not choose to apply it in this instance, and the decisions of the New York courts have been given no weight or effect.

Since, then, the legalisms of the situation tip justice's scales in favor of the case for effective civil service, and since, certainly, the equities are all on this side of the issue, it is to be regretted that the Supreme Court of Ohio has failed to play an effective role as "watch-dog" over Art. XV, §10 of the Ohio Constitution.

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CONSTITUTIONAL LAW

GOVERNMENTAL POWER TO REGULATE DISTRIBUTION OF COMMERCIAL HANDBILLS

Plaintiff, refused permission by New York City officials to dock his submarine for exhibition off Battery Park, obtained a permit to dock at a state-owned pier. A handbill was prepared containing a cut of the submarine, a directional map, directions to see featured points of the sub under competent guide service, and a schedule of "popular prices." Informed by police that distribution of the handbill would be illegal under Sec. 318 U. Y. C. Sanitary Code,[1] plaintiff then printed a second handbill, substantially the same on one side, except that for the admission price schedule and guide-service references there was substituted a statement of the exhibit's uniqueness and a general description of what the submarine contained. On the other side, however, it carried a protest against city's refusal to grant a dock permit, mentioning that the sub could be seen by following the map on the reverse side. On being notified that street distribution of this handbill also was prohibited, but that the protest could be distributed if the "commercial advertising matter on its face were

[1] N. Y. C. Sanitary Code sec. 318: "No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building or in a letter box therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States Postal Service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

removed," plaintiff petitioned the United States District Court to enjoin the enforcement of the ordinance. On appeal from the granting of the injunction,[2] the Circuit Court of Appeals[3] affirmed, holding that distribution of a combined protest and advertisement, not shown to be a mere subterfuge, cannot be prohibited. On certiorari to the Supreme Court, *held,* reversed. Control of commercial advertising on the streets is a matter for legislative judgment, and where the affixing of a protest to an advertising circular was with the intent and purpose of evading the prohibition of the ordinance, distribution of the handbill may be prohibited. *Valentine* v. *Chrestensen,* 315 U. S. 604 (1942).

Violative of the free-speech protection now found in the due process clause of the Fourteenth Amendment, anti-littering ordinances prohibiting the distribution of handbills upon the streets were held invalid, in *Schneider* v. *State,*[4] when applied to the distribution of informative material on political, economic, or religious issues. A distinction between commercial advertising and informative matter of general public concern had previously been made,[5] permitting restraints on commercial advertising and reasonable regulation thereof as not violative of the equal protection of the laws. Discrimination within the field of commercial advertising, such as anti-price advertising legislation,[6] however, had been held to violate the equal protection clause[7] or the due process clause of the Fourteenth Amendment.

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[2] 34 Fed. Supp. 596 (1940).

[3] Chrestensen v. Valentine, 122 F. (2d) 511 (C. C. A. 2d 1941).

[4] 308 U. S. 147 (1939). *See* Hague v. C. I. O., 307 U. S. 498 (1939). For a discussion of the field of handbill ordinances, *see* Lindsay, *Council and Court: The Handbill Ordinances,* (1941) 39 MICH. L. REV. 561.

[5] Compare Schneider v. State, 308 U. S. 147 (1939), with San Francisco Shopping News v. San Francisco, 69 F. (2d) 879 (C. C. A. 9th, 1934), *cert. denied,* 293 U. S. 606 (1934); Sieroty v. Huntington Park, 111 Cal. App. 377, 295 Pac. 564 (1931); Goldblatt Bros. Corp. v. East Chicago, 211 Ind 621, 6 N. E. (2d) 311 (1937); (1941) 39 MICH. L. REV. 570.

[6] Jones v. Bontempo, 137 Ohio St. 634, 32 N. E. (2d) 17 (1941); Regal Oil Co. v. State, 123 N. J. L. 456, 10 A. (2d) 495 (1939); Needham *et al.* v. Proffitt — Ind. —, 41 N. E. (2d) 606 (1942); State *ex rel.* Booth *et al.* v. Beck Jewelry Enterprises, Inc., — Ind. —, 41 N. E. (2d) 623 (1942). Note that these cases are subsequent to *Schneider* v. *State,* yet are based on discrimination between media of advertising or deprivation of property rights either under Fed. or State due process clauses. *Cf.* Slome v. Godley, 304 Mass. 187, 23 N. E. (2d) 133 (1939) where anti-price advertising was upheld as reasonable policy regulation, based also on Mass. constitutional authority to regulate advertising. See note, (1940) 20 BOSTON U. L. REV. 345.

[7] *Ex parte* Johns, 129 Tex. Crim. Rep. 487, 85 S. W. (2d) 709 (1935), and cases *supra* note 6.

[8] Cleveland Shopping News Co. v. Lorain, 37 Ohio L. R. 527 (1922); *In re.* Thomburg, 55 Ohio App. 229, 9 N. E. (2d) 516 (1936).

Generally, in these cases, no mention of free speech was made.[9] This distinction between commercial and non-commercial, generated from equal protection litigation, is now taken by the Supreme Court to place commercial advertising, *in toto,* without the protective cloak of free speech.

Commercial advertising[10] has been defined as matter exclusively or primarily calculated to attract the attention and patronage of the public to a commercial enterprise, i.e., one entered into primarily for pecuniary gain.[11] The application of this test to a given fact situation may be approached in two different ways. Determination of the commercial or non-commercial character of a publication may be attempted by objective or quantitative methods.[12] The presence or absence of price mention,[13] the relative weight given informative matters as against the purely commercial aspects[14] would, under such a test, be determinative of the character. But such methods do not meet the hybrid cases where the informative matter cannot easily be separated from the commercial aspects or background.[15] Suggested for these instances is the character-contents test, used in the principal case, of the motive of the distributor. Whether the handbill is primarily commercial depends, by this measure, on whether the profit motive[16] is the principal purpose[17] in the distribution.

These tests and the decision in the principal case, however, are based on the assumption that there is a valid distinction between commercial and non-commercial literature. It is questionable whether

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[9] *See,* however, Jones v. Bontempo, 137 Ohio St. 634, 32 N. E. (2d) 17 (1941); Needham *et al.* v. Proffitt, — Ind. —, 41 N. E. (2d) 606 Syllabus 3 (1942), where invalidity was rested in part on violation of free speech.

[10] *See* discussion and criticism thereof, of distinction between commercial and non-commercial in Chrestensen v. Valentine, 122 F. (2d) 511, 515 (C. C. A. 2d, 1941). But *see* 2 WORDS AND PHRASES (Perma Ed.) 616 *et seq.*

[11] Motion pictures have not been held within the free speech guarantee as the purpose of publication is the exhibitor's profit. Mutual Film Corp. v. Ind. Com. of Ohio, 236 U. S. 230 (1915) *But see,* Notes (1938) 5 OHIO S. L. J. 89.

[12] *See* Chrestensen v. Valentine, 122 F (2d) 511, at 515 (C. C. L. 2d, 1941).

[13] Admission prices stated but held not commercial: People v. Armstrong, 73 Mich. 288, 41 N. W. 275 (1889); People v. Loring and Green, (N. Y. Mag. Ct. 1933) (unreported), noted (1933) INT. JURID. ASSOC. BULL. No. 12 at 2. Admission price omitted but held commercial; Valentine v. Chrestensen, 314 U. S. 601, 85 L. ed. 861 (1942).

[14] *See* Chrestensen v. Valentine, 122 F. (2d) 511 at 516, (C. C. A. 2d 1941).

[15] Note (1940) 35 ILL. L. REV. 90.

[16] Test suggested (1941) 39 MICH. L. REV. 561.

[17] Test suggested (1940) 35 ILL. L. REV. 90: "Yet by ascertaining the principal purpose intended by the distributor in each case, the proper classification should be accomplished without great difficulty."

any distinction should be made.[18] Illustrative of the questionability is the decision in *Jones* v. *Opelika*.[19] Here though involving similar facts as in *Schneider* v. *State*,[20] and there held within the free-speech protection, the Court sustained a license fee on the distribution of religious literature where a charge was made for the literature. Though apparently saying that religious literature was not, merely because of the free-speech aspect, exempt from non-discriminatory taxation, yet in the words of the majority, "It is because we view these sales as partaking more of commercial than religious or educational transactions that we find the ordinances, as here presented, valid."[21] The minority, remembering the decision in the *Schneider* case, held that mere charging of a small sum to cover cost of printing did not make the matter, otherwise non-commercial, commercial, and therefore entitled to exemption from unreasonable restraint.

The majority have by this decision laid the foundation for the complete emasculation of the effective protection of the *Schneider* case. If profit motive excludes one's utterances from "sale" in the intellectual market place, what is available for exchange in this, democracy's most important market? Few indeed are those free of the taint of profit motive or self-service. The politician extolling his qualifications for public office, or business protesting the burden of taxation and government intervention, are motivated in part by desire for personal gain. A newspaper publisher is not wholly devoid of covetousness for the "root of all evil."[22] The presence of comparative prices for identified products, in a handbill presenting arguments on the controversial economic question of chain versus independent merchant distributive systems, coupled with reference to the location of the place of business of the publisher and calling attention to his business, being in the field of economic endeavor of the publisher and calling attention to his business, is published with the purpose of attracting patronage. Yet the information on the relative advantage of chain or independent merchant distribution is a matter of public concern, just as in labor dispute picketing is to secure the demands

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[18] *See,* note (1938) 5 U. OF CHIC. L. REV. 675, 676, criticizing the distinction: "What is news of general nature as compared with advertising?"

[19] 315 U. S. , 10 U. S. L. Week 4462 (June 9, 1942).

[20] 308 U. S. 147 (1939).

[21] Jones v. Opelika, 315 U. S. , , 10 U. S. L. Week 4462, 4464 (June 9, 1942).

[22] *See,* Lindsay, *Council and Court: The Handbill Ordinances* (1941), 39 MICH. L. REV. 561 at 595: "Whether or not commercial in nature it seems clear that the distribution of newspapers should be exempted from the ordinances."

of the union from the particular employer, even though the problem of employee-employer relationship is a matter of public concern. The labor situation has nevertheless been held within the protection of free speech.[23] True, the chain merchant could circulate his handbills without price mention, or lecture on chain advantages in a downtown hall; but price and effective consumer contact being the bases of his competitive advantage, these methods are the most effective for proving his argument; just as picketing at the matrix of the labor dispute is for labor more effective than hiring a hall for debate on the abstract issue.[24] So, too, anti-price-advertising legislation deprives the small merchant of his most effective plea for patronage.[25]

The principal case, with the protest involving an individual complaint not of great public interest and the appeal for patronage being separable from the protest, was an unfortunate test for the problem of commercial versus non-commercial advertising. While the decision was justified, still the differentiation of commercial advertising from matters protected by free speech was unfortunate, as shown by *Jones* v. *Opelika* case. The distinction having been made, however, it would seem that where matters of public concern are published relative to matters in the particular field of the publisher, even though there is some showing of personal concern and possibility of personal advantage, there should nevertheless be a presumption in favor of it being within the protection of free speech, that is, non-commrcial.[26] In balancing the more important right of free speech against the less important police power of the cities to prevent littering of its streets, or the porches of its citizens, any doubt should be resolved in favor of the informative character of the publication.[27]

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[23] Thornhill v. Alabama, 310 U. S. 88 (1940).

[24] See *ibid* at 104 *et seq.*

[25] See note 6, *supra.*

[26] Chrestensen v. Valentine, 122 F (2d) 511, at 515 *et seq.* (C. C. A. 2d 1941).

[27] The *Valentine* and *Opelika* cases were decided under the federal constitution, the anti-price advertising cases were, for the most part, decided under state constitutions. It is possible therefore that protection of advertising and borderline cases may be found in the state constitution. *See* Direct Plumbing Supply Co. v. Dayton, 138 Ohio St. 540, (1941) noted (1942) 8 OHIO ST. L. J. 201, as an example of state court assertions of freedom to interpret the state "due process" clause as it sees it.