Strengthening and Clarification of

Commercial Speech Protections

Virginia Pharmacy was followed by a series of First Amendment cases which expanded recognition of protected speech and clarified the commercial speech protections established in prior First Amendment cases.

In *Linmark Ass'n v. Township of Willingboro*,[1] the Court refused to accept a time, place and manner defense of an ordinance prohibiting "For Sale" signs on residential lawns. The purpose of the ordinance was to stop "white flight" from the racially integrated community. Just as it had in *Virginia Pharmacy*, the Court rejected the use of a speech limitation to accomplish an otherwise justifiable objective which might be obtained by some other means. Moreover, the prohibition on the commercial communication was not concerned about time, place (front lawns), or manner (signs) of the speech, but rather on the content of the speech ("For Sale"), and on that basis alone, the speech was banned.[2]

The law was struck down because it restricted the free flow of truthful commercial information, and, importantly, because it did so without allowing for alternative methods of communication. The Court recognized that the signs could do what newspaper advertising and real estate listings could not, because those alternatives involved "more cost and less autonomy than signs, are less likely to reach persons not deliberately seeking sales information, and may be less effective."

In *Bates v. State Bar of Arizona*,[3] attorneys placing a number of newspaper and other

1. 431 U.S. 85 (1977).
2. *Id.* at 93, 94.
3. 433 U.S. 350 (1977).

Real estate signs can do what newspaper advertising and real estate listings cannot, because those alternatives involve "more cost and less autonomy than signs, are less likely to reach persons not deliberately seeking sales information, and may be less effective," according to the Court.

advertisements for a "legal clinic" with "legal services at very reasonable fees," and listing their fees for various services were charged with violating the State Supreme Court's disciplinary rule prohibiting them from advertising prices. The State's goal was to preserve the professionalism of attorneys and prevent them from misleading the public about the cost of services. Justice Blackmun, who delivered the opinion of the court, wrote, "Obviously the information of what lawyers charge is important for private economic decisions by those in need of legal services. Such information is also helpful, perhaps indispensable, to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered." Comparing the case to *Virginia Pharmacy*, Blackmun observed that "the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance."

Truthful advertising related to lawful activity is protected by the First Amendment.

The Court additionally recognized two important facts about commercial advertising: first, that "advertising is the traditional mechanism in a free market economy for a supplier to inform a potential purchaser of the availability and terms of exchange" and second, that it grants entry into the market. Blackmun wrote, "In the absence of advertising, an attorney must rely on his contacts with the community to generate a flow of business. In view of the time necessary to develop such contacts, the ban in fact serves to perpetuate the market position of established attorneys. Consideration of entry barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the market."

The next year, the Court had further opportunity to clarify the nature of protected commercial speech. In *First National Bank of Boston v. Bellotti*,[4] the Court established the free speech rights of corporations when it ruled corporate campaign expenditures were speech protected under the First Amendment. The Court found that speech – and in this case, commercial speech – "serves significant societal interests" wholly apart from the speaker's interest in self-expression, and that the identity of the speaker does not determine whether the speech itself is protected. The Court held that even corporate speech furthers the First Amendment purpose of fostering a broad forum of information to facilitate self-government.

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It is the on-premise business sign that helps grant "mom and pop" entry to the market.

ment.

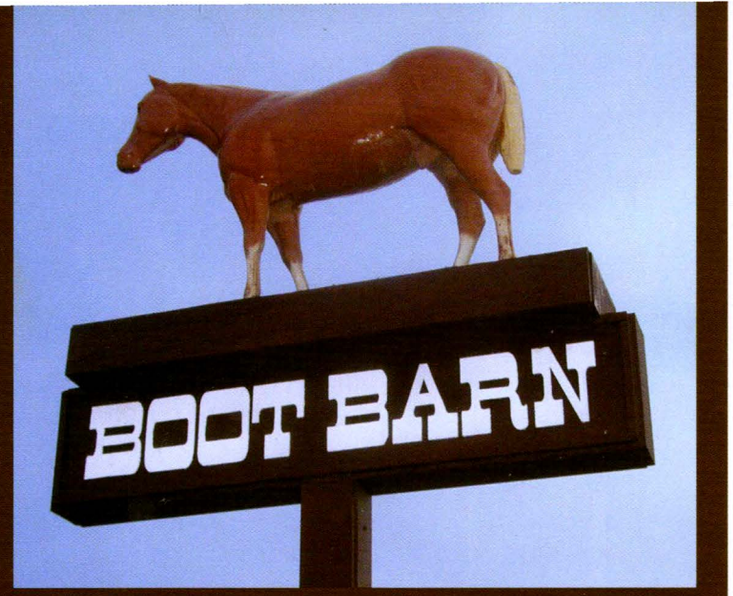
But the Court did not erase the distinctions between commercial speech and other speech. Rather, in *Ohralik v. Ohio State Bar Ass'n*,[5] the Court attempted to clarify the distinction for purposes of determining when broader regulation is permissible. Justice Powell, in delivering the opinion of the Court, wrote,

> *Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech 'is wholly outside the protection of the First Amendment,' ... we were careful not to hold 'that it is wholly undifferentiable from other forms' of speech. We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.*

Shifting the Burden of Proof

Land use planning that has been driven by selfish motives can quite easily produce negative results for private property owners. Inherent in land use planning and zoning is the potential for institutionalizing social biases. This is made possible by means of a process that can be influenced by the desire of some individuals to use it to enhance their own occupational opportunities, aid their friends or political allies, or increase the value of particular parcels of land. Until the 1980s, land use decisions were often based on unproven assertions, a situation that exacerbated the problems faced by property owners. An aggrieved property owner was forced to bear the burden of proving that the assumption on

4. 435 U.S. 765, 776 (1978).
5. 436 U.S. 447 (1978).



City officials bear the responsibility of understanding the aesthetic needs and desires of the community.

which the regulation was based was false. Because of the excessive costs involved, this was nearly impossible in practical terms. Rarely did one person on one property have the means to challenge the basis for a zoning decision; most were, in effect, forced to submit to it.

The Court was growing less and less comfortable with the way the states' interference with basic rights was expanding as they were subject only to the Rational Basis standard of judicial scrutiny. If the states continued to base this interference on unproven opinions, forcing the citizens to bear the burden of proving the opinions were wrong, people would lose confidence in their government.

In *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*,[6] involving a challenge to a New York state law that totally prohibited public-utility advertising, the Court began to step in. The state asserted that such advertising would increase consumer demand, thereby leading to increased energy consumption, which directly contradicted the state's interest in energy conservation. The Court adopted a four-part "balancing test" to decide the issue:

1. The court must first ask if the commercial speech at issue concerns "lawful activity" and is not "misleading." (If the answer here is negative, then no protection is afforded, and the inquiry is ended.)
2. The court must ask if the government interest served by the regulation is substantial. (If the answer here is negative, then the First Amendment will be seen as invalidating the regulation, because speech should not be limited for insubstantial reasons.)

If the answer to both of the first two questions is affirmative, the court must then determine the following:

3. Does the regulation directly advance the government's interest?
4. Is the regulation no more extensive than necessary to serve that interest?

In applying this test to the facts of the public utility case, the Court found that the ban failed the fourth requirement because the state could achieve its goal by requiring that the utility include in its advertisements information regarding energy conservation. And while still paying deference to the "commonsense differences" between commercial and noncommercial speech, the Court clearly articulated more scrutiny of restrictions on commercial speech than the deferential standards of "reasonable" or "rational," or "not arbitrary and capricious," which normally had been applied to test the validity of government regulation of purely economic interests.

Central Hudson for all practical purposes marked the end of Rational Basis review for sign codes and replaced that standard with the Intermediate Scrutiny test for commercial speech regulation. The Court said that although the special nature of commercial speech may require less than Strict Scrutiny of its regulation, entirely suppressing commercial speech in pursuit of a nonspeech related policy "could screen from public view the underlying government policy." The Court, therefore, had not recently "approved a blanket ban on commercial speech unless the speech itself was flawed in some way, either because it was deceptive or related to unlawful activity."[7]

Metromedia Inc. v. City of San Diego[8] was the first in a series of U.S. Supreme Court decisions on signage regulation that followed *Central Hudson*. In that case, the city's sign ordinance permitting on-premise signs while banning off-premise signs was challenged by Metromedia, Inc., an outdoor advertising company. The city had advanced two reasons for its ban on outdoor advertising: first, that the signs significantly degraded the attractiveness of the community, and second that they compromised traffic safety. During the course of the case, San Diego conducted a scientific study of signage. The City realized that its sign code was manipulating a phenomenal communication system that was very efficient at allocating resources and that the signs in no way caused traffic accidents. In summary judgment, it stipulated to those two facts.

Aesthetics are subjective: what one finds quaint, another finds silly; what one finds elegant, another finds austere.

The Court had a tremendous amount of difficulty with the case, which resulted in five separate opinions. None of the five opinions represented a majority of the Court's members, but the Court did rule 6 to 3 that the sign ordinance was unconstitutional. Two justices felt the city had not established a sufficient interest in aesthetics and traffic safety (although the city had already stipulated that this was not a traffic safety issue). Four justices found the ordinance favored commercial speech over noncommercial speech because commercial speech could be displayed on on-premise signs, while non-commercial speech could not. Thus, the regulation was not content-neutral.

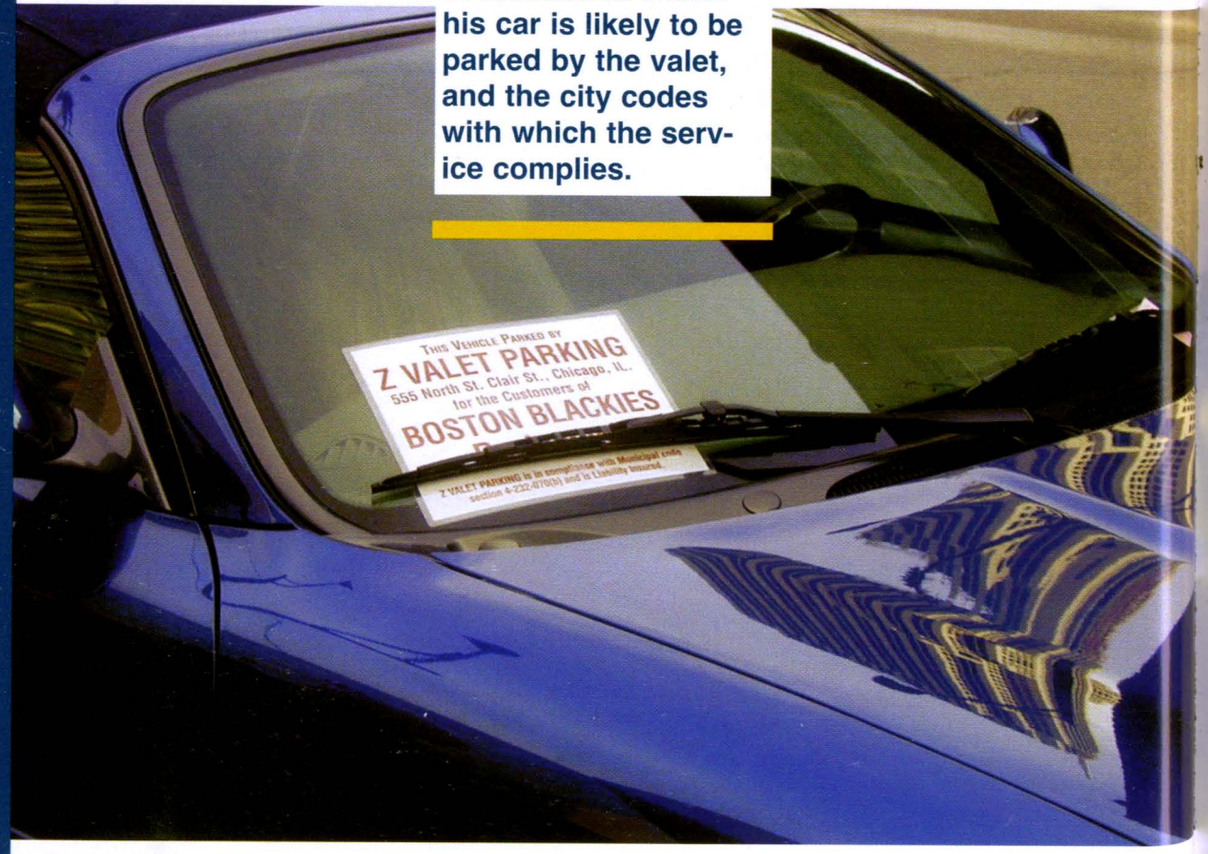
One year later, the Court spelled out its thinking on the regulation of commercial speech, in a case known as *In re R.M.J.*[9] The decision invalidated sanctions that had been imposed on an

6. 447 U.S. 557, 566 (1980).
7. *Id.* at 566, n.9.
8. 101 S.Ct. 2882 (1981).
9. 455 U.S. 191 (1982).

attorney who violated advertising standards because the State was unable to show that the advertising was misleading or that any substantial government interest was served by the standards. Justice Powell, who delivered the opinion of the Court, wrote,

"Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information ... Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served ... Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest."

This sign offers the reader a wealth of information he may find important - the name of a restaurant at which valet parking is available, the type of location at which his car is likely to be parked by the valet, and the city codes with which the service complies.



In the midst of this expanding Supreme Court protection of individuals' rights and protected speakers, a key event occurred: the 1980 failure of the savings and loans. In response, Congress in 1989 passed the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). Title 11 of the FIRREA was the government's first serious look at land value procedures, or in other words, appraisal – the act of attaching a neutral opinion of value to real estate. This formal recognition of the value of private property worked to weaken the authority of the state in land use decisions. If the government was to be involved as a lender, it had to become more aware of how its actions were affecting the value of the property serving as collateral on its loans.

Cincinnati's ban of commercial newsracks containing advertising and located on public property was overturned because the paltry reduction in the overall number of newsracks did not justify the speech restriction.

That same year, the Court furthered its limits on state authority in the regulation of commercial speech in *Board of Trustees of State University of New York v. Fox*.[10] Here, the Court found that the regulation of commercial speech required something more than "mere reasonableness." The "something more" was:

... a fit between the legislature's means and ends – a fit is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective.

The Intermediate Scrutiny test, as strengthened by *Fox*, was used by the Court four years later to decide *Cincinnati v. Discovery Network*.[11] In that case, Cincinnati had attempted to ban commercial newsracks containing advertising publications and located on public property, but leave other newsracks containing newspapers and in place. This would have eliminated only 62 of the city's more than 1500 newsracks located on public property. The City claimed the ban would protect the safety and aesthetics of the community. The Court overturned the ban, saying that the paltry reduction in the overall number of newsracks that would occur with the ban could not justify the regulation.

Furthermore, the Court wrote, "In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech." The Court continued, "Not only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests." (emphasis in original).

Finally, the Court determined that the ban could not be considered a valid content-neutral regulation of "time, place, and manner" because the very basis for the regulation was the difference in content between commercial and noncommercial newsracks.

The Cincinnati newsrack ban provides a classic example of "rational relationship" logic in action. In an attempt to deal with a legitimate problem (i.e. public safety and aesthetics), cities frequently pass regulations (i.e. banning commercial newsracks from public property) based on rational-sounding reasons (i.e. commercial publications tend to proliferate, are not well-maintained, and pose a hazard in the right-of-way), without scientific analysis that would prove whether the regulation will address the problem (i.e. a study showing that the regulation will only rid the city of 62 of its 1500+ newsracks).

10. 492 U.S. 469 (1989).
507 U.S. 410 (1993).