Regulation of Commercial Speech: Commercial Access To The Newspapers

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Commercial access to the advertising pages of the newspaper is essential to the success of many businesses. Where advertising space has been denied, businessmen have asked the courts for relief in the form of compulsory access. In response the courts have held that, absent legislation, the newspaper, as long as it does not act in furtherance of a monopoly, has the power to contract with whom it pleases and to reject any submitted material arbitrarily. The courts have never refused relief *squarely* on the grounds that free press guarantees would forbid a judicial or statutory right of commercial access. This comment shall examine the need for, and constitutional basis, of a legislated right of commercial access.

1. See *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (holding that where newspaper enjoyed substantial monopoly in community and refused certain advertisements for the purpose of destroying a competing radio station, the refusal could be enjoined as a violation of the Sherman Act); *Poughkeepsie Buying Service, Inc. v. Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 985, 131 N.Y.S.2d 515, 518 (1954) (“their [newspaper’s] reasons for rejecting a proposed advertisement are immaterial, assuming, of course, there are absent factual allegations connecting them with a duly pleaded fraudulent conspiracy or with furthering a monopoly”). Where, however, the complaint alleges only that the newspaper enjoys a monopoly, rather than that it is engaged in monopolistic practices in restraint of trade, then no access is granted. *Approved Personnel, Inc. v. Tribune Company*, 177 So. 2d 704 (Fla. App. 1965). *But cf. Grand Caillou Packing Co.*, 65 F.T.C. 797, 868 (1964) (separate opinion), stating, “Firms possessing monopoly power may not be *ipso facto* unlawful monopolists under the antitrust laws, but the permissible limits of lawful business conduct for such firms are more narrowly circumscribed than in the case of firms not possessing such economic power.”


3. Some cases have implied that it may be permissible for the legislature to regulate commercial access. See, e.g., *Approved Personnel, Inc. v. Tribune Company*, 177 So. 2d 704, 709 (Fla. App. 1965) where the court conceded “that appellants may have just complaint for the treatment they have received at the hands of appellee [where newspaper unexplainedly refused to publish appellants’ ads while publishing their competitors’]. If so, their remedy properly lies in petitioning the legislature to incorporate a prohibition against the acts of which appellants now complain.” However, in *Tornillo v. Miami Herald Publishing Co.*, 418 U.S. 241 (1974) the Court held that a Florida statute offering political candidates a right of reply to remarks published in newspapers violated the freedom of the press. The *Tornillo* case should not control, however, where an essentially commercial right of access is attempted. For discussion concluding that the commercial ads of a newspaper can be regulated see notes 38-89 and accompanying text. *But see* *Bloss v. Federated Publications, Inc.*, 5 Mich. App. 74, 145 N.W.2d 800 (1966), where the court rejected a right to have an adult movie advertisement accepted on grounds that the newspaper was subject to a public trust. In dicta the court added, “The First Amendment . . .
A statutory right of commercial access would legislate the public trust concept that the courts have refused to apply to the press. It would remedy newspaper abuse of their central role as an advertising medium. Access has often been denied even where economic survival was conditioned on it, and where hidden monopolistic or conspiratorial practices were suggested.

The Sherman Act offers little protection for rejected advertisers. Section I prohibits “Every contract, combination or conspiracy, in restraint of trade . . . .” If sufficiently proved section I would reach both horizontal and vertical agreements among newspapers and competing advertisers. Proof of oral conspiracies not to publish proffered advertisements may be difficult to obtain. The newspaper may in fact be responding to pressure from, and acting in concert with, some advertisers in excluding another. But since it may legitimately exclude advertisements arbitrarily or capriciously, only carelessness may prevent a monopolistic action from being disguised as a valid exercise of freedom of contract.

declares and safeguards the sanctity of freedom of the press . . . The public interest, therefore, insofar as it affects the operation of a newspaper, demands that the press shall remain independent, unfettered by government regulation regardless of whether that regulation stems from legislative enactment or judicial decisions.” Id. at —, 145 N.W2d at 804.

4. See notes 15-19 infra and accompanying text.

5. For example, in Approved Personnel, Inc. v. Tribune Company, 177 So. 2d 704 (Fla. App. 1965) plaintiff employment agencies complained of the effects of newspaper discrimination in favor of their competitors. “In order to successfully carry on the business in which the appellants and their competitors are engaged, it is vitally necessary that they publish classified advertisements concerning the services they offer their clients in the daily newspapers published within the area served by them.” Id. at 705. In J.J. Gordon, Inc. v. Worcester Telegram Pub. Co., 343 Mass. 142, 177 N.E.2d 586 (1961), a real estate business brought a tort action based on defendant newspaper’s unexplained and sudden refusal to accept plaintiff’s ads. The court sustained a demurrer to the complaint despite the fact that defendant published the only three newspapers in the city and that plaintiffs had freely published the ads for over a year previously and the ads were absolutely necessary for plaintiff’s business to function.


7. See note 2 supra.

8. In North Station Wine Co. v. United Liquors, 323 Mass. 48, 80 N.E.2d 1 (1948), the court sustained a demurrer to a bill alleging a common law combination or conspiracy. Plaintiff liquor store sought to force defendant newspapers to accept their advertisements for rum at $1.89 per “fifth.” Both defendant newspapers had refused to advertise the rum at that price. Plaintiff alleged a conspiracy between certain liquor and newspaper interests to maintain the price of the rum at $3.81 per “fifth,” and that he was “advised” of this by an officer of a defendant corporation. The court said the term “advise” did not sufficiently allege the existence of the conspiracy. Further, the court said the illegal character, purpose and effect of the conspiracy were insufficiently alleged. For example “[i]t does not appear that other effective methods of advertising were not open to [plaintiff].” Id. at 52, 80 N.E.2d at 4.
Section 2 of the Sherman Act prohibits monopolizing\(^9\) and might support a right of access for advertisers excluded by such anti-competitive practices.\(^{10}\) In *Lorain Journal v. United States*\(^{11}\) a newspaper's practice of refusing ads from those who advertised over a competing radio station was held to be a violation of sections 1 and 2 of the Sherman Act. The Supreme Court denied that an injunction against such practices would violate the freedom of the press. Quoting *Associated Press v. United States*\(^{12}\) the Court said the "publisher may not accept or deny advertisements in an attempt to monopolize . . . any part of the trade or commerce among the several states. . . ."\(^{13}\)

Monopolizing may be difficult to show, however, where the newspaper is not obviously acting to reduce cross or intra media competition. Allegations that the paper already enjoys a monopoly are insufficient,\(^{14}\) absent evidence of acts designed to achieve or maintain that monopoly. It might be argued that by caving in to the pressure of a dominant advertiser to exclude another the newspaper is acting to maintain its monopoly. However, this would require proof of the same facts necessary to sustain a section I conspiracy theory and would be subject to the same difficulties of proof. It is submitted that whatever the merits of a cause of action based on the Sherman Act, advertisers should have a more adequate remedy to require newspapers to behave responsibly as an advertising medium.

The courts have made it clear that the remedy does not lie with the judiciary. The common law did extend the obligation to serve the general public to proprietors of carriers,\(^{15}\) inns\(^{16}\) and insurance companies.\(^{17}\) In

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The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). The relevant market would be newspaper advertising. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 610 (1953).

10. In *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 411 (1912), the Court granted competitors access to defendant's railroad terminal facilities after finding that defendant's exclusionary practices constituted an illegal restraint of trade.


13. 342 U.S. at 156.

14. See note 1 *supra*.

15. *State v. Jacksonville Terminal Co.*, 90 Fla. 721, 106 So. 576, 584 (1925) ("It is the common-law duty of common carriers to serve the public efficiently and impartially, and without unreasonable discrimination in any respect. . . .").

16. *United States v. Stanley*, 109 U.S. 3, 40 (1883) (*citing with approval J. Story, Bailments §§ 475–76 (5th ed. 1831) to the effect that an innkeeper is bound to accommodate all travelers*).

17. *McCarter v. Firemen's Ins. Co.*, 74 N.J. Eq. 372, 73 A. 80 (1909). The court examined whether the defendant insurance company was "engaged in a business affected with a public interest." "The answer to this question does not depend . . .
imposing quasi-public responsibilities on these industries, courts have emphasized the essentially public nature of the business, the public's interest in its regulation, and occasionally the extent to which it enjoys special privileges and rights. But with the lone exception of Uhlman v. Sherman, courts have consistently rejected the argument that newspapers are clothed with a public interest and therefore are under legal compulsion to sell space to all customers on equal terms.

With respect to commercial access, the cases rejecting the application of the “affected with a public interest” doctrine have been less than convincing. In one compelling instance where access was denied, plaintiff was unable to exercise a statutory right because the newspaper refused publication of his legal notice. The court regretted such newspaper mischief and the possible effects it might have on statutory rights but said the hardships imposed did not change the private nature of the business. Characterizing the newspaper as a “public necessity,” the opinion emphasized that the same might be said of the grocer or hardware store, yet they could not be compelled to sell their wares.

Such reasoning avoids proper examination of whether the newspaper has, in fact, evolved into the position of a public trustee. Absent controlling precedent, the real inquiry, generally ignored, is not what the newspaper's character has always been, but what it is now.

In their inception all public callings were private ones, whose history has consisted in the evolution of a public character and of the incidents that they now possess . . . . Such at common law was the course by which common carriers, and all of the callings now recognized as affected with a public interest, ceased to be juris privati only, and became matters of public concern.

upon whether the defendants were expressly created as public agents, or whether the state has expressly charged them with the performance of a public duty, or has to that end clothed them with monopolistic privileges . . . .” Id. at 377, 73 A. at 82.

18. Id. at 380-81, 73 A. at 82-3 (discussing the common law “clothed with a public interest” doctrine as applied to the fire insurance industry). Some jurisdictions, though apparently a minority, include as part of the public interest test the fact that the occupations “have secured to them by the law certain privileges and rights which are not enjoyed by the members of the public generally.” Bowlin v. Lyon, 67 Iowa 536, 54, 25 N.W. 766, 768 (1885). Such privileges are enjoyed by the newspaper industry. For example, the Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (1970), provides for certain anti-trust exemptions for failing newspapers.


21. Id. at 515-16, 143 N.W. at 951.

22. The most curt dismissal of the public interest contention was in Journal of Commerce Publishing Co. v. Tribune Co., 286 F. 111, 113 (7th Cir. 1922): “Appellant's suggestion that the [newspaper] business in 'impressed with a public interest' . . . needs no attention, we think, except to show that it is not being passed unnoticed.” See also Friedenberg v. Times Publishing Co., 170 La. 3, 127 So. 345 (1930).

In *Uhlman* plaintiff obtained an injunction requiring defendant to accept his advertisement which had been previously rejected because of coercion by other competing merchants. Despite undue emphasis on *Munn v. Illinois*\(^2\) which involved legislative, rather than judicial imposition of a public trust concept, the court more thoroughly examined traditional tests for determining whether the evolution of the newspaper business rendered it affected with a public interest. Properly considered were such factors as the growth of the newspaper, its control of public information and opinion, its function as an advertising medium, and the special consideration it received from the state. Summarizing, *Uhlman* held:

> We believe that the growth and extent of the newspaper business, the public favors and general patronage received by the publishers from the public, and the general dependence, interest and concern of the public, in their home papers, has clothed this particular business with a public interest and rendered them amenable to reasonable regulations and demands of the public.\(^2\)

\(^2\) 24. 94 U.S. 113 (1876). *But see* McCarter v. Fireman's Ins. Co., 74 N.J. Eq. 372, 73 A. 80 (1909), which said that *Munn* provided support for a judicial imposition of a public utility concept. "Upon the underlying proposition that a business, private at its inception, may become affected with a public interest it is immaterial that the question of its public character arose in a case where its restraint had been legislatively rather than judicially determined. *Id.* at 379, 73 A. at 83.

25. 22 Ohio N.P. (n.s.) at 233, 31 Ohio Dec. at 62. Some prior support for the *Uhlman* decision may be found in Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N.E. 822 (1900). The Associated Press, organized to gather and distribute news, and also to build and sell telegraph lines, prohibited its members from buying news items from rivals. The complainant sought the right to continue purchasing news from the Associated Press despite its breach of the restrictive covenant. It was held that the Associated Press was a business devoted to the public interest and therefore could not refuse to sell to able purchasers. *Inter-Ocean* does not provide direct support for *Uhlman* for two reasons. First, although the Associated Press had never engaged in the telegraph and telephone business (which had a prior history as a public trust), it was permitted to do so by charter and the court considered this in its opinion. Second, the question of access to a newspaper's pages reflects different considerations than problems of purchasing new items. Nevertheless, many of the qualities found determinative of Associated Press's quasi-public status are applicable to newspapers. The court noted that the business of gathering and disseminating news is unlikely to be beset by competition, requires a large organization and capital, and furnishes a service which, by nature, others cannot. The court's argument that denying the right to purchase news would spell death for the refused has even greater application to the would be purchaser of space for commercial and legal ads. *See* United States v. Harte-Hanks Newspapers, Inc., 170 F. Supp. 227, 228 (N.D. Tex. 1959) (dictum): "The evidence shows that newspaper advertising is now considered a necessity to the successful operation of public enterprises. So completely has this become true that their need is regarded as a quasi public service." One caveat to the *Uhlman* decision is that the facts indicated a conspiracy in restraint of trade whereby other merchants were conspiring against plaintiff and inducing the newspaper to exclude him. In such circumstances, cases have indicated a right of access would exist as a remedy for the monopolistic practice. *Cf.* J. J. Gordon v. Worcester Telegraph Pub. Co., 343 Mass. 142, 177 N.E.2d 586 (1961). *Uhlman*, however, preferred to rest on the public interest ground.
The reluctance of the courts to accept *Uhlman* often stems not from disagreements as to the quasi-public nature of the newspaper business or the desirability of a general right of commercial access, nor generally from fears that the first amendment might forbid such a right. Rather, the courts apparently feel that absent firm precedent, it is up to the legislature to impose such duties on an historically private business. One recent case\(^2\) rejected *Uhlman* on freedom of contract grounds, stating that while there are limitations to this inherent right, any such limitation must come by statute unless there is firm common law supporting it. Similarly reluctant to accept *Uhlman*, though perhaps endorsing the merits of its argument, is *Approved Personnel, Inc. v. Tribune Company*:\(^2\)

This court feels very strongly that the judicial branch of government should never lend itself to the purpose of legislating rights, privileges, or immunities not otherwise provided by the law-making branch of government. . . . When we accept as true the allegations of the complaint . . . , we must concede that appellants may have just complaint for the treatment they have received at the hands of the appellee. If so, their remedy properly lies in petitioning the legislature . . . so as to incorporate a prohibition against the acts of which appellants now complain. This is the conclusion reached by the Supreme Court of New York in the Poughkeepsie Buying Service case, . . . and is the only conclusion which we consider to be justified under the circumstances.\(^2\)

Whatever the original merits of the public interest argument for commercial access, consistent judicial rejection\(^2\) has thrown the task to the legislature to create the right.

**Constitutionality of a Legislatively Created Right of Commercial Access**

Like other businesses, newspapers are subject to reasonable regulation under the state police power concerning ordinary business affairs. Thus,

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\(^2\) 177 So. 2d 704 (Fla. App. 1965).
\(^2\) Id. at 709.
\(^2\) Id. at _, 247 N.W. at 815.

In *Shuck v. Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1933), the court strongly emphasized the private nature of the newspaper industry. The court also seemed afraid of the "camel's nose in the tent" effect.

If a newspaper were required to accept an advertisement, it could be compelled to publish a news item. If some good lady gave a tea, and submitted to the newspaper a proper account of the tea, and the editor of the newspaper, believing that it had no news value, refused to publish it, she, it seems to us, would have as much right to compel the newspaper to publish the account as would a person engaged in business to compel a newspaper to publish an advertisement of the business that that person is conducting.

*Id.* at _, 247 N.W. at 815.
newspapers must comply with non-discriminatory tax laws,\textsuperscript{30} anti-trust laws,\textsuperscript{31} and laws regulating rates for political advertising\textsuperscript{32} and legal notices.\textsuperscript{33} However, while the newspaper’s commercial activity is subject to legislative control, the “idea” content of the newspaper has traditionally been deemed protected from regulation because of the first amendment’s free speech and free press guarantees. The advertising columns present a twilight zone in which it is difficult to distinguish between protected and non-protected speech. If, as the courts have indicated,\textsuperscript{34} commercial speech lies outside the scope of the first amendment, then commercial advertising should be subject to legislative control.

But printed advertisements may become integrated with certain traditional press freedoms such as editorial control over content and arrangement. In \textit{Miami Herald Publishing Co. v. Tornillo}\textsuperscript{35} the Supreme Court held unconstitutional a Florida statute which granted political candidates a right of reply to newspaper attacks on their record. In doing so the court stated:

A newspaper is more than a passive receptacle 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 and content of the paper . . . constitute 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.\textsuperscript{36}

\textit{Tornillo} held only that political replies may not be forced onto newspaper pages. Therefore, it may be possible to frame a commercial right of access that would survive \textit{Tornillo}’s scrutiny if interference with legitimate editorial interests in selecting and arranging advertisements could be minimized.\textsuperscript{37}

\textsuperscript{30} Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (holding invalid a discriminatory newspaper “license tax,” although stating that there would be no such immunity from “ordinary” taxes); Girage v. Moore, 48 Ariz. 33, 58 P.2d 1249, \textit{rehearing}, 64 P.2d 819 (1936) (holding that the press is not free from non-discriminatory taxes on gross revenues).

\textsuperscript{31} Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Associated Press v. United States, 326 U.S. 1, 7 (1945); Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957).


\textsuperscript{34} See notes 38-41 \textit{infra} and accompanying text.


\textsuperscript{36} 418 U.S. at 258 (footnote omitted) (emphasis added).

\textsuperscript{37} See notes 94-98 \textit{infra} and accompanying text.
Constitutional Bases for Regulating Commercial Speech

Tornillo does not challenge traditional distinctions between political and commercial speech which have held the latter subject to reasonable regulation. The distinction arose in Valentine v. Chrestensen, where the Supreme Court upheld a municipal ordinance forbidding street distribution of commercial and business advertising matter. The Court stated that:

[T]he streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.

The distinction has been reiterated by the courts on a number of occasions. In United States v. Hunter, the Fourth Circuit rejected a publisher's contention that the distinction between commercial advertising and other forms of expression is "'meaningless in the context of the newspaper publishing business' because the revenue newspapers derive from advertising makes possible the publication of the rest of the paper."

Although the distinction between political and commercial speech has been maintained, the basis for the distinction is unclear. Two different

38. 316 U.S. 52 (1942).
39. Id. at 54.
40. See New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964); Breader v. Alexandria, 341 U.S. 622, 642 (1951); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969); San Francisco Shopping News Co. v. City of South San Francisco, 69 F.2d 879 (9th Cir. 1934); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), aff'd per curiam, 405 U.S. 1000 (1972); Buxbom v. Riverside, 29 F. Supp. 3 (S.D. Cal. 1939); Developments in the Law — Deceptive Advertising, 80 Harv. L. Rev. 1005, 1027 (1967), stating, "In the quarter century since Valentine v. Christensen the notion that commercial advertising is not protected by the first amendment has been enshrined among the commonplaces of constitutional law" (footnote omitted). But see Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring) indicating that the "ruling [of Valentine that commercial speech is unprotected] was casual, almost offhand. And it has not survived reflection."
41. 459 F.2d 205 (4th Cir.), cert. denied, 409 U.S. 934 (1972). The court held that the state could constitutionally forbid the advertising of discriminatory housing ads, noting that the "Supreme Court and lower courts have frequently rejected First Amendment attacks on injunctions where the enjoined conduct or expression was not fully protected by the First Amendment" (emphasis added). Id. at 212. The court also found that no substantial revenue loss would result from the prohibition. Id.
42. Id.
rationales can be identified from the cases which try to justify regulation of commercial speech. One theory argues that while commercial speech may per se be protected, it may be limited incidentally by regulation of the commercial activity with which it is associated. A second rationale would hold commercial speech outside the first amendment because the speech itself does not communicate ideas which the first amendment was designed to protect.

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* the Supreme Court, in a five to four decision, upheld the constitutionality of a city ordinance forbidding a newspaper advertising system in which employment opportunities were published under headings designating job preference by sex. Justice Powell's majority opinion, ambiguous as to the extent to which commercial advertising in newspapers may be regulated, cautiously emphasized the illegality of sex discrimination in deciding that the state could regulate a newspaper practice promoting it. Pittsburgh Press had argued that *Valentine,* traditionally invoked for the proposition that commercial speech may be regulated, was inapplicable since editorial discretion is required in designing layout. When commercial speech is coupled with such discretion, the newspaper argued, it should be accorded first amendment protection. The Court rejected this contention as to the instant facts, while recognizing that it may have merit in other contexts:

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.

The majority does not make clear what the basis is for regulating the "ordinary commercial proposal." The opinion indicates that perhaps the content of the commercial proposal itself is not protected since it does not promote first amendment interests. Under this theory, it should not


44. See notes 63-83 infra and accompanying text.


46. Id. at 386.

47. Id. at 389.

48. The court distinguished *Sullivan* from *Valentine* on the grounds that the advertisements in *Sullivan* "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." Id. at 385 (quoting from Sullivan, 376 U.S. at 266). It then found the present case to be more like *Valentine* since the advertisements involved did not
matter who the speaker is, since it is the commercial idea that may be regulated. Thus, the argument of Pittsburgh Press and of Justice Stewart in his dissenting opinion that the "restriction . . . was placed on the editorial judgment of the newspaper in choosing advertisement layout, not the advertisement" would be to no avail. If the commercial idea is completely without first amendment protection then editorial discretion concerning such advertising should hold no better position. Justice Stewart’s argument would contain an illogical bootstrapping, using the editor’s discretion to raise unprotected speech to protected status.

But Justice Stewart and the majority indicate it is not the commercial idea that is regulated but the commercial transaction itself. Under this view, the state can only regulate the commercial idea when it is incidental to its power to regulate commercial activity. In Pittsburgh Press, Justice Stewart argued, there was sufficient disassociation of the idea from the activity since the newspaper was involved in expressing the idea. The majority countered by acknowledging that a first amendment interest existed in the newspaper’s statement of the commercial idea. However, there was a sufficient integration of the idea with the activity so that, despite the involvement of the newspaper, the restriction was validly placed on the activity itself. In other words, the newspaper would be protected express “a position on whether, as a matter of social policy, certain positions ought to be filled by members of one sex, nor [do] any of them criticize the Ordinance or the Commission’s enforcement practices.” 413 U.S. at 385. The majority appeared, therefore, to be focusing on the content of the advertisement.

49. 413 U.S. at 402 n.7.

50. Id. at 388. Professor David Bogen of the University of Maryland School of Law suggests that the activity/idea distinction underlies all of the Supreme Court’s holdings in the first amendment area.

51. Cf. Breeard v. Alexandria, 341 U.S. 622 (1951), where the court held valid a municipal ordinance forbidding solicitation of goods at private residences without the consent of the occupants. Defendant, a magazine salesman, argued that the ordinance violated the first amendment. The Court answered, “Only the press or oral advocates of ideas could urge this point. It was not open to the solicitors of gadgets or brushes. . . . The selling . . . brings into the transaction a commercial feature” (emphasis added). Id. at 641–42; Cf. Banzhaf v. FCC, 405 F.2d 1082, 1101–02 (D.C. Cir. 1968), cert. denied sub nom. Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969) stating, “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 . . . a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices.”

52. Cf. 413 U.S. at 400–04.

53. Id. at 384–85.

54. “Nothing in a sex-designated column heading sufficiently dissociates the designation from the want ads placed beneath it to make the placement severable for First Amendment purposes from the want ads themselves. The combination, which conveys essentially the same message as an overtly discriminatory want ad,
by the free press guarantees if in its editorial columns it stated the idea that employers should be able to discriminate between men and women. But although arguably it was making the statement in the help wanted ads by using segregated sex columns, it was also participating in the activity of discriminatory employment which could be prohibited.

If the commercial idea/activity distinction is accepted, then the court must decide whether the advertisement so integrates the idea with the activity that the state may validly restrict the former. For example, the state might be able to regulate a statement by General Motors that their cars are better than Ford's by arguing that it is the act of selling cars, rather than a statement about quality that is being regulated. If Ralph Nader makes the same statement, however, it should receive first amendment protection since he is merely expressing an idea disassociated from the commercial activity of selling cars (and ignoring motives of selling a book). When the newspapers permit the same statement to be made as an advertisement the result is not clear. Justice Stewart saw the newspaper in the same disinterested position as Ralph Nader, and consequently argued that it should receive first amendment protection. The majority disagreed that the newspaper's advertising columns were sufficiently disassociated from the commercial activity, and concluded that the restriction in Pittsburgh Press was validly placed on the activity itself.

But the activity/idea distinction suggested by Pittsburgh Press does not indicate which advertisements will be considered sufficiently disassociated from the commercial transaction to be held protected; or alternatively, which will be held sufficiently integrated so that the state may regulate it. Pittsburgh Press relied in part on the fact that the commercial activity - discriminatory hiring of employees - was illegal. Perhaps, then, as long as the newspaper advertisements concern legal activity the state could not regulate it.

Such an interpretation of Pittsburgh Press seems too narrow. Once the activity/idea distinction is accepted, the commercial idea advertised may become part of the commercial activity. In United States v. O'Brien, the defendant contended that a statute forbidding destruction of draft cards violated the first amendment because the act of destruction was "communication of ideas by conduct." The Supreme Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important government interest in regulating the

is in practical effect an integrated commercial statement." Id. at 388. The Court quoted the ordinance's provision making it unlawful for "any person . . . to aid . . . in the doing of any act declared to be unlawful . . . by this ordinance." It then noted that the "Commission and the courts below concluded that the practice of placing want ads for non-exempt employment in sex-designated columns did indeed 'aid' employers to indicate illegal sex preferences." Id. at 389.

55. Cf., id. at 376.

nonspeech element can justify incidental limitations on First Amend-
ment freedoms.\textsuperscript{57}

\[\text{We think it clear that a government regulation is sufficiently justi-
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fied if it is within the constitutional powers of the Government; if it
furthers an important or substantial governmental interest; if the
governmental interest is unrelated to the suppression of free ex-
pression; and if the incidental restriction on alleged First Amendment
freedoms is no greater than is essential to the furtherance of that
interest.\textsuperscript{58}\]

In one “speech plus conduct” case\textsuperscript{59} plaintiffs challenged as overbroad a
statute which restricted political activities of state employees. The Supreme
Court rejected the claim, stating that the first amendment protections
against overbreadth attenuates as the proscribed behavior “moves from
‘pure speech’ towards conduct.”\textsuperscript{60}

Under this analysis the protection received by advertising would de-
pend on how clearly the content could be disassociated from the commercial
activity which the challenged state action purports to regulate. Thus,
advertising by manufacturers of shaving cream is sufficiently integrated
with commercial activity that it may be proscribed if it is false or decep-
tive.\textsuperscript{61} But a book making the same “false statements about an item of
trade in which the author has no commercial interest cannot be treated as
false advertising”\textsuperscript{62} since it is an idea (albeit a commercial one) protected
by the first amendment.

A separate and altogether distinct view that can be gleaned from the
first amendment cases would hold commercial speech in and of itself un-
protected by the first amendment.\textsuperscript{63} “Put simply, the use of speech to
sell products or promote commercial ventures bears little, if any, relation
to the discussion of politics, religion, philosophy, art and other more mun-

\textsuperscript{57} \textit{Id.} at 376.
\textsuperscript{58} \textit{Id.} at 377.
\textsuperscript{59} \textit{Broadrick v. Oklahoma}, 413 U.S. 601 (1973). \textit{See also} \textit{Konigsberg v. State
\textsuperscript{60} 413 U.S. at 615; \textit{The Supreme Court, 1972 Term}, 87 \textit{Harv. L. Rev.} 1, 151
n.58 (1973) (“The Court has indicated that ‘speech plus conduct’ merits less first
amendment protection than ‘pure speech,’ in the sense that the former will properly
yield to governmental interests less compelling than those required to subordinate
speech alone.”)
\textsuperscript{61} \textit{FTC v. Colgate-Palmolive Co.}, 380 U.S. 374 (1965) (finding deceptive a
commercial which purported to make an actual demonstration of its product while in
fact using mock-ups, and upholding the Commissioner’s cease and desist order against
such practices).
\textsuperscript{62} \textit{Developments in the Law — Deceptive Advertising, supra} note 40 at 1031
(footnote omitted).
\textsuperscript{63} \textit{See note 40 supra; Resnik, Freedom of Speech and Commercial Solicitation,
30 Cal. L. Rev. 655 (1942); Developments in the Law — Deceptive Advertising,
supra} note 40 at 1028; \textit{The Supreme Court, 1972 Term}, 87 \textit{Harv. L. Rev.} 1, 156
(1973).
dane subjects which the Supreme Court believes the First Amendment was historically designed to protect.  

One problem involved with this view is in defining what communications do support a first amendment interest. Valentine case law has left a muddied definition. Valentine implied that the touchstone was whether the speech was made primarily for private economic gain.

The difficulty with [this] test is that it makes little sense, either practically or theoretically. If it is acknowledged that an important aspect of the first amendment right is the listeners interest in acquiring knowledge, the existence of financial motives on the part of the speakers would seem irrelevant. Furthermore, . . . its logical extension would seriously reduce the scope of first amendment protection accorded virtually all periodicals, books and newspapers, since all these methods of communication are now major industries, primarily concerned with maximizing profits.

In New York Times Co. v. Sullivan, the Court focused on the ad's content rather than on the newspaper's reason for publishing. "That the Times was paid for publishing the advertisement is as immaterial in this connection [to the issue of whether the political ad constituted protected speech] as is the fact that newspapers and books are sold." Editorial advertisements, dealing informatively with matters of public concern, were held protected by the first amendment.

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64. Holiday Magic, Inc. v. Warren, 357 F. Supp. 20, 25 (E.D. Wis. 1973), vacated, 497 F.2d 687 (7th Cir. 1974). The circuit court vacated the lower court's decision and ordered a three judge court convened after determining plaintiff's claim to be not insubstantial. 28 U.S.C. § 2281 requires the convening of a three judge court whenever enforcement of a state statute is sought to be enjoined because it is unconstitutional. While insubstantial constitutional claims can be dismissed by a single judge, Ex parte Forestry, 290 U.S. 30 (1933), "claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281." 497 F.2d at 697. Judge Pell, dissenting from the circuit court opinion, thought the district court "gave careful consideration to each constitutional claim," and properly dismissed the case. 497 F.2d at 698.


66. 316 U.S. at 54.

67. Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 Geo. Wash. L. Rev. 429, 452 (footnotes omitted) [hereinafter cited as Redish]. But see Note, Constitutionality of Handbill Ordinances, 33 Ill. L. Rev. 90, 94 (1940) (concluding that the primary purpose test is workable.)


69. See note 48 supra and accompanying text.

70. 376 U.S. at 266 (citations omitted).

71. New York Times involved an advertisement urging participation in a civil rights movement, and describing events involving alleged racial discrimination.
advertisements for religious meetings, 72 religious books, 73 political debates 74 and labor union activities 75 had received free press and speech guarantees.

Product advertising aimed purely at persuading the reader to purchase has been denied favored status 76 because its contribution to public debate is so slight. 77 Such advertising, however, often impliedly states a position on matters of social or political concern. For example, an adult movie advertisement, not legally obscene or otherwise unlawful, arguably states a social position (e.g., advocating a certain type of sexuality or permissiveness). Additionally, it begs the reader to attend an event which constitutes constitutionally protected expression. Similarly, a child's toy gun advertisement might advocate certain behavior, or a trash compactor ad might affirm a position which is antithetical to recycling. 78 Despite this, the courts have been reluctant to include ordinary product advertising within the first amendment, unless, in addition to being persuasive, it is politically and socially informative. In Banzhaf v. FCC, 79

73. Jamison v. Texas, 318 U.S. 413, 416 (1943) (handbills inviting purchase of religious books and attendance at gathering held protected).  
76. See note 51 supra. But cf. Friends of Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971) where the court, although dealing with a broadcast situation, found product advertisements to concern socially and politically important interests. The court reversed an FCC determination and extended fairness doctrine obligations to broadcasters airing commercials for large-engine automobiles and high-test gasolines. Acknowledging the automobiles contributed to pollution, the court agreed that the advertisements impliedly stated that powerful engines and high-test gasolines were socially desirable, and thus presented one side of a controversial issue. The result, the court said, was generated by the decision in Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1959), cert. denied sub nom. Tobacco Institute v. FCC, 396 U.S. 842 (1959), where the Commission first extended the fairness doctrine to product advertising (cigarette commercials). Recent FCC regulations, however, have reversed the Banzhaf policy.  
77. See text accompanying note 80 infra.  
78. Cf. John S. MacInnis, 32 F.C.C.2d 837 (1971) (complainant argued that product ads concerning trash compactors reinforced traditional waste disposal concepts, and therefore presented one side of the controversial recycling issue. The demand for corresponding free time under the fairness doctrine was rejected by the commission.)  
although inconclusive on the ultimate first amendment status of cigarette advertising, it was said:

But though this advertising strongly implies that cigarette smoking is a desirable habit, petitioners have correctly insisted that the advertisements in question present no information or arguments in favor of smoking which might contribute to the public debate. Accordingly, even 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 . . .".80

In Capital Broadcasting Co. v. Mitchell,81 the court, upholding a statute banning cigarette advertising in the electronic media, said that such product ads receive only tangential first amendment protection. Commercial advertisements are not completely uninformative since they help the consumer to make more intelligent choices in the marketplace.82 But such information, the courts have held, does not merit a free speech guarantee.83

The unprotected commercial speech theory fails when concerned with the identical commercial idea stated by two different speakers, one with a commercial interest and one without. If the idea itself is without first amendment protection the identity of the speaker should not matter in determining whether his speech could be controlled. But the courts, as noted,84 have indicated that statements by a commercially uninterested speaker would be constitutionally protected, although the same state-

80. Id. at 1102. The court felt constrained to find the speech commercial and hence unprotected, because it doubted the constitutionality of the fairness doctrine (which gives the FCC limited control over programming content) insofar as it pertained to political speech. The court specifically rejected the traditional rationale of scarcity and public ownership of the airwaves as justifying incursions upon free speech. Id. However, in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969), the Supreme Court relied upon those rationales in holding the fairness doctrine constitutional. It thus made unnecessary the distinctions between protected and unprotected speech which the court in Banzhaf felt constrained to make.

82. See Holiday Magic, Inc v. Warren, 357 F. Supp. 20, 25 (E.D. Wis. 1973), vacated, 497 F.2d 687 (7th Cir. 1974), stating that "it is apparent that informative commercial expression dealing with, for example, the safety, cost, and quality of consumer products or, . . . , the wisdom of possible investments, involves matters of public concern." Martin Redish argues that, in addition to the informational content, the artistic qualities of some commercial ads should accord them protection. Since purely promotional advertising, which he says lacks first amendment interest, would be difficult to distinguish from artistic ads, he would extend protection to all truthful commercial speech, subject only to case by case determinations of a superior state interest in its regulation. Redish, supra note 67 at 447-48.
83. SEC v. Wall Street Transcript Corp., 422 F.2d 1371, 1379 (2d Cir.), cert. denied, 398 U.S. 958 (1970) (holding that a "newspaper" giving commercial investment advice was not entitled to the same constitutional protection "provided for certain forms of social, political or religious expression").
84. See notes 61 and 62 supra and accompanying text. See also Pittsburgh Press, 413 U.S. at 391, stating that "our decision [does not] authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors."
ments by a businessman would not. This suggests that the proper focus of the courts should be whether a state restriction is validly placed on a commercial activity, even though an idea is integrated with such activity. The "commercial speech" label is not a starting point from which a court decides that the speech is unprotected. Rather, it is a conclusion that the speech has been validly (and incidentally) restricted because it is associated with commercial activity.

Where statutes are designed to regulate activity but incidentally infringe on first amendment rights, the Supreme Court has adopted a "least restrictive alternative" test. The purpose of this test is to ensure that the statute enacted to achieve a desired social goal minimally interferes with individual liberties. Essentially the test is one of balancing "the state's interest in the added effectiveness of the chosen means against the individual interest in the use of less drastic ones." Normally this test should weigh in favor of state regulation of commercial ideas. The individual's first amendment interest will often be slight, such as in advertisements advocating an idea by implication. Further, less drastic forms of regulation can rarely achieve the same state goal.

Where equally effective means exist to achieve a state goal the choice of the "harsher . . . means suggest that suppression of speech was the legislature's real purpose from the start." A similar conclusion can be reached where the state can show no rational basis for the regulation of the activity. In *Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy*, a consumer group challenged a law imputing unprofessional conduct to pharmacists who advertised drug prices. The court indicated that the regulation was invalidly placed on the activity because it was without a rational basis. The court held the law unconstitutional on first amendment grounds, however, indicating that the law was apparently designed to restrict knowledge rather than to regulate the pharmaceutical profession.

Where the "First Amendment interest which might be served by advertising an ordinary commercial proposal . . . arguably outweigh[s] the governmental interest supporting the regulation," the integrated
activity/idea ought to find constitutional protection. In *Bigelow v. Virginia*, a newspaper editor was convicted of violating a statute making it a misdemeanor for publishing an advertisement encouraging abortions. The advertisement, placed by a New York City referral agency, stated that abortions were legal in New York without residency requirements, and offered to make all arrangements to place women in accredited hospitals and clinics at low cost. The Supreme Court of Virginia affirmed the conviction, holding the statute to be a reasonable measure to ensure that decisions concerning abortions are free of "the commercial advertising pressure usually incidental to the sale of soap box powder." On appeal, the Supreme Court of the United States reversed the conviction on first amendment grounds. The Court adopted a balancing test, weighing the first amendment interest against the public interest served by the regulation.

Here, Virginia is really asserting an interest in regulating what Virginians may hear or read about the New York services. It is, in effect, advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach. This asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances. A legitimate state interest does exist in policing commercial solicitation for out-of-state activity. But the Court indicates that when the activity purported to be regulated consists solely of solicitation and dissemination of ideas concerning the services or product (where, as in the instant case, the service or product is itself beyond the police power of the state), then the state's interest takes on a diminished value when balanced against first amendment interests.

Framing a Right of Access Consistent with Free Press Guarantees

Under either the "activity/idea" distinction or the "unprotected commercial speech" theory, advertisements should be subject to some legislative control. The fact that the advertisements appear in newspapers should

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94. 95 S. Ct. 2222 (1975).
97. 95 S. Ct. at 2234-35. The *Bigelow* dissent rejected the balancing approach used by the majority. If an advertisement is directed towards the exchange of services rather than of ideas, they argued, then for first amendment purposes the subject of the advertisement ought to make no difference. Since the advertisement in question involved a proposal to furnish services on a commercial basis, it merited no more protection than an ad for an out-of-state bucket shop or Ponzi scheme. *Id.* at 2237 (Rehnquist, White, J.J., dissenting).
98. *Id.* at 4740.
not accord them better protection, since newspapers are subject to reasonable regulation concerning activities outside the scope of the first amendment.100 "[A] newspaper will not be insulated from otherwise valid regulation of economic activity merely because it also engages in constitutionally protected dissemination of ideas." Thus in Pittsburgh Press,101 the state could forbid discriminatory column headings, and in Hunter, Congress could proscribe publication of discriminatory housing ads.102 Similarly, a state should have the power to create a commercial right of access for advertisers.

To be found constitutional, the statute would have to avoid serious incidental infringements of the newspaper's protected rights. Partial infringements of the freedom of the press would likely attend any access oriented statute. In similar circumstances, where legislation is directed toward a proper subject but incidentally infringes first amendment rights, the Supreme Court has adopted a balancing test, weighing the interest in public regulation against the magnitude and character of the infringed right.103 Suppose, in Pittsburgh Press, job seekers ceased purchasing the newspaper or employers withdrew ads, resulting in substantially decreased revenues. In such a factual setting, the Court probably would have found the ordinance invalid.104 Preserving the newspaper's audience and revenue sources in order to protect the dissemination of news would provide heavy counterweight in a delicate constitutional balance with access interests.

Requiring publication of sensitive material such as adult movie ads would be unlikely to survive a balancing test. Substantial editorial discretion is involved in identifying the nature, taste and demands of the newspaper audience, and in designing advertising policy so as to cater to those interests. Interference with such discretion, such as permitting adult movie ads access to "family" magazines, is more likely to result in alienation of readers or other advertisers. This could lead to reduced circulation or failure and consequent, although incidental, suppression of guaranteed

100. See note 30-33 supra and accompanying text.
102. See notes 45-53 supra and accompanying text.
103. See notes 41-42 supra and accompanying text.
104. Konigsberg v. State Bar of California, 366 U.S. 36, 50 (1961) (stating that the governmental and individual interests must be weighed to determine if a general regulatory statute, which incidentally restricts first amendment rights, is constitutional); Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950).
105. This argument was made by defendant in United States v. Hunter, 459 F.2d 205 (4th Cir.), cert. denied, 409 U.S. 934 (1972). The court rejected it on its facts, however, finding that no substantial revenue loss would result. Id. at 212. Cf. Breard v. Alexandria, 341 U.S. 622, 650 (1951) (Black, J., dissenting) stating that, "The constitutional sanctuary for the press must necessarily include liberty to publish and circulate. In view of our economic system, it must also include freedom to solicit paying subscribers.")
speech. In Associates & Aldrich Co. v. Times Mirror Co., the court rejected an adult movie advertiser’s claim that he had been denied first amendment rights by the refusal of his advertisement. “Even if state action were present,” the court conceded arguendo, “there is still the freedom to exercise subjective editorial discretion in rejecting a proffered article.”

Tornillo also feared interference with editorial discretion, although presumably only such discretion as concerned the newspaper’s first amendment activities. To minimize such interference, a statute could be passed which reads as follows: “If any newspaper accepts an advertisement from any advertiser, then that newspaper must accept all similar advertisements from any other paying advertiser.” The term “advertisements” should be limited to advertisements of commercial goods or services which do not significantly advance ideas which could be deemed to have political, social, scientific or literary merit. However, the courts would engraft their own definition of “advertisement” since whenever the court deemed the advertising to have significant idea content (or could be disassociated from the activity), the Tornillo holding that a newspaper cannot be compelled to publish ideas would apply.

Finally, the term “similar” should be defined as including the type or nature of the goods or services being advertised and the location and size provided for the original ad. Under this definition, the editors would still retain their discretion to reject an entire class of advertising (such as adult movie ads), or to limit that class to a particular page or section. But once an ad of any class were printed, there would accrue to all other advertisers the right to have their “similar” ad printed also.

**Conclusion**

*Tornillo* guarantees that as to political and social issues, responsibility will be left to the journalistic ethics and the whims of the publishing profession. But as a commercial medium, the newspapers’ imperfections are not shielded by the first amendment. A limited right of commercial access could constitutionally require newspapers to act responsibly in their central role in the marketplace.

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106. 440 F.2d 133 (9th Cir. 1971).
107. Id. at 135.
108. See text accompanying note 36.