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Constitutional Law—First Amendment—Protection of Commercial Speech—In *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* the United States Supreme Court announced that "purely commercial speech" is entitled to first amendment protection. This was the first time that the Court explicitly recognized that the Constitution does not permit the government to regulate purely commercial expression without restraint. In a seven-to-one decision the Court stated that:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

The case signifies the end of the "commercial speech doctrine" which originated in the 1942 decision of *Valentine v. Christensen.* In that case the Court said that "purely commercial speech" was not entitled to constitutional protection. The precedent established in *Valentine* has been frequently criticized, and recent cases created serious doubts about its con-

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1. 96 S. Ct. 1817 (1976).
2. The term "commercial speech" refers to expressions which are intended to induce some kind of commercial interaction. Although "commercial speech" is possibly a broader term than "advertising," in this article the two terms will be used interchangeably. See *Note,* *Freedom of Expression in a Commercial Context,* 78 Harv. L. Rev. 1191 (1965). The term "purely commercial speech" refers to commercial speech which provides information only about goods, services or some other form of commercial enterprise, and adds nothing to the exchange of knowledge or ideas. In previous cases the Supreme Court has recognized a distinction between expressions which do no more "than simply propose a commercial transaction" (that is, purely commercial speech) and expressions which "contain factual material of clear 'public interest.'" *Bigelow v. Virginia,* 421 U.S. 809, 822 (1975). See also *Population Services Int'l v. Wilson,* 398 F. Supp. 321, 337 (S.D. N.Y. 1975), *prob. juris. noted,* *Carey v. Population Services Int'l,* 96 S. Ct. 2621 (1976).
3. 96 S. Ct. at 1827.
4. See note 27 infra and accompanying text.
5. 316 U.S. 52 (1942).
6. *Id.* at 54.
7. See, *e.g.,* *Cammarano v. United States,* 385 U.S. 498 (1958) (Douglas, J., concurring); see also materials at note 27 infra.
RECENT DECISIONS

continuing validity. The Virginia Citizens case removed any lingering questions; it is now clear that purely commercial speech is entitled to first amendment protection.

The facts in the Virginia Citizens case were straightforward. Virginia law required the Virginia State Board of Pharmacy (the defendant in the case) to regulate the profession of pharmacology within that state. The Board had authority to license all pharmacists and to revoke the license of any pharmacist who engaged in "unprofessional conduct." The statutory definition of unprofessional conduct included "publish[ing], advertis[ing], or promot[ing] directly or indirectly, in any manner whatsoever" the price of prescription drugs. In effect, the state legislature prohibited the advertisement of the price of any prescription drug.

Two Virginia consumer organizations sought to enjoin the Board of Pharmacy from enforcing the statutory proscriptions against advertisements which included the prices of prescription drugs. The consumer groups claimed that the prices of pharmaceutical products varied considerably throughout the state and that the first amendment guaranteed the right of Virginia citizens to have ready access to information about these different prices. A federal district court agreed that Virginians did have a first amendment right to receive information about drug prices and therefore enjoined the Board of Pharmacy from enforcing the anti-advertising regulations. The Board appealed to the Supreme Court, arguing that the information which was sought was "purely commercial speech," and therefore was not protected by the first amendment. The Court affirmed the district court's decision striking down the statute.

Before reaching the first amendment question, the Court resolved the threshold issue of the plaintiffs' standing. Although the statute was directed at pharmacists, the consumer organizations asserted that the law interfered with the rights of all of the citizens of the state. The plaintiffs did not claim that their standing was derived from the pharmacists, who

9. 96 S. Ct. at 1820.
10. Id. at 1819 n.2.
11. Id. at 1821.
could have alleged that the law restricted the exercise of their first amendment freedoms. Instead, they claimed that the law infringed directly on a right of the citizens of Virginia to receive information.\(^\text{13}\)

The district court not only accepted this argument, but also used it as the rationale for finding that the consumers were in a better position to challenge the law than the pharmacists themselves. When the Virginia drug advertising law was challenged by a pharmacist in 1969, the constitutionality of the law was upheld.\(^\text{14}\) The success of the second challenge can be partially attributed to a recognition that “the actual suitors are consumers; their concern is fundamentally deeper than a trade consideration.”\(^\text{15}\)

The view that freedom of speech encompasses a corresponding right to receive information is not novel.\(^\text{16}\) Thus, it took only a single paragraph in the Supreme Court’s opinion to reach the conclusion that “[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these [consumers].”\(^\text{17}\) This pronouncement legitimizes the positions taken by several district courts.\(^\text{18}\) The Court’s statement also should give encouragement to other consumer groups challenging laws which allegedly interfere with the public’s right to be informed. Such groups have already challenged laws in other states which restrict advertisements of prescription drugs,\(^\text{19}\) prescription eyeglasses,\(^\text{20}\) and contraceptives.\(^\text{21}\)

This concern for the consumer seemed to be carried to an extreme in the case of Population Services International v.

\(^{13}\) 96 S. Ct. at 1821.
\(^{17}\) 96 S. Ct. at 1823.
\(^{18}\) A number of federal district courts have already adopted this position in cases which are similar to the Virginia Citizens case. See, e.g., Terminal-Hudson Electronics v. Department of Consumer Affairs, 407 F. Supp. 1075 (C.D. Cal. 1976); Terry v. California State Board of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975).
\(^{19}\) Terry v. California State Board of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975).
Wilson. This case was a complex action involving five plaintiffs who attacked a New York law regulating the distribution of contraceptives. The plaintiffs were primarily sellers or distributors of contraceptives. When the court considered the standing of the various plaintiffs, it did not discuss the sellers' own first amendment rights. Rather, the court said that the sellers "have standing to represent the First Amendment rights of New York State residents who are potential recipients of information these plaintiffs might seek to disseminate." Thus, this New York district court implied that the sellers' first amendment rights were derived from those who were in a better position to assert such rights—the citizen-consumers. In past cases involving commercial speech, the party challenging a governmental restriction has usually been either a seller of products or services, or an advertiser of products and services. In future cases, it can be expected that challenges to restrictions on commercial speech will be made not only by speakers (sellers) or the media (advertisers), but also by recipients of such commercial speech (consumers).

After considering the preliminary question of standing, the Court in Virginia Citizens turned to the applicability of the commercial speech doctrine. This doctrine is an interpretation of the first amendment under which speech which is classified as "commercial speech" is not entitled to the same protections given to other forms of speech. The history of the commercial speech doctrine is well documented. The origin of the doctrine is considered to be the case of Valentine v. Christensen, decided in 1942. In that case the United States Supreme Court upheld the constitutionality of a New York law that prohibited the distribution of handbills which were intended to attract

22. Id.
23. Id. at 329.
26. In addition to the Virginia Citizens case, see also cases cited at note 18 supra; Comment, The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations, 63 Geo. L.J. 775 (1975).
customers to a commercial enterprise. The Court indicated that "purely commercial advertising" was not a form of speech that the first amendment was intended to protect.

Following the Valentine decision, "commercial speech" became a kind of "magical incantation" used to dismiss allegations of governmental interference with first amendment freedoms. Some courts held that Valentine did not stand for the proposition that commercial speech was entitled to no protection whatsoever; however, a finding that commercial speech was present almost always meant that the government regulation under attack would be upheld. In other words, the courts had a tendency to require much less justification for governmental regulation of commercial speech than was required for regulation of other types of speech.

The Valentine case remained the predominant Supreme Court statement in the area of commercial speech until recently. Since 1973 two other significant cases prior to Virginia Citizens addressed the subject of commercial speech. In Pittsburgh Press Co. v. Human Relations Commission the Court refused to abandon the commercial speech doctrine in a situation where the plaintiffs advertised activities which were themselves illegal. [The advertisements allegedly suggested that some job applicants should be given a preferred status on the basis of their sex, and this sex discrimination was illegal. However, the Court in Pittsburgh Press did indicate that the commercial speech doctrine might be due for reevaluation. In Bigelow v. Virginia the Court took another step toward removing the distinction between commercial speech and the

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30. Before the Pittsburgh Press and Bigelow decisions at least one district court judge recognized that "[t]he commercial element does not altogether destroy its [advertising's] quality as protected speech, but it does substantially reduce the weight of the expression on constitutional scales." Rowan v. United States Post Office Dep't, 300 F. Supp. 1036, 1044 (C.D. Cal. 1969) (Hofstedler, J., specially concurring).
33. The Court specifically avoided giving serious consideration to the continuing validity of Valentine and stressed that its decision was not based on the fact that the advertisements were commercial speech, but rather on the fact that the advertisements were illegal. Id. at 389.
34. 421 U.S. 809 (1975).
more vigorously protected forms of expression. In that case the Court held that a Virginia law which banned the advertisement of abortion referral services violated the first amendment.

The Bigelow and Pittsburgh Press decisions made it clear that the commercial speech doctrine had fallen into disfavor. However, contrary to the claims of at least two district courts, it is not entirely clear from these cases that the Valentine rationale "was sent to oblivion."\(^{35}\) The majority opinion in Bigelow pointed out that the advertisement for the abortion referral service was not a purely commercial dissemination of information. The Court emphasized that the advertisement under scrutiny was not intended solely for the purpose of selling a service:

> The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear "public interest" . . . .

> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.\(^{36}\)

It might have appeared from this statement that the Court was still hesitant to extend first amendment protection to speech which did no more than "simply propose a commercial transaction." But this language was not sufficient to prevent one court from reaching the following determination: "True enough, Bigelow involved commercial advertising of an abortion referral service, while the issue before us is commercial advertising

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> The line differentiating unprotected commercial from "pure" speech was not erased by Bigelow; rather it was redrawn with the recognition that some forms of commercial speech should be entitled to First Amendment protection and that the "commercial speech" label of Valentine v. Christensen [citation omitted] did not appropriately demarcate the scope of First Amendment protection of speech in a commercial context.

\(^{36}\) See also, The Supreme Court, 1974 Term, 89 HARV. L. REV. 111, 115-16 (1975).
of margarine. Both involve commercial advertising and we see no significant distinction between the two."

If Bigelow was intended to create a crucial distinction between advertisements which do something more than simply propose a commercial transaction and those which do no more than that, then the important distinction was diminished in the Virginia Citizens case. The Court recognized that the speech involved in the Virginia Citizens case was "purely commercial" and that therefore "the question whether there is a First Amendment exception for 'commercial speech' is squarely before us."

The Court concluded that there is no such exception.

Much of the reasoning behind the Court's decision stems from the idea that "[s]ociety . . . may have a strong interest in the free flow of commercial information" because such information helps the public to make more intelligent decisions. The first amendment represents the philosophy that a free flow of ideas and opinions will allow truth to emerge. This concept has frequently been invoked in cases involving the expression of political, economic, and religious opinions. Now the Court has held that the free flow of commercial information is also in the best interest of society, and accordingly, the Court has extended first amendment protection to this type of information.

This extension of first amendment guarantees is not without qualification. Now that commercial speech has been found to deserve first amendment protection, more difficult questions will arise concerning the nature and extent of the protection to be given. The Supreme Court has provided at least a few guidelines to assist in answering these questions. In the future there


38. 96 S. Ct. at 1825.

39. Id. at 1827.

40. The first amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." United States v. Associated Press, 52 F. Supp. 362, 372 (D.C. S.D. N.Y. 1943).


will be numerous challenges to laws which place restrictions on commercial speech.\textsuperscript{42} The Supreme Court's guidelines are presented here in the form of a list of factors which courts should consider when entertaining challenges to these laws.

1. An initial factor to be considered is the legality of the product or service which is being advertised. The Supreme Court has explicitly recognized that:

\begin{quote}
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.\textsuperscript{43}
\end{quote}

At the time the Court made this observation in \textit{Pittsburgh Press}, it also pointed out by way of example that advertisements "proposing a sale of narcotics or soliciting prostitutes"\textsuperscript{44} could be constitutionally outlawed. However, problems can arise where a product, service, or activity is legal in one state, but illegal in the state where it is being advertised. \textit{Bigelow v. Virginia} provides strong authority for an argument that a state has no legitimate reason for preventing its citizens from receiving information about legal activities in a sister state, even if these activities are illegal in a state where the information is being made available through advertising.\textsuperscript{45}

2. Courts should also consider the form of the advertising which is being regulated. In other words, is the challenged

\begin{quote}
\textsuperscript{42} In the aftermath of the \textit{Pittsburgh Press} case and the \textit{Bigelow} case there has been a variety of cases involving commercial speech issues. See, e.g., \textit{Howard v. Superior Court}, 52 Cal. App. 3d 722, 125 Cal. Rptr. 255 (1975) (statute prohibiting advertisement of divorce assistance services); \textit{Welton v. City of Los Angeles}, 51 Cal. App. 3d 803, 124 Cal. Rptr. 480 (1975) (ordinance prohibiting sale of maps to movie stars' homes); \textit{John Donnelly & Sons, Inc. v. Outdoor Advertising Bd.}, Mass. 339 N.E.2d 709 (1975) (regulations on billboards); \textit{State v. Cardwell}, 539 P.2d 169 (Ore. App. 1975) (obscenity in advertising). Certainly more challenges to state and municipal regulations of advertising can be anticipated after the \textit{Virginia Citizens} case.


\textsuperscript{44} \textit{Id.} at 388.

\textsuperscript{45} The \textit{Bigelow} case involved advertisements calling attention to the availability of abortions in New York. The advertisement appeared in a Virginia newspaper at a time when abortions were still illegal in Virginia. The Supreme Court held that "[a state] may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." 421 U.S. at 824-25.
\end{quote}
regulation directed specifically at television or radio,\textsuperscript{46} newspapers,\textsuperscript{47} billboards or other signs in public places,\textsuperscript{48} or "door-to-door" types of advertising?\textsuperscript{49} A complete analysis of the constitutional problems related to various forms of advertising is beyond the scope of this article. However, it should be noted that the court in \textit{Virginia Citizens} did indicate that the form of advertising is a relevant factor in determining the constitutionality of a law which restricts the exercise of commercial speech. The majority opinion pointed out that "the special problems of the electronic media are . . . not in this case."\textsuperscript{50} The Court also drew attention to the fact that the drug price advertising ban was more than "a mere time, place and manner restriction."\textsuperscript{51} The Court could have added that the restrictions were not designed to protect the privacy of citizens\textsuperscript{52} or to prevent the advertiser's message from being thrust upon them as a captive audience.\textsuperscript{53} States have been allowed to place limited types of restrictions on other kinds of expression which are protected by the first amendment, and the Court in \textit{Virginia Citizens} seemed to be saying that these restrictions will continue to be approved in commercial speech cases.

3. Another relevant factor is the elusive "public interest" element,\textsuperscript{54} i.e., an advertisement's contribution to matters of concern to society. The Court did not point directly to this "public interest" value of an advertisement as a factor to be considered in cases involving the regulation of commercial speech. In fact, the major point of the Court's decision ap-

\textsuperscript{47} See, e.g., cases cited at note 25 supra.
\textsuperscript{50} 96 S. Ct. at 1831.
\textsuperscript{51} Id. at 1830; See Cox v. Louisiana, 379 U.S. 536 (1965).
\textsuperscript{52} See, e.g., Breard v. City of Alexandria, 341 U.S. 622 (1951).
\textsuperscript{54} The fact that a commercial expression provides some information of interest to the public has frequently been found to be significant. The Supreme Court stressed the public interest element in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Bigelow v. Virginia, 421 U.S. 809 (1975). The problem with this public interest factor (which causes it to be "elusive") is that it is difficult to standardize. Who should determine what is of interest to the public?
peared to be that purely commercial speech is to be given the same protection as that which is afforded to advertisements that do something more than "simply propose a commercial transaction." Nevertheless, the majority and concurring opinions suggested that an advertisement which contains some kind of ideological expression, in addition to a commercial message, will receive a greater degree of first amendment protection. It was unequivocally stated that commercial speech can be treated differently from other forms of expression. If there are "important differences between commercial price and product advertising, on the one hand, and ideological communication on the other," then it follows that there is still a difference between purely commercial advertising, and advertising which contains "factual material of clear 'public interest'." This public interest element was at the center of the Bigelow decision, and there is reason to believe that it has not been abandoned as a factor to be considered.

4. Courts which are required to review laws affecting advertising practices should consider whether the purpose of the challenged law is to protect the public from false or misleading advertisements. The Virginia Citizens case made clear that a law which is intended to stop false or deceptive advertising should normally be deemed constitutional. Mr. Justice Stewart wrote a separate opinion in order to emphasize this point. Relying heavily on the Court's decision in a recent libel case, Justice Stewart stressed that "[t]here is no constitutional value in false statements of fact." He also pointed out: "Since the factual claims contained in commercial price or product

55. In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does 'no more than propose a commercial transaction' [citation omitted] and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.

56. Id. at 1834 (Stewart, J., concurring).
57. Id. at 1825.
59. 96 S. Ct. at 1832.
advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought.\footnote{62}

The Court has said that the Constitution requires toleration of false statements made in the context of an exchange of ideas, because protection of this type of "ideological expression" is the overriding concern of the first amendment.\footnote{63} Since "under the First Amendment there is no such thing as a false idea,"\footnote{64} false statements made during an exchange of ideas are protected. However, there is such a thing as a false advertisement, and false statements in the context of commercial advertising should not be constitutionally protected from governmental controls.

5. The final factor to be considered is the special status which has been traditionally accorded to certain professions, most notably doctors and lawyers. This final consideration is not yet fully established, and future decisions will be necessary in order to determine to what extent this is really a relevant consideration.\footnote{65} In Virginia Citizens the majority opinion allotted only a footnote to deal with the obvious questions concerning the effect which the decision would have on the legal and medical professions. This footnote warned that readers of the Court's opinion should not automatically assume that prohibitions against the advertisement of legal and medical services will soon be struck down.

Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require considerations of quite different factors. Physi-

\footnote{62. Id. at 1835.}
To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
\footnote{64. 96 S. Ct. at 1835 (Stewart, J., concurring), quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).}
\footnote{65. "It is important to note that the Court wisely leaves these issues [concerning advertisements of other professional services] to another day." 96 S. Ct. at 1832 (Burger, C.J., concurring).}
cians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.\(^6\)

The separate opinion written by Chief Justice Burger was primarily an amplification of this statement about the special considerations which might arise in cases involving physicians and attorneys.\(^6\)

The reasoning which convinced the Court that information about drug prices should be readily available can probably be applied to information about legal and medical services. Information about professional services is certainly of as much interest to the public as drug prices, and would most likely help the public to make better informed decisions. However, the point made in the Court's footnote and the Chief Justice's opinion is that the government might have a greater interest in regulating advertisements dealing with professional services than it does in regulating advertisements of drug prices. A state has an interest in protecting the health, safety, and welfare of its citizens, and this interest allows a state to regulate the practice of law and medicine, as well as other professions and trades.\(^6\) If a state can convincingly demonstrate that it is necessary to regulate advertisements of certain professional services in order to insure that those professions will maintain high standards, then those regulations will probably be upheld. It remains to be seen whether or not such convincing demonstrations can be provided.

The Court has considered the governmental interest in regulating various professions in previous cases.\(^6\) These cases have primarily involved fourteenth amendment due process and equal protection issues, but they seem to indicate that the Court believes that a state has a very significant interest in regulating the conduct of professionals. In the recent case of

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66. 96 S. Ct. at 1831 n. 25.
67. Id. at 1831 (Burger, C.J., concurring).
Goldfarb v. Virginia State Bar\textsuperscript{70} the Court specifically emphasized the governmental interest in regulating the legal profession.\textsuperscript{71}

A further argument that has been suggested as a justification for bans on advertisements of legal and medical services is that such advertising will necessarily tend to be misleading. As mentioned above, false or misleading advertising is not constitutionally protected. This is apparently what Chief Justice Burger had in mind when he wrote:

I doubt that we know enough about evaluating the quality of medical and legal services to know which claims of superiority are "misleading" and which are justifiable. Nor am I sure that even advertising the price of certain professional services is not inherently misleading since what the professional must do will vary greatly in individual cases.\textsuperscript{72}

Therefore, despite Justice Rehnquist's opinion to the contrary,\textsuperscript{73} it would appear that there is good reason to suspect that at least some type of restrictions on advertising by the legal and medical professions will be permitted.

The five factors discussed above have been presented as a simplified list and not as a comprehensive analysis. Not all of these factors will be relevant to every case involving commer-

\textsuperscript{70} 421 U.S. 773 (1975). The Goldfarb case was an antitrust action brought against a bar association that maintained a "minimum fee schedule." First amendment issues were not considered. It is interesting to note however, that one of the defenses asserted by the bar association was that it should not be subject to antitrust regulations since it was an agency of the state. The Court rejected the argument stating that "[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." \textit{Id.} at 791. The Court did not find sufficient "state action" to protect the bar association from the antitrust charges. \textit{Id.} This raises the question of whether or not the Court would find sufficient "state action" so that the first amendment (through the fourteenth amendment) could be applied to a state bar association.

\textsuperscript{71} "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'." \textit{Id.} at 792.

\textsuperscript{72} 96 S. Ct. at 1832.

\textsuperscript{73} Justice Rehnquist stated that:

[I]f the sale limitation on permissible state proscription of advertising is that it may not be false or misleading, surely the difference between pharmacists' advertising and lawyers' and doctors' advertising can be only one of degree and not of kind. I cannot distinguish between the public's right to know the price of drugs and its right to know the price of title searches or physical examinations or other professional services for which standardized fees are charged.

\textit{Id.} at 1837.
cial speech, but it is difficult to imagine a case which will not require a consideration of some of these factors. In the Virginia Citizens case, the Court did not discuss all of the five factors extensively, but it did give at least some consideration to most of them.

The Court considered these factors as a part of the process of weighing the first amendment rights claimed by the plaintiffs against the reasons for maintaining the advertising regulations which were asserted by the Board of Pharmacy. "This case presents a fairly typical First Amendment problem — that of balancing interests in individual free speech against public welfare determinations embodied in a legislative enactment."\(^{74}\) The majority of the Court would probably agree with this statement of Mr. Justice Rehnquist, the lone dissenter in Virginia Citizens. However, the majority of the Court found that the balance in this case tipped in favor of the "interests in individual free speech," whereas Justice Rehnquist believed that the "public welfare determinations embodied in [the] legislative enactment" should prevail. The Court gave extensive consideration to the justifications which were offered by the defendant Board of Pharmacy in support of the Virginia ban on prescription drug advertisements. It conceded that the state had an interest in maintaining professionalism on the part of pharmacists; but the Court concluded that because the advertising prohibition did not "directly affect professional standards one way or the other,"\(^{75}\) the attempted justifications of it failed.

Prior to recent developments, a regulation which restricted purely commercial speech could normally be upheld, because first amendment considerations were thought to be irrelevant. When this situation existed, the crucial concern was whether the speech which was being regulated was in fact "purely commercial." The significance of the Virginia Citizens decision is that it is no longer essential to consider whether the restricted form of expression is of a purely commercial nature. Virginia Citizens stated that first amendment considerations are relevant even if a case does involve purely commercial speech; thus the crucial concern has changed.

Future cases will determine the extent of the first amendment protection which will be made available to commercial

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\(^{74}\) *Id.* at 1839.

\(^{75}\) *Id.* at 1829.
speech. The importance of allowing a free flow of commercial information will have to be weighed against the importance of the restriction which is being challenged. This must be done on a case by case basis, and the weighing process should involve consideration of the factors which have been outlined above. Another case involving commercial speech has been appealed to the Supreme Court, and hopefully it will give the Court an opportunity to elaborate on the *Virginia Citizens* rationale. However, it appears today that the Court is unwilling to give the fullest measure of first amendment protection to commercial speech.

Paul M. Lohmann

Constitutional Law—Federal Civil Rights Act—Absolute Immunity Extended to Prosecuting Attorney—In the recent case of *Imbler v. Pachtman*, the United States Supreme Court held that a prosecuting attorney, acting within the scope of his duties in initiating and prosecuting a case, has absolute immunity from liability for damages for alleged violations of another's constitutional rights under section 1983 of the Civil Rights Act. In so holding the court further limited the effect of section 1983 in civil tort actions and elevated the position of prosecuting attorney to the same protected status enjoyed by judges and grand jurors acting within the scope of their duties. This article will discuss the decision and attempt to anal-

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1. 96 S. Ct. 982 (1976).
2. 42 U.S.C. § 1983 (1970) was originally passed as § 1 of the Civil Rights Act of 1871, 17 Stat. 13, and reads in full:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.