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Speech in the Local Marketplace: 
Implications of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* for Local Regulatory Power

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INTRODUCTION

On May 24, 1976, the Supreme Court decided the case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹ holding that the first and fourteenth amendments were violated by statutory bans on advertising prescription drug prices. In so doing the Court apparently eliminated the commercial speech exception to first amendment protection which had its origin thirty-four years ago in *Valentine v. Chrestensen.*² I say “apparently,” because *Virginia State Board* left unclear its implications for most of the issues to which the commercial speech doctrine had been applied.

This article will deal primarily with those uncertain implications, with emphasis on regulations at the local government level. However, it will begin with a brief history of the commercial speech doctrine, followed by a discussion of the Supreme Court’s treatment of that doctrine in *Virginia State Board*.

THE HISTORY OF THE COMMERCIAL SPEECH DOCTRINE

The first suggestion that commercial speech might not receive full first amendment protection occurred in *Schneider v. State.*³

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2. 316 U.S. 52 (1942).
3. 308 U.S. 147 (1939).
Schneider struck down an ordinance which required prior police approval of canvassing, set forth broad, discretionary grounds for nonapproval, and placed certain stringent time and manner restrictions on the canvassing itself. Justice Roberts, writing for the majority, stated in dictum that "[w]e are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires."

If the commercial speech doctrine was foretold in Schneider, it was born in Valentine v. Chrestensen. There the Supreme Court upheld a New York City municipal ordinance which prohibited distribution on the streets of "commercial and business advertising matter." Chrestensen was convicted for distributing handbills advertising the commercial exhibition of a submarine. Justice Roberts, writing for a unanimous Court, stated that although the streets could not be entirely closed to general communication of information, "the Constitution imposes no such restraint on government as respects purely commercial advertising."

Nine years later, in Breard v. Alexandria, the scope of the Valentine commercial speech exception was tested. In Breard the Supreme Court upheld a municipal ordinance prohibiting door-to-door solicitation for the sale of "goods, wares and merchandise" without advance permission of the householder. The ordinance was being applied to a person soliciting subscriptions to certain national magazines.

The significance of Breard lay in the fact that a year after Valentine, in Martin v. City of Struthers, the Court had held unconstitutional an ordinance banning all door-to-door handbilling. In that case the ordinance had been applied to the distribution of literature advertising a religious meeting. The same day, in Murdock v. Pennsylvania, drawing upon two earlier decisions, the Court had struck down an ordinance imposing a flat license fee on canvassing and soliciting which was being applied to the door-to-door sale of religious materials. In Martin and Murdock the Court had found Valentine inapplicable. However, in Breard the Court upheld the ordinance, despite acknowledging the first amendment protection afforded the periodicals themselves. It distinguished Breard from Martin and Murdock on the ground that door-to-door sale introduced a commercial element not present in those cases.

4. Id. at 165.
5. 316 U.S. at 54.
7. 319 U.S. 141 (1943).
Breard is susceptible to at least two interpretations. The first is that the commercialization of fully protected speech renders it either less protected or even unprotected. The second is that although it does not render otherwise fully protected speech less protected or unprotected, commercialization does make regulating protected speech permissible in order to prevent fraud, deception, duress, invasion of privacy, and other evils unrelated to the suppression of ideas. Under the first interpretation, Breard differs from Martin in that the latter involved fully protected—that is, noncommercial—speech. Under the second interpretation, the sale of magazines is as worthy of first amendment protection as is the free dissemination of religious tracts. However, door-to-door selling introduces the possibility of psychological coercion, whereas free dissemination does not.

The first interpretation does not adequately distinguish the sale of religious literature that occurred in Murdock. Nevertheless, the first does seem more plausible. The Breard Court stressed privacy, not coercion. And in Valentine the evils the ordinance attacked did not vary according to whether the handbills were commercial or noncommercial. But in several subsequent cases, the Supreme Court made clear that this interpretation of Breard was erroneous. The fact that otherwise fully protected speech was bought and sold in the marketplace would not strip it of its protection. Indeed, prior to its decision in Breard, the Court had stated, in the context of regulating labor organizers, that a financial motive did not itself reduce first amendment protection. Therefore, the second inter-


Professor C. Edwin Baker has offered a theory of the first amendment which would justify excluding some forms of commercial speech from protection, relegating them to the general protection of property rights found in the due process and contracts clauses. Briefly, Baker sees the first amendment as protecting the freedom of the speaker to express and communicate (with willing listeners) that which he deems important, and not as protecting a marketplace of ideas. Speech by enterprises whose directors are legally bound to pursue profits or by enterprises which treat the speech as an expense and not as a consumption of income does not reflect the values of any person or group but is solely a product of the mandate to return a profit. As such it does not come within the rationale for first amendment protection.
pretation, strained though it is, had to be correct if Breard was still good law: Selling may be regulated more stringently than may free distribution in order to protect against certain evils. This principle is true despite the fact that the article being sold is protected by the first amendment.

So far the discussion has focused on the commercial speech doctrine in the context in which it arose—that is, advertising and soliciting restrictions which concerned the location and manner, but not the content, of the message. With respect to regulating time, place, and manner, the commercial speech doctrine gave less protection to advertising and solicitation than to other speech.12

Advertising and solicitation have also been subjected to content regulation and, in certain areas, to complete bans. Regulation has been aimed at preventing false, deceptive, or product-disparaging claims. The complete bans on advertising and soliciting have been premised upon either the undesirability or the illegality of the product or upon the undesirability of advertising an otherwise acceptable product.

Baker would thus distinguish commercial speech by its source and motivation, not by its content. However, he does not believe that the cases mentioned in note 10 supra were necessarily wrongly decided. He would make exception for the profit-motivated industries whose product is speech—the press, the broadcast media, the movies—on three grounds: (1) These industries need not be concerned with stimulating desires for any particular product other than communicated expression itself; (2) these industries have been singled out by the Constitution to be free from governmental control in order to protect effective criticism of the government; (3) and within these industries it is impossible to tell whether the speech of those involved in the industry is for the purpose of producing profits or whether the profits are produced in order to promote their speech. Thus under Baker's theory, the first amendment would not protect any speech (political or purely commercial) by an enterprise (other than one whose product is speech) which is legally obligated to pursue profit or which treats the speech as a business expense, except perhaps speech which is purely informative or which is made at the request of customers.

Parts of Baker's theory will be rejected by many people—especially a distinction which he draws between speech which expresses instrumental values (unprotected) and speech which expresses substantive values (protected), for this distinction is broader and more dubious than the distinction between speech regarded as a business expense and speech regarded as consumption of income. Nevertheless, the theory warrants close attention, as does the question of what due process protection should be accorded sellers, or perhaps more importantly buyers, with respect to commercial messages excluded from first amendment protection by the theory. Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 Iowa L. Rev. 1 (1976).

12. New York Times Co. v. Sullivan, 376 U.S. 254 (1964), Smith v. California, 361 U.S. 147 (1959), and Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1942), which did involve content control, were mentioned only to demonstrate that the most far-reaching interpretation of the doctrine was never accepted by the Court.

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Little needs to be said at this juncture about the bans on false and deceptive advertising or product disparagement. The scholarly criticism in this area has focused primarily on the distinction the courts have drawn between claims by sellers and similar claims by third parties, who were not subject to the sanctions applied to the former, and upon the general question of whether false and deceptive or defamatory claims in other areas—for instance, the political—should be treated differently from false, deceptive, or disparaging advertising of products. For example, some commentators have suggested that the New York Times Co. v. Sullivan rule should apply to product disparagement.

The bans on truthful advertising premised on the undesirability or illegality of the product, or the undesirability per se of advertising the particular product, do deserve some comment because they are the forebears of Virginia State Board. Illustrative of advertising bans predicated on the undesirability of a legal product are the bans on racially informative statements designed to prevent discrimination or blockbusting and the ban on cigarette advertising on television. In such cases the government has chosen to discourage an activity by preventing its advertisement, rather than by attempting to outlaw it directly. The latter alternative might raise constitutional questions.

In Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, decided in 1973, the Supreme Court invoked the Valentine commercial speech doctrine to uphold suppressing advertisement of sexually discriminatory employment offers. The case was significant, not only because of the Court's stated willingness to continue to apply the commercial speech doctrine and to apply it to offers of employment, but also because the Court stressed the illegality of the underlying transaction being advertised. How the

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15. Redish, supra note 13, at 458-64. But see Baker, supra note 11, at 42-43 n.146.
illegality of sexual discrimination entered the *Pittsburgh Press* analysis is not at all clear. Typically, in the first amendment area, advocating a criminal act is protected until there exists imminent danger of a crime occurring; at that point advocacy is denominated *inciting* or *aiding.* Soliciting a criminal act is treated differently. There need be no imminent danger *in fact,* for in many cases the person solicited is an undercover police officer. Conceptually, exactly which factors distinguish solicitation from advocacy are, I submit, extremely unclear. The most that can be said is that the distinction appears to turn on the nature of the incentive offered and perhaps also on the relationship between the solicitor and the person solicited. In any event, the *Pittsburgh Press* Court may have believed that the advertisement in question amounted to soliciting a crime and thus was clearly suppressible irrespective of the commercial speech doctrine. However, if the Court did not believe that the advertisement equaled solicitation of a crime, the illegality of the advertised transaction itself would not be a sufficient explanation, apart from the commercial speech doctrine, of why the Court allowed the prohibition to stand.

In 1975, the demise of the commercial speech doctrine, if that is what *Virginia State Board* has wrought, was portended in *Bigelow v. Virginia.* The Court had before it a Virginia statute prohibiting advertising abortion services. The statute was being applied to a Virginia newspaper editor who had run a paid advertisement for a New York abortion referral service. One justification for the statute proffered by the dissent was protecting Virginia citizens from psychological pressures to choose abortion. In other words, although abortion could not be prohibited (and could not perhaps be deemed an undesirable activity similar to smoking in the sense that it could be *deterred* constitutionally through an advertising ban), it is an activity which should not be subject to any coercion that *advertising* might produce. Nonetheless, the Court in *Bigelow* began to retreat from *Valentine* and the commercial speech doctrine by rejecting first the contention that commercial advertising is per se unprotected. *Valentine's* continued validity was deemed questionable beyond its narrow factual context, which the Court described as involving "a reasonable regulation of the manner in which commercial advertising could be distributed." The Court failed to state precisely how the *Valentine* regulation, a blanket ban on commercial handbilling, was reasonable, while a blanket ban on all other handbilling was not. Surely commercial handbilling is not

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21. Id. at 819.
any more coercive than other handbilling, especially if no sale is to be consummated at the time the handbill is distributed.

After this all-but-express overruling of Valentine, the Bigelow Court pointed out that the commercial advertisement before it referred to a matter of clear public interest and related to an activity partially protected from state interference. This combination of public interest and constitutional immunity of the advertised activity rendered the advertisement protectible under the first amendment. However, the Court did not attempt to define the parameters of the public interest test, a test which has been notoriously difficult to apply in the defamation/privacy area. And with respect to the protected status of abortion, the Court observed: "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."

All that was clear after Bigelow was that nothing was clear. What was the status of cases like Valentine and Breard and of commercial handbilling and door-to-door canvassing generally? What rendered an advertisement a matter of public interest? And what role was played by the legality and regulability of the activity advertised? Because some aspects of abortions may be regulated under Roe v. Wade, why may abortions not be regulated with respect to advertising? Did the Court peek at the legislative motive in Bigelow and determine that the state's real purpose was not to prevent psychological coercion, but rather to deter the activity through suppression of information about it? Finally, was the compelling state interest test to be applied to advertising like that in Bigelow, as it would to other forms of protected speech, or was some lesser balancing test to be applied? Without explanation, the Court

23. Baker disagrees that the advertisement in Bigelow was protected speech. But he thinks the decision was correct because of the burden that would be placed on the press were it required to assess the legality of advertisements under his first amendment test. Baker, supra note 11, at 49-50.
25. 421 U.S. at 825.
appeared to take the latter course, although it severely discounted the importance of valid state interests. Did advertising remain a lesser type of speech?

**The Virginia State Board Opinion**

It was against this background that the Supreme Court decided *Virginia State Board*. Justice Blackmun, writing the majority opinion in which Justices Marshall, Brennan, White, and Powell joined, began by describing briefly the practice of pharmacy in Virginia. He then discussed the right to receive the communications that the plaintiffs, consumer groups, were asserting. He concluded that if the pharmacists' right to advertise existed, consumers would have a right to receive the advertising and that these plaintiffs could assert such a right.

Blackmun then directed his attention to the right to advertise drug prices. He dealt first with *Valentine* and *Breard*, noting that since *Breard*, the Court had never denied protection to speech solely on the ground that the speech was commercial. *Pittsburgh Press* was explained as turning on the illegality of the conduct advertised. *Bigelow* was discussed and accurately described as a retreat from *Valentine*, but not a direct overruling because of the public interest in abortion and abortion's constitutional immunity from suppression. Blackmun then concluded the discussion of *Bigelow*:

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

Blackmun began the Court's answer to the question of whether the first amendment excepts commercial speech by stating several established propositions. First, speech is not unprotected solely because money is spent to project it, because it is in a form that is sold, or because it involves a solicitation to purchase or otherwise pay or contribute money. Second, commercial speech may not be deemed unprotected because it is uneditorial, for purely factual matter of public interest is protected.

Justice Blackmun then reformulated the question of protecting commercial speech to be

whether speech which does “no more than propose a commercial transaction,” . . . is so removed from all “exposition of ideas,” . . . and from “truth, science, morality, and arts in general, in

its diffusion of liberal sentiments on the administration of Government,"... that it lacks all protection. Our answer is that it is not.29

First, even if true, it is irrelevant that the advertiser has a purely economic interest. Blackmun cited as support for this proposition the first amendment protection afforded contestants in labor disputes who are motivated by purely economic concerns.30 But he relegated to a footnote the fact that certain restrictions on speech in the labor disputes context had been upheld, a point which dissenting Justice Rehnquist found significant. Blackmun said that the Court was expressing no view on the constitutionality of these restrictions, referring to the entire matter of speech in labor disputes as a "complex subject."

Second, commercial speech cannot be distinguished from other, fully protected speech because of the absence of public interest in the information conveyed. Blackmun described at length the public interest in commercial advertisements and concluded:

Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not.31

Finally, Blackmun pointed to a capitalistic society's public interest in intelligent, well-informed, private decisions in the marketplace. These decisions require the free flow of commercial information. And, said Blackmun, if the free flow of commercial information 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."32

After detailing the reasons for revitalizing first amendment protection of commercial speech, Blackmun turned his attention to the interests asserted by Virginia in banning prescription drug advertising. What is remarkable is that he did so as part of the argument that commercial speech should be welcomed back into the fold of fully protected speech, and not as part of determining whether an imminent danger to some compelling state interest existed which

29. Id. at 762.
32. Id. at 763.
would support regulating ordinary protected speech. Advertising would increase competition, and competition, said Virginia, would endanger the quality of service rendered by pharmacists, perhaps raise drug prices (because of advertising costs), encourage price shopping (upsetting the stability of the pharmacist-customer relationship), and lower the pharmacist's professional image.

Blackmun characterized these arguments for Virginia's ban as resting "in large measure on the advantages of the citizens' . . . being kept in ignorance." The advertising ban affected professional standards only through the assumed customer response to the free flow of drug price information. Blackmun concluded:

Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. . . . But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold.33

After holding commercial speech, specifically the speech at issue in the case, protectible under the first amendment, Blackmun concluded the Court's opinion by retreating somewhat from a position of full first amendment protection for commercial speech. After stating that commercial speech, like other speech, could be subjected to content-neutral time, place, and manner regulations—an already accepted proposition—Blackmun named three areas in which commercial speech might be regulated more stringently than is other protected speech.34 The first is the area of false and deceptive advertising, where Blackmun discounted the chilling effect of failing to allow a New York Times Co. v. Sullivan defense or of requiring that additional information, disclaimers, or warnings be attached to certain advertisements or solicitations. The second is the area of advertising illegal transactions or events. The third is the area of commercials on radio or television. However, Blackmun did not elaborate on the scope of or rationale behind this differential treatment of commercial speech.

Chief Justice Burger concurred separately in order to emphasize his understanding that the Court had not touched the area of advertising professional services, such as those rendered by attorneys and physicians. In fact, the last footnote in Blackmun's opinion had

33. Id. at 770. Baker finds the decision in Virginia State Board justifiable only on the assumption that the pharmacists were forbidden from publicizing their prices upon request from consumers (Baker, supra note 11, at 52-53), an assumption which Justice Rehnquist thought was untrue. See note 39 infra.
34. See Baker, supra note 11, at 41 n.143 & 45-46.
said as much, noting that advertising "professional services" of an almost infinite variety and nature created a much greater possibility for confusion or deception than existed with advertising drug prices.35

Justice Stewart concurred separately in order to explain why he did not believe the Court's holding affected the laws regulating false and deceptive advertising. Although he restated the reasons given by Justice Blackmun on behalf of the majority, he went further in distinguishing advertising from other protected speech whenever the issue is regulating false and deceptive practices. He pointed out that speech in labor disputes, though otherwise enjoying full first amendment protection, may be regulated in ways in which political speech may not. For example, citing NLRB v. Gissel Packing Co.,36 he pointed out that an employer's freedom to communicate his views to his employees may be restricted by the requirement that any predictions about the effect of unionization on the company "be carefully phrased on the basis of objective fact."37 And in a footnote, with citation to authority, he stated:

Speech by an employer or a labor union organizer that contains material misrepresentations of fact or appeals to racial prejudice may form the basis of an unfair labor practice or warrant the invalidation of a certification election. . . . Such restrictions would clearly violate First Amendment guarantees if applied to political expression concerning the election of candidates to public office. . . . Other restrictions designed to promote antiseptic conditions in the labor relations context, such as the prohibition of certain campaigning during the 24-hour period preceding the election, would be constitutionally intolerable if applied in the political arena . . . .38

He concluded his opinion with the following passage:

Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services. The First Amendment protects the advertisement because of the "information of potential interest and value" conveyed, . . . rather than because of any direct contribution to the interchange of ideas. . . . Since the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought. Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and

35. 425 U.S. at 773 n.25.
37. 425 U.S. at 778.
38. Id. at 778 n.3.
reliable information relevant to public and private decision-making.39

IMPLICATIONS OF Virginia State Board

The discussion now turns to the possible implications of Virginia State Board for various types of regulations of commercial speech. Some of these types may have been totally preempted by federal or even state law, but most will be regulations which local communities have some power to utilize.

The first area of importance is that of time, place, and manner restrictions on speech, including zoning ordinances and similar measures. In the light of Virginia State Board, what is the constitutional status of general ordinances zoning commercial activity, including commerce in books, movies, and art as well as in non-speech-related goods? In other words, may bookstores and movie theaters be zoned as businesses along with hardware stores and restaurants? Note that such a zoning ordinance may give to books handed out door-to-door or to speeches preference over books and movies sold at fixed locations. In this sense the ordinance resembles that in Breard, which gave preference to some forms of door-to-door distribution (those protected under Martin v. City of Struthers and Murdock v. Pennsylvania) over others (the door-to-door sale of products, including speech products). Although Breard was used by the Virginia State Board Court as an important example of the commercial speech doctrine in action, absolutely nothing in the latter case suggests that a general ordinance aimed at business establishments must except those businesses which deal in some form of speech so long as problems exist which are unique in type and magnitude to business establishments and are not present in door-to-door canvassing or general speech-making. Indeed, another case decided last term, Young v. American Mini-Theatres, Inc.,40 in upholding special zoning of adult bookstores,

39. Id. at 780–81. Justice Rehnquist was the lone dissenter in Virginia State Board. Although he questioned the Court's finding that plaintiffs had standing, his main polemical guns were trained on the overruling of the commercial speech doctrine. He professed inability to understand how the Court could distinguish advertising of drug prices from advertising of professional services, or why an employer may be prohibited from publicizing, in a labor dispute, the truthful promise of a benefit, whereas pharmacists may not be prohibited from publicizing truthful prices. He pointed out the difficulties of defining misleading or deceptive advertising. And he concluded by noting that suppression of information about harmful but legal products, such as cigarettes, had previously been upheld (and should continue to be so) and that the information sought in the instant case could be obtained legally through channels other than advertising.

Justice Stevens did not participate in the decision.

40. 96 S. Ct. 2440 (1976).
implicitly approves zoning of speech-related commercial establishments.

Suppose that certain speech-related commercial enterprises are zoned differently, perhaps more restrictively, than are other speech-related and non-speech-related commercial enterprises. The classification might turn on the form in which the speech is packaged—movie theaters versus bookstores, or bookstores versus newsracks—or upon the content of the speech—adult movies versus other movies. Or, to move from trade to advertising, suppose that a city wishes to subject sound trucks or billboards bearing political messages to lesser (or greater) restrictions than applied to sound trucks or billboards bearing commercial messages. Or suppose that it wishes to distinguish in the sound truck/billboard context within the broad class of commercial messages. Young v. American Mini-Theatres, Inc. is directly on point. Its precursor is Lehman v. City of Shaker Heights, which, contrary to the California Supreme Court’s decision in Wirta v. Alameda-Contra Costa Transit District, upheld a content-based differential treatment of advertising which resulted in the commercial being treated more favorably than the political. Both of these cases stand in an uneasy relationship to two other cases in which content-based differential time, place, and manner restrictions on speech were struck down: Police Department v. Mosley and Erznoznik v. City of Jacksonville, the former dealing with picketing, the latter, with drive-in movies.

The uncertainty which pervades this area will undoubtedly

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42. 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).
43. In Lehman, the Court sustained a city’s sale of commercial and public service, but not political or public issue, advertising space on its vehicles. In Wirta, the California Supreme Court struck down a transit district’s restriction of ads on its vehicles to commercial solicitations and ballot issues and candidates. Baker suggests that Lehman rejects the proposition that commercial advertisements are first amendment speech and thereby avoids the result of favoring one type of first amendment speech over another. Baker, supra note 11, at 41 n.144.
44. 408 U.S. 92 (1972).
45. 422 U.S. 205 (1975).
46. In Mosley, the Court invalidated, on both equal protection and first amendment grounds, an ordinance banning all picketing, except labor picketing, within 150 feet of a school in session. In Erznoznik, the Court invalidated an ordinance which prohibited drive-in theaters from showing movies containing nudity when the screens were visible from a public place. The ordinance was held to be either under- or over-inclusive with respect to each of the purposes which it was said to further.
continue. However, I would say that a distinction based on the form of packaging—bookstores versus movie theaters—will probably be upheld upon the showing of some substantial state interest behind the distinction, such as the interest in preventing the decay of neighborhoods which sufficed in Young v. American Mini-Theatres, Inc.

Content distinctions, both within the area of commercial speech and between commercial and non-commercial speech, are more problematic. In the area of advertising media, regulations of billboards, sound trucks, or other similar media which favor political speech over commercial speech, or favor some commercial speech over other commercial speech, probably will fall after Virginia State Board. It is very doubtful that the Court will allow, for example, political billboards preference over a billboard leased by Ralph Nader to attack the quality of Detroit's latest autos. And if Nader's billboard must be allowed, so must General Motors', for profit motive is irrelevant.47

In the area of trade, some door-to-door canvassing restrictions on commercial activity, such as those in Breard, may be upheld, not because the commercial is second-class, but rather because the state interest regarding coercion and privacy48 may vary along the commercial/non-commercial lines drawn by the restrictions in question. And general zoning of commercial activity, as I have already said, will undoubtedly be upheld, so long as noncommercial speech activities which create problems of the same type and magnitude as do bookstores and movie theaters are treated similarly. Differential zoning of commercial establishments dealing in speech, if based on content, will stand or fall depending upon whether the court sees the case as more similar to Mini-Theatres or to Erznoznik and Mosley.49

47. But see Baker, supra note 11.
48. The initial invasion of privacy is constant regardless of whether the canvasser is selling items or giving them away. However, on the one hand, the commercially oriented canvasser may be much more likely to intrude further than one who is merely distributing materials. On the other hand, the noncommercial canvasser who is soliciting funds for political or charitable causes may be as intrusive as the commercial.
49. The Court in Mini-Theatres distinguished Erznoznik in a footnote:

The City Council's determination was that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which this zoning ordinance attempts to avoid, not the dissemination of "offensive" speech. In contrast, in Erznoznik, . . . the justifications offered by the city rested primarily on the city's interest in protecting its citizens from exposure to unwanted, "offensive" speech. The only secondary effect relied on to support that ordinance was the impact on traffic—an effect which might be caused
To return to advertising, as opposed to trade, if differential by a distracting open-air movie even if it did not exhibit nudity. 96 S. Ct. at 2452 n.34. However, the Court made no attempt whatsoever to distinguish Mosley. (Justice Powell, concurring, merely asserted that in Mosley no governmental interest justified the content-based distinction. Id. at 2458 n.6.)

There may be at least two methods of reconciling Mini-Theatres with Mosley. The first is merely to deny that the content of speech must be either protected or unprotected under the first amendment—in other words, that there are no degrees of first amendment protection of speech content. This method finds ample support both in the plurality opinion's discussion of how content affects protectibility in the context of fighting words, libel, commercial speech, labor speech, and speech directed to juveniles and in its distinction between political and philosophical speech on the one hand and the "less important" speech represented by adult movies on the other. Moreover, Virginia State Board gives less first amendment protection to commercial speech, at least advertising, than to other forms of speech. See text accompanying note 34 supra.

The second method does not depend upon ranking various kinds of speech content in terms of first amendment protectibility. Rather, it involves examining the meaning of Mosley's content-neutrality requirement. Assume that an ordinance forbids any parade or demonstration which substantially obstructs traffic—a paradigmatic content-neutral time, place, and manner restriction on speech. And assume further that parades by Democrats always obstruct traffic and that parades by Republicans and other groups never do. Why this happens is not particularly important, except that it is the result neither of people believing what the Democrats are saying [see Scanlon, A Theory of Freedom of Expression, 1 Pitt. & Pub. Aff. 204 (1972)] nor of unreasonable crowd reaction to the Democratic message. [See Terminiello v. Chicago, 337 U.S. 1 (1949). Cf. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), upholding restrictions on "fighting words." But see Feiner v. New York, 340 U.S. 315 (1951).] Given these assumptions, no difference will result between enforcing the content-neutral ordinance and enforcing an ordinance which forbids only Democratic parades and demonstrations. Nor would there have been any difference in result in Mosley between enforcement of the ordinance at issue and enforcement of one banning all disruptive picketing near schools had the picketing excepted in Mosley—labor picketing—always been less disruptive than all other picketing. Similarly, had wilful destruction of draft cards always been associated with a particular message—opposition to the Viet Nam war—a content-biased statute ("do not wilfully destroy draft cards in order to protest the Viet Nam war") would have effected the same results as the content-neutral statute at issue in United States v. O'Brien, 391 U.S. 367 (1968).

Of course, it is difficult to imagine any causal connection between the content of speech and the harms described other than one based on the audience's believing the message or one based on the audience's reacting with unreasonable hostility to it. Nevertheless, such a causal connection might exist at a certain time between adult movies and neighborhood blight. And if it were to, an ordinance specially zoning adult theaters would effect a result identical to a content-neutral ordinance specially zoning "causes of neighborhood blight."

What the above discussion shows is that the concept of content neutrality is not all that clear. Indeed, when the Supreme Court decided, in Hudgens
treatment of the commercial and noncommercial—for example, in v. NLRRB, 424 U.S. 507 (1976), that Mosley required the denial of a first amendment exception for labor picketing in enforcing private shopping centers' exclusion of speech activities—a position which had been urged by those who believe content neutrality is at the heart of the first amendment [e.g., Karst, Equality as a Central Principle in the First Amendment, 43 U. Ctri. L. Rev. 20, 41 (1975)]—Justice Marshall, who had written the Court's opinion in Mosley, dissented on the ground that the result of the majority's holding would not be content-neutral but would instead penalize those messages whose effectiveness depends upon access to the shopping center. 424 U.S. at 525-43 (dissenting opinion). Marshall's concept of content-neutrality—taking equal account of each message's need for using certain media—echoes Justice Harlan's concurring opinion in United States v. O'Brien, 391 U.S. 367, 386-89 (1968). This concept also finds some support in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389-92 (1969). It is completely antithetical to the concept of content-neutrality ("rich messages and poor messages are equally disabled from sleeping under the bridge of a particular medium") found in the majority opinions in Hudgens and Mosley and urged by such commentators as Professor Kenneth Karst, supra. Cf. Buckley v. Valeo, 424 U.S. 1, 12-59 (1976) (striking down expenditure limitations designed to equalize the positions of wealthy and poor candidates); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (striking down a Florida right-of-reply statute guaranteeing political candidates access to privately owned newspapers which have attacked their candidacy); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (refusing under the first amendment to compel access to the broadcast media of paid public-issue advertisements).

The general view is that the first amendment mandates minimum, and not merely equal, access to certain publicly-owned and perhaps privately-owned property for purposes of communication, even at the expense of interests such as protection of the fisc, of aesthetics, of privacy and of sensibilities. See, e.g., Alexander, Cutting the Gordian Knot: State Action and Self-Help Repossession, 2 Hastings Const. L.Q. 893, 905-6 n.37 (1976); Horning, The First Amendment Right to a Public Forum, 1969 Duke L.J. 931; Kalven, The Concept of the Public Forum, 1965 Sup. Ct. Rev. 1; Stone, Fora Americana, 1974 Sup. Ct. Rev. 233; Note, The Public Forum: Minimum Access, Equal Access, and the First Amendment, 28 Stan. L. Rev. 117 (1975). This view stems from a recognition that either rule—minimum access or equal access—although facially content-neutral, de facto favors and disfavors different speakers and messages. See also the debate in the context of the first amendment religion clauses over whether the required governmental neutrality vis-a-vis religion is blindness to the religious interests affected by government action [P. Kurland, Religion and the Law 112 (1962)] or is instead neutrality regarding what counts as a religious interest but not indifference to effect on religion [Hollingsworth, Constitutional Religious Protection: Antiquated Oddity or Vital Reality?, 34 Ohio St. L.J. 15 (1973)].

Even if one accepts the Mosley concept of content-neutrality and rejects the Marshall concept, how should a court deal with a law which places a time, place, or manner restriction on a particular message because that message is closely associated with a particular harm which could have been defined in a content-neutral manner? There are these possibilities:

1. The court could find that the law is over- and/or under-inclusive with respect to the harm and strike it down on that ground.
2. The court could find that the causal connection between the law and elimination of the harm rests upon people believing in and acting upon
the context of billboards, sound trucks, or perhaps door-to-door

the message or upon people reacting to the message in an unreasonably hostile manner. The court would then protect the message and force the state to attempt to eliminate the harm by focusing on the acts of those in the audience immediately causing the harm.

(3) The court could find that although a causal link existed between the harm and the use of the medium by the particular message, there were harms of equal severity which were caused by other messages utilizing that medium. The court would then force the state to define the harm at higher level of generality, at which point the law in question would be fatally under-inclusive. See P. Brest, Processes of Constitutional Decisionmaking 565-66 (1975). (Note that Marshall's concept of content-neutrality can be viewed as an attempt to redefine the harm to which the law in question is directed for example, from "to prevent disruption" to "to prevent disruption without seriously impeding communication of messages.")

(4) The Court could find that the legislative motive was to suppress the message itself rather than to suppress the message's peculiar time, place, and manner effects. See Village of Arlington Heights v. Metropolitan Housing Dev., 97 S. Ct. 555 (1977).

(5) If the court does not find defects (1) through (4), it must, in order to invalidate the law, find that the causal relation is such that for a legislature, as opposed to an adjudicatory body, to take cognizance of the causal relation would be inappropriate. This final approach to invalidation resembles approaches the Supreme Court has taken in the Bills of Attainder cases [e.g., United States v. Brown, 381 U.S. 437 (1965)] and in those cases involving legislative grants of monopolies or other special privileges to particular people or enterprises [e.g., Morey v. Doud, 354 U.S. 457 (1957), overruled in New Orleans v. Dukes, 96 S. Ct. 2513 (1976)]. See also Alexander, supra 916-18 n.66 (1976). (Cf. the related problem of a statute which by its terms suppresses content but is applied in a situation in which a suppressible mischief does exist. See, e.g., Street v. New York, 394 U.S. 576 (1969) (conviction under a flag desecration statute for burning a flag on a street corner). The problem in such a case is the statute, not the suppression of the mischief. The statute does not by its terms indicate a legislative concern with the mischief, nor will a similar mischief necessarily exist in any future application of the statute. Because the factors specified by the statute's terms add nothing relevant to the mischief, the mischief is not the "hard core" of a merely overbroad statute.)

Difficulties with the concept of content-neutrality in the first amendment area are related to a larger difficulty with what Professor Paul Brest terms the "equal protection mode" of constitutional rights. P. Brest, supra, 274-76 (1975). When a classification for entitlement to a benefit which is not constitutionally mandated turns on the exercise of a constitutional right, the unequal provision of the benefit may deter such exercise, or it may not. If it does, unless the state interest in the classification is compelling, that right itself is infringed. If it does not, a pure equal protection analysis should be applied to determine whether the classification is an acceptable proxy for a legitimate grounds for entitlement. Compare, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (probably no deterrence), with Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) (probably some deterrence).
advertising—is allowed, much will depend on characterizing something as commercial. If Consumers Union rents a sound truck or billboard space to proclaim its findings about various commercial products, is this activity “commercial speech”? No court or city council should approach such a definitional question without looking at the substantive evils that are sought to be prevented. Profit motive, all that distinguishes an advertisement placed by a seller and the same advertisement placed by a third party, is not relevant to constitutional protection except in the few situations in which profit motive might affect coerciveness or the potential for fraud and deception. As the Virginia State Board Court took pains to reaffirm, profit motive surely does not affect the intrinsic value of the speech.\(^{50}\)

How has Virginia State Board affected the validity of commercial licenses for those whose stock-in-trade is speech—namely, booksellers, movie theaters, magazine salesmen, and the like? Murdock v. Pennsylvania stands for the proposition that license fees unrelated to actual costs incurred by the locality must fall when imposed on door-to-door sellers of religious tracts. Has Virginia State Board extended Murdock to businesses? The logic of the opinion suggests that it has, unless, of course, Murdock is no longer good law. But because so many businesses deal to some extent in speech products, and because it is so very difficult to determine when a license fee exceeds the costs imposed on the locality, my instinct tells me that the Court will struggle mightily to uphold such fees and to do so without overruling Murdock. Bookstores and theaters will somehow appear to the Court quite unlike the religious colporteurs in Murdock.

Moving away from time, place, and manner restrictions on commercial activity and commercial statements, the focus shifts to attempts to suppress commercial statements because the underlying activity is deemed harmful or is in fact illegal or because the statements are false, deceptive, disparaging, or coercive. All the members of the Court took pains to note that Virginia State Board did not upset the status of false and deceptive advertising regulations or, by implication, product disparagement regulations. New York Times Co. v. Sullivan will not apply to advertising, so says the Court.

However, because at present the law distinguishes between false, deceptive, and disparaging statements made by the sellers and those made by third parties such as Ralph Nader or Consumers Union, the issue is not simple. Once commercial speech is accorded first amendment protection, and given that profit motive is generally

\(^{50}\) But see Baker, supra note 11.
immaterial, the only conceivable ground for this distinction is that the seller can check his facts more easily than can a third party. However, so can certain politicians who make false and deceptive political statements regarding facts within their knowledge. And because the seller cannot always check his facts more easily, no apparent reason exists to distinguish between the seller's statements and those of others. The question thus becomes whether the Supreme Court will countenance the standards of false, deceptive, or disparaging advertising being applied to the reports of scientific researchers, consumer advocates, and the like, as it will not to the statements made in the political arena.

The validity of restricting advertising doctors' and lawyers' services appears now to turn on whether such advertising may be deemed misleading per se, or perhaps on whether it foments litigation. A line of cases, beginning with *NAACP v. Button* and based on the first amendment, allows groups to inform members of their legal rights and of the names of certain lawyers who can handle their claims. With *Virginia State Board* we may find some first-amendment-compelled relaxation of the restrictions on the professionals themselves, for advertisements placed by the professionals should be considered no more misleading than third party publications of lawyers' and doctors' fees. However, based upon what was said in *Virginia State Board* concerning professional advertising, I predict that the Court will not protect such advertising by the professionals themselves, but it may very well protect third-party publications.

How has *Virginia State Board* affected bans on advertising transactions which are illegal? Blackmun excepted such advertising from the Court's holding, but he did not say why. Surely if the advertisement amounts to the crime of solicitation, under the precedents it may be punished, although, as has been suggested, the distinction between solicitation and advocacy is conceptually unclear. But what if the advertisement is not legally solicitation, as it clearly would not be if it were placed by a third party? An example is an advertisement placed by a group naming stores or

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52. See text accompanying note 35 supra.


54. See text accompanying note 19 supra.
people dealing in contraband and advocating patronizing them (an advertisement the sellers would doubtless not appreciate). It is difficult to perceive how any standards but those applicable to ordinary advocacy of illegal acts could be applied to such an advertisement.

More crucial perhaps is the question of the validity of bans on advertising transactions which are legal but which are nonetheless deemed undesirable. I believe that here the message of Virginia State Board is relatively clear. The government may not suppress an activity which it has chosen to allow (or which is protected by the Constitution) by suppressing information about it, whether that information comes from the provider of the activity or from a third person. However, the reason that the government must ban or regulate the activity directly rather than suppress it indirectly through restricting information about it is not totally clear. Perhaps the premise is that information about the activity, other than that conveyed through a solicitation, could not be suppressed, even if the activity was illegal. In any event, apparently no more suppression through restrictions on advertising will be allowed, although Blackmun's citation without disapproval of the cases upholding the broadcast ban on cigarette advertising and the ban on racial information in real estate transactions does introduce some degree of uncertainty. This area of advertising bans regarding legal and illegal activities goes directly to the philosophical heart of the first amendment and raises such basic issues as why the government may not prevent advocacy of illegal acts, and why it may be paternalistic regarding the purchase of goods but may not be paternalistic regarding information about those goods, as the Court in Virginia State Board said it may not be.

Taxation specifically directed at revenue from advertisements remains forbidden under Grosjean v. American Press Co., which can be deemed only to have been strengthened by Virginia State Board.

Finally, restrictions on picketing and boycotts should be mentioned, although most are federal concerns. After Virginia State Board, may advocacy of a boycott be forbidden merely because a boycott might put undesirable pressure on an enterprise? Does the answer depend on the legality of the boycott itself? Note that in other areas only advocacy of imminent illegal action is generally proscribable. Does a conspiracy to advocate differ constitutionally from the advocacy itself? May boycotts consti-
tutionally be made illegal when no conspiracy (to boycott, not to advocate) exists among the boycotters?58 In other words, may my individual refusal to shop at stores owned by people whose politics I dislike or who abide by laws I resent be made illegal?59 May advocacy of boycotts by unions be proscribed while advocacy by other groups is allowed? Virginia State Board has, I believe, only added one more unsettling ingredient to this very unsettled area.60

Thankfully, the last area of difficult questions raised by Virginia State Board, that of coercive speech by employers or union organizers, is one that may be left for those whose concern is federal regulation. The local problems engendered by Virginia State Board are weighty enough.


58. Of course, some conspiracies to boycott constitute antitrust violations or illegal strikes, even when unilateral refusal to deal is arguably constitutionally protected. See Dorchy v. Kansas, 272 U.S. 306 (1926); Bird, Sherman Act Limitations on Noncommercial Concerted Refusals to Deal, 1970 DuBois L.J. 247. And picketing by unions which is simply a signal to other unions might be viewed as merely part of a joint conspiracy to withhold labor. Alternatively it might be considered as incitement to breach a contractual obligation and thus prohibitable under first amendment doctrines relating to incitement of imminent illegal action.

The apparent justification for forbidding associations to act in ways in which the individual members have a right to act probably turns on a comparison of the likely effects of concerted group activity and individual activity. This justification is difficult to square with certain libertarian positions.


Baker would, of course, have no trouble from a first amendment standpoint with unilateral refusals to deal for political or other reasons when the ultimate motivation is the profit of a corporation or another profit-oriented enterprise. See Baker, supra note 11.