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Commercial Speech and Paid Access
To the Press

By P. CAMERON DeVORE* and MARSHALL J. NELSON**

AFTER the epic confrontations between government and the press in recent years, there is a tendency to view the newsroom and editorial page as the exclusive battlegrounds of the First Amendment, and in terms of direct assaults on freedom of the press, this view may be justified. But as any media lawyer knows or soon learns, the day to day crises are just as likely to arise in the advertising department. They may lack some of the drama of a subpoena for news sources or a political exposé, but they lack nothing in complexity of the legal issues raised.

A major cause of the complexity is the simple fact that advertisers usually pay for access to the newspaper in order to sell something. The advertiser may see this fact as converting the press into his own personal forum and as entitling him to a First Amendment guarantee against interference by the newspaper itself. To a court, on the other hand, it may trigger the magical incantation "commercial speech," resulting in exclusion of both the advertiser and the newspaper from the First Amendment protection. Much of the media lawyer's time is spent grappling with the practical application of these two concepts.

The constitutional issues raised in the process are not simply whether a right of access should be guaranteed for the advertiser or whether commercial speech should be protected under the First

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1. As suggested by the title, this article is concerned primarily with commercial speech in the context of the printed media. This is not meant to minimize the significance of recent cases in the area of the broadcast media, but the treatment of broadcasters as public trustees under the present regulatory framework raises additional considerations beyond the scope of this article. Where broadcast cases are discussed, it is generally with a narrow focus on particular First Amendment issues.
Amendment. Commercial advertising in the press serves a number of functions, each of which raises its own peculiar questions under the First Amendment.

1. Advertising is the economic base of the communications media. It can hardly be denied that an absolute ban on commercial advertising would be fatal to the mass media as we know it; however, the ban need not be absolute or even a prohibition in form to have the same effect. Any restriction which materially diminishes advertising revenues could have a chilling effect on the functional viability of the press and thus run afoul of the First Amendment.

2. At the same time, advertising is a form of communication for which members of the media may be held responsible, both legally and in the minds of the public. The decision to publish a given advertisement or the ads of a given advertiser, as well as the form in which they are published, are therefore matters of editorial judgment within the scope of the First Amendment.

3. Advertising is also a means of access to the forum of the mass media. As stated by the Supreme Court in New York Times Co. v. Sullivan, advertising is

an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. . . . The effect [of excluding paid advertising from First Amendment protection] would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources."

The role of advertising as a forum may create direct conflicts with the media's right to control its content and editorial policies, as noted above.

4. Advertising is undeniably speech in its own right. Regardless of whether the "product" being advertised is a new car, a political candidate or a social philosophy, an advertisement is a "dissemination of information" which the public has at least an arguable First Amendment right to receive.

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5. Id. at 266.
These multiple roles all too often have been ignored by the courts in deciding questions involving advertising. In the words of one dissenting judge: "[I]t does not follow . . . that the words 'product advertising' are a magical incantation which, when piously uttered, will automatically decide cases without the benefit of further thought." But in the past eighteen months, two significant Supreme Court decisions have touched on each of these issues; one in the course of affirming restrictions on the press in its treatment of advertising, the other in denying an enforced right of access to the press. The interface of these two cases raises intriguing questions about the status of advertising under the First Amendment and at the same time provides some guidance for future developments in the area of commercial speech.

The Commercial Speech Doctrine

Any discussion of advertising and the First Amendment must recognize that in many quarters and indeed in some courts, the subject is a contradiction in terms. With the exception of political advertising and public issue "advertorials," advertising, like obscenity, has been pretty well drummed out of the First Amendment. But where obscenity receives at least some ceremony of due process, commercial advertising is often summarily dismissed on the basis of its label.

There are two assumptions at work here. The first has to do with the nature of commercial advertising—the assumption that it is somehow undignified and of less social value than other forms of speech. The second is more an assumption about its treatment under the law—a belief that the courts have already held "commercial speech" to be totally without First Amendment protection. A closer analysis of how the so-called "commercial speech doctrine” has actually been applied may force some rethinking of both assumptions.

Valentine v. Chrestensen

The origin of the “commercial speech doctrine” is usually traced

to the following quotation from the 1942 Supreme Court decision in
Valentine v. Chrestensen:12

This court has unequivocally held that the streets are proper
places for the exercise of the freedom of communicating informa-
tion and disseminating opinion and that, though the states and
municipalities may appropriately regulate the privilege in the pub-
2
lic interest, they may not unduly burden or proscribe its employ-
ment in these public thoroughfares. We are equally clear that the
Constitution imposes no such restraint on government as respects
purely commercial advertising.13

The respondent, Chrestensen, was an enterprising promoter who
owned a submarine which he opened to the public for an admission
fee. His attempts to advertise this fact were frustrated by enforcement
of a New York City ordinance prohibiting distribution of “commercial
and business advertising matter” in the streets and other public places.
On advice of counsel, he changed his advertising handbill to remove
most of the puffery and added on the reverse side a protest against the
city's refusal to allow him to dock at a public pier. After being re-
strained from distributing the modified handbills, Chrestensen sued to
enjoin enforcement of the ordinance. An injunction was granted in the
federal district court14 and upheld by the Second Circuit15 on the basis
of earlier United States Supreme Court handbill cases which had held
similar ordinances unconstitutional as applied to distributors of religious
and political materials.16 On certiorari, the Supreme Court distin-
guished those cases in the language just quoted but avoided the admit-
tedly difficult question raised by the protest side of the handbill by find-
ing it to be a willful attempt to evade the ordinance.17

Read literally, the Chrestensen decision holds only that distribu-
tion of purely commercial advertising in the public streets may constitutionally be prohibited. But the distinction between commercial adver-
tising and other information or opinion, on which the Court relied to
reach that conclusion, has far broader implications. The exact scope
of the distinction in Chrestensen remained undefined until 1973, when
the Supreme Court again confronted the issue in Pittsburgh Press Co.
v. Pittsburgh Commission on Human Relations.18 In the thirty years

12. 316 U.S. 52 (1942).
13. Id. at 54 (emphasis added).
15. 122 F.2d 511 (2d Cir. 1941).
16. Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S.
444 (1938).
17. 316 U.S. at 55.
which intervened, however, many lower courts readily adopted Chrestensen as authority for a broad exception to the First Amendment, thus excluding a substantial body of profit-tainted expression from the class of protected speech. 19

The Commercial Speech Doctrine in the Lower Courts

The application of Valentine v. Chrestensen in the lower courts has not been as clear or consistent as one might expect of a "doctrine." The questions raised by Chrestensen remain largely unasked, let alone answered, and in most cases there is no attempt to define either the scope or rationale of the distinction between commercial and noncommercial speech.

Statements of the doctrine range from absolute declarations that "the First Amendment deals with the free exchange of ideas and not with commercial 'factual' speech," 20 to the almost affirmative statement that "[e]ven advertisers enjoy first amendment rights, although it is said that product advertising is 'less vigorously protected . . . than other forms of speech.' " 21 The great majority of cases, however, adopt an approach similar to the Chrestensen decision, denying protection to the specific commercial matter before the court without attempting to meet the broader issue. 22

For example, in E. F. Drew Co. v. FTC, 23 petitioner, a distributor of oleomargarine, challenged the constitutionality of Federal Trade Commission restrictions on the use of certain "dairy product" terms in its advertising. The court noted:

The Commission, relying on Valentine v. Chrestensen . . . replies that all commercial advertising is without the protection of the First Amendment. We think it is sufficient to state that Congress can prohibit or control misleading advertising . . . without deprivation.

19. See cases cited notes 20 & 22 infra.
22. See, e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir.), cert. denied, 400 U.S. 850 (1970); Regina Corp. v. FTC, 322 F.2d 765, 770 (3d Cir. 1963); Murray Space Shoe Corp. v. FTC, 304 F.2d 270, 272 (2d Cir. 1962); E.F. Drew & Co. v. FTC, 235 F.2d 735, 739-40 (2d Cir. 1956); American Medicinal Prod., Inc. v. FTC, 136 F.2d 426, 427 (9th Cir. 1943).
23. 235 F.2d 735 (2d Cir. 1956).
of First Amendment rights. There is no constitutional right to disseminate false or misleading advertisements.\(^2\)

While this limited approach is undoubtedly sound judicial practice, it does little to clarify either the scope or rationale of the commercial speech doctrine.

A few recent opinions have attempted to define or explain the doctrine, and while the results are largely dicta, they offer more guidance than unanalyzed holdings of other cases. Judge Hufstedler's concurring opinion in \textit{Rowan v. United States Post Office Department},\(^2\)\(^5\) which upheld postal restrictions on the mailing of unsolicited erotic material, avoided the mechanical distinction between commercial and non-commercial speech with the following analysis:

The degree to which the First Amendment applies to protect speech varies with society's interest in the content of that speech. "Purely commercial advertising" has never received the same kind of constitutional protection as that afforded to expressions of greater public concern. The commercial element does not altogether destroy its quality as protected speech, but does substantially reduce the weight of the expression on constitutional scales.\(^2\)\(^6\)

Judge Hufstedler concluded that the "peculiar quality of offensiveness"\(^2\)\(^7\) inherent in erotic material added greater weight to the public interest in regulation. Whatever criticisms may be leveled at this balancing approach, the opinion is noteworthy in its treatment of the commercial speech question as a First Amendment issue.

In a case involving similar subject matter, \textit{Hodges v. Fitle},\(^2\)\(^8\) the district court for Nebraska defined the doctrine, focusing on the purpose of the expression rather than its content:

If the activity classified as speech is conducted to communicate information or disseminate opinion, it is offered the fullest protection of the First Amendment. . . . The distinction as to what separates "purely commercial advertisement" from this type of case is that, in the former, the expression is used, not to disseminate opinion or communicate information, but to sell a product or service.\(^2\)\(^9\)

Applying this distinction, the court reached a novel application of the

\(^{24}\) Id. at 739-40.  
\(^{26}\) Id. at 1044 (Hufstedler, J., concurring).  
\(^{27}\) Id.  
\(^{29}\) Id. at 509. With respect to the standard of First Amendment protection for commercial advertisement, the court stated only that the restricted test of \textit{Valentine v. Chrestensen} would be applicable. Id.
commercial speech doctrine, holding that topless dancing, if it was “speech” at all, was “purely commercial advertising” within the meaning of Valentine v. Chrestensen:

As the handbill in Chrestensen was used to promote a product, so is the dancing here used to promote a product—the sale of alcoholic beverages. 30

One of the few cases to suggest a rationale for excluding commercial speech was Banzhaf v. FCC. 31 While the court was primarily concerned with interpretation of the “fairness doctrine” and the “public interest” standard applicable to broadcasting, it devoted considerable attention to First Amendment issues in the commercial context. Banzhaf upheld an FCC requirement that broadcasters who carry cigarette advertising also provide a significant amount of time for presentation of anticigarette messages. One group of petitioners argued that the requirement would have a chilling effect on the exercise of First Amendment freedoms by discouraging cigarette advertising on radio and television. The court answered:

The speech which might conceivably be “chilled” by this ruling barely qualifies as constitutionally protected “speech.” It is established that some utterances fall outside the pale of First Amendment concern. Many cases indicate that product advertising is at least less rigorously protected than other forms of speech. Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices. 32

It is instructive to note that despite this persuasive distinction between commercial speech and other forms of expression, the court did not exclude advertising from the First Amendment and, in fact, went on to frame its analysis in First Amendment terms, noting: “[E]ven if cigarette commercials are protected speech, we think they are at best a negligible ‘part of any exposition of ideas, and are of . . . slight social value as a step to truth. . . . ’” 33 In addition, the court found a countervailing First Amendment purpose which outweighed any inhibition

30. Id.
32. 405 F.2d at 1101-02.
33. Id. at 1102.
of the advertisers' "marginal" freedom of speech.\textsuperscript{34}

In a sequel to \textit{Banzhaf}, the district court in \textit{Capital Broadcasting Co. v. Mitchell},\textsuperscript{35} upheld the 1971 ban on cigarette advertising in the electronic media. As in \textit{Banzhaf}, the holding was based in large part on "[t]he unique characteristics of electronic communication [which] make it especially subject to regulation in the public interest,"\textsuperscript{36} but the court also noted that "Congress [could] prohibit the advertising of cigarettes \textit{in any media}" under either its power to regulate interstate commerce or its supervisory role over federal regulatory agencies.\textsuperscript{37} The constitutional implications of an absolute prohibition remained unexplored, since the petitioners were not the advertisers or manufacturers, whose right to speak would clearly be abridged, but the broadcasters who, in the words of the court, "lost no right to speak—[but] only lost an ability to collect revenue from others for broadcasting their commercial messages."\textsuperscript{38} Despite this dicta, the court's approach was essentially the same as that in \textit{Banzhaf}; \textit{i.e.}, that "product advertising is less vigorously protected than other forms of speech," and the restrictions are justified by the "unique characteristics" of the broadcast media.\textsuperscript{39}

In \textit{Fur Information & Fashion Council, Inc. v. E. F. Timme & Son},\textsuperscript{40} the court stated that "[e]ven advertisers enjoy first amendment rights," and that although "product advertising is 'less vigorously protected . . . than other forms of speech,'" any limitations on those rights, however valid, "must be drawn narrowly, so as to meet the perceived evil, without unnecessary impingement on the right of free speech."\textsuperscript{41} The case involved a fur industry claim that the defendant, a manufacturer of artificial furs, was engaged in a systematic campaign of unfair competition, implying in its advertising that endangered species were used by the fur industry. Finding that defendant's advertising involved matters of public interest, the court refused to grant an injunction on the basis of the traditional First Amendment prohibition

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\textsuperscript{34} \textit{id.} at 1102-03.
\textsuperscript{36} 333 F. Supp. at 584.
\textsuperscript{37} \textit{id.} (emphasis added).
\textsuperscript{38} \textit{id.}
\textsuperscript{39} \textit{id.}
\textsuperscript{40} 364 F. Supp. 16 (S.D.N.Y. 1973). This case was decided on September 21, 1973, after the Supreme Court's decision in \textit{Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations}, 413 U.S. 376 (1973), but since it does not mention the decision, it is discussed here in connection with other \textit{pre-Pittsburgh Press} cases.
\textsuperscript{41} 364 F. Supp. at 22.
\end{flushright}
against prior restraints and concluded instead that the proper forum for this dispute was the “marketplace of ideas.”

It is not simply the holding that distinguishes the *Fur Information* case from the other cases discussed. It is also the focus of the court on the *manner* of regulation and its constitutional implications. The case treats the commercial speech doctrine as a true *exception* to the First Amendment, insisting on narrowly drawn restrictions in order to leave the broadest possible area of speech protected. The court thus goes one step beyond a simple definitional approach to consider the effect of overly broad regulation on protected speech.

At least two other recent cases have raised First Amendment issues beyond the question of whether commercial speech is itself protected. In *United States v. Hunter,* the appellant-newspaper challenged the 1968 Civil Rights Act prohibition against discriminatory advertising of housing. It argued that any distinction between commercial advertising and other forms of expression was “meaningless in the context of the newspaper publishing business,” because the revenue from advertising made possible publication of the rest of the newspaper and any restriction which discouraged advertising would therefore have a chilling effect on the exercise of First Amendment rights of the press. The court acknowledged the validity of this argument in theory but found on the particular facts that no such chilling effect would occur.

A similar argument was raised in a slightly different context in *SEC v. Wall Street Transcript Corp.* There, the newspaper challenged the issuance of subpoenas pursuant to an investigation by the Securities and Exchange Commission to determine whether the publication was a “bona fide newspaper” or an “investment advisor” subject

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42. *See id.*
44. 459 F.2d 205 (4th Cir.), *cert. denied,* 409 U.S. 934 (1972).
46. 459 F.2d at 212.
47. The court’s reasoning on this point is convincing: “While it is true, as Hunter contends in his brief, that ‘a newspaper can be silenced as easily by cutting off its source of funds, as it can be by enjoining its publication,’ no such threat is raised by the Act’s prohibition of racially discriminatory advertisements. Nondiscriminatory advertisements are still permitted. Since the Act also bars private publication of discriminatory advertisements, an advertiser has no incentive to abandon his regular use of newspapers to publicize his offer to sell or rent. We therefore doubt that the Act will deprive a newspaper of any revenue.” *Id.*
to regulation under the Investment Advisors Act. The Transcript argued that the process of investigation would itself have a chilling effect on the exercise of constitutionally protected rights of bona fide newspapers. While acknowledging "that a demand for disclosure may have some deterrent effect upon speech," the Second Circuit nevertheless held that the SEC investigation was within permissible limits. The court's treatment of the basic commercial speech question elsewhere in the opinion may have influenced the ease with which it reached this conclusion. Citing the language from Banzhaf v. FCC that "[p]romoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect," the court reasoned that the activities involved in giving commercial investment advice are not necessarily entitled to the same First Amendment protection accorded to particular forms of social, political, or religious expression. With this reasoning, however, the court went considerably beyond the type of product advertising usually excluded and extended the commercial speech doctrine to the dissemination of commercial information and opinion.

Despite the fact that both the Hunter and Wall Street Transcript cases applied the commercial speech doctrine to reject First Amendment protection, they are important in their recognition that restrictions on commercial speech may involve other First Amendment issues unrelated to the question of whether the speech itself is protected.

If any common "doctrine" can be drawn from the majority of these lower court cases, it is not that commercial speech is totally outside the protection of the First Amendment, as is often assumed, but only that commercial speech is entitled to less protection than other types of speech. With the possible exception of the Fur Information case, which acknowledged limits on the manner of regulation, the exact degree of protection has not been defined. In most cases, the axiom is simply stated in support of the court's own denial of protection in the

50. 422 F.2d at 1380.
51. Id.
52. Id. at 1379, citing 405 F.2d at 1101. See note 32 supra.
53. See 422 F.2d at 1379.
54. See New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964), which distinguished the unprotected advertising in Valentine from the protected advertisement before the Court on the basis that the former was "purely commercial advertising," whereas the latter "communicated information [and] expressed opinion." See also text accompanying note 90 infra.
particular case and followed by citation to *Valentine v. Chrestensen*.\(^{56}\)

The lack of consistent development in the doctrine may be attributed, at least in part, to the Supreme Court's relative silence on the commercial speech question. Between *Valentine v. Chrestensen* and the decision in *Pittsburgh Press*, there are only a handful of cases in which the doctrine is even mentioned.

The Commercial Speech Doctrine in the Supreme Court

After the decision in *Chrestensen*, the commercial speech doctrine received some attention in the religious pamphleteering cases of the 1940's.\(^{57}\) It then lapsed into a tenuous half-life in the footnotes of the Supreme Court, surfacing only occasionally either as dicta in decisions on other grounds or as the subject of criticism in separate opinions. It was not squarely confronted as an independent ground for decision until the 1973 decision in *Pittsburgh Press Co. v. Pittsburgh Human Relations Commission*.\(^{58}\) The occasional references in the intervening period do, however, help to explain its rationale more fully than the casual statement of the rule in *Chrestensen*.

In the period immediately following *Chrestensen*, the Supreme Court reaffirmed the distinction between commercial and noncommercial speech in the context of commercial activity on the part of religious groups; however, an important qualification on the commercial speech doctrine emerged in the process. Initially the Court held that although a state could tax the use by religious sects of ordinary commercial methods of sales (\textit{e.g.}, canvassing),\(^{59}\) it could not proscribe the distribution of handbills designed to solicit funds for religious purposes (\textit{e.g.}, advertising sales of religious literature).\(^{60}\)

In *Murdock v. Pennsylvania*,\(^{61}\) the Court recognized the possible conflict and noted that "the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult."\(^{62}\) The court concluded that

\[\text{the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism}\]
into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church serve a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. 63

The Murdock opinion, written by Justice Douglas, was at once a reaffirmation of the commercial speech distinction of Valentine v. Chrestensen and a warning that it should not be extended beyond that context. More importantly, it refuted the simplistic argument that a mere sale in connection with the exercise of First Amendment rights converts these activities into commercial conduct within the state's regulatory power.

These principles appeared again in Breard v. Alexandria 64 which upheld the constitutionality of a municipal ordinance which prohibited door-to-door magazine sales. In a somewhat puzzling application of a commercial speech distinction, the Court asserted that although the sale of periodicals did not itself preclude First Amendment protection, it did introduce a commercial element into the transaction. 65 The opinion went on to distinguish Martin v. City of Struthers, 66 which had held invalid a similar prohibition as applied to religious solicitors, on the finding that Martin involved no commercial element, as the solicitors there sought only to distribute free invitations to religious services. 67 Resting its decision on the presence of the commercial component in the facts before it, the Court concluded that the householder's interest in privacy outweighed the publisher's desire to maximize sales. 68 The Court dispensed with the First Amendment arguments in the following words:

It would be, it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents. We see no abridgement of the principles of the First Amendment in this ordinance. 69

This formulation of the commercial speech doctrine, more implied than stated, is difficult to square with either the prior cases 70 or the

63. Id.
64. 341 U.S. 622 (1951).
65. Id. at 642.
66. 319 U.S. 141 (1943).
67. 341 U.S. at 643.
68. Id. at 644.
69. Id. at 645.
70. See text accompanying notes 59-63 supra.
later treatment in *New York Times Co. v. Sullivan*. On the one hand, the Court recognized the First Amendment interest involved and merely balanced it against the "householders' desire for privacy." At the same time, the Court apparently relied on the "commercial element" to remove the problem from the scope of the First Amendment. The end result is a confusing decision which arguably could have been determined solely on the issue of whether door-to-door solicitation was a necessary part of the dissemination of the protected publications.

The clearest statement of the commercial speech doctrine prior to the *Pittsburgh Press* decision came in *New York Times Co. v. Sullivan*. The Court there refused to apply the doctrine to a paid editorial advertisement which 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.

Emphasizing that the holding in *Chrestensen* was based on the fact that the handbills were "purely commercial advertising," the Court rejected the argument that payment for the ad placed it in the category of commercial speech. Any other conclusion, the Court noted, would discourage newspaper publication of "editorial advertisements," thereby limiting the freedom of speech of persons who lack access to alternative publishing facilities. The Court did not, however, consider what status "purely commercial advertising" might have in the libel context.

Following *New York Times Co. v. Sullivan*, the Court summarily

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71. See text accompanying note 90 infra.
73. 376 U.S. 254 (1964).
74. *Id.* at 266.
75. *Id.*
76. The *New York Times* decision requires a public official to prove that a statement concerning his official conduct was made with knowledge of its falsity or reckless disregard for its truth in order to recover damages for defamatory falsehood. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), the Court extended the *New York Times* libel rule to all communications involving matters of public concern; however, the Court expressly refrained from stating a position "on the extent of constitutional protection . . ." *Id.* at 44 n.12. A 1974 decision of the Supreme Court, *Gertz v. Robert Welch, Inc.*, 94 S. Ct. 2997 (1974), dealt with the application of the *New York Times* rule to private individuals, and the Court again avoided discussion of the constitutional status of purely commercial advertisements.
affirmed Capital Broadcasting Co. v. Mitchell\textsuperscript{77} and denied certiorari in United States v. Hunter,\textsuperscript{78} SEC v. Wall Street Transcript Corp.\textsuperscript{79} and Banzhaf v. FCC,\textsuperscript{80} three of the more significant commercial speech cases decided in the lower courts. Certiorari was also denied in Dun & Bradstreet v. Grove\textsuperscript{81} which involved libel by a commercial credit report. To this order, Justice Douglas filed a lengthy dissent restating his position in Cammarano v. United States that any distinction between commercial and noncommercial speech\textsuperscript{82} should be abandoned and noting the extent to which Valentine v. Chrestensen had been eroded by subsequent cases.\textsuperscript{83}

The status of the commercial speech doctrine in 1972, when the Court granted certiorari in Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,\textsuperscript{84} was therefore uncertain. Valentine v. Chrestensen, although cited in the older handbill decisions and distinguished in the New York Times case, had never been squarely presented to the Court. While there were convincing arguments in the Douglas opinions and in New York Times that the distinction was no longer sound,\textsuperscript{85} the question was explicitly left open in a footnote in Rosenbloom v. Metromedia, Inc.\textsuperscript{86} Furthermore, Pittsburgh Press raised the commercial speech doctrine in the context of newspaper advertising, thus further complicating the issues with the addition of First Amendment considerations unique to freedom of the press.

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations

Pittsburgh Press\textsuperscript{87} involved an ordinance of the City of Pittsburgh

\begin{itemize}
\item \textsuperscript{77} Capital Broadcasting Co. v. Acting Att'y Gen., 405 U.S. 1000 (1972). See note 35 & accompanying text \textit{supra}.
\item \textsuperscript{78} 409 U.S. 934 (1972). See note 44 & accompanying text \textit{supra}.
\item \textsuperscript{79} 398 U.S. 958 (1970). See note 48 & accompanying text \textit{supra}.
\item \textsuperscript{80} National Broadcasting Co. v. FCC, 396 U.S. 842 (1969). See note 31 & accompanying text \textit{supra}.
\item \textsuperscript{81} 404 U.S. 898 (1971).
\item \textsuperscript{82} See text accompanying note 72 \textit{supra}.
\item \textsuperscript{83} 404 U.S. at 905: "Surely we have eroded Valentine to the extent that it held a commercial \textit{form} of publication negated the applicability of the First Amendment. Nor, in my view, should commercial \textit{content} be controlling. The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources."
\item \textsuperscript{84} 413 U.S. 376 (1973).
\item \textsuperscript{85} See notes 73-75, 81 & accompanying text \textit{supra}.
\item \textsuperscript{86} 403 U.S. 29, 44 n.12 (1971). See note 76 \textit{supra}.
\item \textsuperscript{87} 413 U.S. 376 (1973).
\end{itemize}
forbidding an “employer or Employment agency” from employment advertising which discriminates on the basis of sex. The ordinance also forbade any person from “aiding in the doing” of any such act. The Pittsburgh Human Relations Commission charged that the newspaper’s separate male and female help-wanted classifications in its advertising columns constituted “aiding” in unlawful discrimination under the ordinance. The commission issued a cease and desist order against the maintenance of the sex-designated classification system which was modified by the Commonwealth Court of Pennsylvania. The Supreme Court affirmed the order, as modified, primarily on the ground that the advertising at issue was purely commercial speech.

Stated simply, Pittsburgh Press reaffirmed the commercial speech doctrine of Valentine v. Chrestensen. However, in doing so, the Court was careful to limit its decision to the facts at hand and to reserve other significant First Amendment issues in the commercial context. In this sense it might also be seen as the first step in defining the limits of the commercial speech doctrine as applied to the press.

The Court undeniably recognized the Chrestensen distinction between commercial and noncommercial speech, comparing the advertisement in Chrestensen to that in New York Times Co. v. Sullivan:

The critical feature of the advertisement in Valentine v. Chrestensen was that, in the Court’s view, it did no more than propose a commercial transaction, the sale of admission to a submarine. In New York Times v. Sullivan, Mr. Justice Brennan, for the Court, found the Chrestensen advertisement easily distinguishable: “The publication here 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.” 376 U.S., at 266. In the crucial respects, the advertisements in the present record resemble the Chrestensen rather than the [New York Times] advertisement. None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission’s enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.

Had the Court ended its inquiry here and simply affirmed the commission’s order on the basis of this finding, one could argue that

89. 43 U.S. at 385, 391,
90. Id. at 385,
purely commercial advertising is outside the realm of First Amendment protection. But in the remainder of the Court's opinion, specific limitations on the application of the doctrine are carefully delineated in what, for the sake of discussion, may be classified as three general categories.

1. Institutional or Financial Threat to the Press

The Court stated:

At the outset . . . it is important to identify with some care the nature of the alleged abridgment. This is not a case in which the challenged law arguably disables the press by undermining its institutional viability.

. . . Nor does Pittsburgh Press argue that the Ordinance threatens its financial viability or impairs in any significant way its ability to publish and distribute its newspaper. 91

Without citing the specific cases, this limitation recognizes the type of arguments raised in United States v. Hunter 92 and SEC v. Wall Street Transcript Corp., 93 discussed earlier. The implication is that if such a threat or impairment could be shown, it could render unconstitutional an otherwise valid regulation of commercial speech.

2. Editorial Judgment of the Press

Having found the advertisements to be "classic examples of commercial speech," 94 the Court next considered the newspaper's argument that its editorial judgment regarding acceptance and placement of the advertisement, as opposed to the commercial content of the ad itself, should be dispositive of the issue. The Court acknowledged the exercise of judgment in allowing the advertiser to select the "male" or "female" column for a particular ad, 95 but it quite predictably found the degree of "judgment" to be insufficient to separate it from the commercial character of the ad. The Court concluded that the column heading and advertisement comprised an integrated commercial statement "which conveys essentially the same message as an overtly discriminatory want ad. . . ." 96 But the Court was quick to affirm protection

91. Id. at 382-83.
92. 459 F.2d 205 (4th Cir.), cert. denied, 409 U.S. 934 (1972). Hunter argued that "a newspaper can be silenced as easily by cutting off its source of funds, as it can be by enjoining its publication." 459 F.2d at 212.
93. 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970). The Transcript argued that investigations and subpoenas by the SEC would interfere with its ability to investigate, criticize, and otherwise carry out its traditional journalistic functions.
94. 413 U.S. at 385.
95. Id. at 386.
96. Id. at 388.
for such editorial judgment in other contexts:

Nor, a fortiori, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.\footnote{97}

Further, the Court left open the possibility that even in the context of purely commercial advertising, some editorial judgments might warrant constitutional protection:

\textit{Under some circumstances}, at least, a newspaper's editorial judgments in connection with an advertisement take on the character of the advertisement...\footnote{98}

Similarly, a commercial advertisement remains commercial in the hands of the media, at least under some circumstances. ... [T]he exercise of this kind of editorial judgment does not necessarily strip commercial advertising of its commercial character.\footnote{99}

The effect of this apparently intentional hedge is to leave an area of editorial discretion between the "integrated commercial statement" of the Pittsburgh Press ads and the protected expression of controversial views in "stories or commentary," the exercise of which might be considered truly "editorial" and thus protected despite the clear commercial nature of the underlying advertisement.

At the risk of stating the obvious, it should be stressed that at this point in the opinion the Court had not yet determined the basic issue. It had held only that the advertisements were purely commercial speech and that the newspaper's exercise of judgment took on that commercial character. But the Court had not stated that commercial speech was unprotected by the First Amendment; that question was subsequently answered only in the narrowest context.

3. "Legal" Commercial Activity

The Pittsburgh Press argued that even if the combination of advertisement and placement were to be treated as commercial speech, there should be no distinction between commercial and noncommercial speech under the First Amendment.\footnote{99} The Court answered:

Whatever the merits of this contention may be in other con-

\footnote{97. Id. at 391.}
\footnote{98. Id. at 386-87 (emphasis added).}
\footnote{99. Id. at 388. The newspaper's argument was essentially the same as that urged by Justice Douglas in his dissent from the denial of certiorari in Dun & Bradstreet v. Grove, 404 U.S. 898 (1971), i.e., that "the exchange of information is as important in the commercial realm as in any other..." 413 U.S. at 388.}
texts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance. . . .

. . . .

. . . 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. 100

On first reading, this distinction suggests that prohibition of discriminatory advertising is constitutional because discriminatory advertising is prohibited. Closer analysis, however, indicates some substance in the distinction and suggests a third limitation on the Court's holding.

Discrimination in employment, by the Court's logic, is illegal commercial activity comparable to the sale of narcotics or solicitation for prostitution. 101 Commercial advertising of such activity therefore serves no valid First Amendment interest. However, where the underlying economic activity is not illegal, the Court noted the possibility that the First Amendment interest underlying advertising of "an ordinary commercial proposal" might outweigh the government's interest in regulation. 102

To find substance in the distinction is not to ignore serious problems with the Court's approach. If a distinction is to be drawn between "legal" and "illegal" commercial activity, it would appear that government policy need only be translated into a legal prohibition to justify restrictions on the press. Justice Stewart, in a dissenting opinion, stated:

The Court today holds that a government agency can force a newspaper publisher to print his classified advertising pages in a certain way in order to carry out governmental policy. After this decision, I see no reason why government cannot force a newspaper publisher to conform in the same way in order to achieve other goals thought socially desirable. 103

The opinion of the Court, however, stated:

We hold only that the Commission's modified order, narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities, does not infringe the First Amendment rights of Pittsburgh Press. 104

100. 413 U.S. at 388-89.
101. Id. at 388.
102. Id. at 389.
103. Id. at 403 (Stewart, J., dissenting).
104. Id. at 391.
There is a temptation to read into the Court’s disclaimer a distinction, based perhaps on principles of *malum prohibitum* and *malum in se*, to avoid the apparent conflict, but there is little in the opinion itself to suggest or support such an analysis.\textsuperscript{105}

There is, however, an implied distinction between *commercial* and *noncommercial* advertising of illegal activity. A noncommercial advertisement or “advertorial” urging or even aiding in conduct which is illegal would presumably be subjected to a different test. This is not to say its publication would necessarily go unpunished, but one might expect the traditional tests of the First Amendment to be applied.\textsuperscript{106} This implied distinction may be given substance in the very near future. The case of *Bigelow v. Virginia*,\textsuperscript{107} before the Court at this writing, challenges the conviction of a newspaper editor for publication of an advertisement giving information about out-of-state abortion services. Unless the Court is able to find “purely commercial speech” in this controversial area, its treatment of the illegal subject matter in this context may help to clarify the holding of *Pittsburgh Press*.

While *Pittsburgh Press* did not overrule *Valentine v. Chrestensen*,\textsuperscript{108} as many had hoped it would, it did both significantly narrow the *definition* of commercial speech and suggest guidelines for narrowing future *applications* of the doctrine. It is also interesting to note that the issues left open by the Court roughly correspond to the various roles of advertising suggested at the beginning of this article.\textsuperscript{109} The “financial threat” limitation recognizes the role of advertising as the economic base of a free press; the “editorial judgment” limitation recognizes that advertising is part of the content of the media; and the “illegal subject matter” limitation leaves open the possibility that a lawful advertisement may be speech entitled to some protection in its own right. The

\begin{footnotes}
\item[105] See Note, *Commercial Speech—An End in Sight to Chrestensen?*, 23 DePaul L. Rev. 1258, 1269 n.62 (1974), which suggests that *Pittsburgh Press* might have been decided solely on the basis of the illegality which was promoted by the advertisements, without reference to *Valentine v. Chrestensen* and the commercial speech doctrine. Although the logic of this observation is appealing, such a holding could easily have swept too broadly. Consider, for example, a noncommercial advertisement protesting an existing law and furthering the unlawful conduct. Under a strict “illegality” theory, such a protest might not be protected, whereas under the Court’s reasoning, it is at least arguably subject to First Amendment analysis. See text accompanying notes 106-07 infra.
\item[106] See, e.g., *Yates v. United States*, 354 U.S. 298 (1957) (distinction between advocacy of abstract doctrine and incitement to action under Smith Act).
\item[108] 316 U.S. 52 (1942).
\item[109] See notes 2-6 & accompanying text *supra*.
\end{footnotes}
one category not raised in *Pittsburgh Press*—that of advertising as a means of access to the mass media—was considered by the Court in *Miami Herald Publishing Co. v. Tornillo*, decided less than a year later.

**The Right of Access**

In sharp contrast to the confused career of the commercial speech doctrine in the courts, the issue of access to the press has been a model of consistency. Almost without exception, the courts have held that the business of publishing a newspaper is a private enterprise with no legal obligation to sell advertising space to anyone. In short, a newspaper may discriminate in the acceptance or rejection of advertising, even if the effect is demonstrably damaging to an advertiser who lacks a substitute forum for his ads. The only significant limitations on this doctrine are the prohibitions of the antitrust laws and the peculiar position of broadcasters under the public interest standard of the Federal Communications Act. Otherwise, the press remains free to decide independently which advertisements it will publish and in what form.

A sophisticated line of attack on this rule has developed in recent years, and, although it is largely laid to rest in the Supreme Court's decision in *Miami Herald Publishing Co. v. Tornillo*, it is worthwhile to consider these arguments, in view of the fact that *Tornillo* did not involve commercial advertising. Moreover, since the subject matter in *Tornillo* was specifically placed by the Court within the exception noted in *Pittsburgh Press* for "stories or commentary" and "the free expression of views on [controversial] issues," some room still remains for

115. Id. at 2838.
arguments that a right of access should be recognized in the commercial context.

Two key examples of this attack in the lower courts are *Amalgamated Clothing Workers v. Tribune Publishing Co.* and *Associates & Aldrich Co. v. Times Mirror Co.* In *Amalgamated Clothing Workers* a garment workers union picketed major department stores in a campaign to limit the importation of foreign clothing. The stores were major advertisers in the defendant newspapers, and one of them, Marshall Field & Co., shared common ownership with one of the defendants. In the course of the controversy, the union submitted a full-page advertisement which depicted a picket line beneath the well-known Marshall Field clock and explained the union's position. The newspapers refused to publish the ad. The union sued to compel publication, arguing that a "special relationship" existed between the newspaper publishing industry and the state through which the defendant newspapers received "economic benefit and favored treatment flowing from public sources as a result of the statutes, ordinances and custom." This relationship, they asserted, converted the newspapers' censorship into "state action" infringing the First Amendment rights of the union and its members.

The Seventh Circuit rejected this argument and affirmed the district court's summary judgment for the defendant. The court cited the traditional concept of the role of the press in the following words:

Rather than regarded as an extension of the state exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on governmental power. . . . In sum, the function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation.

The court, in essence, affirmed the established rule that private censorship is not prohibited by the First Amendment. It did not reach the question of what effect enforcing a right of access might have on the First Amendment rights of the newspaper.

117. 440 F.2d 133 (9th Cir. 1971).
118. 435 F.2d at 473.
119. *Id.*
120. *Id.* at 474.
The same result was reached in the context of product advertising in *Associates & Aldrich Co. v. Times Mirror Co.*,121 a Ninth Circuit case. There, an ad for the motion picture "The Killing of Sister George" was accepted by the *Los Angeles Times* on the condition that certain parts of the ad be removed. The film's producers sued the *Times* to enjoin "any form of censorship of motion picture advertising"122 on the same basic theory relied on in *Amalgamated Clothing Workers, i.e.*, that the newspaper's interference constituted state action. To reach this argument, however, the plaintiffs cited the newspaper's "semi-monopoly and quasi-public position" rather than the specific catalogue of special favors cited in *Amalgamated Clothing Workers*.123 The court of appeals joined the Seventh Circuit in rejecting this state action argument; however, it also stated:

Appellant has not convinced us that the courts or any other governmental agency should dictate the contents of the newspaper.

There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material.124

In what appears to be an afterthought, the court noted the commercial nature of the plaintiff's advertisement and stated, "[T]his type of commercial exploitation is subject to less protection than other types of speech,"125 citing *Valentine v. Chrestensen*.

The state action argument of these cases was laid to rest, at least implicitly, in *Columbia Broadcasting System, Inc. v. Democratic National Committee*.126 There, the Supreme Court refused to recognize the argument even in the context of the highly regulated broadcast media and upheld the broadcasters' right to reject political advertising. In dicta comparing newspapers and broadcasters, it also noted that

*The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers.*127

In *Miami Herald Publishing Co. v. Tornillo*,128 which unequivo-
cally reaffirmed this principle of journalistic independence, the issue of enforced access to the press was raised not by private individuals, but by legislation requiring “equal space” for any political candidate whose record was attacked in a newspaper.\(^\text{129}\) It was also raised in a distinctly noncommercial context. Nevertheless, the holding in *Tornillo* appears to be broad enough to affirm effectively both the *Amalgamated Clothing Workers* and the *Associates & Aldrich* cases. In its concluding paragraph, the Court stated simply:

A newspaper is more than a passive receptable or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.\(^\text{130}\)

This conclusion is based on essentially the same argument advanced by the *Pittsburgh Press*—i.e., that the acceptance and placement of materials in the newspaper are matters of editorial judgment entitled to First Amendment protection.\(^\text{131}\) But where the application of this argument was rejected in *Pittsburgh Press*, it was squarely affirmed in the noncommercial context of *Tornillo*. In addition to recognizing protection for the editorial judgment of the press, the Court also acknowledged the institutional and financial threat inherent in an enforced right of access. Noting first that “[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations . . . ”\(^\text{132}\) the Court found such a restraint in the financial burden imposed by an enforced right of reply:

The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in

\(^{129}\) Fla. Stat. § 104.38: “If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.803.”

\(^{130}\) 94 S. Ct. at 2840.

\(^{131}\) See note 95 & accompanying text *supra*.

\(^{132}\) 94 S. Ct. at 2839.
printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. . . . [I]t is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.\textsuperscript{133}

This burden, the Court found, constituted a classic example of an impermissible “chilling effect” on the free exercise of the press:

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right of access statute, editors might well conclude that the safe course is to avoid controversy and that, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government enforced right of access inescapably “dampens the vigor and limits the variety of public debate.”\textsuperscript{134}

The clear effect of \textit{Tornillo} can be summarized in the Court’s own language: “[A]ny such a compulsion to publish that which ‘reason’ tells [a newspaper] should not be published’ is unconstitutional.”\textsuperscript{135} But what if “that which should not be published” is a purely commercial advertisement? Although \textit{Tornillo} did not reach the question, there is nothing in the opinion to suggest that the same rule would not apply. In fact, the Court cited with approval \textit{Associates & Aldrich Co. v. Times Mirror Co.}\textsuperscript{136} which, as noted above, denied access to just such an advertisement.\textsuperscript{137} Furthermore, the Court stated that “a newspaper is more than a passive receptacle or conduit for news, comment, and advertising.”\textsuperscript{138} While it is true that Justice White’s concurring opinion cited \textit{Pittsburgh Press} as an example of “[w]hatever power may reside in government to influence the publishing of certain narrowly circumscribed categories of material . . .”\textsuperscript{139} the right of a newspaper to refuse publication of a purely commercial advertisement appears to be established by \textit{Tornillo}.\textsuperscript{140}

\begin{itemize}
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{135} 94 S. Ct. at 2839.
  \item \textsuperscript{136} \textit{Id.} at 2838.
  \item \textsuperscript{137} See note 124 & accompanying text \textit{supra}.
  \item \textsuperscript{138} 94 S. Ct. at 2840 (emphasis added).
  \item \textsuperscript{139} \textit{Id.} at 2841 (White, J., concurring).
  \item \textsuperscript{140} \textit{See also} \textit{Lehman v. City of Shaker Heights}, 94 S. Ct. 2714 (1974) (decided the same day as \textit{Tornillo}). The \textit{Lehman} Court held that a city-owned transit system could refuse advertising space inside city buses, so long as the policy was not applied arbitrarily. In dicta, the Court noted “[i]n much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make
\end{itemize}
Commercial Speech After Pittsburgh Press and Tornillo

It is too early at this writing to cite application of Tornillo in the lower courts, but several noteworthy cases in the commercial speech area have been reported since Pittsburgh Press, each representing a slightly different application of the newly-revived commercial speech doctrine.

Associated Students v. Attorney General141 challenged a postal ban against materials publicizing abortion services or materials, as applied to a student publication on birth control. Applying the New York Times/Chrestensen142 distinction to the plaintiffs' publication, the court paraphrased Pittsburgh Press, finding:

[T]he materials here resemble the [New York Times] rather than the Chrestensen advertisement. They express a position on social policy and criticize many of the prevailing family planning ideas. They are classic examples of non-commercial speech.143

As indicated by the court, the case does not really involve commercial speech and therefore borrows little from Pittsburgh Press except the implication that a “commercial” advertisement for abortion services might be prohibited.

In Barrick Realty, Inc. v. City of Gary,144 the court upheld an anti-blockbusting ordinance which prohibited use of “For Sale” signs in certain residential areas of Gary, Indiana. The opinion is significant for its carefully studied application of Pittsburgh Press. The court first acknowledged that “the Gary ordinance is directed at signs that merely [p]ropose a commercial transaction,”145 and applied the “illegal subject matter” analysis of Pittsburgh Press, noting that the ordinance was also directed at illegal discrimination. However, rather than rest its decision on this easy conclusion, the court also noted that “For Sale’ signs are forbidden even if they do not contain an explicit reference to race.”146 Instead, the court squarely faced the fact that use of the signs in a blockbusting campaign did indeed communicate a message to neighbors and visitors as well as to purchasers:

In a sense, the very purpose of the ordinance is censorial. First

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142. See note 90 & accompanying text supra.
143. See 368 F. Supp. at 24.
144. 491 F.2d 161 (7th Cir. 1974).
145. Id. at 163.
146. Id.
Amendment as well as commercial interests are therefore affected by this ordinance.147

The court upheld the ordinance under a traditional First Amendment analysis, focusing on the fact that the regulated speech also involved conduct and that alternate means of communication were available.148

A third case, Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy,149 overturned a Virginia law against advertisement of prescription drug prices. Relying on Pittsburgh Press, the court found a First Amendment interest in the right of consumers to have this price information which, in the court's view, outweighed the governmental interest in prohibition:

The right-to-know is the foundation of the First Amendment; it is the theme of this suit. Consumers are denied this right by the Virginia statute. It is on this premise that we grant the plaintiffs the injunction and the declaration they ask.150

However, the court left unchallenged an earlier decision by its sister court for the Western District of Virginia, Patterson Drug Co. v. Kingery,151 which had upheld the same price advertising restrictions against a challenge by pharmacists. In a questionable distinction, the court noted that the pharmacists' argument rested on "a prima facie commercial approach" and that consequences to consumers were not discussed because they were not raised.152

A fourth case, Carpets by the Carload, Inc. v. Warren,153 raised both right of access and commercial speech issues with an interesting twist. Plaintiff was an advertiser who had been denied newspaper space on normal credit terms after the newspaper received notice of a statutory consumer protection action against the business. Plaintiff challenged the constitutionality of both the statute and the newspaper's action on First Amendment grounds, claiming that the attorney gen-

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147. Id. at 164.
148. Id.
150. Id. at 687.
152. 373 F. Supp. at 686. Read literally, this distinction would require a token "consumer" to be among named plaintiffs before the First Amendment interest in receiving information could be raised. Such an application would be wholly inconsistent with the Supreme Court decisions noted in Kleindienst v. Mandel, 408 U.S. 753, 763 (1972), protecting the First Amendment rights of persons not before the court. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-90 (1969); Thomas v. Collins, 323 U.S. 516, 534 (1945); Martin v. City of Struthers, 319 U.S. 141, 143 (1943). The distinction did, however, avoid what would otherwise have been an uncomfortable conflict of authority between the district courts of Virginia.
eral's notice to the newspaper converted its refusal into either state action or a conspiracy to deprive plaintiff of its First Amendment rights. The court cited Pittsburgh Press for the proposition that "commercial advertising is not protected by the freedom of speech and press provisions of the first amendment" and held that "an advertiser does not have a constitutional right to access to a newspaper."

With the exception of the extremely broad interpretation of Pittsburgh Press to support the denial of access, the case itself is not remarkable. But the circumstances under which it arose and the court's observation that the attorney general might have brought action against the newspaper suggest a new range of practical problems for the press. The combination of Pittsburgh Press, which sanctions regulation of advertising, and Tornillo, which upholds the right to refuse advertising, may raise fundamental questions regarding freedom of the press.

Taken together, Pittsburgh Press and Tornillo state an apparent rule that a newspaper may discriminate by refusing commercial advertising altogether, but once it honors the advertiser's request, its treatment of the ad may be regulated to prevent discrimination or to further any "valid limitation on economic activity." If such limitation carries with it restrictions on the content of advertising and sanctions against the newspaper, the end result is that the press may be penalized for granting access.

If a newspaper has any doubt as to the compliance of an advertisement with state or federal regulations, the risk of sanctions against the paper itself creates strong pressure to refuse publication, regardless of its own desires or editorial policy. But the effect of these pressures may be to constrict the principal outlet for dissemination of information and ideas available to those who are not members of the press—the very result the Court sought to avoid in New York Times Co. v. Sullivan and Associated Press v. United States. Proponents of a broad commercial speech exception will of course argue that there is

154. Id. at 1076.
155. Id. at 1078.
156. Id.
157. Id. at 1077.
160. 376 U.S. at 266.
161. 326 U.S. 1, 20 (1945) (purpose of the First Amendment to secure "the widest possible dissemination of information from diverse and antagonistic sources").
no real loss since commercial advertising serves none of the interests normally associated with the First Amendment.\footnote{162} In short, no "information and ideas" in the constitutional sense are involved. The defect in this argument is its focus on only the question of free speech and its failure to recognize the inherent threats to the freedom of the \textit{press} as an institution under the First Amendment.

First is the ironic fact that the decision not to print, defended in \textit{Tornillo} as a constitutionally protected exercise of editorial judgment, may as a practical matter be compelled by the threat of state-imposed sanctions. Secondly, there may be a real financial threat to the newspaper, not only in the form of economic sanctions, but also in the administrative costs of reviewing ads to insure compliance with state and federal laws. If these costs and the threat of sanctions are great enough, the newspaper may be forced to forego revenue from certain types of advertising altogether. One need not posit the extreme situation in which the newspaper is forced out of business to find an unconstitutional chilling effect. As noted in \textit{Tornillo}\footnote{163} and \textit{Columbia Broadcasting Systems, Inc. v. Democratic National Committee},\footnote{164} the amount of advertising revenue has a direct relationship to the ability of the press to provide adequate news coverage. If the \textit{Carpets} case, discussed above,\footnote{165} had involved a threatened suit against the newspaper for deceptive advertising by automobile dealers or other major advertisers as a class, the financial impact and resulting chilling effect on the press would be obvious. Of course, a newspaper can avoid the threat of such actions by simply insisting on compliance by the advertisers before it agrees to publish. It is here that the most subtle and yet most serious effect of the commercial speech doctrine is felt.

The practical effect of \textit{Pittsburgh Press} and \textit{Tornillo} may be to convert the press into a regulatory arm of the government. If, as Justice Stewart suggests, \textit{Pittsburgh Press} holds that the newspaper can be forced "to carry out government policy"\footnote{166} in its advertising pages, \textit{Tornillo} provides the most effective tool for enforcement of that policy against the advertisers. Whereas the state's enforcement efforts are confined to legal action consistent with due process of the law, the

\begin{itemize}
\item \footnote{163} 94 S. Ct. at 2839 n.22.
\item \footnote{164} 412 U.S. at 117.
\item \footnote{165} See note 153 \& accompanying text \textit{supra}.
\item \footnote{166} 413 U.S. at 403 (Stewart, J., dissenting).
\end{itemize}
newspaper now reluctantly wields the ultimate sanction against violation of advertising regulations—it can summarily refuse to publish any advertisement that might pose a risk of violation, a fact which will not be lost on legislatures and government agencies. There will be a great temptation to shift the burden of enforcement from the government to the media by simply enacting provisions making the media liable for publication of any offending advertisements. Not only does this remove the risk and expense of lengthy court proceedings, but it also shifts the expense of careful day to day review and enforcement directly to the media.

It is one thing for a newspaper to choose to enforce government policy in this manner, and some newspapers may even have an affirmative policy in this regard. It is an entirely different matter, however, if the press is forced into such a role by the threat of sanctions against it. The traditional function of the press has been that of an independent check on governmental action, requiring a healthy distance between press and government. To compel enforcement of government policy by the press is a dangerous encroachment on this independence which undermines the purposes of the First Amendment.

Obviously, a further narrowing of the distinction between commercial and noncommercial speech would reduce the impact of these problems by reducing the amount and complexity of regulation over advertising. It is crucial to recognize, however, that even total abrogation of the commercial speech doctrine will not eliminate the problem. As the decision in *Barrick Realty, Inc. v. City of Gary*\(^{167}\) suggests, it is entirely possible for regulation of advertising to be upheld on traditional First Amendment analysis, leaving the newspapers in exactly the same position with respect to regulations which are held valid. The First Amendment issues affecting the press are therefore not so much matters of free speech as they are questions of interference with the freedom of the press as a viable, independent institution. The failure to distinguish these issues can have a serious impact on the First Amendment interests of the media.

Consider, for example, the courts' treatment of the loss of revenue in *Banzhaf v. FCC*\(^{168}\) and *Capital Broadcasting Co. v. Mitchell*.\(^{169}\) In *Banzhaf*, the court found it unlikely that cigarette advertising would be "chilled" by the requirement that it carry antismoking messages, in light

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167. 491 F.2d 161 (7th Cir. 1974).
168. 405 F.2d 1082 (D.C. Cir. 1968).
of the fact that cigarette advertising accounted for more than 7 percent of all television advertising revenues and nearly $300,000,000 annually to radio and television combined.\textsuperscript{170} In the \textit{Capital Broadcasting} case, which upheld a total ban on radio and television cigarette advertising, the court noted that the resulting loss of revenue might "affect [broadcasters] with sufficient First Amendment interest" to raise a constitutional challenge, but concluded:

Finding nothing in the Act or its legislative history which precludes a broadcast licensee from airing its own point of view on any aspect of the cigarette smoking question, it is clear that petitioners' speech is not at issue. Thus, contrary to the assertions made by petitioners, Section 6 does not prohibit them from disseminating information about cigarettes, and therefore, does not conflict with the exercise of their First Amendment rights.\textsuperscript{171}

This approach equates First Amendment rights solely with the freedom to "air one's point of view" and says nothing about the impact of lost revenues on the broadcasters' ability to "disseminate information" generally. It may well be that the broadcasters, like the newspaper in \textit{United States v. Hunter},\textsuperscript{172} would not be able to show sufficient loss of revenues to sustain a "chilling effect" argument, but this issue cannot be resolved by a finding that freedom to speak about cigarettes is preserved.

\section*{Conclusion}

Perhaps the most hopeful indication in \textit{Pittsburgh Press} and \textit{Tornillo} is the recognition, in each, of the multiplicity of issues involved, including those specifically affecting freedom of the press. Despite the questionable result and reasoning of \textit{Pittsburgh Press}, it does acknowledge those First Amendment interests of the press which extend beyond the simple question of whether commercial speech is to be protected. \textit{Tornillo} goes further in reaffirming the strength of those interests and provides a well-reasoned framework for future analysis in the area of commercial speech.

Before \textit{Pittsburgh Press}, there may have been an element of false optimism among media lawyers, a belief or hope that the Supreme Court was moving away from the commercial speech doctrine and would, if invited, eventually overrule \textit{Chrestensen}. That opportunity has now been presented and declined by the Court in such a way as

\begin{footnotesize}
\begin{enumerate}
\item[170.] 405 F.2d at 1102 n.83.
\item[171.] 333 F. Supp. at 584.
\item[172.] 459 F.2d 205 (4th Cir.), \textit{cert. denied}, 409 U.S. 934 (1972).
\end{enumerate}
\end{footnotesize}
to invite resolution of many of the issues left unanswered by the lower courts. It is now clear that resolution of these issues may involve much more than simply overruling the commercial speech doctrine. Thus, while the time may have passed for urging absolute First Amendment protection for all advertising, the narrower, and in many ways more significant issues suggested in *Pittsburgh Press* and *Tornillo* are now ripe for determination.