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CONSTITUTIONAL LAW — COMMERCIAL SPEECH — FEDERAL STATUTE PROHIBITING MAILING OF UNSOLICITED CONTRACEPTION ADVERTISEMENTS VIOLATES FIRST AMENDMENT AS APPLIED TO ACCURATE MAILINGS THAT CONTRIBUTE TO INFORMED DECISION MAKING. *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875 (1983).

The United States Postal Service warned an advertiser of contraceptives that its proposed mailing of unsolicited advertisements was prohibited under 39 U.S.C. § 3001(e) as nonmailable matter.[1] The advertiser brought an action in federal district court for declaratory and injunctive relief. It claimed that the statute, as applied to its mailings, violated the first amendment by preventing the distribution of the advertisements.[2] The district court held the statute unconstitutional because it prohibited commercial speech, which is protected under the first amendment. The court deemed the statute more extensive than necessary to serve the government's interest in protecting the privacy of individuals in their homes.[3] On appeal,[4] the Supreme Court affirmed on different grounds. The Court held the statute unconstitutional as applied to the proposed mailings for three reasons. First, the alleged governmental interest in protecting people from receiving offensive material was insubstantial. Second, although the asserted governmental interest in aiding parental attempts to teach birth control was substantial, the regulation did not advance it, especially when other less restrictive means were available. Third, the statute was more extensive than necessary because it prevented the dissemination of truthful information to adults and adolescents who were legally entitled to purchase birth control products.[5]

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1. Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2877-78 (1983). The pertinent part of the statute is: "Any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable [and] shall not be carried or delivered by mail . . . ." 39 U.S.C. § 3001(e)(2) (1982). The statute is inapplicable when the sender has no commercial interest and when the advertisement is solicited. *Youngs*, 103 S. Ct. at 2877-78. The statute originated in the Comstock Act, Act of March 3, 1873, ch. 258, § 2. 17 Stat. 599 (1873) (current version at 39 U.S.C. § 3001(e)(2) (1982)). The Act was designed to prohibit the mailing of obscene and immoral material. *Youngs*, 103 S. Ct. at 2882.
2. Youngs Drug Prods. Corp. v. Bolger, 526 F. Supp. 823, 825 (D.D.C. 1981), *aff'd on other grounds*, 103 S. Ct. 2875, 2878 (1983).
3. *Id.* at 829. The court suggested that the least restrictive alternative necessary to balance the advertiser's commercial interest with the government's privacy interest would be to have the mailing envelope obscure the contents, to label it prominently as containing unsolicited contraception promotion, and to state that federal law permits recipients to remove their names from the mailing list pursuant to 39 U.S.C. § 3008(a) (1982). *Id.* at 830. This suggestion was unchallenged on appeal. Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2878-79 n.5 (1983).
4. The government appealed directly to the Supreme Court pursuant to 28 U.S.C. § 1252 (1982). *Youngs*, 103 S. Ct. at 2879.
5. *Youngs*, 103 S. Ct. at 2884-85. The Court's opinion, written by Justice Marshall, was unanimous. Justice Brennan did not participate and two concurring opinions were filed. In the first concurring opinion, Justice Rehnquist, joined by Justice O'Connor, argued that the governmental interests were substantial but that the statute's regulations were broader than necessary to serve those interests. *Id.* at 2887

Only recently has commercial speech been accorded first amendment protection.[6] Previously, courts adhered to the view announced in *Valentine v. Chrestensen*[7] that commercial advertising is unprotected by the first amendment. In *Chrestensen*, a municipal ordinance banning advertising in public places prevented a merchant from distributing handbills that advertised his marine exhibit and that protested government wharfage regulations. The Court held that the ordinance did not violate the merchant's first amendment right to distribute the handbills. The often quoted reasoning was that the Constitution imposed no restraint on governmental regulation of "purely commercial advertising."[8] The Court also set forth a policy rationale. Underlying the holding was the intent to prevent merchants from evading lawful regulation merely by including a noncommercial component to their advertising.[9]

(Rehnquist, O'Connor, J.J., concurring). In the second concurring opinion, Justice Stevens questioned the majority's conclusions that all of the mailings were properly classified as commercial speech. Because of the noncommercial components of the mailings, Justice Stevens advocated the same level of scrutiny that would apply to mailings distributed by a party without a commercial interest. Justice Stevens further reasoned that the statute violated the first amendment because it was an impermissible content regulation. *Id.* at 2888 (Stevens, J., concurring).

6. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 581 n.4 (1980) (Stevens, J., concurring). Commercial speech falls under the first amendment. *Youngs*, 103 S. Ct. at 2879. The speech provision of the first amendment is: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. It applies to the states through the fourteenth amendment. Grosjean v. American Press Co., 297 U.S. 233 (1936); Gitlow v. New York, 268 U.S. 652 (1925) (application assumed).

   Commercial speech is distinguished from noncommercial speech, which may be political, social, scientific, educational, economic, artistic, or literary speech. *See* New York v. Ferber, 458 U.S. 747, 762-63 (1983); Miller v. California, 413 U.S. 15, 23 (1973) (listing examples of protected speech, but not expressly distinguishing commercial from noncommercial speech); *see infra* note 37 and accompanying text for examples of noncommerical speech. Commercial speech protection has been applied in a variety of contexts. *E.g.*, Metromedia, Inc. v. City of San Diego, 435 U.S. 490 (1981) (plurality opinion) (billboards); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (utility advertising); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (attorney advertising); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977) ("for sale" signs).
7. 316 U.S. 52 (1942).
8. *Id.* at 54. The decision cited no precedents, prior case law, or contemporaneous lower court decisions attempting to reconcile governmental regulation of commercial advertising with first amendment rights. *See* Chrestensen v. Valentine, 34 F. Supp. 596, 599, 600 (S.D.N.Y. 1940), *rev'd*, 316 U.S. 52 (1942). Justice Douglas later described the *Chrestensen* holding as "casual, almost offhand" and not surviving on reflection. Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring). The Supreme Court subsequently characterized the holding as a manner regulation, Bigelow v. Virginia, 421 U.S. 809, 819 (1975), and as a mere "indication" that commercial speech is unprotected. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 758 (1976).
9. Valentine v. Chrestensen, 316 U.S. 52, 55 (1942). This policy is still operative. *See Youngs*, 103 S. Ct. at 2881 (an advertiser's reference to a public issue should not immunize it from government regulation); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 540 (1981) (plurality opinion) (Brennen, J., concurring) (commercial entities will try to take advantage of the "safe haven" of noncommercial speech).

Chrestensen came to stand for the old commercial speech doctrine, which divided speech into two categories: purely commercial advertising, or commercial speech, which was profit motivated and unprotected under the first amendment; and noncommercial speech, which received first amendment protection.[10] The *Chrestensen* doctrine was narrowed as subsequent cases involved speech that was not readily identifiable as purely commercial or noncommercial. The result of these cases was the principle that economic motive alone would not render speech commercial.[11]

The Supreme Court in effect overturned *Chrestensen* in *Bigelow v. Virginia*.[12] An agency had placed an advertisement for out of state abortion services in a Virginia newspaper. The newspaper was charged with violating a Virginia statute that made it a misdemeanor to encourage abortion in publications.[13] The Supreme Court of Virginia upheld the statute under the *Chrestensen* doctrine that commercial speech was unprotected.[14] The Supreme Court reversed, reasoning that the government may not prevent the dissemination or receipt of information concerning a lawful activity.[15] The decision implied that three elements render speech commercial: the speech is a sales solicitation, is paid for,

10. Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 207-09 (1976). For informative treatments of the origins and development of the commercial speech doctrine, see Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080, 1084-96; Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 722-30 (1982). For criticism of the modern doctrine, see Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979) (commercial speech as contract theory); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979) (commercial speech values inappropriate under the first amendment).

11. *E.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (profit motive is immaterial when civil rights advertisement communicated information and opinion on matter of public concern); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (profit motive in selling religious publications is incidental to the right to disseminate religious publications).

12. 421 U.S. 809, 818-20 (1975). The Supreme Court had earlier held that the commercial selling of periodicals was within first amendment protection; however, the ban on door-to-door periodical sales was upheld as against community interest and not on commerical speech reasoning. Breard v. Alexandria, 341 U.S. 622, 642, 645 (1951). *Chrestensen* was more clearly limited in Bigelow v. Virginia, 421 U.S. 809, 819-21 (1975). *See* Comment, *supra* note 10; Comment, *Legislative Choice and Commercial Speech:* Central Hudson Gas & Elec. Corp., 1981 UTAH L. REV. 831; Note, *Standard of Revision for Regulations of Commercial Speech:* Metromedia, Inc. v. City of San Diego, 66 MINN. L. REV. 903 (1982). *See generally* Rotunda, *supra* note 10 (*Chrestensen* overturned in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1973)).

13. 421 U.S. 809, 811 (1975).

14. Bigelow v. Virginia, 213 Va. 191, 193, 191 S.E.2d 173, 174 (1972), *rev'd*, 421 U.S. 809 (1975).

15. *Bigelow*, 421 U.S. at 824-25; *accord* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (advertisement for energy sources); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (in-person attorney advertising); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (attorney advertising); Linmark Assocs.

and is motivated by profit.[16] The Court found that the abortion advertisement was more than a mere proposal of a commercial transaction; it pertained to a lawful activity — abortion — and communicated factual information of public interest.[17] Balancing the state government's interest in maintaining the quality of medical care within its borders against the public's interest in receiving the information, the Court held that the statute violated the newspaper's first amendment right.[18] The Court rejected the lower court's assumption that advertising was per se excluded from first amendment protection, but expressly left open the extent to which regulation may be permissible.[19]

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,*[20] the Supreme Court for the first time explicitly held that the first amendment protected commercial speech. The Court invalidated a Virginia statute that prohibited a pharmacist from publishing prescription drug prices because the law violated the first amendment.[21] *Virginia Pharmacy* did not define commercial speech but characterized it in terms of policies. The Court described commercial speech as part of the "exposition of ideas" protected by the first amendment.[22] Advertisers have an economic interest in the exposition of certain ideas.[23] Consumers have an interest in obtaining the free flow of commercial information so that they can obtain necessary products at affordable prices.[24] Society has a general interest in the free flow of commercial information to ensure access to available products and to ensure intelligent, well informed consumer decisions.[25]

In dictum, the Court stated that time, place, and manner restrictions were permissible if they did not regulate the content of speech.[26] Reasonable time, place, and manner regulations may be imposed on any type of

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v. Township of Willingboro, 431 U.S. 85 (1977) ("for sale" signs); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (advertisement for contraceptives).

16. *See Bigelow*, 421 U.S. at 818.
17. *Id.* at 822.
18. *Id.* at 826-29.
19. *Id.* at 825.
20. 425 U.S. 748 (1976).
21. *Id.* at 770, 773.
22. *Id.* at 762 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). In a free market economy, society has an interest in the dissemination of information "as to who is producing and selling what product, for what reason, and at what price." *Virginia Pharmacy*, 425 U.S. at 765; *accord* Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977); *see also* Jackson & Jeffries, *supra* note 10, at 2 (commercial speech doctrine rests on distinction between economic marketplace and marketplace of ideas).
23. *Virginia Pharmacy*, 425 U.S. at 762; Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977).
24. *Virginia Pharmacy*, 425 U.S. at 764; *accord* Friedman v. Rogers, 440 U.S. 1 (1979).
25. *Virginia Pharmacy*, 425 U.S. at 764-65; *accord* Friedman v. Rogers, 440 U.S. 1, 8-9 (1979); Bates v. State Bar of Arizona, 433 U.S. 350, 363-64 (1977).
26. *Virginia Pharmacy*, 425 U.S. at 771; *see also In re* R.M.J., 455 U.S. 191, 200 (1982) (attorney advertising); Friedman v. Rogers, 440 U.S. 1, 9 (1979) (trade name).

speech[27] when a significant governmental interest is involved and alternative channels of communication are left open.[28] Time, place, and manner regulations are impermissible when they are based on the content or subject matter of the speech;[29] censorship of the speaker's views is thereby avoided.[30] Commercial speech, however, may be regulated for its content to the extent that the content is false, misleading, deceptive, or promotes unlawful activity.[31]

The *Virginia Pharmacy* Court also noted that the prior restraint doctrine may not be applicable to commercial speech.[32] The prior restraint doctrine refers to the interpretation of the first amendment as precluding the government from imposing restraints on a publication in advance of a judicial determination of whether the publication contains protected speech.[33] Its rationale in part is to prevent government censorship[34] and facilitate a free flow of information.[35] It further encourages an informed public, interpreted by some commentators as a politically in-

27. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535 (1980) (citing Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 93 (1977)); *Virginia Pharmacy*, 425 U.S. at 771. For time, place, and manner regulations in a noncommercial speech context, see Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (safety reasons on state fairgrounds); Adderley v. Florida, 385 U.S. 39 (1966) (nonpublic property use).
28. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75-76 (1981) (citations omitted); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535 (1980).
29. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 93-94 (1977) (application assumed); Police Dep't v. Mosley, 408 U.S. 92, 99 (1972).
30. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) (Frankfurter, J., concurring) (citing Niemotko v. Maryland, 340 U.S. 268, 282 (1951)).
31. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980) (dictum); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771-72 (1976) (dictum). For specific examples see *infra* note 49 and accompanying text.
32. *See Virginia Pharmacy*, 425 U.S. at 771-72 n.24; *cf.* Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 495-96 (1982) (prior restraint argument rejected because only noncommercial speech was implicated).
33. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (citing Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940)); Grosjean v. American Press Co., 297 U.S. 233, 245 (1936); Near v. Minnesota, 283 U.S. 697, 735 (1931) (Butler, J., dissenting). For a discussion of the historical origins of the prior restraint doctrine, see Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556-61 (1976); Grosjean v. American Press Co., 297 U.S. 233, 245-49 (1936); Near v. Minnesota, 283 U.S. 697, 713-20 (1931). For a discussion of the doctrine in a modern context, see O'Brien, *Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication*, 265 VILL. L. REV. 1, 48-58 (1980).
34. *See* Near v. Minnesota, 283 U.S. 697, 716 (1931); *e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (licensing); Lovell v. Griffin, 303 U.S. 444 (1938) (same) (*but cf.* FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) (license renewal decision not in conflict with listeners' first amendment rights)); Grosjean v. American Press Co., 297 U.S. 233 (1936) (taxation). The first amendment promotes the value that individuals should be free to think as they want, not as the government wants them to think. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977).
35. *See* Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

formed public[36] but interpreted by the Supreme Court as encompassing more than political speech.[37] The first amendment creates a heavy presumption against prior restraint.[38] Prior restraint of certain types of speech has been permitted, provided that standards are provided and procedural safeguards are taken to prevent suppression of associated protected speech.[39] Because a chief purpose of the first amendment is to prevent prior restraint,[40] first amendment protection accorded commercial speech would be severely limited if the publication of all commercial speech were restrained prior to judicial determination of its status as protected or unprotected.

The next major commercial speech case was *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[41] Whereas in *Bigelow* and *Virginia Pharmacy*, the Supreme Court had used a balancing test to determine if the first amendment protected the commercial speech at issue,[42] in *Central Hudson* the Court replaced the balancing test with a four-step analysis. The analysis determines whether the statutory prohibition is the least restrictive means of achieving the substantial government interest alleged.[43] In *Central Hudson*, an administrative regulation prohibited promotional advertising (intended to stimulate purchase), but not informational advertising (not clearly intended to promote sales), as

36. *E.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Jackson & Jeffries, *supra* note 10; O'Brien, *supra* note 33, at 48.
37. *See* Miller v. California, 413 U.S. 15, 23 (1973); Near v. Minnesota, 283 U.S. 697, 717 (1931); *see also* Board of Educ. v. Pico, 457 U.S. 853 (1982) (education); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (entertainment); Brown v. Glines, 444 U.S. 348 (1980) (military regulations); Madison School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (labor); Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413 (1966) (literature).
38. Brown v. Glines, 444 U.S. 348, 364 (1980) (Brennan, J., dissenting); Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963); Near v. Minnesota, 283 U.S. 697 (1931).
39. *E.g.*, Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984) (civil pretrial discovery); Brown v. Glines, 444 U.S. 348 (1980) (military regulations); Snepp v. United States, 444 U.S. 507 (1980) (per curiam) (classified information) (*but cf.* Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (press denied access to pre-criminal trial proceeding); New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (injunction against publication of Pentagon Papers denied because government burden for enforcement of prior restraint not met)); United States v. Rosenberg, 195 F.2d 583 (2nd Cir. 1952) (espionage act forbidding certain communications not unconstitutional), *cert. denied*, 344 U.S. 838 (1953). For prior restraints not upheld because of lack of standards, see Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975) (film); Blount v. Rizzi, 400 U.S. 410, 416 (1971) (mail); Freedman v. Maryland, 380 U.S. 51, 58 (1965) (film).
40. *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)); Near v. Minnesota, 283 U.S. 697, 713 (1931).
41. 447 U.S. 557 (1980).
42. The interests of the speaker, the hearer, and the public were weighed against the asserted governmental interest. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976); Bigelow v. Virginia, 421 U.S. 809, 826-29 (1975).
43. *Central Hudson*, 447 U.S. at 566.

contrary to the national energy conservation policy.[44] A utility company was thereby barred from mailing bill-inserts that explained different types of energy but also promoted the use of electricity. The Court held the prohibition invalid, reasoning that it was more extensive than necessary and that other less restrictive means existed to serve the government's interest.[45] As in *Virginia Pharmacy*,[46] the Court stated that three interests were involved: the consumer's interest in the free flow of information that bears on consumer decisions, the advertiser's economic interest in providing that information, and society's larger interest in the fullest dissemination of information.[47]

The *Central Hudson* four-step test is important in modern commercial speech analysis. Step one requires that the speech relate to a lawful activity and not be false, deceptive, or misleading.[48] If this requirement is not satisfied, the speech may be governmentally prohibited or regulated.[49] If this initial requirement is satisfied, the next three steps of the analysis determine whether the state interest is substantial, whether the regulation directly advances the interest, and whether the regulation is the least restrictive means to serve that interest.[50] All four steps must be met to uphold the governmental regulation.

The *Central Hudson* analysis is thus a least restrictive means test,[51] one of the tests used in analyzing noncommercial speech. The constitutional standard applied to determine if the government may prohibit or regulate speech depends on the type of speech being regulated.[52] Some noncommercial speech, such as "fighting words," is analyzed under a "clear and present danger" test or a modern variant.[53] Other noncommercial speech, such as symbolic speech, is analyzed under a least restric-

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44. *Id.* at 558-59.
45. *Id.* at 571-72.
46. *See supra* notes 22-25 and accompanying text; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).
47. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561-62 (1980).
48. *Id.* at 564, 566.
49. *E.g.*, Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982) (ordinance requiring license to sell drug-related paraphernalia does not violate first amendment); Friedman v. Rogers, 440 U.S. 1 (1979) (ban on deceptive communication); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (same); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (sex-designated help-wanted ads unconstitutional when employment selection by sex is unlawful).
50. *Central Hudson*, 447 U.S. at 564-66. For later Supreme Court cases applying the test, see *In re* R.M.J., 455 U.S. 191 (1982); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507 (1981) (plurality opinion).
51. Note, *supra* note 10, at 729.
52. Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, 858 (2d ed. 1983).
53. Feiner v. New York, 340 U.S. 315 (1951) (fighting words); Brandenberg v. Ohio, 395 U.S. 444 (1969) (per curiam) (seditious speech); *see also* Landmark Communications, Inc., v. Virginia, 435 U.S. 829 (1978) (judicial proceedings).

tive means test.[54] In analyzing commercial speech under the four-part test, the *Central Hudson* Court accorded commercial speech a higher standard of constitutional scrutiny than had existed under the balancing test. The Court applied to commercial speech one of the standards of analysis that had previously applied only to certain types of noncommercial speech. Nonetheless, according to the Court, commercial speech receives a lesser standard of protection than noncommercial speech.[55]

The Supreme Court has supported its position that commercial speech is entitled to less protection than noncommercial speech with three basic reasons. First, the Court consistently has cited a "commonsense" distinction between commercial and noncommercial speech.[56] Second, the Court has emphasized that advertising has a greater potential for deception and confusion than has noncommercial speech[57] and therefore consumers need protection.[58] Third, commercial speech is more "durable" and less likely to be inhibited by regulation than noncommercial speech.[59] These reasons, however, assume a clear distinction between commercial and noncommercial speech. It is sometimes difficult, though, to distinguish the two, as in *Bolger v. Youngs Drug Products Corp.*[60]

In *Youngs*, a federal postal statute prevented an advertiser from mailing three types of materials: (1) contraceptive-only flyers; (2) multi-item flyers, each providing brand name and pricing information; and (3)

54. Procunier v. Martinez, 416 U.S. 396 (1974) (inmate correspondence); Police Dep't v. Mosley, 408 U.S. 92 (1972) (picketing); United States v. O'Brien, 391 U.S. 367 (1968) (symbolic speech).

55. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980). *See also* Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2879 (1983); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 505 (1981) (plurality opinion); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Certain types of so-called noncommercial speech may be unprotected by the first amendment. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (child pornography); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (defamation); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel); Roth v. United States, 354 U.S. 476 (1957) (obscene speech), *modified*, Miller v. California, 413 U.S. 15 (1973).

56. Bolger v. Youngs Drug Prods., Inc., 103 S. Ct. 2875, 2879 (1983) (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976). Some commentators distinguish commercial from noncommercial speech by arguing that commercial speech falls outside of the traditional first amendment area. *See, e.g.*, Jackson & Jeffries, *supra* note 10, at 14; Note, *supra* note 10, at 725 nn.38-40. In addition, intrastate regulation of commercial enterprise historically has been a state rather than a federal matter. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942); Fifth Ave. Coach Co. v. City of New York, 221 U.S. 467 (1911).

57. *See In re* R.M.J., 455 U.S. 191, 200 (1982); Friedman v. Rogers, 440 U.S. 1, 10 (1979); *see also supra* note 31 and accompanying text.

58. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460, 462 (1978).

59. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976).

60. 103 S. Ct. 2875 (1983). *Cf.* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 538-39 (1981) (plurality opinion) (Brennan, J., concurring) (recognizing difficulty distinguishing commercial from noncommercial speech).

informational pamphlets on venereal disease and on prophylactics.[61] The Supreme Court held that all three types of materials were commercial speech[62] and that the statutory ban on them was unconstitutional.[63] In determining whether the materials were commercial speech, the Court classified the single- and multi-item flyers as "speech which does 'no more than propose a commercial transaction.'"[64] The informational pamphlets, however, did not readily meet this core definition. The Court borrowed from prior decisions and identified three commercial speech elements. The material was an advertisement,[65] referred to a specific product,[66] and was economically motivated.[67] The Court, without elaboration, found all three elements present in the informational pamphlets; thus they were commercial speech. Each element alone was insufficient to render speech commercial, but not all three elements had to be present.[68]

The Court then applied the *Central Hudson* four-part test[69] to determine whether the speech was protected. The state had asserted interests in preventing the dissemination of offensive material and in assisting parents to control the receipt of contraceptive information by their children. Under the first step of the analysis, the Court found no evidence of false, deceptive, or misleading promotional techniques and that contraception and contraceptive advertising were lawful activities.[70] The second part of the analysis resulted in two determinations. The Court found that the governmental interest in shielding people from offensive material was insufficient to justify suppression of the speech; mail recipients could avoid material they considered offensive by throwing it away or by removing their names from the advertiser's mailing list.[71] The governmental interest in assisting parental attempts to regulate their children's acquisition of birth control information, however, was found to be substantial be-

61. *Youngs*, 103 S. Ct. at 2877-78.
62. *Id.* at 2880.
63. *Id.* at 2885.
64. *Id.* at 2880 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) and Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).
65. *Youngs*, 103 S. Ct. at 2880 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964)).
66. *Youngs*, 103 S. Ct. at 2880 (citing Associated Students v. Attorney Gen., 368 F. Supp. 11, 24 (C.D. Cal. 1983)).
67. *Youngs*, 103 S. Ct. at 2880 (citing Bigelow v. Virginia, 421 U.S. 809, 818 (1975)).
68. *Youngs*, 103 S. Ct. at 2880. Two of the three elements are, therefore, sufficient to render speech commercial. The Court suggested that reference to a specific product, which is a new element in Supreme Court commercial speech cases, is the unrequired one. *Id.* at 2880-81 n.14. Thus, for example, a television commercial promoting dairy products without mentioning a specific brand might be commercial speech.
69. *See supra* notes 48-50 and accompanying text.
70. *Youngs*, 103 S. Ct. at 2881-82.
71. *Id.* at 2883. Names may be removed from mailing lists under 39 U.S.C. § 3008(a) (1982). Rowen v. Post Office Dep't, 397 U.S. 728 (1970).

cause of parents' important role in teaching their children.[72]

Even though the Court considered the state interest in assisting parents to be substantial, the regulation failed under the third *Central Hudson* step because it did not *directly* advance that interest. The Court reasoned that parents can control disposition of mail once it enters their mailboxes, and that contraceptive advertisements are just one of many ways to receive sexual information.[73]

The statute also failed under the final step of the analysis because it prevented adults and adolescents from receiving information to which they were entitled.[74] The prohibition of information pertaining to a decision people have a right to make, according to the *Youngs* Court, is a basic constitutional violation.[75]

The *Youngs* decision that the advertiser's items were protected mailable material is well reasoned. The mailings related to a lawful activity, were accurate, and concerned information helpful to informed decision making. They thus served the first amendment commercial speech interests of consumer, advertiser, and society.

The problem with the decision, however, is the classification of the venereal disease pamphlet as commercial speech. The pamphlet does not meet the requisite elements of being an advertisement, referring to a specific product, and being economically motivated. Because the venereal disease pamphlet does not fit the requisite elements, it is noncommercial speech and should not have been subject to the *Central Hudson* four-part test. For the "advertisement" element, the *Youngs* Court cited *New York Times Co. v. Sullivan*, which accorded a nonprofit social action advertisement the same degree of protection as ordinary speech.[76] The speech in *New York Times* was a paid newspaper advertisement, while in *Youngs* what was paid for was not advertising space but the printing and mailing of the pamphlets themselves. The *New York Times* advertisement solicited money. The *Youngs* pamphlet solicited nothing.

Regarding the element of reference to a specific product, the pamphlet generically mentioned products, such as prophylactics and douches, that aid in prevention of venereal disease. No brand names were given; however, the advertiser's name as the source of the pamphlet was noted in small letters on the last page.[77]

The third and most consistent element of commercial speech is economic motivation. The venereal disease pamphlet was ultimately economically motivated, but its immediate function was informational. It

72. *Youngs*, 103 S. Ct. at 2883-84.
73. *Id.* at 2884.
74. *Id.* at 2884-85.
75. *Id.* at 2885.
76. *Id.* at 2880 (citing New York Times Co. v. Sullivan, 376 U.S 254, 265-66 (1964)).
77. *Youngs*, 103 S. Ct. at 2880 n.13. The Court reasoned that generic reference to a product is nevertheless commercial speech and cited as examples a manufacturer's name nearly synonomous with its brand name, and a trade association product promotion. *Id.*

was not designed to solicit direct sales. Six of its eight pages explained general, nonprophylactic venereal disease information; no price, product description, or specific purchase location information was provided.[78] There was nothing to persuade the reader to buy one advertiser's brand over another advertiser's brand, although the reader might have been persuaded to use prophylactics preventively. The pamphlet thus had a remote buying influence, if any, on the consumer. The pamphlet is more properly classified as a public service pamphlet or as public relations advertising.

The misclassification presents a moot issue in *Youngs* because the mailings were permitted. By labeling the venereal disease pamphlet as commercial speech, however, *Youngs* extends the definition of commercial speech to include commercial public service advertising. As a result, commercially generated public service advertising is indistinguishable from direct sales advertising for purposes of first amendment commercial speech analysis.[79]

In addition to assigning the venereal disease pamphlet commercial speech elements that do not clearly apply, the Supreme Court's classification of the pamphlet is problematic for a second reason. The same pamphlet, absent reference to the advertiser, would constitute noncommercial speech if distributed by a noncommercial source, such as a clinic or student association.[80] The pamphlet would be considered noncommercial speech because the required element of economic motivation would be absent.[81] That the same content is in the one instance commer-

78. Brief for Appellee at 25-32, Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875 (1983).

79. Public service advertising is becoming increasingly more frequent. Alsop, *These Ads Sell Food Stamps and Sobriety — and With Style*, Wall St. J., Jan. 31, 1985, at 31, col. 1. For an earlier case implying a distinction between public service and promotional advertising, see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), discussed, *supra* note 44 and accompanying text. For commercial speech concepts that have been extended so broadly as to be applied in a nonadvertising context, see Securities and Exch. Comm'n v. Lowe, 725 F.2d 892 (2d Cir. 1984) (investment newsletter held to be commercial speech because it was sold and was devoted to economic interests), *cert. granted*, 105 S. Ct. 81 (1984). For a discussion of the implications of *Lowe*, see Riley, *New Step for the 'Commercial Speech' Doctrine?*, Nat'l L.J., Feb. 6, 1984, at 8, cols. 1-4.

80. Associated Students v. Attorney Gen., 368 F. Supp. 11, 24 (C.D. Cal. 1973) (unsolicited contraceptive advertisements mailed by student government are noncommercial speech) (cited with approval in *Youngs*, 103 S. Ct. at 2880). *Cf.* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion) (ordinance restricting billboard locations valid for commercial speech but invalid for noncommercial speech).

81. What seems to be meant by "economic motivation" in the context of public service advertising is the possibility that the advertiser will increase its market share regardless of whether the increase will occur immediately, and regardless of whether the advertiser will also increase the market shares of its competitors. For a case discussing the use of advertising to build a market rather than to acquire a larger market share, see Dunagin v. City of Oxford, Miss., 718 F.2d 738, 750 (5th Cir. 1983). For an argument that the speaker's motivation should be irrelevant in commercial speech analysis, see Note, *supra* note 10, at 745.

cial speech, but in the other noncommercial speech, highlights the questionable nature of a classification based on economic motivation. Such a result contradicts the Court's position that economic motivation alone is insufficient to render speech commercial.[82] The result disguises a content-based regulation. Moreover, it is speculative whether the same wording and format are actually more deceptive or "durable" if produced by a commercial source than by a noncommercial one.[83] With public service advertising such as the *Youngs* pamphlet, the so-called "common-sense" distinction between commercial and noncommercial speech[84] breaks down.

There is another significant feature to *Youngs*. It impliedly supports the principle, suggested in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[85] that the doctrine of prior restraint is inapplicable to commercial speech. The postal statute constituted a prior restraint because it prohibited any mailing of unsolicited contraceptive advertisements, without requiring a judicial determination of whether the advertisements constituted protected speech. *Youngs* held that the statute was unconstitutional as applied to the advertiser, not that it was unconstitutional on its face. The statute is, therefore, still valid and continues to operate as a prior restraint on advertisers. A prior restraint is a serious infringement of first amendment rights.[86] First amendment protection for commercial speech is already limited by content regulation for falsity, deception, and unlawful conduct.[87] The inapplicability of the prior restraint doctrine would further narrow the extent of first amendment protection accorded to commercial speech.[88]

The possible imposition of prior restraint on commercial speech may result in an inability to predict whether specific advertising is constitutionally protected. Under *Youngs*, an advertiser might be obligated to obtain government permission before it mails its advertisements. The

82. *See supra* notes 11 and 68 and accompanying text.
83. *See supra* notes 57-59 and accompanying text.
84. *See supra* note 56 and accompanying text.
85. 425 U.S. 748 (1976); *see supra* note 32 and accompanying text.
86. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); New York Times Co. v. United States, 403 U.S. 713, 723 (1971) (per curiam) (Douglas, J., concurring). In addition, restriction of the use of the mails is not an insignificant restraint on first amendment rights. Blount v. Rizzi, 400 U.S. 410, 416 (1971).
87. *See supra* notes 26 and 48 and accompanying text.
88. *See supra* note 55 and accompanying text. The inapplicability of the prior restraint doctrine helps explain what the Supreme Court means by the principle that commercial speech receives less protection than noncommercial speech. The first amendment overbreadth doctrine also seems to be inapplicable to commercial speech, thereby reducing first amendment protection; it allows a litigant to challenge a statute on grounds that it violates the first amendment broadly but not the litigant's conduct specifically. *See* Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 496-97 (1982); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 504 n.11 (1981) (plurality opinion); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978); Bates v. State Bar of Arizona, 433 U.S. 350, 380-81 (1977).

standards for granting governmental permission are not set forth in *Youngs*, and permissible prior restraints require standards.[89] The advertiser alternatively may waste time, money, and judicial resources in litigating the permissibility of its mailings; or it may decide not to mail the advertisements, thus chilling the speech.

Prior restraint is inconsistent with the function of commercial speech as serving the interests of the consumer, advertiser, and society in the free flow of information.[90] Information does not flow freely if withheld by statute or subject to government approval before mailing, and consequently may be delayed or denied to consumers. The *Youngs* Court reasoned that the prohibition of information pertaining to a consumer's decision was not justified by any counterbalancing state interest.[91] The Supreme Court has already protected the public by permitting regulation to ensure that commercial speech relates to a lawful activity and is not false, misleading, or deceptive. An additional limitation on the free flow of commercial speech, in the form of prior restraint, is unnecessary and antithetical to the reasoning the Court has offered to justify protection of commercial speech.[92]

The *Youngs* decision affirms prior case law in two important respects. First, under the modern commercial speech doctrine the first amendment protects commercial speech because of its informational value. Second, commercial speech is analyzed under the *Central Hudson* four-step test and is subject to content regulation to prevent falsity, deception, and promotion of unlawful activity. The *Youngs* decision clarifies prior case law in two important respects. First, it broadens the range of commercial speech to include commercial public service advertising. Second, the prior restraint doctrine may be inapplicable to commercial speech, thus enabling the government to impose restraints on speech before the speech ever reaches its hearers. The threshold question in modern commercial speech analysis is whether the speech is commercial. If speech is mislabeled commercial, it is subject to potentially unjustifiable governmental regulation of its content.

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89. *See supra* note 39 and accompanying text.
90. *See supra* notes 22-25 and accompanying text.
91. *See supra* note 75 and accompanying text.
92. *See supra* notes 22-25 and accompanying text for a discussion of the Court's reasoning as to why the first amendment protects commercial speech.

The Supreme Court has interpreted *Youngs* as standing for the proposition that the first amendment precludes governmental regulation of speech that favors one viewpoint at the expense of another. Members of the City Council of Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118, 2128 (1984) (ordinance prohibiting signs on public property constitutional as applied to supporters of political candidate). Justice Stevens wrote the majority opinion in *Vincent* and a concurring opinion in *Youngs*. The *Vincent* interpretation of *Youngs* seems to be based more on Justice Stevens's concurring opinion than on the majority opinion in *Youngs*. *See Youngs*, 103 S. Ct. at 2888.