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Constitutional Law -- The First Amendment and Advertising: The Effect of the "Commercial Activity" Doctrine on Media Regulation

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into consideration in weighing these justifications.[56]

The Supreme Court then would go one step further than Judge Winter's interpretation of *Palmer*. Not only would it allow motivational factors to be considered once a prima facie case has been established, but it would shift the burden of persuasion to the party responsible for the challenged activity. In *Holt* a prima facie case of unconstitutional effect had been made with the proof of the timing of the dilution of black votes. The City of Richmond should then have been forced to justify its actions, and motivational factors should have been considered in determining whether the city has met its burden of proof.

The Court formulated the *Emporia* analytical rules in a fourteenth amendment school desegregation decision. It should logically apply them to the fifteenth amendment voting rights problem in *Holt*. Motivation is perhaps even more relevant to fifteenth amendment problems where numerical comparisons of equality are not possible as they are in fourteenth amendment questions. In the meantime, the *Holt* court seems to have seized on a hybrid rule of law to avoid rectifying a subtle infringement on rights guaranteed by the fifteenth amendment. In any event, the court in its *Holt* decision has perpetrated the injustice done by the Richmond annexation and has further confused the issue of when legislative motivation may be considered by the court in determining the existence of a violation of the fifteenth amendment.

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Constitutional Law—The First Amendment and Advertising: The Effect of the "Commercial Activity" Doctrine on Media Regulation

Mitchell Family Planning, Inc. v. City of Royal Oak[1] presented the United States District Court for the Eastern District of Michigan with a novel first amendment issue framed in the context of media regulation. Plaintiff Mitchell Family Planning, Inc., a non-profit[2] corporation, was

[56] *Id.* at 2205. Emporia had had since 1967 to establish its own school system. It began to show interest in doing so only after the county system was ordered to integrate. The effect of the city's withdrawal from the county system would have been to increase the number of white students in city schools and decrease their numbers in the county schools.

[1] 335 F. Supp. 738 (E.D. Mich. 1972).

[2] While the non-profit nature of plaintiff corporation was accepted here, in S.P.S. Consultants, Inc. v. Lefkowitz, 333 F. Supp. 1370 (S.D.N.Y. 1971), plaintiff Martin S. Mitchell was identified as president of Mitchell Referral Service, Inc., a profit-making enterprise engaged in the referral of pregnant out-of-state women to New York physicians for the purpose of abortion procurement.

engaged in the dissemination of information concerning family planning, contraception, sterilization and abortion. Mitchell leased an outdoor billboard to display the following message: "Abortion Information. Male and Female Sterilization Information. MITCHELL FAMILY PLANNING INCORPORATED, Niagara Falls, New York. Phone No. 716-285-9133. Local Phone No. 358-4672."[3] After the sign had been erected, the defendant city adopted an ordinance[4] which proscribed willful advertising of any information concerning abortion and further prohibited billboard owners from allowing such information on their signs. After the city attorney informed the plaintiffs that the sign would have to be removed to avoid imminent prosecution, the plaintiffs sued for a declaration that the ordinance was unconstitutional and for a permanent injunction against its enforcement.[5]

The court employed the "clear and present danger" doctrine[6] in holding that the billboard did not create a clear danger of the commission of illegal abortions. The offer of information concerning abortion over the telephone did not indicate any probability that the laws of Michigan would be transgressed, for the court could not know the content of the message which would be given to a caller.[7] Additionally, there was no reason to suspect that an illegal abortion, if indeed that was the

[3]335 F. Supp. at 739.

[4]Section 32A. ILLEGAL ADVERTISING. Any person who willfully advertises on a sign, in his own name or the name of another person, firm or pretended firm, association, corporation or pretended corporation, any means whatever whereby a miscarriage or abortion may be produced or procured, or any information concerning the producing or procuring of an abortion, or who offers his services by such advertisement to assist in the accomplishment of any such purpose, and also any person engaged in the outdoor advertising business who suffers or permits any such advertisement to be displayed upon any sign owned by him or under his control, shall be guilty of a violation of this ordinance.

335 F. Supp. at 744.

[5]The court concluded that the ordinance was overly broad for the following reasons: First, the ordinance did not discriminate between legal and illegal abortions. Consequently, plaintiffs were not only prohibited from advertising an activity which the state had a compelling interest to outlaw, illegal abortions, but also from dispensing information concerning legal activities. This flaw in statutory draftmanship violated the constitutional mandate of specificity and narrowness. Secondly, the court examined the breadth of the ordinance in relation to the other possible state interest, protection against "immoral advertising." The ordinance prohibited "any information concerning the producing or procuring of an abortion," while the Michigan "immoral advertising" statute merely covered "means" of producing an abortion. Therefore, the ordinance prohibited both activity which the state has the requisite compelling interest in outlawing and that in which it does not. *Id.* at 741-42.

[6]*See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[7]335 F. Supp. at 742-43.

subject of the information to be volunteered, would occur immediately. Noting that the newly liberalized abortion laws of the state of New York would probably be part of the information dispensed by plaintiffs, the court held that defendant did not have the necessary compelling state interest in an abortion committed in New York to warrant the limitation of free speech.

Upon an initial reading of the opinion, the court's reasoning appears clear and persuasive. However, the court's use of the "clear and present danger" test is in apparent conflict with the method of resolution adopted by the Supreme Court when dealing with issues like those presented by *Mitchell.*

Not all speech is protected by the first amendment.[8] The Supreme Court unequivocally identified commercial advertising as one of those unprotected classes of speech in *Valentine v. Chrestensen.*[9] The purely commercial nature of the message distinguished *Valentine* from earlier cases which had held that protected activities included pamphleting,[10] handbilling to advertise a political rally at which admission was charged,[11] and picketing.[12] This commercial exception to first amendment coverage has been described as a "general negative attitude towards commercial speech which was . . . formulated with a limited amount of reasoned analysis."[13]

A variety of difficulties have surfaced as the Court has attempted to deal with the cases which have arisen concerning the scope of the "commercial activity" exception. It is important to note that the initial approval of the regulation of commercial speech in *Valentine* involved the manner of distribution and not the substance of the communication.[14] However, judicial confusion sometimes reigned in the wake of

[8]Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

[9]316 U.S. 52, 54 (1942); *see* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 450 (1971): "The Court [in *Valentine*] felt that commercial advertising was merely ancillary to the proper performance of a business, and accordingly could be regulated by legislative action in the public interest. Thus . . . the Court effectively read commercial speech out of the first amendment." Compare the favorable arguments in Professor Redish's article with the policy reasons for not extending first amendment protection to purely commercial speech. Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1195 (1965).

[10]Lovell v. Griffin, 303 U.S. 444 (1938).

[11]Schneider v. State, 308 U.S. 147 (1939).

[12]Thornhill v. Alabama, 310 U.S.88 (1939).

[13]Redish, *supra* note 8, at 472.

[14]The controversy in *Valentine* was precipitated by plaintiff's transportation of his submarine to New York for a commercial exhibition. The New York City Police informed him of § 318 of

Valentine so that occasionally courts would regulate purely commercial speech distributed in an unobjectionable manner and non-commercial speech which would otherwise be protected but for its dissemination for a profit-making purpose.[15] After *Valentine*, the Court had to clarify its seemingly contradictory position between cases involving purely commercial speech[16] and those in which the speech merely had commercial overtones.[17] The first of these was *Murdock v. Pennsylvania*,[18] in which Jehovah's Witnesses were restrained from distributing their religious materials. The Court dismissed the state's contention that because donations were sought in return for the pamphlets, the Jehovah's Witnesses' conduct was removed from the area of protected speech. Two subsequent cases, *Thomas v. Collins*[19] and *Follett v. McCormick*,[20] reaffirmed the *Murdock* decision by holding that the distribution of communicative material does not necessarily fall outside of the zone of protected speech merely because money is procured by the solicitor.

The degree of commercial nature the advertising must have in order to fall within the "commercial activity" exception is unspecified. In 1951 the Court addressed the unresolved conflict between *Valentine* and the *Lovell-Murdock-Thomas* line of cases. In *Breard v. Alexandria*,[21] the defendant was arrested for violating an ordinance which prohibited door-to-door solicitation on private property for sales purposes without prior invitation. While agreeing that the selling of the periodicals did not put them beyond the first amendment's protection, the Court con-

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the Sanitary Code which forbade distribution of business advertising in the streets. Police Commissioner Valentine told Chrestensen that handbills solely devoted to "information or a public protest" could be dispensed lawfully. Plaintiff had a double-faced handbill printed with his advertisement on one side and a protest against city policy on the other. Disregarding defendant's warning, plaintiff distributed his handbills and was restrained. The Supreme Court reversed the decision granting injunctive relief to plaintiff. 316 U.S. 52 (1942); *see* Kaufman, *The Medium, the Message and the First Amendment*, 45 N.Y.U.L. REV. 761, 763-64 (1970). *See also* Redish, *supra* note 8, at 458.

[15]*See* Redish, *supra* note 8, at 472: "The summary dismissal of the value of commercial speech has reached into areas of traditionally protected communication. Thus the courts have often confused pure commercial speech with the classical expression of ideas and information when the dissemination is for profit-making purposes . . . , [or] on the basis of the use of the advertising form."

[16]*E.g.*, Valentine v. Chrestensen, 316 U.S. 52 (1942).

[17]*E.g.*, Schneider v. State, 308 U.S. 147 (1939) (handbilling to advertise a political rally at which admission was charged held protected).

[18]319 U.S. 105 (1943).

[19]323 U.S. 516 (1945).

[20]321 U.S. 573 (1944).

[21]341 U.S. 622 (1951).

cluded that it brought a commercial feature into the transaction.[22] With this commercial feature thus cited as a major consideration, the Court balanced the interests of the defendant and Alexandria's residents and held that the latters' "desire for privacy" was of greater significance.[23]

The Court resolved the issue in *Breard* by reasserting the primary purpose test, obliquely enunciated in *Valentine*,[24] to establish whether the commercial activity exception applied. The primary purpose test examines the motive of the advertiser to discover if his reason for advertising was primarily economic or whether the commercial nature of the medium was subordinate to the dissemination of constitutionally protected expression.[25] The primary purpose test has fallen into disuse since the *Valentine* and *Breard* decisions.[26] Now the nature of the material and the method of communication are relevant criteria.[27]

The status of the commercial activity exception has been thoroughly altered by these recent developments. Instead of automatically removing commercial messages from the category of speech protected by the first amendment, the doctrine now serves as an adjunct to the

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[22] *Id.* at 642.

[23] *Id.* at 644.

[24] "We need not indulge nice appraisals based upon subtle distinctions in the present instance . . . . It is enough for the present purpose that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance." 316 U.S. at 55. *See also* Murdock v. Pennsylvania, 319 U.S. 105 (1944).

[25] The primary purpose test can be used to resolve the apparent contradictions between the *Valentine*-type cases and those in the *Lovell-Murdock-Thomas* line of decisions. The primary purpose test must be applied to the content of the material being distributed and the nature of the organization sponsoring the canvassing. The availability of alternative means of dissemination provides an analytical tool which measures the full effect of the disputed regulation on the speaker's ability to communicate. *See* Note, 78 HARV. L. REV., *supra* note 8, at 1202-03.

[26] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (a libel action in which the Court rejected plaintiff's contention that defendant's message was not protected by the first amendment because it was a paid commercial advertisement); Smith v. California, 361 U.S. 147 (1959) (concluding that it is of no consequence that the dissemination takes place under commercial auspices); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (rejecting the contention that "motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit," *id.* at 501). *See also* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (expanding the New York Times Co. v. Sullivan rule to cover matters of "public or general concern"); Julian Messner, Inc. v. Spahn, 387 U.S. 239 (1967) (per curiam) (broadening the scope of the *Times* rule to include "public figures"); Time, Inc. v. Hill, 385 U.S. 374 (1967) (including newsworthy items within the aegis of the *Times* rule).

[27] In *Mitchell*, the commercial nature of the transactions coupled with the use of billboard display, usually an instrumentality of business advertising, justify the application of the "commercial activity" doctrine.

balancing test[28] utilized by the Court[29] to determine the extent of constitutional protection in a specific controversy. The commercial nature of a message and the chosen medium reduces the weight assigned to the individual and social interest in its free expression. This weight is balanced against the public interest in the regulation. The balancing test can only be employed as an analytical tool when the governmental control of speech is directed at the medium of communication and not the message itself.[30]

Before progressing to an examination of the potential consequences of an application of the balancing test to the considerations present in *Mitchell*, it is necessary to illustrate the possible conflict with the analytical methodology of the Supreme Court incurred by the use of the "clear and present danger" test by the *Mitchell* court. Although the "clear and present" doctrine is a type of balancing test,[31] it is not applicable to the situation presented in *Mitchell*. The "clear and present danger" test is administered only when the statute in question attempts to limit directly the content and not just the method of speech.[32] What the speaker says must present the danger of causing a substantive evil which the legislature has a compelling interest in preventing. The manner is relevant only in determining if the danger is indeed "imminent" and "likely to incite or produce such action."[33] When the balancing test is employed, the clear and convincing state interest which must support media regulation is balanced against the speaker's interest in adopting that particular method of communication.[34] If the regulation meets this

[28]Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). Professor Emerson, a critic of the balancing formula, has defined it: "The formula is that the court must, in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression." *Id.* at 912.

[29]*But see* Time, Inc. v. Hill, 385 U.S. 374 (1967) (Black, J., concurring). Mr. Justice Black strongly opposed the balancing test which he described as a "Constitution-ignoring-and-destroying technique." *Id.* at 399.

[30]*See* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 216.

[31]Loewy, *Free Speech: The "Missing Link" in the Law of Obscenity*, 16 J. PUB. L. 81, 83 (1967).

[32]The stringent restraints on governmental control of freedom of speech do not *ipso facto* apply to media regulation. *Cf.* Cox v. Louisiana, 379 U.S. 559, 563 (1964) ("[t]he examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited"); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

[33]Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). *See also* Bridges v. California, 314 U.S. 252, 262 (1941); Schenck v. United States, 249 U.S. 47, 52 (1919).

[34]Kovacs v. Cooper, 336 U.S. 77 (1949).

test, it is constitutional even if the restricted speech presented no clear and present danger of any further substantive evil.

The method of distribution of ideas is balanced with the state's interest in regulating the manner of dissemination.[35] The vestigal concept of the primary purpose test, availability of alternative means of communication, is still useful in assessing the protected status of a particular method of dissemination.[36] The commercial nature of either the content or method of a particular message will have the effect of reducing the emphasis placed on the chosen mode of communication if there are other more reasonable means available.

Thus the commercial nature of the message involved in *Mitchell* could have the effect of balancing the scales of constitutionality on the side of regulation. If that is indeed the case, it is necessary to examine the scope of permissible regulation and the competing interests to determine whether the ordinance in *Mitchell* was constitutionally infirm.[37] Four general rules limit the extent to which government may regulate media use: (1) the interest of the state in its regulatory effort must be at least substantial;[38] (2) the regulation cannot be designed to restrain content;[39] (3) any "incidental" regulation of speech must be limited to the smallest scope possible consistent with the purpose of the restraint;[40] and (4) the restriction must be so narrowly constructed as to prevent unequal application.[41]

One of the first examples of media-use regulation was *Kovacs v. Cooper*.[42] There the Court sustained an ordinance prohibiting the use of vehicles and equipment which emitted "loud and raucous" noises.[43]

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[35]*See* Kaufman, *supra* note 13, at 771.

[36]*Cf.* NAACP v. Button, 371 U.S. 415 (1963); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968).

[37]*See* Kaufman, *supra* note 13, at 765.

[38]NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 464 (1958). In addition, *see* Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("paramount"); *id.* at 408 ("strong"); NAACP v. Button, 371 U.S. 415, 438 (1963) ("compelling"); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) ("cogent", "subordinating"); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (holding that all of the above mentioned words are synonymous with "substantial").

[39]An important distinction, which is extremely material to the case under consideration, must be noted here. Banning certain types of content entirely from one type of medium is not equivalent to restraint of that message. Only if the ordinance in question attempted to ban all speech dealing with abortion procurement would it violate the prohibition on content restraint. *See* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971).

[40]NAACP v. Button, 371 U.S. 415, 432 (1963).

[41]Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967).

[42]336 U.S. 77 (1949).

[43]*Id.* at 78. *But cf.* Saia v. New York, 334 U.S. 558 (1948). The difference in results in these

The serenity and privacy of the neighborhoods in which the sound trucks ventured was deemed to be of greater importance than the use of the loudspeaker systems as a medium. In *Banzhaf v. FCC*[44] the District of Columbia Circuit held that the cigarette advertising regulation adopted by the FCC requiring a health warning in all broadcast cigarette commercials was not violative of the first amendment. The court cited *Valentine* and many of its successors in support of its statement that "product advertising is at least less rigorously protected than other forms of speech."[45] The regulation was upheld as being properly narrow[46] and adequately supported by the compelling state interest in public health,[47] so that the incidental and minor "chilling effect" on the broadcasters which might result was deemed to be "overbalanced."[48]

Three years later in *Capital Broadcasting Co. v. Mitchell*,[49] a three-judge panel denied injunctive relief against the enforcement of section 6 of the Public Health Cigarette Smoking Act of 1969.[50] Also denied was a declaratory judgment holding section 6 unconstitutional. The court noted that strong governmental and public interest in public health was the basis of the regulation,[51] and that the petitioners were not prohibited from publicizing information about cigarettes. They merely lost the privilege of collecting revenue from broadcasting tobacco manufacturers' messages.[52]

There is little question that billboards as an advertising medium itself can be regulated with respect to size and height.[53] A state law,[54] banning most roadside signs and all purely commercial advertisements from interstate highways,[55] withstood a first amendment attack in

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two cases is due to contrary resolution of the issue of vagueness. *See* text accompanying note 40 *supra*.

[44]405 F.2d 1082 (D.C. Cir. 1968).

[45]*Id.* at 1101.

[46]*Id.*

[47]*Id.* at 1096-97.

[48]*Id.* at 1101-02.

[49]333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Kleindienst, 92 S. Ct. 1289 (1972).

[50]15 U.S.C. § 1335 (1970).

[51]333 F. Supp. at 583-84.

[52]*Id.* at 584.

[53]*E.g.*, State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967).

[54]Highway Advertising Control Act of 1961, WASH. REV. CODE ANN. §§ 47.42.010-.910 (1970), and the Regulations adopted thereunder by the Highway Commission on May 18, 1961, 3 WASH. ADMIN. CODE ch. 252-40, *cited in* Markham Advertising Co. v. State, 73 Wash. 2d 405, 408, 439 P.2d 248, 251 (1968).

[55]Highway Advertising Control Act of 1961, WASH. REV. CODE ANN. § 47.42.020(b) (1970)

Markham Advertising Co. v. State.[56] The court observed the secondary position of purely commercial speech in the constitutional heirarchy,[57] citing *Valentine.* It gave sympathetic consideration to the public interest in prohibiting the "dangerous, obtrusive, and unsolicited presence of advertising structures,"[58] as well as the public interest n citizens' comfort and convenience on the basis of *Kovacs v. Cooper.*[59]

These examples of permissible regulation of media portend the necessity of examining the possible state or public interests which could support a contrary ruling in *Mitchell.*[60]

The first public interest that could justify the ordinance involves a combination of public health and morality.[61] However, the nexus between these social needs and the regulation is quite tenuous.[62] Additionally, the state's interest in enforcing morality may not be compelling since the first amendment's penumbra protects privacy of certain sexual activity from governmental intrusion.[63] The second public interest justification that can be proposed is protection of the fetus. This issue was decided in cases in which the constitutionality of abortion statutes was challenged. In *Babbitz v. McCann,*[64] the district court held the statute[65] unconstitutional, striking a balance in favor of a woman's right to refuse

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(no sign not specifically exempt could be placed within 660 feet of the right-of-way of interstate system highways).

[56]73 Wash. 2d 405, 439 P.2d 248 (1948), *appeal dismissed,* 393 U.S. 316 (1969) (per curiam).

[57]*Id.* at 428, 439 P.2d at 262.

[58]*Id.*

[59]*Id.* at 429, 439 P.2d at 263.

[60]The goal and the duty of such an investigation was stated in Martin v. City of Struthers, 319 U.S. 141, 144 (1943): "In considering legislation which thus limits the dissemination of knowledge, we must 'be astute to examine the effect of the challenged legislation' and must 'weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation.' "

[61]*See, e.g.,* Planned Parenthood Comm. v. Maricopa County, 92 Ariz. 231, 375 P.2d 719 (1962) (upholding ARIZ. REV. STAT. ANN. § 13-213 (1956) which prohibited advertising to produce abortion or prevent conception). The public interest served by the statute, either moral considerations or the venereal disease problem, was held substantial and predominant when compared with the private interest in free speech through advertising.

[62]The widespread availability of a variety of inexpensive contraceptive devices as well as the almost universal familiarity with these methods undermines the credibility of the assertion that the dissemination of information concerning expensive and painful abortions will materially reduce the incidence of venereal disease or promiscuity.

[63]Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

[64]310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed,* 400 U.S. 1 (1970); *accord, e.g.* Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), *jurisdictional issue postponed,* 402 U.S. 941 (1971), *scheduled for reargument,* 92 S. Ct. 2476 (1972).

[65]WIS. STAT. ANN., §§ 940.04(1), (5) (1958).

to carry an embryo during the early months of pregnancy. This right may not be restricted by the state without a more compelling public necessity than protection of the embryo.[66] The United States District Court for the Western District of North Carolina in *Corkey v. Edwards*,[67] however, arrived at a diametrically opposed conclusion. The contention that the state has a cogent interest both in protecting public health by controlling the venereal disease epidemic and in preserving the life of a fetus is not relevant, regardless of the final resolution of the controversy aired in *Babbitz* and *Corkey*, because there are other direct criminal sanctions by which the state can assert these interests without venturing into the first amendment area.

The final public interest which could justify the regulation is a mixture of highway safety and aesthetics. This was the basis for the restrictions in *Markham Advertising Co. v. State*.[68] It is quite conceivable that the very word "abortion" would be shocking or at least disconcerting to a segment of the motoring public.[69] The dangerous conse-

[66]310 F. Supp. at 301.

[67]322 F. Supp. 1248 (W.D.N.C. 1971). Judicial acceptance of the position asserted by the plaintiffs in this class action, that the state has no substantial interest in interfering with a woman's right to choose between childbirth and abortion, was held to involve a value judgment beyond the proper capacity of the court. *Id.* at 1250. The evaluative process which the court refused to undertake was deemed to be within the province of the legislature. *Id.* Finally, the North Carolina General Assembly's determination that protection of the embryo was an adequate public interest to support the statutory invasion of a woman's protected zone of privacy was approved as a valid exercise of the legislative function. *Id.* at 1254. *Accord, e.g.* Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970); Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).

[68]73 Wash. 2d 405, 439 P.2d 248 (1968); *see* text accompanying note 75 *infra*.

[69]*But cf.* Cohen v. California, 403 U.S. 15 (1971) (reversing a conviction for disturbing the peace by offensive conduct based on defendant's wearing a jacket on which was inscribed "Fuck the Draft" while he was walking along a corridor of a county courthouse). This case can easily be distinguished from *Mitchell* because of the different state interests advanced as justification for the two ordinances. In *Cohen*, the Court held that neither the interest in prohibiting speech that would incite violent reaction nor that of protecting public morality would suffice as a compelling rationale for the application of the ordinance to the actions of the defendant. *Id.* at 20-21. As only this particular enforcement of the ordinance was deemed violative of constitutional rights, the setting in which the protected activity transpired becomes all important. Cohen was walking in a corridor. He was surrounded by persons walking or sitting. Someone disturbed by the content of his message could easily avert his or her eyes. *Id.* at 21. And even if some person were so upset by the word "Fuck" that he or she became physically disoriented, the worst that could happen would be a minor collision with another pedestrian or a wall. The extremely limited adverse consequences of being upset by Cohen's message is completely different from the possibilities inherent in the *Mitchell* situation. The driver who's sensibilities are assaulted by the sight of the word "abortion" on the billboard could easily cause a serious accident involving major property damage, physical injury or death, if the shock was serious enough to destroy his or her concentration on the highway and traffic. The interest of the state in preventing this type of consequence is more compelling than that present in *Cohen*.

quences of such an effect are obvious when one considers the inherent dangers of high speed automobile travel and the omnipresent nature of billboard advertising which is seen without the exercise of choice or volition.

The Supreme Court decision in *Railway Express, Inc. v. New York*[70] lends support to the contention that highway safety is a compelling state interest which legitimates the ordinance questioned in *Mitchell*. Although appellant did not raise the first amendment issue[71] and instead relied upon the due process and equal protection clauses in attacking the constitutionality of a New York City traffic regulation which forbade the operation of any advertising vehicle, except those engaged in normal business which carried the commercial message of the owner,[72] the conclusion of the Court of Special Sessions[73] that the prohibited advertising on the side of defendant's trucks constituted a distraction and safety hazard to pedestrians and motorists was accepted by the Court.[74]

Applying the principles and criteria previously discussed, a persuasive case can be made that the *Mitchell* decision is not in harmony with the probable resolution of the issues indicated by prior adjudication. First, the "commercial activity" doctrine applies to *Mitchell*. The billboard advertised information, but the actual service to be provided was referral to New York physicians as observed in the court's "inference."[75] This introduced "into the transaction a commercial feature."[76] Also, the medium Mitchell employed to communicate his information was commercial in nature.[77] Second, the balancing test as affected by the "commercial activity" doctrine, employed in lieu of the court's questionable application of the "clear and present danger" test, could easily be resolved in favor of the state. Mitchell's right was to disseminate his information. This must be balanced against the public interest in highway safety which is strong and compelling and has been cited as suffi-

[70]336 U.S. 106 (1949).

[71]Presumably on account of Valentine v. Chrestensen, 316 U.S. 52 (1942).

[72]336 U.S. at 107-08.

[73]People v. Railway Express Agency, Inc., 188 Misc. 342, 67 N.Y.S.2d 732 (1947), *aff'd*, 297 N.Y. 703, 77 N.E.2d 13 (1947), *aff'd sub nom.* Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

[74]336 U.S. at 109. *See also* Fifth Ave. Coach Co. v. New York, 221 U.S. 467 (1911) (sustaining the predecessor ordinance against due process and equal protection attacks); General Outdoor Advertising Co. v. Department of Pub. Works, 289 Mass. 149, 168, 193 N.E. 799, 808 (1935).

[75]335 F. Supp. at 743. *See also* note 2 *supra*.

[76]Breard v. Alexandria, 341 U.S. 622, 642 (1951).

[77]*See* Breard v. Alexandria, 341 U.S. 622 (1951).

cient justification for prohibiting almost all roadway advertising.[78] In *Mitchell* there is the added factor of shock to some drivers caused by the word "abortion."

The *Mitchell* court's objection to the breadth of the regulation was also debatable. Instead of judging the ordinance by the type of abortion information proscribed,[79] the court should have noted that the only medium regulated was the billboard. This introduces the final consideration which demonstrates the probable constitutionality of the ordinance. As billboard advertising was the only medium the plaintiff was prohibited from using, he had many alternative means of communicating his information. The newspaper appears to be the most suitable, although radio and television are plausible. Mr. Mitchell might even be able to follow in the illustrious, and apparently immortal, footsteps of F.J. Chrestensen and disseminate his message by handbill.

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Consumer Protection—Truth-In-Lending Disclosures Not Timely at Closing

Recognizing that the American consumer was faced with inconsistent and noncomparable credit disclosure practices which were causing confusion about credit,[1] Congress enacted Title I (Truth in Lending) of the Consumer Credit Protection Act (the Act),[2] which became effective July 1, 1969.[3] The Board of Governors of the Federal Reserve System (the Board) was granted the power of prescribing regulations[4] for the Act. The implementing regulation, known as Regulation Z,[5] became

[78] *See* Markham Advertising Co. v. State, 73 Wash. 2d 405, 415-16, 439 P.2d 248, 254-55 (1968) (summary of expert testimony concerning the effect of billboards on highway safety).

[79] 335 F. Supp. at 741-42.

[1] S. REP. No. 392, 90th Cong., 1st Sess. 1 (1967).

[2] Consumer Credit Protection Act, 15 U.S.C. §§ 1601-81 (1970).

[3] Pub. L. No. 90-321, § 504(b), 82 Stat. 167.

[4] Truth in Lending Act § 105, 15 U.S.C. § 1604 (1970):

> The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

[5] 12 C.F.R. § 226 (1971).