulation. If the relationship is tenuous, the state interest in the regulation is correspondingly weakened. Looking for the connection between the two is consistent with Central Hudson, but Justice Powell's test leaves little room for balancing interests. The first amendment interest is not weighed in the balance, but simply assumed to be taken into account by the level of scrutiny implicit in the formula. With that as a given, the Court focusses first on the state interest to see if it is substantial, and then on the regulation to determine if it directly advances the interest and is no more extensive than necessary.

If Central Hudson fails to reflect the balancing process implicit in the precedents, it also ignores the numerous sug-

185. Justices Brennan, Blackmun, and Stevens, who concurred separately, would be very reluctant to sustain such an application of the rule. Justice Marshall, who apparently acquiesced in the opinion, would surely share their reluctance. Justice Rehnquist, judging by past opinions, would undoubtedly be happy to sustain a ban on commercial speech, but he would surely not endorse the Powell formula. With the present composition of the Court, the Powell formula thus appears viable only for the purpose of protecting commercial speech against total suppression by state regulation.


187. The balancing process is explicit in some instances. In Bates, after a detailed examination of the state interest in banning lawyer advertising, the Court concluded: "In sum, we are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys." 433 U.S. at 379. In Ohralik, the Court concluded that "the balance struck in Bates does not predetermine the outcome in this case. The entitlement of in-person solicitation of clients to the protection of the First Amendment differs from that of the kind of advertising approved in Bates, as does the strength of the State's countervailing interest in prohibition." 436 U.S. at 455.
gestions that commercial speech is entitled to full first amendment protection against content-based suppression of truthful information. In *Virginia Pharmacy*, the Court engaged in appraisal of competing interests, but then virtually ignored the balancing process in reaching its conclusion:

> What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.\(^{188}\)

These same rationales were present in the *Linmark* decision. After careful consideration of competing claims, the Court concluded that the township interest in banning "For Sale" signs must bow before first amendment interests because the ordinance does little to achieve its ostensible purpose of keeping Willingboro an integrated community.\(^{189}\) But does all the balancing discussion really matter? Apparently not much, since the "constitutional defect" in the ordinance is "far more basic."\(^{190}\) Truthful commercial speech cannot be suppressed because of its content. As elaborated by Justice Marshall, Willingboro's concern in adopting the ordinance

was not with any commercial aspect of "For Sale" signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that dis-

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188. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 773. But this strong statement was immediately weakened by a disclaimer. "We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors." *Id.* at 773 n.25. Was the Court giving full protection to truthful commercial speech, or just balancing? In *Linmark*, the Court indicated that the *Virginia Pharmacy* decision rested on a dual foundation. The Virginia prohibition of prescription drug advertising was unconstitutional "because we were unpersuaded that the law was necessary to achieve this objective [maintaining professionalism], and were convinced that in any event, the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information." 431 U.S. at 95.

189. *Id.* at 95-96.

190. *Id.* at 96.
closure would cause the recipients of the information to act "irrationally." *Virginia Pharmacy Bd.* denies government such sweeping powers.  

The same "full protection" approach is found in *Carey v. Population Services International*. In the portion of the opinion dealing with advertising, Justice Brennan dispensed with the balancing process and simply quoted from the closing paragraph of the *Virginia Pharmacy* opinion: "[A] State may not 'completely suppress the dissemination of concededly truthful information about entirely lawful activity,' even when that information is categorized as 'commercial speech.'" The more recent cases—*Bates, Primus, Ohralik,* and *Friedman*—do not contain such sweeping endorsements of full protection for truthful commercial speech, but that argument is nowhere repudiated, and it is ignored in the *Central Hudson* formula.

*Central Hudson* also does little to clarify the standard of review when time, place, and manner regulations are applied to commercial speech. Is it the same standard as for ordinary speech, or a lesser one? Again, the precedents are ambiguous. *Linmark* and *Bates* suggest that the standard may be the same for all varieties of speech. *Primus* and *Ohralik,* to the extent that the challenged regulations deal with time, place, or manner, indicate otherwise. *Central Hudson* does not directly address the issue, but if the Court's formula applies to regulations of time, place, and manner as well as to content, the concept of a narrowly drawn statute directly serving a substantial governmental interest looks very much like the ordinary standard for such regulations.

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191. *Id.* The parallel with ordinary speech was heightened by a quotation of Justice Brandeis' often repeated lines from *Whitney v. California*, 274 U.S. 357, 377 (Brandeis, J., concurring). "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Quoted in Linmark Assos. v. Township of Willingboro*, 431 U.S. at 97.

192. 431 U.S. at 700.
193. 431 U.S. at 93-94.
194. 433 U.S. at 384.
195. 436 U.S. at 434.
196. *Id.* at 457. *See also Barrett, supra* note 183, at 188-94.
197. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Saia v. New York*, 334 U.S. 558 (1948). In dicta, the Court said that commercial speech, unlike noncommercial expression, is not subject to the doctrine of prior restraint. *Friedman v. Rogers*, 440 U.S. at 10; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 771-72 n.24. The same is true of the overbreadth doctrine. Vil-
Other elements of the Central Hudson test are more in line with previous decisions. It retains the proposition, enunciated in Pittsburgh Press and repeated in Virginia Pharmacy, that speech proposing an illegal transaction may be prohibited. In this respect, commercial speech is unquestionably less favored than ordinary speech. Advocating a violation of the law may be proscribed only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

False and misleading commercial advertising is also denied the protection that accrues to noncommercial speech. Although untruthful expression has never been protected for its own sake, first amendment protection of ordinary speech has not been limited to truthful statements. False advertising of goods and services, however, has consistently been held subject to governmental regulation. Before Virginia Pharmacy, deceptive advertising could be regulated because it was "commercial." Since Virginia Pharmacy, it has remained subject to regulation because it is untruthful. In the commercial speech cases, the Court has reasoned that advertising qualifies for first amendment protection because of its informational function. "Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." Both Friedman and Ohralik indicate that the government may ban forms of expression that are only potentially deceptive or misleading. The portion of the Central Hudson test that 

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202. 440 U.S. at 13, 15-16.
203. 436 U.S. at 464-65.
cludes deceptive commercial speech from the shelter of the first amendment thus represents a settled rule and a broad consensus on the Court.204

Whatever its contribution to clarifying the scope of protection afforded commercial speech, Central Hudson did little to resolve the definition of commercial speech.205 The Court offered two definitions, but did not analyze either or discuss their interrelationship. The first definition was given in the context of asserting that the state ban on utility advertising was limited to commercial speech. The Court defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.”206 The second definition appeared quite casually in a reference to the oft-repeated “commonsense distinction” between “speech proposing a commercial transaction” and other kinds of speech.207 Neither definition included new and helpful criteria for distinguishing commercial from ordinary speech, but the first definition appeared to be a substantial, if perhaps unintended, broadening of the concept.208 The troublesome question of defining commercial speech is certain to recur in future decisions.

V. CONCLUSION

This article has not been primarily concerned with the desirability of extending first amendment protection to commercial speech, although many opinions have been expressed

204. Neither Central Hudson nor any of its predecessors is clear on the standard required to satisfy the Court that the potential for deception is great enough to take speech out of the first amendment.

205. For incisive analysis of this question, see Barrett, supra note 183, at 201-07; Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372, 407 (1979); Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. Chi. L. Rev. 205 (1976).

206. 447 U.S. at 561.

207. Id.

208. Justice Stevens called it “too broad” because it encompassed speech that is entitled to the maximum protection afforded by the First Amendment. Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward.

Id. at 579-80 (Stevens, J., concurring).
on that subject. For years prior to *Virginia Pharmacy*, legal commentators had advocated that such a step be taken.\(^{209}\) The abandonment of the commercial speech exception was generally welcomed by legal scholars,\(^{210}\) and it still commands wide support as an extension of first amendment freedoms.\(^{211}\) Dissenting voices however, have been raised. Some have expressed the fear that the traditional values of free expression are demeaned, diluted, or stretched beyond recognition by application to the economic marketplace.\(^{212}\) Some also have urged that the new commercial speech doctrine, like the old economic due process, is unwise and unjustified interference with state regulation of economic affairs.\(^{213}\) Without joining that debate this article has raised concerns of a different nature. The Court has abandoned a reasonably well-settled "commercial speech exception" without thus far being able to articulate a consistent, coherent first amendment theory in its place. The reach of the amendment is now broader, but its contours are fuzzier.

The larger problem of disciplined constitutional interpretation is not peculiar to the Burger Court. Complaints of inconsistency, lack of principled decision-making, and general ad-hocery have been directed at previous Courts.\(^{214}\) The problem is exacerbated by the litigation explosion and by the intellectual and ideological diversity of the present Court. Look-

\(^{209}\) See note 114 supra.


\(^{214}\) As Professor Howard observed, “Americans seem content to abide a fair degree of contradiction and of ad hoc evolution in their law. The Burger Court is heir to this tradition.” Howard, supra note 1, at 28.
ing through the cases we do not see a "conservative Nixon Court" busily undoing the work of the Warren years. Rather, we see a Court that has encountered unusual difficulty in its efforts to interpret constitutional guarantees of individual rights with principled consistency.