Responses

The Anti-History and Pre-History of Commercial Speech

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I. Introduction

First things first: We were honored to learn that there is now a "Kozinski and Banner line."[1] We're not sure what it is, but we're proud to join Messrs. Mason and Dixon as eponymous line-drawers, and we intend to toe our line as much as we can. Had Professors Collins and Skover done no more than throw us our lime, we would still have been grateful.

Of course, they've done much more than that. They've convincingly demonstrated that the practice of advertising out there in the world looks quite a bit different from the descriptions of advertising in the opinions of appellate courts. Regardless of whether this divergence has any implications for the First Amendment, it is an important point in itself. If courts are going to apply the First Amendment to commercial speech with any coherence, they should have a grasp of what commercial speech actually is.[2]

And Professors Collins and Skover are on to something even bigger. Read their essay in conjunction with their two previous works,[3] and you're left with the unsettling feeling that developments in communications may have outpaced developments in the law. Many of our legal concepts—

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1. Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 733 (1993).

2. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 638-48 (1990).

3. Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509 (1992) [hereinafter Collins & Skover, *Paratexts*]; Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087 (1990) [hereinafter Collins & Skover, *Paratroopers*].

freedom of the press,[4] appellate review,[5] copyright—were born when non-face-to-face communication was almost entirely in writing. The legal landscape has remained largely unchanged, despite obvious technological transformation. None of this may make the slightest bit of difference, but whether change is necessary, and if so what kind, are questions that deserve serious thought. The Collins and Skover line of inquiry (here we're returning the favor) should provoke a great deal of commentary on this subject. One need not agree with them to appreciate the value of the debate they open.

Most of *Commerce & Communication* is devoted to proving propositions unlikely to be disputed: Commercial advertising is motivated by money. Much advertising is nonsense. Much advertising is about conveying product images, or molding consumers' own self-images, rather than about conveying information about products themselves. Advertising is designed to persuade people to buy things they would not otherwise buy. We agree with all of that. We do indeed live in a material world (though it needn't be the only one in which we live), and the mass media no doubt cater to the desires of the marketplace (though that needn't inhibit the existence of non-mass media). Whether you think this is good or bad depends largely on how certain you are that your tastes are superior to those of your neighbors.

But rather than listing the many points on which we agree with Professors Collins and Skover or the few on which we disagree—an exercise of interest only to the four of us—we'd like to discuss two larger issues relating to how one goes about understanding the First Amendment's application to commercial speech and to speech in general. First, we'd like to situate *Commerce & Communication* in the world of First Amendment commentary, as one instance of the frequent attempt to assign objective ahistorical value to particular forms or subjects of communication as a method of determining how to apply the First Amendment, and think about the shortcomings of this approach. Second, we'll try to figure out exactly how the law's distinction between commercial and noncommercial speech got there in the first place.

II. Anti-History

Collins and Skover's work is *a*historical, in the sense that the articles suffer from a romanticized vision of the past. Contemporary popular culture may, depending on one's standards, be junk, but the same has been said about popular culture in every era. We have no reason to believe (and

4. Collins & Skover, *Paratroopers*, *supra* note 3.

5. Collins & Skover, *Paratexts*, *supra* note 3.

Collins and Skover provide none) that reasoned discourse represented any greater fraction of total communication 200 or 100 years ago than it does now. Our predecessors were up to more than attending town meetings and writing *The Federalist*: They were also singing bawdy drinking songs, reading racy French novels, publishing nasty false attacks on members of the opposing political party, and touting the virtues of all kinds of quack medical treatments. The essay's we're-going-to-hell-in-a-handbasket tone relies on a view of the past that we doubt could be supported with facts.[6]

But more than that, and in common with much academic writing on the First Amendment, Collins and Skover's work is *anti*historical, in that it doesn't depend on what the First Amendment says or how it has ever been understood. The First Amendment poses a difficult practical problem: It is quite short and does not explain what counts as "speech," what counts as "freedom," or what counts as "abridging." To fill the chasm between the broad rule and its application to specific cases, a great deal of thinking has to be done. There are, in broad outline, two ways of going about it—the history-based approach and the theory-based approach.

Under the history-based approach, which has tended to be the specialty of judges (and hence lawyers trying to persuade judges), one looks to past practice to figure out what the First Amendment means. Different people may emphasize different sources of evidence of past practice—some value the contemporary writings of the late-18th century political leaders responsible for the First Amendment's existence, others look to the 200-year common-law development (which is almost entirely concentrated in the period from World War I to the present) of judges' understanding of the First Amendment as evidenced in appellate opinions—but the technique is the same. It rests on the notion that at least some aspect of the meaning of the words used in the First Amendment remains consistent over time. It implies that the views of people who may no longer be living exert at least some influence on today's understanding of the First Amendment.

The theory-based approach has largely been the province of academics. Under this technique, before one looks at how the First Amendment has been understood in the past, one constructs a theory of communication capable of demonstrating that a particular type of speech should or should

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6. This criticism has been leveled at Collins and Skover's work before. *See* Mark V. Tushnet, *Decoding Television (and Law Reviews)*, 68 TEX. L. REV. 1179, 1180 (1990). To be fair, Collins and Skover are among the most intelligent members of an entire curmudgeonly school of criticism of popular culture, all of which gains force only by romanticizing the past. *See, e.g.*, NEIL POSTMAN, AMUSING OURSELVES TO DEATH (1985); ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND (1987). This school can trace its pedigree at least as far as Cicero's "O tempora, o mores!," 10 CICERO, *The Speeches Against Lucius Sergius Catilina: In Catilinam I*, *in* CICERO IN TWENTY-EIGHT VOLUMES 1, 32 (G.P. Goold ed. & C. MacDonald trans., Harvard Univ. Press 1977) (63 A.D.), but we're sure it goes back many millennia before that.

not receive constitutional protection. Armed with the theory, one can then examine the past cases to determine which ones were correctly decided.

Most actual writing about the First Amendment draws on both approaches. Many theories about the sorts of speech protected by the First Amendment, for instance, derive their content at least in part from what someone in the past (usually the Framers) thought about the subject. And given a sufficiently broad sense of what constitutes a theory, it could probably be said that even the most strictly history-based inquirer into the meaning of the First Amendment has some kind of unarticulated background "theory" about how to read the historical record.[7] The history-based and the theory-based approaches can be mixed, but in any given piece of writing about the First Amendment one can usually find one approach predominant.

Commerce & Communication provides a perfect opportunity to think about theory-based approaches because it is as close to a pure theory-based essay as one is ever likely to find. The essay contains no mention of the actual words of the First Amendment, no discussion of any cases interpreting the First Amendment (except a brief mention of the descriptions of advertising contained in some of the Supreme Court's commercial speech cases[8]), and no attempt to discern what the real-life First Amendment might mean. Perhaps because the essay is just one chapter of a larger work in progress, Professors Collins and Skover devote their entire attention to the nature of one kind of speech. Lurking unstated in the background is the assumption that the First Amendment is a vessel empty enough to receive whatever content their theory suggests should be poured in.

While the theory itself is quite intelligent (if one accepts that we should have a theory), it has a structure common to most or all such theories. Professors Collins and Skover have (1) stated what they understand to be the values explaining the existence of the First Amendment;[9] (2) analyzed a given type of speech to demonstrate that it does not advance those values (and may even advance their opposite);[10] and (3)

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7. This is particularly true of the early First Amendment cases, which, simply because of their timing, had less history to draw upon. In the late 20th century, a judge can use the early cases as history, in the sense that stare decisis and general professional norms permit the use of the early cases as evidence of what the First Amendment "means." This option is, of course, less available to someone (like a law professor) writing about the First Amendment from the outside, who needs to find some ground *outside* the cases from which he can talk *about* them.

8. Collins & Skover, *supra* note 1, at 727-29.

9. *See id.* at 729 (asserting that protection of speech is desirable because citizens can "ferret truth out of a universe of information").

10. *See id.* at 745 ("If commercial speech is safe, it is not because it *actually* furthers the First Amendment's traditional values of rational decisionmaking and self-realization. Rather, it is because it has effectively co-opted the marketplace metaphor." (emphasis in original)).

concluded that the First Amendment should therefore not protect the type of speech being analyzed.[11] The framework would serve equally well with any other kind of communication. Justice Stevens in *FCC v. Pacifica Foundation*,[12] for instance, (1) reasoned that the First Amendment is mostly about "exposition of ideas" and determining truth;[13] (2) found that "patently offensive words dealing with sex and excretion" advance these values only minimally;[14] and (3) concluded that the First Amendment should therefore give them a lower level of protection.[15] Likewise, Robert Bork, in an article that has since become famous, has (1) argued that the goal of the First Amendment is to further self-government; (2) observed that advocacy of violating the law doesn't further self-government; and (3) concluded that the First Amendment should therefore not protect advocacy of violating the law.[16]

Collins and Skover are no slouches in this arena. They've shown first how television lacks the merit they find in other forms of communication,[17] and now how the modern practice of advertising has less value than older forms of discourse.[18] With regard to commercial speech, they're not alone.[19] Most of the commercial speech literature is concerned with the Great Debate: Is it valuable? Is it not valuable? Do people like it? If they think they like it, are they mistaken? It seems universally assumed that the answers to questions like these will tell us whether advertising is encompassed within the term "speech" as it is used in the First Amendment.

There is a great deal of irony, as we see it, in this type of argument. The First Amendment, one might think, prevents the people's representatives in legislatures from prohibiting speech the majority doesn't like. That's the whole point. People might quibble about *why* that should be so, or about the *values* served by the freedom of speech, but there seems to be no debate that the First Amendment bars the majority from suppressing the

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11. *See id.* at 738.

12. 438 U.S. 726 (1978).

13. *Id.* at 746 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

14. *Id.* at 745.

15. *Id.* at 747.

16. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26-31 (1971).

17. Collins & Skover, *Paratroopers*, *supra* note 3, at 1093-1106.

18. Collins & Skover, *supra* note 1, at 700-07.

19. *See, e.g.*, C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 9-25 (1976); Thomas H. Jackson & John C. Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 6-25 (1979); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 432-48 (1971); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1223-51, 1256-82 (1983).

speech of some simply because others find it to have little value.[20]

Given that premise, it strikes us as odd to argue that a particular form of speech shouldn't receive First Amendment protection solely because that speech has little value. This is exactly the type of argument the First Amendment should foreclose. People value speech differently, and all sorts of different people think that all sorts of different speech is valueless or downright pernicious. Professors Collins and Skover don't like advertising or television. Upright citizens of 1950s New York didn't care much for *Lady Chatterley's Lover*.[21] A recent Attorney General didn't have much use for pornography. Not long ago, the government of the former Soviet Union thought the advocacy of democracy and capitalism would lead people to their ruin. Slightly longer ago, the government of this country thought exactly the same about the advocacy of communism. The Nazis were quite concerned about the degenerate effects of the work of Jewish artists. We freely admit we find Nazism to be wrong and would prefer that it not be advocated. Lots of people don't like lots of speech. If all it takes to remove First Amendment protection from a given kind of speech is that a sufficiently large number of people finds the speech less valuable than other kinds, we may as well not have a First Amendment at all. Such an understanding of the First Amendment—according to which speech not valued by a majority receives no protection—throws all speech regulation questions back into the political arena.

Of course, speech-valuers like Professors Collins and Skover aren't making the claim we just outlined. They aren't saying that advertising deserves no First Amendment protection because many people find it valueless. They say it deserves no protection because it *is* valueless, in an objective sense. If only people would realize that Collins and Skover are right—*objectively* right—people would come to recognize the First Amendment consequences. This, we imagine, is the crucial difference Collins and Skover perceive between themselves and, for instance, a 1950s government official suppressing communist advocacy. The government official was advancing his own personal subjective *opinion* about what ideology was preferable. Collins and Skover, on the other hand, are being objective: people might *think* they prefer TV commercials to *The Iliad*, but if they think harder they'll realize their original preference was wrong.

But this quest for objectivity is ultimately futile.[22] There's simply no external measuring stick. When the communism-suppressing (but TV-watching) government official responds to Collins and Skover by saying

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20. If we had much more time, space, and patience, we think we could support this.

21. *See* Kingsley Int'l Pictures Corp. v. Regents of the Univ., 360 U.S. 684 (1959).

22. The notion of "objectivity" may deserve more discussion than we give it here. *See* RONALD DWORKIN, LAW'S EMPIRE 76-86 (1986).

"*I'm* being objective—communism really *is* wrong—but you guys are voicing your own personal preferences," what could Collins and Skover say? They could urge the official to reread *Commerce & Communication* a little more closely, but in the likely event that he's not persuaded, the two sides will be at an impasse. Collins and Skover like political advocacy but not advertising; the official likes advertising but not political advocacy; and each party will make "objective" arguments in its favor. How do we know who's right? Where are the objective standards for assessing the respective arguments? There aren't any. There's no way to step outside the world of discourse to prove that some forms of discourse have more value than others.

The same challenge of false objectivity can be levied against what looks on the surface like the more limited claim that (1) the First Amendment exists to protect only a limited class of expression (for instance, it protects only reasoned, intelligent speech); (2) a given kind of expression doesn't fall within that class (for instance, advertising is neither reasoned nor intelligent); and therefore (3) that kind of expression isn't protected by the First Amendment. Such a limited speech-valuing claim only doubles the possible grounds of irreconcilable conflict. Now our communism-suppressing government official can challenge Collins and Skover on two points. On proposition (1), he can claim that Collins and Skover have misstated the bounds of the First Amendment. In fact, he'll say, the values advanced by the First Amendment aren't served by speech as dangerous as that advocating communism, so that proposition (1) must be modified to state that the First Amendment protects only reasoned and *non-dangerous* speech, which doesn't include *Das Kapital*. On proposition (2), he can disagree with Collins and Skover's classification of the advocacy of communism, but not advertising, as reasoned and intelligent. Communism, he'll say, isn't intelligent at all—it's the very antithesis of intelligent public policy, cooked up by evil men to dupe the people into surrendering their freedom. Advertising, he'll say, *is* generally reasoned and intelligent, and is in any event valuable because it provides consumers like him with information about things he wants to buy. Now we have arguments on two fronts, and neither can be resolved by reference to some objective yardstick capable of being ascertained through rational thought and persuasion. All we have are competing personal preferences as to what kinds of speech are good or bad.

One interesting point about these competing preferences deserves mention. Articles and books about the First Amendment aren't written by a representative sample of the population. They're written by a group that, by and large, doesn't watch much television or care much for advertising. We can add a few more characteristics likely to be found among writers on the First Amendment: they probably read many more books than average;

they probably attend art museums more often than average; and they probably listen to less heavy metal music than average. You can fill in the rest of the picture. We shouldn't be surprised if we discover that the "objective" value found by these writers in various kinds of expression tends to mirror their own likes and dislikes.[23]

It's the kind of thing that makes you want to shout "fire" in a crowded theater. Perhaps the lure of objectivity is all we have to work with, in which case the foregoing may be true but beside the point.[24] But we should realize how great a tension there is between the antimajoritarianism at the core of the First Amendment and any notion of "valuing" different kinds of speech.

III. Pre-History

A. *My Funny* Valentine

Let's set aside for a moment the inherent problems of valuing speech; the Supreme Court has accepted the speech-valuing argument in the past (to a limited extent).[25] But even assuming it is proper to value different kinds of speech differently, why do it in this case? *Virginia Pharmacy* said there were "common[-]sense differences" between commercial and noncommercial speech,[26] but that by itself isn't reason enough: there are common-sense differences between political speech and entertainment; in fact, some commercial speech is more relevant to political discourse than much entertainment.[27] There are common-sense differences between

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23. We wish we had thought of this ourselves, but we didn't. *See* R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 15 (1977); Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 6 (1964).

24. We succumbed to this lure in Kozinski & Banner, *supra* note 2, and we still find it tempting on occasion. But this Response is meant to talk *about* the debate, and to present some possible alternative terms for the debate, rather than merely to participate in it. *Cf.* Stuart Banner, *Please Don't Read the Title*, 50 OHIO ST. L.J. 243, 245-46 (1989).

25. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543 (1992) (holding that fighting words have relatively low value); FCC v. Pacifica Found., 438 U.S. 726, 744 (1978) (finding no absolute protection for profanities); Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 n.18 (1976) (allowing time, place, and manner restrictions on pornography); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."). *But see* Cohen v. California, 403 U.S. 15, 25 (1971) ("[O]ne man's vulgarity is another's lyric."); *Kingsley*, 360 U.S. at 688-89 (holding that the First Amendment protects the advocacy of adultery no less than the "advocacy of socialism or the single tax"); Winters v. New York, 333 U.S. 507, 510 (1948) (concluding that "the line between the informing and the entertaining is too elusive" to distinguish the type of protection afforded).

26. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

27. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (invalidating a government attempt to suppress contraceptive ads that included public-health information); Carey v. Population Servs. Int'l, 431 U.S. 678, 700-01 (1977) (striking down a ban on contraceptive ads even though the ads were commercial speech); Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (finding that abortion

reasoned political commentary and simple "Vote for *X*" ads, or, for that matter, between advocacy of liberty and advocacy of repression. None of these common-sense differences has translated into a constitutional distinction.

Likewise, though *Virginia Pharmacy* said commercial speech is more verifiable,[28] much noncommercial speech is verifiable and much commercial speech isn't. Moreover, even if verifiability justifies more exacting requirements that the speech be true, it wouldn't justify regulations of true commercial speech (such as those upheld in *Posadas*[29] and *Fox*,[30] and approved of in *Metromedia*[31]). The same is true of *Virginia Pharmacy*'s "hardiness" rationale.[32]

The real reason for the lower protection given commercial speech, we think, is to be found in history, not in logic. The commercial/noncommercial speech distinction seemed "common-sense" to the *Virginia Pharmacy* Court because it had been around for over thirty years; there's nothing quite so common-sense as the familiar. If "the Constitution is what the judges say it is,"[33] then the First Amendment in the early 1970s read as if it had said, "Congress shall make no law abridging the freedom of noncommercial speech." And the fact that *Virginia Pharmacy* was broadening the protection afforded speech, rather than narrowing it, focused the controversy on whether commercial speech was entitled to any protection at all, rather than on whether commercial speech was more regulable than noncommercial speech. *Valentine v. Chrestensen*'s[34] legacy lives on in the very case that supposedly buried it.

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ads' "commercial aspects . . . did not negate all First Amendment guarantees"); Planned Parenthood Ass'n v. Chicago Transit Auth., 767 F.2d 1225, 1229 (7th Cir. 1985) (subjecting restrictions on abortion ads to strict scrutiny); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1806 (1992) (describing EEOC v. Hyster Co., No. 88-930-DA (D. Or. filed Aug. 15, 1988), which involved a workplace harassment claim based on an ad criticizing a manufacturer's Japanese competition in an allegedly "racially demeaning and offensive" manner); *see also* John C. Ulin, Comment, *First Amendment Crossroads—Extending Constitutional Defamation Protection to Commercial Speech*, 39 UCLA L. REV. 633, 678-79 n.283 (1992).

28. *Virginia Pharmacy*, 425 U.S. at 772 n.24.

29. Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328 (1986) (upholding regulations that prohibit advertising Puerto Rican gambling casinos within Puerto Rico but allow such advertising outside the territory).

30. Board of Trustees v. Fox, 492 U.S. 469 (1989) (upholding state university regulations prohibiting private commercial enterprises from operating in its facilities).

31. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (approving the portion of a city ordinance that limited commercial billboards to on-site advertising only).

32. *See Virginia Pharmacy*, 425 U.S. at 772 n.24 (asserting that "commercial speech may be more durable than other" types of speech because advertising is instrumental in generating commercial profits and, therefore, is less likely to be chilled by regulation).

33. CHARLES EVANS HUGHES, ADDRESSES OF CHARLES EVANS HUGHES 1906-1916, at 185 (2d ed. 1916).

34. 316 U.S. 52 (1942) (holding that "purely commercial advertising" is not protected and that a city may ban commercial handbills even when minimal noncommercial information is included).

But how did *Valentine*'s commercial/noncommercial distinction arise in the first place? The First Amendment makes no distinction among types of speech; it speaks only of "speech," which suggests that the burden of explaining a distinction between different kinds of speech should fall on the proponent of the distinction. We have no evidence that the Framers (or anyone else until quite recently) conceptualized speech as divisible into the categories of commercial and noncommercial, and it wasn't until 1942 that the Supreme Court made the distinction explicit.[35] Why was the distinction so obvious to nine Justices in 1942 that they didn't even find explanation necessary, even though they were setting it out for the first time? And why was it so "clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising,"[36] when the Court had never considered the question before? (This latter question is particularly interesting, as this very issue of the *Texas Law Review* is a testament to the fact that the answer isn't nearly as obvious now as it was back then.)

An attempt to answer these questions requires a look at developments in the law before 1942, and some thought about what was going on in American legal culture at the time and how judges immersed in it might have approached what we see now as a commercial speech issue. We call this a pre-history because it's the history not of commercial speech doctrine itself, but of the sources from which the doctrine was (perhaps unconsciously) derived.

B. Advertising as a Business or a Type of Speech

"Commercial speech" is such a familiar way of describing commercial speech that it comes as a shock to discover that the earliest use of the phrase in any published opinion of any court was only two decades ago. In 1971, Skelly Wright (then one of the titans of the D.C. Circuit) observed in a footnote that "[c]ommercial advertising—indeed, any sort of commercial speech—is less fully protected than other speech, because it generally does not communicate ideas and thus is not directly related to the central purpose of the First Amendment."[37] The Supreme Court picked up the phrase two years later in *Pittsburgh Press*, in describing *Valentine* as the origin of the "commercial-speech doctrine."[38] Every case since has described the thing being discussed as "commercial speech." But before

35. *See id.* at 54.

36. *Id.*

37. Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 658 n.38 (D.C. Cir. 1971), *rev'd sub nom.* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). Ah, the wonders of Lexis®

38. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384 (1973).

1971, no judge thought of the thing as commercial speech—they called it "advertising" (as in *Valentine*),[39] or "soliciting and canvassing,"[40] or some such term that denoted a *business activity* rather than a form of expression. The choice of name is important, because the attempt to drum up business can be called "commercial speech" only by someone who thinks of it as a kind of speech. And among American lawyers the word "speech" is invested with significance; everyone knows that it shows up in the First Amendment and thus occupies a privileged position relative to other things a person might do. The shift from "advertising" (a kind of business) to "commercial speech" (a kind of expression) needs to be taken seriously as an indicator of a less overt shift in the way lawyers have thought about advertising.

In *Valentine*, therefore, the Court wasn't facing a case about commercial speech; it was facing a case about advertising. And it was one of the easiest cases the Court ever decided. Oral argnment was held on March 31. The Justices voted at a conference on Saturday, April 4. Eight voted to reverse the Second Circuit's judgment. (The Second Circuit had ruled in favor of Mr. Chrestensen, the advertiser.) The ninth, Justice Frankfurter, would have vacated the case as moot,[41] because Chrestensen had taken his submarine up the Hudson to Albany by the time the case reached the Supreme Court.[42] At the April 4 conference, the opinion was assigned to Justice Roberts.

On April 13, only nine days later (and less than two weeks after argument), the Court's opinion was announced. Within nine days, Justice Roberts wrote the opinion, he circulated it to his colleagues, they presumably read the opinion and joined it, and it was released to the world. Thirteen days from argument to publication would be a world record pace today. In 1942, when the Court wrote shorter opinions and disposed of its cases faster, thirteen days wasn't unheard of, but it was about as fast as any case was ever decided.[43] *Valentine* wasn't a case any of the Justices found necessary to dwell upon.

Justice Roberts unfortunately destroyed his personal papers, but the papers of three of the remaining eight members of the *Valentine* Court—Chief Justice Stone and Justices Douglas and Jackson—are available at the Library of Congress. All three kept case files for most of each Term's

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39. *Valentine*, 316 U.S. at 54.

40. Schneider v. New Jersey, 308 U.S. 147, 165 (1939).

41. Information about the conference vote is from Box 62 of Justice Douglas's papers, which are kept at the Library of Congress.

42. Memorandum from Justice Felix Frankfurter to his colleagues (Apr. 2, 1942) (on file in the Chief Justice's 1942 file, Library of Congress; copy on file with the *Texas Law Review*).

43. *See, e.g.*, Georgia v. Evans, 316 U.S. 159 (1942) (13 days); FTC v. Raladam Co., 316 U.S. 149 (1942) (14 days); NLRB v. Nevada Consol. Copper Corp., 316 U.S. 105 (1942) (19 days).

cases, but none kept a case file for *Valentine*, most likely because the case was thought so insignificant. All three were voluminous letter-writers, all referred to many of the Court's cases in their letters, and all kept copies of all correspondence, but none sent or received any letters mentioning *Valentine*. Justice Douglas frequently prepared notes (which he saved in his files) on the cases that would be discussed at conference; for *Valentine*, no such notes exist.

All this suggests that in 1942, the Justices considered the question whether the First Amendment has any application to advertising to be one that was easily resolved and not very important. Although the issue had never come up before, the Court disposed of it in a single paragraph containing no citations. The Court's reasoning is worth a close look, because it suggests quite strongly what we alluded to above—that the Court conceptualized advertising as a *business*, not as a means of expression. "Whether," the Court observed, "and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways . . . ."[44]

This is language seemingly more appropriate for the then-recently-adopted deferential economic substantive due process jurisprudence[45] than for a case involving a claimed freedom of speech and of the press. This passage, the crux of the Court's reasoning, contains no mention of speech or expression; it refers only to regulation of the pursuit of a business. The same lines could have been written had Mr. Chrestensen claimed only a right to open a store in the middle of Park Avenue; they give no consideration to any speech-related aspects of advertising that might differentiate it from any other activity carried out in a public place.

In 1942, then, the case was easy not because the Court thought of commercial speech as a category of speech deserving no protection, but because the Court didn't treat the case as involving speech at all. To figure out why this might have been so, and to understand why the Court was so quick to draw the conclusion it did, we must look at a few independent strands of pre-1942 legal and cultural thought that converged to

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44. *Valentine*, 316 U.S. at 54-55.

45. In fact, Chrestensen did raise a substantive due process claim as Point III of his brief on the merits. While Points I and II argued that he had been denied his constitutionally protected freedom of expression, Point III argued that he had been deprived of property without due process, because "it is beyond the police power of the states to interfere arbitrarily with a lawful business." Brief for Respondent at 18, *Valentine* (No. 707). Only a few years earlier this might have been a winning argument.

produce *Valentine*.

C. *The First Amendment Before 1942*

First Amendment cases are a staple of the Supreme Court's docket now, but until World War I, when the federal government began finding political subversives everywhere, the First Amendment was hardly ever before the Supreme Court or the lower federal courts.[46] Three factors contributed to this dearth.

Most important, the First Amendment wasn't definitively understood to apply to state or local governments until the late 1920s or early 1930s. The Court suggested (but refrained from deciding) that the Fourteenth Amendment might incorporate the rights mentioned in the First as early as 1907, although the Court was uncertain as to whether this incorporation was via the Due Process Clause or the Privileges and Immunities Clause.[47] As late as 1922, however, the Court observed that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech.'"[48] Things changed quickly. A year later, the Court listed in dicta a great many aspects of "liberty" protected from state interference by the substantive component of the Due Process Clause, one of which was the right "to acquire useful knowledge."[49] Two years after that, in *Gitlow v. New York*, the Court assumed without deciding that the Due Process Clause protected the freedom of speech against state interference.[50] The Court managed to sneak the same assumption into two 1927 state syndicalism cases, *Whitney v. California* and *Fiske v. Kansas*, this time as implicit statements of the law.[51] The incorporation of the First Amendment didn't finally come out of the closet until 1931, in *Stromberg v. California*, when the Court explained: "It has been determined [in the three cases discussed above, where it was really only assumed] that the conception of liberty under the due process clause of the Fourteenth

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46. For an excellent discussion of the First Amendment in the early years, see David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981) (discussing First Amendment development from the late 18th century to World War I). On even earlier years, see LEONARD W. LEVY, LEGACY OF SUPPRESSION (1960) (examining American concepts of freedom of speech through the end of the 18th century).

47. *See* Patterson v. Colorado, 205 U.S. 454, 462 (1907) (Holmes, J.) (stating that "[w]e leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First," apparently referring to the Due Process Clause); *id.* at 464 (Harlan, J., dissenting) (noting that freedom of speech is one of the "privileges or immunities" the Fourteenth Amendment bars states from abridging).

48. Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).

49. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

50. Gitlow v. New York, 268 U.S. 652, 666 (1925).

51. Whitney v. California, 274 U.S. 357, 371 (1927); Fiske v. Kansas, 274 U.S. 380, 382 (1927).

Amendment embraces the right of free speech."[52] The relevant point for us is that it wasn't until the late 1920s that a lawyer would have felt confident in claiming a right to the freedom of speech as against a state or local government, and it wasn't until 1931 that he would have been certain. *Valentine* began working its way up the courts only nine years later (and was decided by the Supreme Court only eleven years later), at a time when the incorporation question was still fresh in everyone's mind.

Second, in the early part of the century nearly all the regulation that might be thought to affect the freedom of speech was at the state or local level. With the important exception of its sporadic hunts for communists and other types thought dangerous, the federal government didn't do much that could give rise to a First Amendment claim. The handbilling engaged in by Mr. Chrestensen, for example, was regulated only by local governments. Until the decade or two before *Valentine*, any freedom of speech claim arising from most such activities could be based only on state constitutions; the First Amendment restricted only the federal government, which was simply not involved.

Third, it wasn't until the World War I cases that it became clear that the First Amendment prevented the government from doing anything other than imposing prior restraints.[53] Until then, many influential writers took the view that the First Amendment didn't bar the government from punishing a speaker because of his speech, so long as the speech was published first.[54] Thus, even had the incorporation of the First Amendment into the Fourteenth taken place earlier, or had the federal government regulated more speech, the general understanding of the First Amendment's scope would likely have kept the number of litigated cases relatively small.

The importance of the incorporation issue shouldn't be underestimated, because it didn't just limit the number of cases that could arise; it colored, in a sense largely lost to us today, the way lawyers and judges understood how the First Amendment and other provisions of the Bill of Rights were applied to the states.[55] The law today has so completely assimilated the

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52. Stromberg v. California, 283 U.S. 359, 368 (1931).

53. *See* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919). Note who the respondent is in all these pre-incorporation cases.

54. *See, e.g.*, Patterson v. Colorado, 205 U.S. 454, 462 (1907) (Holmes, J.); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 420 (1st ed. 1868); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 731-42 (Carolina Academic Press 1987) (1833).

55. For example, in the early years of the incorporation of the Sixth Amendment right to counsel, judges and lawyers were still conscious of an important distinction between state and federal defendants: federal defendants had a right to counsel, but state defendants had only a right to due process, which incorporated a right to counsel only where counsel was necessary to obtain due process. *See* Powell v. Alabama, 287 U.S. 45, 66-73 (1932). In a case argued ten years after *Powell* and only two weeks after *Valentine*, the Court made this distinction clear:

notion of incorporation that we don't think about it any more. We're accustomed now to think of a "freedom of speech" that restrains the actions of government on all levels, but in the early years of incorporation judges and lawyers were still thinking of the freedom of speech mentioned in the First Amendment as something that existed only against the federal government. The Constitution also prohibited states from regulating speech in some circumstances, but in the legal climate of the time people remembered quite distinctly that it was the Due Process Clause, not the First Amendment, that imposed the prohibition.[56] When a state or town regulated speech in this era, as when New York City prevented Mr. Chrestensen from advertising his submarine, a lawyer wouldn't think (as one would today), "Aha! A First Amendment violation!" He would think, "Aha! A denial of due process!" And were he particularly precise, he would think, "Aha! A deprivation of liberty, in violation of the substantive component of due process!" The right he was claiming (a right not to be prosecuted for distributing handbills) was the same as it would be today, but the constitutional box in which he placed that right wasn't.[57] As we will see, the choice of box made a difference.

D. Substantive Due Process Before 1942

Constitution buffs in 1942 had just witnessed a revolution. The famous "switch in time that saved nine"—Justice Roberts's abandonment

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> [T]he Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.

Betts v. Brady, 316 U.S. 455, 473 (1942); *cf.* Hawk v. Olson, 326 U.S. 271, 274 (1945) ("Denial of effective assistance of counsel [in a state prosecution] does violate due process."); House v. Mayo, 324 U.S. 42, 46 (1945) (holding that forcing a state defendant to plead guilty without counsel was a denial of petitioner's constitutional right to a fair trial).

56. In *Fiske*, for example, the Court concluded that

> the Syndicalism Act has been applied in this case to sustain the conviction of the defendant, without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution. Thus applied the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment.

Fiske v. Kansas, 274 U.S. 380, 387 (1927). The case rests on the freedom of speech, but the last sentence quoted above could have been lifted from *Lochner*.

57. While current doctrine places commercial speech and economic substantive due process in different boxes, some have contended that the two doctrinal categories are in fact the same. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 589-91 (1980) (Rehnquist, J., dissenting); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 784 (1976) (Rehnquist, J., dissenting); Jackson & Jeffries, *supra* note 19, at 23-33.

of the strong substantive due process protection for the liberty of contract characteristic of what has come to be called the *Lochner* era—had occurred only five years before.[58] In the five years between *West Coast Hotel* and *Valentine*, the forty-year corpus of economic substantive due process was destroyed. In *West Coast Hotel*, the Court found no constitutional infirmity in minimum wage legislation; in the next five years, the Court would likewise lend its approval to the National Labor Relations Act,[59] the Fair Labor Standards Act,[60] and the Agricultural Adjustment Act.[61] In this same period, the Court explicitly overruled the cases that provided the clearest and strongest statements of the liberty of contract,[62] and went so far as to explain that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it [does not rest] upon some rational basis."[63]

All this change took place within the five years immediately preceding *Valentine*. Between 1937 and 1942, claims that a state law interfered with commercial activity were being viewed with a new suspicion. Arguments that the Due Process Clause protected business from state regulation were being rejected at every turn, under a theory of the respective roles of the legislature and the judiciary that had been accepted for only a few years and was in the process of working itself out in concrete cases. Claims that would have been slam-dunks a few years earlier had suddenly become losers.

This was the climate into which Mr. Chrestensen brought his submarine. His argument, remember, wasn't one thought of as resting on the First Amendment; Mr. Chrestensen was before the Court claiming a freedom of speech guaranteed by substantive due process, the same doctrine that had just undergone radical transformation. Not just any old speech—Chrestensen was claiming a substantive due process right to distribute handbills *to drum up business*. And who does he draw as the opinion-writer at the Court? None other than Justice Roberts, the "switcher" himself, who had to have been at least as conscious of the due process transformation as anyone.[64]

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58. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (implicitly overruling Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936), and explicitly overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923)).

59. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

60. *See* United States v. Darby, 312 U.S. 100 (1941).

61. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

62. In Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941), for example, the Court overruled Coppage v. Kansas, 236 U.S. 1 (1915), and Adair v. United States, 208 U.S. 161 (1908), which had prevented states from outlawing contracts that allowed employers to fire workers for union membership.

63. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

64. By 1942, Justice Roberts had also become the Court's resident handbill specialist. *See infra* subpart III(F).

With this background, it isn't so surprising that Justice Roberts's opinion for the Court seems to focus more on business than speech, and seems to respond more to an economic due process claim than a speech claim.[65] Unfortunately for Mr. Chrestensen, he probably picked the worst time in the history of American jurisprudence to advertise his submarine.

E. The Forerunners of Commercial Speech Doctrine

Of course, there was more in the mind of a Justice in 1942 than the upheaval in substantive due process doctrine. Over a period beginning long before *Valentine*, the Court had decided cases that would today be thought of as raising issues of commercial speech. We can get a sense of how lawyers and judges thought at the time by considering the issues these cases were understood to raise.

In at least five cases before *Valentine*, the Court assessed the constitutionality of state regulation of advertising. The earliest was *Halter v. Nebraska*,[66] in 1907, in which a beer bottler intent on placing the American flag on its bottles claimed that a state law barring this practice denied liberty and property without due process.[67] Even in the heyday of substantive due process—*Lochner* had been decided only two years before—the Court wouldn't go for it. Selling beer might be part of liberty, but even "the rights inhering in personal liberty are subject . . . to such reasonable restraints as may be required for the general good,"[68] a good which wouldn't tolerate disrespect for the flag. And while the bottler had a property right in the bottle, he had no property right in the representation of the flag, "which, in itself, cannot belong, as property, to an individual."[69] No speech-related claim was made in *Halter*, probably because of the murky status of the First Amendment's application to Nebraska, but probably also because the litigants didn't conceive of bottle-labeling as speech.

The following decade, still a period of uncertainty as to whether there was a freedom of speech as against a state, the Court decided three cases involving municipal ordinances banning certain outdoor advertising. *Fifth Avenue Coach Co. v. City of New York*[70] involved an ordinance prohibiting advertising on the outside of buses—still called "stages" in 1911. The

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65. *See* Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942).

66. 205 U.S. 34 (1907).

67. Now, the case would be generally understood to raise a commercial speech issue. *See* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987).

68. *Halter*, 205 U.S. at 42.

69. *Id.* at 43.

70. 221 U.S. 467 (1911).

other two cases, *Thomas Cusack Co. v. City of Chicago*[71] and *St. Louis Poster Advertising Co. v. City of St. Louis*,[72] involved ordinances limiting the size of billboards. In all three cases, the advertiser raised substantive due process claims; the primary argument in each was that the ordinance deprived the advertiser of property and of the liberty to carry on its business. The advertiser lost in all three. No speech-related issue was raised in any of the cases, again suggesting that advertising at the time was considered to be a business, not a vehicle of expression.[73]

The fifth pre-*Valentine* case involving state regulation of advertising was *Packer Corp. v. Utah*,[74] decided in 1932. By then, as we have seen, it was clear that the Due Process Clause limited a state's power to abridge the freedom of speech.[75] *Packer* involved a state statute implicating what is today one of the quintessential issues of commercial speech—the statute prohibited the advertising of cigarettes on billboards and streetcar signs. The billboard company's lawyers were not ignorant of the Constitution; they claimed that the statute violated the Equal Protection Clause because advertising in newspapers was permitted, that the statute took property without due process because it arbitrarily curtailed the liberty of contract, and that the statute burdened interstate commerce in violation of the Commerce Clause. The Court rejected all three arguments.[76] Relevant for our purposes is a claim the billboard company did *not* make: despite the incorporation of the First Amendment and what seems today like an obvious limitation on the company's ability to communicate with customers, the company did not make any claim relating to the freedom of speech. While one can come up with any number of possible reasons why this might have been so, the most likely candidate is simply that the Packer Corporation's lawyers didn't think of advertising as speech.

A second group of pre-*Valentine* cases presents an even better opportunity to look at contemporary notions of what we think of today as commercial speech, because this group involved the federal government, and we thus avoid the difficulty posed by the uncertain status of the First Amendment's applicability to the states. While the federal government did little at the time that could potentially abridge speech, it did run the post office. In the late nineteenth and early twentieth centuries, the Court decided three cases involving First Amendment challenges to various aspects of the postal system.

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71. 242 U.S. 526 (1917).

72. 249 U.S. 269 (1919).

73. Today, of course, these cases would be litigated as commercial speech cases. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

74. 285 U.S. 105 (1932).

75. *See supra* notes 47-52 and accompanying text.

76. *See Packer*, 285 U.S. at 108-12.

In 1868, Congress banned advertisements for lotteries from the mail.[77] Nine years later, in *Ex parte Jackson*,[78] the Court reasoned that the ban didn't violate the First Amendment, provided that lottery advertisements could still be circulated by other means. "[W]e do not think," wrote Justice Field (speaking of "newspapers and pamphlets"), "that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails."[79] Such a complete ban on circulation would be "a fatal blow given to the freedom of the press."[80] The petitioner had been convicted of mailing a lottery advertisement; the Court formulated its First Amendment rule by discussing only newspapers and pamphlets, with no indication in the opinion that advertisements are any different from newspapers so far as the First Amendment is concerned. Unless this is just sloppy writing, the *Jackson* Court implicitly considered advertising (or at least printed circulars advertising lotteries) to be speech entitled to the same degree of First Amendment protection as any other.

The sloppy-writing hypothesis is rendered unlikely by the Court's repetition of *Jackson*'s holding fifteen years later, in another lottery case, *In re Rapier*.[81] Citing only *Jackson*, the Court reiterated

> that in excluding various articles from the mails the object of Congress is not to interfere with the freedom of the press or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals; and that the transportation in any other way of matters excluded from the mails would not be forbidden.[82]

The petitioner does *not* lose because lottery advertisements do not receive First Amendment protection; he loses because the First Amendment protects him only from complete bans on circulation, not the mere refusal to carry his ads in the mail.[83]

The third postal case, *Lewis Publishing Co. v. Morgan*,[84] reinforces the inference that advertising wasn't beyond the coverage of the First Amendment. The Post Office Appropriation Act of 1912 required news-

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77. Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196.

78. 96 U.S. 727 (1877).

79. *Id.* at 735.

80. *Id.*

81. 143 U.S. 110 (1892).

82. *Id.* at 133.

83. This issue has not gone away. Not long ago, the Court almost considered, but dismissed as moot, a First Amendment challenge to a federal statute prohibiting the mailing of lottery advertisements. *See* Frank v. Minnesota Newspaper Ass'n, 490 U.S. 225 (1989). Shortly before this Response went to press, the Court granted certiorari in a case involving a similar issue. United States v. Edge Broadcasting Co., 113 S. Ct. 809 (Dec. 14, 1992) (No. 92-486).

84. 229 U.S. 288 (1913).

papers and magazines, as a condition of second-class mailing privileges (*i.e.*, cheaper postal rates), to mark all advertisements with the word "advertisement."[85] The Act was upheld against a First Amendment challenge, not because advertising was outside the scope of the Amendment, but simply because the statute didn't concern "any general regulation of what should be published in newspapers."[86] It concerned only "the right on behalf of the publishers to continue to enjoy great privileges and advantages at the public expense,"[87] a matter that raised no First Amendment concern. One gets the sense that the opinion could have read just the same had the statute required editorials to be marked "editorial"; the publisher lost its case, but not because the case involved advertising.[88]

A final case from this period deserves its own category. *Mutual Film Corp. v. Industrial Commission*,[89] decided by a unanimous Court in 1915, produced an opinion that is startling to read today. The case concerned a classic prior restraint—Ohio's establishment of a film censorship board, empowered to determine in advance of public exhibition the films that could be shown in the state.[90] But a prior restraint on film exhibition abridges the freedom of speech[91] only if film is speech, and the Court was quite certain that it wasn't. Justice McKenna wrote:

> The first impulse of the mind is to reject the contention. We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the bill-boards of our cities and towns . . . , and which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion.[92]

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85. Pub. L. No. 336, 37 Stat. 539, 554.

86. *Morgan*, 229 U.S. at 316.

87. *Id.*

88. Two other cases deserve mention. In Public Clearing House v. Coyne, 194 U.S. 497 (1904), the Court upheld a federal mail fraud statute against Fourth and Fifth Amendment challenges; no First Amendment claim was raised. In American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902), the Court held that a statute empowering the Postmaster to prevent the mailing of fraudulent letters did not permit him to stop the American School of Magnetic Healing from selling unorthodox medical advice through the mail. The Court did not reach the school's constitutional claims, which were based on the Fourth, Fifth, and Fourteenth Amendments, but involved no speech-related issue. *Id.* at 103.

89. 236 U.S. 230 (1915).

90. *Id.* at 239-40.

91. One more interesting aspect of this case is that the Court was interpreting the freedom of speech provision of the Ohio Constitution, not the U.S. Constitution. The only federal question in the case was the film company's claim that the statute violated the Commerce Clause; freedom of speech arose only as a pendent state claim. The opinion is sufficiently general to suggest that the Court would have reached the identical conclusion under the federal Constitution.

92. *Mutual Film*, 236 U.S. at 243-44.

Film, like the theater, the circus, and "all other shows and spectacles,"[93] was beyond the scope of the First Amendment.

In a particularly striking passage, Justice McKenna continued:

> It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but . . . capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.[94]

This case is fascinating for a number of reasons, not the least of which is the jurisprudential view of the brand new medium of film and the ancient medium of theater—a view which hasn't survived.[95] More to the point, the Court's emphasis on the fact that films are shown for a profit might be read to mean that the First Amendment doesn't protect profit-motivated speech. But this probably wouldn't be an accurate reading. The opinion suggests quite strongly that (1) the publication of the script of a play, even if for profit, would be protected by the First Amendment, even though the actual staging of the play would not; and (2) a film not produced and shown for profit would still not be entitled to the protection of the First Amendment. Despite the sentence about profit motive, it is the medium that is important, not the motive. *Mutual Film* can't plausibly be read as a blanket statement about the constitutional status of profit-motivated speech.[96]

That brings us back to the two groups of pre-*Valentine* advertising cases discussed above.[97] These two groups of cases present two snapshots of the contemporary legal climate that are difficult to reconcile. On one hand, when a state or local government regulated advertising on billboards and public transportation, the advertisers never thought to raise any speech-related claims. On the other hand, when the federal government regulated advertising in the mail, the advertisers did raise claims based on the First

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93. *Id.* at 243.

94. *Id.* at 244.

95. The Court changed its mind in United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948), and Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). As the Court itself recognized in *Joseph Burstyn*, its change of heart can be at least partially attributed to the 1926 invention of the talking picture. *Id.* at 502 n.12. The *Mutual Film* Court had experience only with silent movies, which by definition included no "speech" in at least one sense of the word.

96. Such a blanket statement would, of course, have had serious implications for the publication of newspapers and books sold for profit.

97. These cases were all brought to the *Valentine* Court's attention in Valentine's brief. *See* Brief for Petitioner at 13, Valentine v. Chrestensen, 316 U.S. 52 (1942) (No. 707). But they aren't mentioned in the opinion (which was sparing in its use of authority of any kind).

Amendment, and although the claims were unsuccessful, that apparently was not because they involved advertisements.

For our purposes, no reconciliation is necessary, as we aren't trying to discern the law—we're trying only to get a sense of what was commonly thought about advertising and the First Amendment in the late nineteenth and early twentieth centuries. And while this set of evidence is admittedly small, we think it excludes the two extreme hypotheses. First, it probably can't be said about this period that advertising was *obviously* within the scope of the First Amendment. If that had been so, surely one of the state-regulated advertisers would have braved the incorporation question and raised a speech-related claim. Second, it probably can't be said about the period that advertising was *obviously not* within the scope of the First Amendment. If that had been so, surely one of the three federal postal cases would have been decided on that ground; such a decision would have been far easier to reach and write than the elaborate theory of postal regulation set forth in *Jackson* and *Lewis*.

Eliminate the two extremes, and we're left with a picture of contemporary jurisprudence in which the status of advertising as speech protected by the First Amendment was uncertain. Certainly the Supreme Court had said nothing either way.[98] To answer this question in a less cursory fashion than we have, research into lower court decisions and other indications of contemporary opinion is necessary.[99] From our limited look at what the Supreme Court had to say, and at what litigants chose to present to the Court, we can tentatively conclude that the status of advertising as

98. So far as we can tell, *no one* had explicitly said anything either way. Zechariah Chafee's two books on the First Amendment, the second of which was published at roughly the same time as *Valentine*, had to have been familiar to the Court. Neither explicitly discusses advertising. *See* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1941) [hereinafter FREE SPEECH IN THE U.S.]; ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH (1920). Theodore Schroeder, perhaps the most prolific (and zealous) writer on the First Amendment in the years before *Valentine*, likewise appears to have said nothing. *See, e.g.*, THEODORE A. SCHROEDER, CONSTITUTIONAL FREE SPEECH DEFINED AND DEFENDED (1919). On Schroeder, a true character who has largely been forgotten, see Rabban, *supra* note 46, at 520 n.19, 576-78.

99. Supposing that further research discloses nothing very interesting because no one had much to say on either side of the question, two possible conclusions could be drawn. First, one might conclude that the lack of argument demonstrates that First Amendment protection for advertising was simply inconceivable at the time; it was the type of argument that no one even thought to make. Historians in the future, after all, will look back at the late 20th century and find no arguments that the First Amendment either does or does not protect the manufacture of Swiss cheese; this will be persuasive evidence that everyone alive at the time thought the issue so one-sided as to be not worth discussing. On the other hand, one might equally conclude that the absence of argument demonstrates that the issue had not popped up much—perhaps simply because the First Amendment was not yet a common subject of litigation, or because advertising was not as heavily regulated as sedition—and that the answer was not perceived as obvious. People arguing about whether or not the First Amendment prohibited anything other than prior restraints were not likely to move on to the details until the antecedent question was close to resolution.

speech was murky in the decades before *Valentine*.

F. The Handbill Cases

Valentine wasn't just a case about advertising, however; it was also a case about handbills. And while it sounds a little silly today to think about *Valentine* as a handbill case rather than a commercial speech case, in 1942 it would have been a great deal more sensible. By looking closely at the many handbill cases decided by lower courts in the decades before *Valentine*, and at the three handbill cases decided by the Supreme Court in the few years immediately prior to *Valentine*, we can sharpen our sense of how the legal culture thought of what we now think of as commercial speech.

It is evident simply from the number of appellate opinions handbilling generated that handbills were a much more important means of communication in the first half of the century than they are now.[100] The decades before *Valentine* saw a great deal of handbill litigation. In the early years, it was commonly noted that handbills swept off the ground by the wind frightened horses,[101] and even after cars replaced the horses, cities had to contend with the litter.[102] Because these cases tended to arise as appeals from convictions for minor handbill distributing offenses, nearly all of the cases were in state courts. Many of the cases involved commercial handbills and many involved noncommercial handbills, so a look at these cases enables us to discern whether lawyers and judges treated the two groups differently.

The commercial cases tended not to involve speech-related claims; the exceptions are from the few years immediately preceding *Valentine*. In 1938, a California intermediate appellate court invalidated on First Amendment grounds San Diego's ban on the distribution of advertising handbills.[103] Two years later, a magistrate in the Bronx upheld a similar ordinance in New York,[104] in an opinion that precisely anticipated the outcome of *Valentine*, and indeed took note of *Valentine*,[105] which was at that time pending before the Second Circuit. In a third case, from 1934, the Texas Court of Criminal Appeals found a ban on commercial handbills "an unwarranted invasion of the rights of the citizen guaranteed by our

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100. A Lexis search reveals over 200 cases decided by state and federal appellate courts between 1900 and 1943 that discussed handbilling.

101. *See, e.g.*, Wettengel v. City of Denver, 39 P. 343, 344 (Colo. 1895).

102. *See, e.g.*, Schneider v. New Jersey, 308 U.S. 147, 154-55 (1939).

103. People v. Taylor, 85 P.2d 978, 979 (Cal. App. Dep't Super. Ct. 1938). This case was discussed in some detail in both parties' briefs in *Valentine*. *See* Brief for Respondent at 11, 12, 23; Brief for Petitioner at 8, 34 n.*.

104. People v. La Rollo, 24 N.Y.S.2d 350, 354 (N.Y. City Magis. Ct. 1940).

105. *Id.* at 353.

Constitutions—State and Federal,"[106] but neglected to specify which provisions of the Constitutions the court had in mind. The opinion is quite short, and gives no indication that the court either was or was not referring to the First Amendment.

These cases are unusual. In most of the commercial cases, no speech-related claim was made at all. The most common ground of attack was that a ban on distributing commercial handbills or on soliciting customers denied substantive due process because it unreasonably interfered with the pursuit of a lawful business. Ordinances were struck down on these grounds in South Carolina,[107] Florida,[108] and Ohio.[109] Ordinances were upheld against substantive due process attacks in California,[110] Colorado,[111] and Pennsylvania.[112] Other grounds of attack included: (1) the Equal Protection Clause—successful in Maryland[113] but not elsewhere;[114] (2) claims that the ordinance exceeded the municipality's power under state law—successful in Maryland[115] but not Massachusetts;[116] and (3) a claim based on state property law—unsuccessful in Indiana.[117] In none of these cases did the advertiser argue that the First Amendment or a state constitutional equivalent had been violated.

Where noncommercial handbilling was involved, however, the handbillers did tend to raise claims based on the First Amendment or a state constitutional equivalent.[118] The results were mixed. Speech-related claims succeeded in Michigan[119] and New Jersey,[120] but foundered in Nebraska,[121] Wisconsin,[122] and (with respect to a different ordinance) New Jersey.[123] But the claims were *raised*; when a handbiller was

106. *Ex parte* Pierce, 75 S.W.2d 264, 264 (Tex. Crim. App. 1934).

107. City of Orangeburg v. Farmer, 186 S.E. 783 (S.C. 1936).

108. Prior v. White, 180 So. 347 (Fla. 1938).

109. *In re* Thornburg, 9 N.E.2d 516 (Ohio Ct. App. 1936).

110. People v. St. John, 288 P. 53 (Cal. App. Dep't Super. Ct. 1930).

111. Wettengel v. City of Denver, 39 P. 343 (Colo. 1895).

112. City of Philadelphia v. Brabender, 51 A. 374 (Pa. 1902).

113. Jewel Tea Co. v. Town of Bel Air, 192 A. 417 (Md. 1937).

114. Sieroty v. City of Huntington Park, 295 P. 564 (Cal. Dist. Ct. App. 1931); *Brabender*, 51 A. at 375.

115. *Jewel Tea Co.*, 192 A. at 418.

116. Commonwealth v. Kimball, 13 N.E.2d 18 (Mass. 1938).

117. Goldblatt Bros. v. City of E. Chicago, 6 N.E.2d 331 (Ind. 1937).

118. For an exception, see City of Chicago v. Schultz, 173 N.E. 276, 277 (Ill. 1930).

119. People v. Armstrong, 41 N.W. 275, 277 (Mich. 1889). The opinion rests primarily on the city's lack of authority under state law to promulgate the ordinance, but the Michigan Supreme Court includes lengthy dicta about constitutional rights. The precise right involved is never stated; it appears to be an amalgam of a speech-based right to publish and distribute literature and a substantive due process-type right to be free of regulation for which the court could see no purpose.

120. Coughlin v. Sullivan, 126 A. 177 (N.J. 1924).

121. Anderson v. State, 96 N.W. 149, 150 (Neb. 1903).

122. City of Milwaukee v. Kassen, 234 N.W. 352, 353 (Wis. 1931).

123. Dziatkiewicz v. Township of Maplewood, 178 A. 205, 208 (N.J. 1935).

arrested under an ordinance banning *noncommercial* handbilling, freedom of speech popped into his head.

Again, the sample is limited, but we can infer that, while in the first few decades of the century noncommercial handbilling tended to be more commonly thought of as involving the freedom of speech than commercial handbilling or other solicitation, the division wasn't clear. Some advertisers raised speech-based claims (which sometimes succeeded), but most didn't; most non-advertisers raised speech-based claims (which often failed), but some didn't. This was the climate of opinion when the Supreme Court decided *Lovell v. City of Griffin*,[124] the first of its three pre-*Valentine* handbill cases.

In light of the frequency with which handbillers were in court, and given the conflicts in the lower courts, the contemporary significance of the Court's three handbill decisions in 1938 and 1939 shouldn't be underestimated.[125] In *Lovell*, the Court held for the first time that the distribution of handbills in the street was protected by the First Amendment.[126] This holding was repeated the following year in *Hague v. CIO*.[127] Finally, in *Schneider v. New Jersey*,[128] the Court expressly took account of the municipalities' interest in preventing litter, but held that interest insufficient to ban the distribution of leaflets.[129] The opinions of the Court in the latter two cases were written by Justice Roberts, the author of *Valentine*.

These cases very quickly attracted an enormous amount of attention in the law reviews.[130] By the time *Valentine* reached the Court, the handbill cases were among the most written-about of the period. One thing that was frequently noted was a sentence of dictum inserted by Justice Roberts near the end of *Schneider*, after the Court had already found the ordinances at issue unconstitutional. Although the case involved only the distribution of political and religious literature, the Court anticipated what was to come. "We are not to be taken as holding," wrote Justice Roberts, "that commercial soliciting and canvassing may not be subjected to such

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124. 303 U.S. 444 (1938).

125. Zechariah Chafee, writing a few years later, described *Lovell* as "a sharp turning point in the law." CHAFEE, FREE SPEECH IN THE U.S., *supra* note 98, at 405.

126. *Lovell*, 303 U.S. at 452.

127. 307 U.S. 496 (1939).

128. 308 U.S. 147 (1939).

129. *Id.* at 160-61.

130. *See, e.g.*, James K. Lindsay, *Council and Court: The Handbill Ordinances, 1889-1939*, 39 MICH. L. REV. 561 (1941); William Aull, III, Recent Case, 6 MO. L. REV. 103 (1941); John H. Freifield, Note, 28 GEO. L.J. 649 (1940); Francis H. O'Neill, Case Note, 35 ILL. L. REV. 90 (1940); Notes and Cases, 1 BILL OF RIGHTS REV. 53 (1940); Decision, 40 COLUM. L. REV. 531 (1940); Recent Case, 8 GEO. WASH. L. REV. 866 (1940); Recent Case, 53 HARV. L. REV. 487 (1940); Recent Case Note, 15 IND. L.J. 312 (1940); Recent Case, 24 MINN. L. REV. 570 (1940); Case Note, 13 S. CAL. L. REV. 253 (1940); Recent Decision, 14 ST. JOHN'S L. REV. 401 (1940); Recent Case, 5 U. CHI. L. REV. 675 (1938); Comment on Recent Decision, 25 WASH. U. L.Q. 611 (1940).

regulation as the ordinance requires."[131]

In the years leading up to *Valentine*, then, the Court had taken the major new step of siding with the leafletters over the regulators, but seemed a little nervous about how far its newly created doctrine would take it. Without some limitation, the First Amendment—which had been applied to the states with certainty for less than a decade—might wipe out a town's ability to keep the streets clean. When *Valentine* came along three years later, it was the Court's first opportunity to place some boundary on the newfound constitutional right to distribute handbills.

G. The Rise of Advertising as a Profession

Until now, we've considered historical developments only in the law. But the law wasn't the only relevant thing changing at the time; the practice of advertising had seen important changes as well. To understand *Valentine*, we need to look briefly at the history of advertising, in a manner complementary to the history provided by Professors Collins and Skover. While they present a fascinating account of how advertisements have changed over the years, we will consider who was writing and placing those advertisements, and what they and the public thought about their work.

Advertising is thousands of years old, but the notion that there is a separate endeavor called "advertising" dates only to the middle of the nineteenth century. Before then, advertising was an aspect of some other underlying business. If a seller of clothing decided to advertise in the newspaper, he would compose an advertisement and take it to the newspaper himself. There were no advertising agencies to do it for him, and few if any individuals specialized in helping other people advertise. Histories of advertising written in the nineteenth century, some of them quite long, say nothing about any institutions devoted solely to advertising.[132]

Individual "advertising agents" began operating in the United States in the mid-nineteenth century. It seems generally accepted that the first American advertising agent was Volney B. Palmer, who opened an office in Philadelphia in 1841.[133] Others opened shop soon after, including one William Carlton in 1865, whose business would later be purchased by an employee named J. Walter Thompson; one Francis Ayer in 1868, who

131. *Schneider*, 308 U.S. at 165.

132. *See* HENRY R. BOSS, A BRIEF HISTORY OF ADVERTISING (1886); HENRY SAMPSON, A HISTORY OF ADVERTISING (1874) (615 pages).

133. G. ALLEN FOSTER, ADVERTISING: ANCIENT MARKET PLACE TO TELEVISION 48-49 (1967); FRANK S. PRESBREY, THE HISTORY AND DEVELOPMENT OF ADVERTISING 261 (1968); JAMES P. WOOD, THE STORY OF ADVERTISING 136-37 (1958).

named his business "N.W. Ayer & Son" after his father and in 1879 conducted the world's first market survey; and one George Rowell in 1865, who four years later compiled the country's first directory of newspapers.[134]

Toward the end of the century, advertising agencies began to grow up around agents like these. Advertising became an occupation in its own right. By 1904, the World's Fair in St. Louis could stage something called an "Ad-Men's Day," with a meeting grandly named "The International Advertising Association."[135] The New York Advertising League was formed in 1906, claiming 30 charter members.[136] Four years later, the Association of National Advertising Managers was formed.[137] Advertising was beginning to acquire a sense of professionalism.

Advertising agencies soon became the institutions they are today. By 1924, one trade association numbered 134 agencies among its members.[138] By 1940, a book about advertising written for teenagers could assume that all advertising was conducted by agencies: the book advised that work in "a medium-sized agency, where one man or woman holds about three jobs, is more interesting and, incidentally, a much better place for a newcomer to get a well-rounded experience" than one of "the big agencies," which had already become as impersonal and routinized as "automobile factor[ies]."[139]

Within the lifetimes of the Justices on the *Valentine* Court, advertising had been transformed from an incident of an underlying business to an occupation pursued by a few specialists, and then to a field employing countless professionals, many of them organized into companies larger than their clients. The Court may have misunderstood what advertisements looked like, as Collins and Skover suggest,[140] but the Court could not have mistaken how advertising was practiced. Advertising was an industry in itself.

H. Summary

All these strands (and no doubt many others we haven't mentioned) came together to form *Valentine*. None of them had much to do with what we today call commercial speech. The Court was in the earliest phases of two major changes in the law—the retreat from *Lochner*-type substantive due process protection against state regulation of business, and the dawn

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134. FOSTER, *supra* note 133, at 126-31; WOOD, *supra* note 133, at 141-42.
135. GEORGE FRENCH, 20TH CENTURY ADVERTISING 119 (1926).
136. *Id.* at 131.
137. *Id.* at 141.
138. *Id.* at 334.
139. WILLIAM C. PRYOR & HELEN S. PRYOR, LET'S LOOK AT ADVERTISING 141 (1940).
140. *See* Collins & Skover, *supra* note 1, at 727-28, 730-32.

of *Lovell*-type substantive due process protection against state regulation of speech—and was almost certainly concerned about furthering the former and solving the looming slippery slope problem posed by the latter. Mr. Chrestensen claimed to be engaging in speech, but he was also conducting a business in two distinct senses. He was obviously selling tours of a submarine. But he was also engaged in the separate business of advertising. The Court had to have been aware that the rule it set forth in *Valentine* would apply equally to the large advertising agencies that were, as Collins and Skover observe, transforming the consumer's experience of commerce.[141] When Justice Roberts referred to the pursuit of "a gainful occupation in the streets,"[142] that occupation wasn't submarine exhibition (a profession that could not be pursued in the streets without a radical redesign of the submarine)—it was advertising. To a Court only a few years removed from *West Coast Hotel* and *Lovell*, a claimed right to advertise free from government interference must have sounded (1) suspiciously like a claimed right to bake free from government interference,[143] and (2) a far cry from the brand-new and frighteningly amorphous right to distribute religious and political literature in public places.[144]

Thus was born the distinction between commercial and noncommercial speech.

IV. Conclusion

The origin of modern commercial speech doctrine lies in an odd confluence of circumstances, most of which have little to do with the current debate. The apparently offhand conclusion that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising"[145] was, at the time, a reasonable way of harmonizing the simultaneous expansion and contraction of two forms of substantive due process. Whether that harmony is still reasonable (or still harmony) now that the expansion and contraction appear to have reached their full extent is something worth thinking about.

Had Chrestensen had the foresight not to sue, and had no other commercial speech cases arrived at the Court until the 1960s or the 1970s—when the days of economic substantive due process had receded into the more distant past and First Amendment protections had matured and become more absolute—things might have come out otherwise. A commercial speech doctrine first molded in the wake of *New York Times*

141. *Id.* at 716-17.
142. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).
143. *See* Lochner v. New York, 198 U.S. 45, 57 (1905).
144. *See* Lovell v. Griffin, 303 U.S. 444 (1938).
145. *Valentine*, 316 U.S. at 54.

Co. v. Sullivan[146] or *Cohen v. California*,[147] rather than in the wake of *West Coast Hotel Co. v. Parrish*,[148] might have looked a good deal different than it does now. Of course, this tells us little about commercial speech doctrine as it now is, or even as it should be, but it does take some of the inexorability and the "common sense" away from the commercial/noncommercial speech distinction.

The present debate about commercial speech brings to mind Holmes's observation about the development of the common law: "The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received."[149] *Commerce & Communication* presents a well-reasoned argument for what is in today's legal culture a reasonable conclusion, but that conclusion might not even seem reasonable today had *Valentine* been decided a few decades later. And the arguments pro and con that make up today's debate are light years from the reasons underlying *Valentine*.

146. 376 U.S. 254 (1964).

147. 403 U.S. 15 (1971).

148. 300 U.S. 379 (1937).

149. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 8 (Little, Brown & Co. reprint) (Mark D. Howe ed., Harv. Univ. Press 1963) (1st ed. 1881).