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## CONSTITUTIONALAW: *New York State Association of Realtors, Inc. v. Shaffer*: When the Second Circuit Chooses Between Free Speech and Fair Housing, Who Wins?

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*NEW YORK STATE ASSOCIATION OF REALTORS,  
INC. V. SHAFFER*: WHEN THE SECOND CIRCUIT  
CHOOSES BETWEEN FREE SPEECH AND FAIR  
HOUSING, WHO WINS?

INTRODUCTION

Housing discrimination and segregation permeate American society.<sup>1</sup> Despite the passage of the Fair Housing Act in 1968,<sup>2</sup> as well as a plethora of state and local statutes designed to combat discrimination and promote diversity, housing in America largely remains segregated by race.<sup>3</sup> Blacks remain the most segregated among minorities, with a disproportionate percentage of blacks living in inner cities.<sup>4</sup>

In 1985, sixty percent of blacks lived in inner cities compared to only twenty-eight percent of non-Hispanic whites; forty-eight percent of non-Hispanic whites lived in the suburbs, compared to twenty-five percent of blacks.<sup>5</sup> Blacks have been excluded from the suburbs to a much greater degree than other minorities. Despite a forty-two percent increase in the suburban black population between 1970 and 1980, blacks in 1980 made up only 6.1 percent of the suburban population.<sup>6</sup>

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\* 27 F.3d 834 (2d Cir.), *cert. denied*, 115 S. Ct. 511 (1994).

<sup>1</sup> See e.g., NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1978) (the Kerner Commission's analysis of the causes for the riots that occurred in American cities during 1966-67); see also UNITED STATES COMMISSION ON CIVIL RIGHTS, A SHELTERED CRISIS: THE STATE OF FAIR HOUSING IN THE EIGHTIES (1983) (discussing prevalence of housing discrimination in the United States).

<sup>2</sup> 42 U.S.C. §§ 3601-3619 (1988).

<sup>3</sup> See STANLEY LIEBERSON, A PIECE OF THE PIE: BLACKS AND WHITE IMMIGRANTS SINCE 1880 253-91 (1981); DOUGLAS MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION & THE MAKING OF THE UNDERCLASS 83-84 (1993).

<sup>4</sup> ARLENE ZAREMBKA, THE URBAN HOUSING CRISIS 15 (1990).

<sup>5</sup> *Id.* (calculated from U.S. CENSUS BUREAU, *Introductory Characteristics-Occupied Units* (Table 2-1), in 1985 AMERICAN HOUSING SURVEY).

<sup>6</sup> John F. Kain, *The Influence of Race and Income on Racial Segregation and Housing Policy*, in HOUSING DESEGREGATION AND FEDERAL POLICY 99 (John M. Goering ed., 1986) [hereinafter "HOUSING DESEGREGATION AND FEDERAL POLICY"].

One commentator has noted that "[a]lthough growing numbers of black households are buying and renting in previously all-white neighborhoods, most of the recent increase in the suburban black population appears to be accounted for by the expansion of central city ghettos into adjacent suburban communities."<sup>7</sup> Data from the 1990 Census reveals that while an increasing percentage of blacks are moving to the suburbs, the number of blacks as compared to whites is still very small. For example, in the New York metropolitan area, seventy-four percent of those who moved to the suburbs were whites, while only fourteen percent were blacks.<sup>8</sup>

At the simplest level, segregated housing results from white homeowners' preference not to live near established black areas.<sup>9</sup> On another level, however, the segregation that pervades both inner city and suburban housing derives largely from a history of discriminatory practices on the part of local governments, financial institutions, and real estate brokers and investors.<sup>10</sup> State and local governments have promulgated municipal segregation ordinances,<sup>11</sup> supported restrictive racial covenants,<sup>12</sup> and drafted suburban zoning laws that prevent building multifamily rental dwellings.<sup>13</sup> Financial institutions have refused to offer loans to blacks; or have imposed more difficult terms for black buyers; or have declined to offer any loans for housing in areas where blacks live, a practice known as "redlining."<sup>14</sup>

The real estate industry has been singled out as "the main

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<sup>7</sup> Kain, *supra* note 6, at 99 (citing U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT, 1981, table 19, p. 16 (1982)).

<sup>8</sup> Sam Roberts, *New York Exports Its Talent as Demographic Tide Turns*, N.Y. TIMES, Mar. 6, 1994, at A1.

<sup>9</sup> J. Linn Allen, *Rare Blend: Achieving, Maintaining Diversity Is No Easy Task*, CHI. TRIB., Nov. 28, 1993, at 1C. See also, MASSEY & DENTON, *supra* note 3 at 88-114. For a discussion of possible reasons why whites prefer to live in segregated communities, see *infra* notes 124-128 and accompanying text.

<sup>10</sup> Charles M. Lamb, *Housing Discrimination and Segregation in America: Problematical Dimensions and the Federal Legal Response*, 30 CATH. U. L. REV. 363, 368 (1981).

<sup>11</sup> UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 1, at 2.

<sup>12</sup> UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 1, at 2.

<sup>13</sup> Rose Helper, *Success and Resistance Factors in the Maintenance of Racially Mixed Neighborhoods*, in HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 6, at 174.

<sup>14</sup> Helper, *supra* note 13, at 174.

cause of problems that undermine racial mixing in residential neighborhoods."<sup>15</sup> Real estate brokers and salespeople use two principal methods to effectuate racial segregation in housing: steering and blockbusting.<sup>16</sup> Steering occurs when real estate brokers direct prospective homebuyers toward or away from particular neighborhoods based on their race. It is the single most widely practiced form of housing discrimination.<sup>17</sup> Blockbusting, in turn, occurs when real estate brokers attempt to induce or hasten "white flight" from a neighborhood "by instilling in white homeowners the fear of an imminent racial turnover in the makeup of their neighborhoods."<sup>18</sup>

Federal, state and municipal governments have attempted to combat steering and blockbusting through a variety of measures.<sup>19</sup> *New York State Association of Realtors, Inc. v. Shaffer*<sup>20</sup> arises from New York State's efforts to combat blockbusting through the promulgation of nonsolicitation orders. Nonsolicitation orders direct realtors to "refrain from soliciting listings for the sale of residential property within a designated geographic area."<sup>21</sup> Such orders aim to protect

<sup>15</sup> Helper, *supra* note 13, at 171. See also JOE T. DARDEN, *AFRO-AMERICANS IN PITTSBURGH: THE RESIDENTIAL SEGREGATION OF A PEOPLE* (1973).

<sup>16</sup> Charles M. Lamb, *Congress, the Courts, and Civil Rights: The Fair Housing Act of 1968 Revisited*, 27 VILL. L. REV. 1115, 1146 (1981-1982), (quoting hearings on S. 506, before the Senate Constitution Subcommittee of the Committee of the Judiciary Committee, 97th Cong., 1st Sess. 165 (1979)).

<sup>17</sup> *Id.* Real estate brokers steer in two ways: (1) active steering, where brokers overtly advise customers where to buy on the basis of their race and; (2) passive steering, where brokers show customers homes only in certain neighborhoods on the basis of their race. Deborah Kemp, *The 1968 Fair Housing Act: Have Its Goals Been Accomplished?* 14 REAL EST. L.J. 327, 338 (1986); See Comment, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808, 809-10, 816-18 (1976).

<sup>18</sup> Lamb, *supra* note 16, at 1142. The blockbuster capitalizes on the prejudices and fears of white homeowners and on the desire of blacks to move into suburban areas. The blockbuster usually focuses his or her activities on white homeowners living in transitional areas and makes representations that a minority population is moving into the area, which will lead to decreased property values and municipal services, and increased crime. The blockbuster induces the homeowner to sell quickly, profiting through commissions or by purchasing the home at low, panic prices and then selling to blacks at a premium. See Kemp, *supra* note 17, at 333-34.

<sup>19</sup> See, e.g., 42 U.S.C. § 3604(a)-(b), (1988) (prohibiting steering); 42 U.S.C. § 3604(e) (1988) (prohibiting blockbusting); N.Y. EXEC. LAW 296(3-b) (McKinney 1993) (prohibiting blockbusting); ILL. REV. STAT. Ch. 720, para. 590/1 (1994) (prohibiting steering).

<sup>20</sup> 27 F.3d 834, (2d Cir.), *cert. denied*, 115 S. Ct. 511 (1994).

<sup>21</sup> [1991] 19 N.Y.C.C.R.R. § 178.1. The orders prohibit any form of solicitation

homeowners in transitional neighborhoods from being unduly influenced into panic selling—the result of blockbusting.

In *Shaffer*, the Second Circuit struck down New York's nonsolicitation orders, holding that they impermissibly infringed on the realtors' free speech rights guaranteed under the First Amendment.<sup>22</sup> The court found that the realtors' speech, because it does "no more than propose a commercial transaction,"<sup>23</sup> may be regulated by the government, only so long as the regulation directly advances a substantial state interest and is no more extensive than necessary to serve that interest.<sup>24</sup> Although a state can regulate the representations of real estate brokers, the court found that the State did not sufficiently show that blockbusting was so significant a problem in the designated areas as to require such an extensive limitation on speech.<sup>25</sup> The decision in *Shaffer* is indicative of the tension between antiblockbusting legislation, which often limits realtor representations as a way of engendering community stability, and the developing commercial speech doctrine, which protects the speech rights of realtors.

This Comment reviews the history of New York State's antiblockbusting legislation and examines the procedural history and decision in *Shaffer* in light of emerging theories in first amendment commercial speech doctrine. As an alternative to the *Central Hudson* test, this Comment will apply two opposing theories of the First Amendment to the facts of

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to obtain a listing for residential property, including letters, handbills, telephone calls, face-to-face contact, and most forms of advertising, directed at or toward homeowners in designated areas in Bronx County, Kings County, Queens County, and Nassau County. [1991] 19 N.Y.C.C.R.R. § 178.5(a)(b)(c); § 178.6; § 178.7; § 178.8; § 178.9.

<sup>22</sup> *Shaffer*, 27 F.3d at 845; U.S. CONST. amend. I.

<sup>23</sup> *Shaffer*, 27 F.3d at 840 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)).

<sup>24</sup> *Id.* at 841 (citing *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) (holding that a regulation of the New York Public Service Commission banning all electric utilities in New York state from advertising to promote the use of electricity was an impermissible infringement of the First Amendment, even though the regulation's objective to foster energy conservation was a substantial state interest)).

<sup>25</sup> 27 F.3d at 844. The court stated, however, "we do not reach the question of whether under certain facts and circumstances and under a different record, the [State] might be able to justify some type of nonsolicitation regulation." *Id.*

*Shaffer*. The first, the self-realization theory, posits that commercial speech should receive greater first amendment protection than that afforded by the *Central Hudson* test. The second, the liberty theory, posits that commercial speech should not receive first amendment protection. The strengths and weaknesses of these approaches will then be discussed, and integrated into a comprehensive analysis of the issue culminating in the exposition of a balancing test that offers greater guidance than the *Central Hudson* test.

Applying the test, this Comment will then show that New York's nonsolicitation legislation is unconstitutional even if blockbusting is found to be "intense and repeated." The court's decision in *Shaffer* was unduly narrow. Rather than merely holding that the particular orders are unconstitutional, the court should have held that the underlying statute that authorized the adoption of nonsolicitation orders was, on its face, an unconstitutional infringement of the first amendment rights of realtors. The Comment concludes by discussing other options left for fighting blockbusting, and cautions against suppressing speech as a way of promoting social goals.

## I. BACKGROUND: NEW YORK STATE'S BATTLE AGAINST BLOCKBUSTING

In 1969, New York outlawed blockbusting<sup>25</sup> and autho-

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<sup>25</sup> The New York law currently provides that:

It shall be an unlawful discriminatory practice for any real estate broker . . . for the purpose of inducing a real estate transaction from which any such person . . . may benefit financially, to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, national origin or marital status of the owners or occupants in the block, neighborhood or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in the block, neighborhood or area in which the real property is located, including but not limited to the lowering of property values, an increase in criminal or anti-social behavior, or a decline in the quality of schools or other facilities.

N.Y. EXEC. LAW § 296(3-b) (McKinney 1993).

Blockbusting is also a violation of federal law. Section 3604(e) of the Fair Housing Act makes it unlawful "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, family status or national origin." 42 U.S.C. § 3604(e) (1991).

rized the Secretary of State to promulgate antiblockbusting regulations.<sup>27</sup> Those regulations provided that real estate brokers and salespeople could not "induce or attempt to induce an owner to sell or lease any residential property or to list same for sale or lease by making any representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin."<sup>28</sup> The Secretary of State also created cease-and-desist zones. Homeowners within these zones could notify the state in writing that they did not want to be solicited by brokers seeking to obtain new property listings. All realtors were prohibited from soliciting homeowners who provided such notification. In addition, the regulations prohibited a real estate broker from soliciting a homeowner who delivered to the broker a written statement stating that he or she did not desire to sell, lease or list their property.<sup>29</sup>

In the 1970s, in addition to issuing cease-and-desist orders, the Secretary of State issued nonsolicitation orders in areas particularly prone to blockbusting. These orders prohibited realtors from engaging in most forms of solicitation, regardless of whether the representations included the proscribed language.<sup>30</sup> Issuance of the nonsolicitation orders were premised on the view that white homeowners in transitional neighborhoods face such pressure to sell their homes that mere solicitation of listings by real estate brokers—even absent any negative representation about minority groups moving into the neighborhood—is sufficient to cause panic selling. The nonsolicitation orders aimed to quiet neighborhoods and protect them from the pressures of real estate brokers intent upon churning the real estate market.<sup>31</sup>

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Many states have also outlawed blockbusting. See e.g., ILL. ANN. STAT. ch. 38, para 70-51(b)(c) (Smith-Hurd Supp. 1971); MD. CODE ANN. BUS. OCC. & PROF. § 17-608 (1995); OHIO REV. CODE ANN. 4112.02(H)(10) (Baldwin 1992); WIS. STAT. ANN. § 101.22(K)(2)(2m) (West 1991).

<sup>27</sup> N.Y. EXEC. LAW 29 (3-b) (McKinney 1993); [1991] 19 N.Y.C.C.R.R. 175.17(a).

<sup>28</sup> [1991] N.Y.C.C.R. 175.17(a).

<sup>29</sup> [1991] 19 N.Y.C.C.R.R. § 175.17.

<sup>30</sup> *Shaffer*, 27 F.3d at 836. Judicial support for the position that the solicitations of blockbusters can be regulated, even if those solicitations do not include explicit references regarding the entry into the neighborhood of persons of another race, color, or religion, is found in *United States v. Mitchell*, 335 F. Supp. 1004 (N.D. Ga. 1971) and *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975).

<sup>31</sup> See MEMORANDUM OF THE DEPARTMENT OF STATE, STATEMENT IN SUPPORT

New York's campaign against blockbusting has been marked by challenges from realtors in state courts.<sup>32</sup> In 1989, the New York Court of Appeals held in *In re Campagna*<sup>33</sup> that the promulgation of a regulation that bans both lawful and unlawful forms of solicitation exceeds the Secretary of State's authority. The statute under which the Secretary of State had acted prohibited only discriminatory representations by realtors. The court upheld the challenge stating that "[i]f the only way to prevent blockbusting is to ban all broker solicitation in certain areas, that is a policy choice for the Legislature, not for the agency."<sup>34</sup>

In response to the court's ruling in *Campagna*, the New York Legislature enacted section 442-h of the Real Property Law, which expressly authorized the Secretary of State to adopt nonsolicitation orders to combat blockbusting. These orders could prohibit "any or all types of solicitation directed towards particular homeowners."<sup>35</sup>

In support of the bill, the Secretary of State submitted a

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OF BILL, reprinted in [1989] N.Y. LAWS 212 at 2251-52 (McKinney).

<sup>32</sup> In *Hawley v. Cuomo*, 46 N.Y.2d 990, 389 N.E.2d 827, 416 N.Y.S.2d 232 (1979), the court struck down as arbitrary and capricious a nonsolicitation order that covered areas of Kings and Queens counties because the state failed to show that racial blockbusting tactics were sufficiently prevalent to "establish any rational basis for promulgation of an order so broad in geographic scope" *Id.* at 992, 389 N.E.2d at 828, 416 N.Y.S.2d at 233. In *Russo v. Shaffer*, 131 A.D.2d 853, 517 N.Y.S.2d 212 (2d Dep't 1987), the appellate division upheld the validity of a nonsolicitation order covering areas in Queens county.

<sup>33</sup> 73 N.Y.2d 237, 536 N.E.2d 368, 538 N.Y.S.2d 933 (1989).

<sup>34</sup> *Id.* at 244, 536 N.E.2d at 371, 538 N.Y.S.2d at 936.

<sup>35</sup> The statute provides that:

If, after a public hearing and a reasonable investigation, the secretary of state determines that the owners of residential property within a defined geographic area are subject to intense and repeated solicitations by real estate brokers and salespersons to place their property for sale with such real estate brokers or salespersons, and that such solicitations have caused owners to reasonably believe that property values may decrease because persons of different race, ethnic, social, or religious backgrounds are moving or are about to move into the neighborhood or geographic area, the secretary of state may adopt a rule, to be known as a nonsolicitation order, directing all real estate brokers and salespersons to refrain from soliciting residential real estate listings within the subject area. . . . A nonsolicitation order may prohibit any or all types of solicitation directed toward particular home-owners, including but not limited to letters, postcards, telephone calls, door-to-door calls, and handbills. . . . A nonsolicitation order shall not be effective for more than five years.

N.Y. REAL PROP LAW 442-h (2)(a) (McKinney Supp. 1995).



statement explaining why broad nonsolicitation orders were necessary:

Experience has shown that home owners in many urban neighborhoods are subjected to intense and repeated solicitation by real estate brokers to place their homes for sale with such brokers, and that the underlying implication of those solicitations is that property values will be decreasing because persons of different ethnic, social or religious backgrounds are moving into the neighborhood. These solicitations play on the fear and uncertainty attendant with change. Even if the words are not spoken the message is delivered. The result is an artificial churning of the market, panic selling, and flight from established neighborhoods. In such a charged atmosphere, the mention of ethnic, social or religious prejudices is unnecessary.<sup>36</sup>

Pursuant to the passage of section 442-h, the Secretary of State promulgated a nonsolicitation regulation that provided that within a nonsolicitation area, no realtor "shall engage in any form of solicitation where the purpose of such solicitation is, directly or indirectly, to obtain a listing of residential property for sale."<sup>37</sup> While the regulation prohibited such communications as letters, direct advertising delivered by mail or other service, telephone calls, door-to-door calls, and postings in public places,<sup>38</sup> it allowed newspaper solicitations provided that "such newspaper ha[d] a general readership . . . throughout a substantial portion of the metropolitan New York City area," was published not less than once per week, and was not distributed free of charge.<sup>39</sup> In April 1991, following public hearings, the Secretary of State promulgated four nonsolicitation orders, covering areas in the Bronx,<sup>40</sup> Brooklyn,<sup>41</sup> Queens,<sup>42</sup> and Nassau County.<sup>43</sup> Shortly after the promulgation of these orders, realtors mounted a legal challenge to the Secretary of State's actions.

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<sup>36</sup> MEMORANDUM OF DEPARTMENT OF STATE, *supra* note 31 at 2251-52.

<sup>37</sup> [1991] 19 N.Y.C.C.R.R. § 178.5(a).

<sup>38</sup> [1991] 19 N.Y.C.C.R.R. § 178.5(b).

<sup>39</sup> [1991] 19 N.Y.C.C.R.R. § 178.5(c).

<sup>40</sup> [1991] 19 N.Y.C.C.R.R. § 178.6.

<sup>41</sup> [1991] 19 N.Y.C.C.R.R. § 178.7.

<sup>42</sup> [1991] 19 N.Y.C.C.R.R. § 178.8.

<sup>43</sup> [1993] 19 N.Y.C.C.R.R. § 178.9.

## II. NEW YORK STATE ASSOCIATION OF REALTORS, INC. V. SHAFFER

### A. The District Court Decision

On May 28, 1991, the New York State Association of Realtors, Inc., ["NYSAR"] a trade association of licensed real estate brokers and local boards of realtors, and Clifford Hall, an individual licensed real estate broker in Queens, filed suit against the Secretary of State, in the United States District Court for the Eastern District of New York.<sup>44</sup> The Realtors sought a declaratory judgment invalidating Real Property Law section 442-h and the regulations promulgated thereunder.<sup>45</sup>

The district court's opinion focused on the plaintiffs' claim that the nonsolicitation statute and regulations were an impermissible restriction on commercial speech.<sup>46</sup> First, the court reviewed the contours of the Supreme Court's emerging commercial speech doctrine. Citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>47</sup> the court stated that "[t]he First Amendment protects commercial speech from unwarranted government regulation," and defined commercial speech as being "an expression related to the economic interests of the speaker."<sup>48</sup> Then, the court set forth the four-part test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*<sup>49</sup> to determine whether, within the context of commercial speech, first amendment rights had been violated.<sup>50</sup>

According to the test set forth in *Central Hudson*, for commercial speech to come within first amendment protection, it

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<sup>44</sup> New York State Ass'n of Realtors, Inc. v. Shaffer, 833 F. Supp. 165, 168 (E.D.N.Y. 1993), *rev'd*, 27 F.3d 834 (2d Cir.), *cert. denied*, 115 S. Ct. 511 (1994).

<sup>45</sup> *Id.* at 167.

<sup>46</sup> The plaintiffs also made arguments based on the Privileges and Immunities clause (U.S. CONST. art. IV, § 2), equal protection clause (U.S. CONST. amend. XIV), the Fair Housing Act (42 U.S.C. 3604(e)), 42 U.S.C. §§ 1981-1992, and 42 U.S.C. § 1983. *Id.* at 186-89.

<sup>47</sup> 425 U.S. 748, 761-62 (1976) (holding that Virginia's ban on advertising drug prices infringed the first amendment right to free speech).

<sup>48</sup> *Shaffer*, 833 F. Supp. at 171.

<sup>49</sup> 447 U.S. 557 (1980).

<sup>50</sup> *Id.* at 566.

must concern lawful activity and not be misleading. If this first prong is satisfied, then the court determines whether the asserted governmental interest is substantial. If this second prong is met, then the court "must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."<sup>51</sup>

Applying the *Central Hudson* test to the nonsolicitation statute, the court found that the requirements of the first two prongs of the test were met: the speech at issue concerned lawful activity and the state's interest in enacting the statute—the elimination of blockbusting—was a "vital goal."<sup>52</sup> In applying the third prong of the test, whether section 442-h directly advanced the asserted governmental interest, the court reviewed affidavits submitted by the plaintiffs stating that blockbusting practices no longer exist. The court also reviewed transcripts of proceedings before the Secretary of State, in which community members testified about blockbusting in local neighborhoods. After weighing the evidence,<sup>53</sup> the court found that the state had presented sufficient "generalized anecdotal evidence" of blockbusting to support the conclusion that the statute "further[ed] the governmental interest of combating the invidious practice."<sup>54</sup>

The district court then applied the final part of the *Central Hudson* analysis to determine "whether the statute [was] narrowly tailored to serve only the asserted governmental interest."<sup>55</sup> The court employed an intermediate standard of review:

What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends, . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to

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<sup>51</sup> *Id.*

<sup>52</sup> *Shaffer*, 833 F. Supp. at 173-77.

<sup>53</sup> The court applied the standard articulated in *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993): "[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." In *Edenfield*, the Supreme Court struck down a Florida statute that banned in-person solicitation by certified public accountants.

<sup>54</sup> *Shaffer*, 833 F. Supp. at 179.

<sup>55</sup> *Id.*

the interest served,' . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds, we leave it to government decision makers to judge what manner of regulation may best be employed.<sup>56</sup>

Based on this intermediate standard, the district court found that the New York statute was "narrowly tailored to achieve the desired objective of combatting blockbusting."<sup>57</sup> In like manner, the court analyzed the specific nonsolicitation ordinances and found that they too passed constitutional muster.<sup>58</sup>

Accordingly, the district court denied the plaintiff's motion for summary judgment, and granted the Secretary of State's motion for summary judgment. The court also denied NYSAR's motion for an injunction that would have prevented New York State from enforcing New York Real Property Law section 442-h and its regulations. On October 7, 1993, the district court entered final judgment and dismissed the action.<sup>59</sup>

### B. *The Second Circuit Decision*

The Second Circuit reversed, in an opinion written by Judge Meskill, holding that "the nonsolicitation regulation was an impermissible restriction on commercial speech under the First Amendment."<sup>60</sup> The court began its analysis by reducing the plaintiffs' first amendment claim to its narrowest form: that the "Secretary has failed to justify the establishment and enforcement of nonsolicitation areas involved in this case."<sup>61</sup> The court unequivocally rejected the plaintiffs' contention that section 442-h(2)(a) was facially invalid, reasoning that the statute was "readily distinguishable from other nonsolicitation statutes that on their face mandate the type of broad prophy-

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<sup>56</sup> *Id.* (quoting *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989) (citations omitted)).

<sup>57</sup> *Id.* at 181. The district court also distinguished the New York regulation from the statute struck down by the Supreme Court in *Edenfield*. *Id.*

<sup>58</sup> *Id.* at 181-85.

<sup>59</sup> *Id.* at 189.

<sup>60</sup> *Shaffer*, 27 F.3d at 838. The Second Circuit agreed with the district court that plaintiff's claims, except those related to the commercial speech issue, lacked merit. *Id.*

<sup>61</sup> *Id.* at 839.

lactic rules that are inherently suspect.”<sup>62</sup> Thus, the court confined its inquiry to the narrow issue of whether the challenged regulations were “valid governmental restrictions on speech.”<sup>63</sup>

The Second Circuit followed the same method of analysis that the district court used. The court first examined the definition of commercial speech and the scope of the first amendment rights associated with such speech.<sup>64</sup> The majority then analyzed the regulations and applied the *Central Hudson* test.<sup>65</sup> Like the court below, the Second Circuit found that the requirements of the first two prongs were met. The court then focused on the final two prongs: “whether the regulation at issue ‘directly advances [the] governmental interest asserted’”—the promotion of stable and racially integrated communities through the elimination of blockbusting—and “whether it is not more extensive than is necessary to serve that interest.”<sup>66</sup>

Like the district court, the Second Circuit majority applied intermediate scrutiny. Here, however, the Second Circuit diverged from the lower court by finding that the Secretary of State failed to provide sufficient evidence of blockbusting to establish a reasonable fit between the asserted governmental goal and the broad nonsolicitation order used to achieve that

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<sup>62</sup> *Id.* The court mentioned, as examples, the statutes struck down in *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (Florida statute banning CPA's from any in-person solicitation); *City of Cincinnati v. Discovery Network*, 113 S.Ct. 1505 (1993) (city ordinance prohibiting distribution of free, magazine-format, commercial handbills through newsracks placed on public property, but permitting distribution of newspapers through newsracks); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (state supreme court's disciplinary rule prohibiting lawyers from advertising in newspapers or other media); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977) (town ordinance banning “For Sale” and “Sold” signs from residential property); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (state law prohibiting pharmacists from advertising prices of prescription drugs).

<sup>63</sup> *Shaffer*, 27 F.3d at 839.

<sup>64</sup> The court quoted from *Bolger v. Youngs Drugs Products Corp.*, 463 U.S. 60, 64-65 (1983), for the proposition that “the Constitution affords less protection to commercial speech than to other constitutionally safeguarded forms of expression.” In *Bolger*, the Court more narrowly defined commercial speech as being speech which does “no more than propose a commercial transaction.” *Id.* at 66.

<sup>65</sup> *Shaffer*, 27 F.3d at 840-44 (citing *Central Hudson*, 447 U.S. at 557). For a summary of the *Central Hudson* test, see *supra* note 51 and accompanying text.

<sup>66</sup> *Id.* at 841 (quoting *Central Hudson*, 447 U.S. at 566).

goal. The court held that the nonsolicitation regulation<sup>67</sup> violated the first amendment rights of the realtors in this case.<sup>68</sup>

Judge Altamari succinctly dissented from the majority opinion. He faulted the majority for not deferring to the district court's weighing of the evidence that supported the necessity for the blockbusting regulations. According to the dissent, the evidence established a constitutional fit between the government's interest in preventing blockbusting and the means used to further that interest. Judge Altamari faulted the majority for failing to "credit the difficulties of finding direct evidence" of blockbusting.<sup>69</sup>

### III. ANALYSIS

#### A. *Confronting the Legacy of Central Hudson*

By formulating the question before it simply in terms of the sufficiency of proof of blockbusting, the Second Circuit effectively dodged a larger question: whether, in a situation where the court would have found there was sufficient evidence of blockbusting in a designated nonsolicitation area, the nonsolicitation order still would constitute an impermissible restriction on commercial speech. The court's narrowly crafted decision, which reversed the district court's decision on the slimmest of grounds, reflects the confused state of current commercial speech jurisprudence. This confusion stems from the failure of the Supreme Court to articulate a clear, consistent approach to adjudicating commercial speech cases.

Although in *Central Hudson* the Supreme Court attempted to clarify its approach to commercial speech, the four-part balancing test that it established<sup>70</sup> has led to a plethora of irreconcilable decisions.<sup>71</sup> Rather than giving much-needed

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<sup>67</sup> [1991] 19 N.Y.C.C.R.R. § 178.

<sup>68</sup> *Shaffer*, 27 F.3d at 845.

<sup>69</sup> *Id.*

<sup>70</sup> For a summary of the *Central Hudson* test, see *supra* note 51 and accompanying text.

<sup>71</sup> The *Central Hudson* test remains too porous to allow for consistent results. For example, as Judge Alex Kozinski and Stuart Banner have noted, the Supreme Court has held that the government cannot prohibit certain kinds of commercial billboards, but can prohibit the unauthorized use of certain words altogether. See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?* 76 VA. L.

direction to the lower courts, the Supreme Court's case-by-case approach has led to such unpredictability that "[u]nless a case has facts very much like those of a prior case, it is nearly impossible to predict the winner."<sup>72</sup> This inconsistency has led to a situation in which, as one commentator has written, "almost all of the foundational questions about first amendment protection for commercial speech remain on the table for consideration and reconsideration."<sup>73</sup> It is in the context of this debate that the Second Circuit rendered its decision in *Shaffer*.

### 1. Self-Realization and the Value of Commercial Speech

According to Professor Martin H. Redish, the constitutional guarantee of free speech serves one overriding value, "individual self-realization," which refers "either to development of the individual's powers and abilities . . . or to the individual's control of his or her own destiny through making life-affecting decisions."<sup>74</sup> According to this view, other values identified as

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REV. 627, 631 (1990). See also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (city ordinance permitting billboards limited for onsite commercial advertising, but prohibiting offsite billboards). The government cannot prohibit the mailing of unsolicited contraceptive advertisements. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (federal statute prohibiting the mailing of unsolicited advertisements for contraceptives). However, it can prohibit advertisements for legal casino gambling. See *Posados de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) (Puerto Rico statute prohibiting local casinos from directing advertisements at residents, but allowing advertisements directed at tourists).

<sup>72</sup> Kozinski & Banner, *supra* note 71 at 631.

<sup>73</sup> Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1182 (1988). For a review of commentators' views see C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 194-224 (1989) (arguing that commercial speech should not receive first amendment protection); Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372 (1979) (discussing proper scope of protection to be given to commercial speech); Thomas H. Jackson & John Calvin Jeffries, Jr. *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979) (supporting commercial speech doctrine under which "ordinary business advertising" is part and parcel of the economic marketplace and therefore is excluded from the protections of the First Amendment); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971) (arguing that there should not be a distinction between commercial and noncommercial speech); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983) (arguing that no single, unified theory of the First Amendment is sufficient to address the range of issues raised by commercial speech).

<sup>74</sup> MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 11

central to free speech, such as those of self-government,<sup>76</sup> the checking function,<sup>76</sup> and marketplace of ideas,<sup>77</sup> are merely sub-values of self-realization. Thus, Redish argues that all forms of expression that further self-realization should receive full constitutional protection:

Just as we require a free flow of information regarding the political process because we value the concept of political realization, so too, should we require an open exchange of ideas and information in the marketplace that will help the individual govern his personal life.<sup>78</sup>

According to this theory, commercial speech, such as advertising, which helps individuals make decisions about how best to run their lives and maximize welfare, should receive constitutional protection.<sup>79</sup> According to Redish:

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(1984).

<sup>76</sup> This view, which is most closely associated with Alexander Meiklejohn, argues that the essence of American democracy is self-government by the people. Self-government requires that the electorate be informed about those matters which impact upon self-governance. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255. Based on this view, several commentators have argued that only speech relating directly to the political process should receive first amendment protection. See, e.g., Jackson & Jeffries, *supra* note 72 at 2 (arguing that commercial speech, because it is "part and parcel of the economic marketplace," is excluded from first amendment protection). See also, Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing in favor of constitutional protection only for explicit political speech). Redish argues that these commentators define self-government too narrowly; he broadens self-government to include speech that promotes private decisionmaking. Redish, *supra* note 73, at 442.

<sup>76</sup> See generally, Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (arguing that freedom of speech serves the central value of "checking" the abuse of power by the government).

<sup>77</sup> This theory is most often associated with the writings of John Stuart Mill. See JOHN STUART MILL, *ON LIBERTY* (Currin Shields, ed. 1956). Although contemporary commentators generally reject this approach, Supreme Court decisions often speak in language supportive of it. Perhaps the most famous expression of this viewpoint was made by Justice Holmes: "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The Supreme Court affirmed Holmes's "marketplace" theory in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969), stating that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."

<sup>78</sup> Redish, *supra* note 73, at 445.

<sup>79</sup> In *State Board of Virginia Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court employed a similar argument in determining that commercial



By providing the consuming public with information, commercial speech aids society in attaining its goal of intellectual self-fulfillment. More importantly, commercial speech helps the individual to plan his or her life rationally and to achieve the maximum satisfaction possible within the reach of his or her resources. In so doing, commercial speech serves the important catalytic function for the achievement of personal self-realization.<sup>80</sup>

Elemental to this theory is the view that the first amendment right to freedom of speech resides in the consumer, or the receiver of the speech, and not in the speaker.<sup>81</sup> It follows from Redish's analysis that New York's nonsolicitation regulation deprives a homeowner of important information about the housing market. For most homeowners, a home is among their most significant financial investments. Hence, any regulation that denies a homeowner potentially important information about the possible sale of this asset should be subject to scrutiny.

Redish does not advocate an absolute or unlimited free speech right, however. Only commercial speech that serves an informational function and promotes rational enlightenment warrants full first amendment protection.<sup>82</sup> Thus, fear-peddling communications usually associated with blockbusting, those which appeal to homeowners' irrational fears and prejudices, would receive limited scrutiny. In addition, the strong presumption in favor of expression may be outweighed by the presence of a compelling governmental interest;<sup>83</sup> in this case, the promotion of stable, diverse neighborhoods.<sup>84</sup>

New York's nonsolicitation statute, however, too broadly restrains all solicitations, including truthful representations. A homeowner will be prevented from receiving information about

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speech should receive first amendment protection. 425 U.S. 748, 763 (1976) (acknowledging that a consumer's interest in the free flow of commercial information regarding drug prices "may be as keen, if not keener by far, than his interest in the day's most urgent political debate").

<sup>80</sup> Redish, *supra* note 73, at 472.

<sup>81</sup> Redish, *supra* note 73, at 434.

<sup>82</sup> Informational commercial speech is defined as "communication that provides rational enlightenment to the consumer concerning the merits of a product or brand, so that he may make a more intelligent choice in the marketplace. The more rational information conveyed, the more 'informational' the advertising can be considered." Redish, *supra* note 73, at 447.

<sup>83</sup> REDISH, *supra* note 74, at 261.

<sup>84</sup> See *supra* text accompanying notes 1-18.

the housing market. Pursuant to the New York nonsolicitation regulation at issue in *Shaffer*, the homeowner is barred from receiving letters, postcards, handbills, leaflets or fliers, telephone calls and door-to-door calls, or from seeing any advertisement featured in free local weekly newspapers.<sup>85</sup> The state action impinges on individuals' ability to govern their lives and make decisions that might maximize satisfaction. Since the expression conveys significant factual information that would be valuable to homeowners, the court should have discounted the state interest. In short, according to the self-realization theory, the nonsolicitation order is unconstitutional.

## 2. The Liberty Theory: Devaluing Commercial Speech

The liberty theory articulated by C. Edwin Baker offers another approach to the self-realization paradigm.<sup>86</sup> The liberty theory focuses on the speaker's right to speak, rather than the listener's right to receive information.<sup>87</sup> According to Baker,

as long as speech represents the freely chosen expression of the speaker, depends for its power on the free acceptance of the listener, and is not used in the context of a violent or coercive activity, freedom of speech represents a charter of liberty for noncoercive action.<sup>88</sup>

The primary motivations for protecting speech are promoting the speaker's individual autonomy, self-fulfillment and ability to participate in democratic change.

Commercial speech falls outside the scope of this protection because, by definition, it does not represent the freely chosen expression of the speaker. It does not arise from an individual's use of speech "as a tool for understanding and communicating about th[e] world in ways she finds important."<sup>89</sup> Rather, commercial speech arises from externally imposed market forces that require profit-maximization. Essen-

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<sup>85</sup> [1991] 19 N.Y.C.R.R. § 178.5(c).

<sup>86</sup> See generally, BAKER, *supra* note 73.

<sup>87</sup> BAKER, *supra* note 73, at 197. For a discussion of the theoretical importance of the listener's right to receive information, see *supra* note 80 and accompanying text.

<sup>88</sup> BAKER, *supra* at 73, at 69.

<sup>89</sup> BAKER, *supra* note 73, at 196.

tially, when a speaker acts in a commercial role, she is merely an instrument of the market. The "source" of commercial speech resides in the structure of the market itself, not in the speaker as an individual. The "domination of profit, a structurally required standard, breaks the intrinsic connection between speech and any vision, or attitude, or value of the individual."<sup>90</sup>

Applying the liberty theory to the nonsolicitation orders at issue in *Shaffer*, it becomes readily apparent that regulating the speech of real estate brokers involves no liberty interest. In contrast to the strict scrutiny standard posited under the self-realization theory, under the liberty theory such commercial speech, being but a component of commercial activity, should be regulated according to the same rational basis standard applied to all other commercial activity. Thus, the Constitution permits the nonsolicitation statute and orders provided that they reasonably relate to a legitimate governmental objective.<sup>91</sup> Given that the Secretary of State offered ample proof that blockbusting was a problem in these particular areas, and that the nonsolicitation orders offered a reasonable means of combating blockbusting,<sup>92</sup> the state's restrictions would easily meet this low standard.

In fact, the liberty theory does not merely permit such a statute: it actively endorses its promulgation. The nonsolicitation statute itself is an expression of political choice as to which values society wishes to promote. It reflects citizens' essential liberty to shape society.<sup>93</sup> Indeed, regulation of blockbusting counters the divisive effects of the real estate market, forces unaffected by the larger societal goals of community stability and racial diversity.<sup>94</sup>

One aspect of the liberty theory of particular importance in the blockbusting context is its distinction between the "prof-

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<sup>90</sup> BAKER, *supra* note 73, at 202.

<sup>91</sup> Justice Rehnquist, who has consistently dissented from Supreme Court decisions giving commercial speech a measure of first amendment protection, has agreed with Baker's position that the government should be given a free hand to regulate commercial speech. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting).

<sup>92</sup> *Shaffer*, 27 F.3d at 843-44.

<sup>93</sup> BAKER, *supra* note 73, at 205.

<sup>94</sup> *See* Michael Alexander, *Housing Split: No End to Trend*, *NEWSDAY*, Sept. 24, 1990, at 7 (describing effect of market forces on real estate brokers).

it-making enterprise" and the "household."<sup>95</sup> According to Baker, capitalist society separates these two spheres: citizens live out and express personal values at home and serve as profit-maximizers in business.<sup>96</sup> This distinction is pivotal in defining those uses of property that will be protected under the liberty theory, and those uses of property that will not. Those uses of property that express private, personal values are protected as an important component of essential liberty. Uses of property for purposes of market exchange, however, do not receive comparable protection. In the market-exchange context, the owner values property only for its exchange value. In that context,

[s]he uses the property solely as a means to influence or gain temporary power over another. When the government restricts these exchange-oriented practices, it only restricts people's opportunity to exercise power over others, not people's expression of their own values or their own autonomy.<sup>97</sup>

The regulation of exchanges is a proper use of governmental authority. It is an expression of collective control over the distribution of resources and a way of favoring certain opportunities and disfavoring others.

An ironic result occurs in the context of commercial speech related to the real estate market. Although activities within one's home generally are protected as residing within the sphere of liberty,<sup>98</sup> this characterization changes once the home is placed on the market. The home's identity as a focal point of protected liberty becomes transformed. It is "treated as a regulatable part of the system of commerce rather than part of the system of freedom of expression or of individual liberty."<sup>99</sup> The home becomes an asset, and speech about the home becomes susceptible to regulation. In sum, according to the liberty theory, the nonsolicitation ordinance at issue in *Shaffer* permissibly regulates commercial speech.

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<sup>95</sup> BAKER, *supra* note 73, at 200.

<sup>96</sup> BAKER, *supra* note 73, at 200-02.

<sup>97</sup> BAKER, *supra* note 73, at 211.

<sup>98</sup> See *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2047 (1994) ("A special respect for individual liberty in the home has long been part of our culture and our law.").

<sup>99</sup> BAKER, *supra* note 73, at 218.

## B. *An Eclectic Approach: Commercial Speech and Real Estate*

The self-realization and liberty theories are limited by their absolutist postures. Both fail to balance the various competing interests at stake in the commercial speech context. The following analysis, based on Professor Steven Shiffirin's eclectic approach, denies that any general theory can properly dictate solutions in most actual cases.<sup>100</sup> While informed by the self-realization and liberty theories, this approach is inclusive in that it accepts that the First Amendment protects many different values and that, in a particular situation, one or more of those values may be of increased importance. The eclectic approach balances the importance of speech against other societal goals without presumptively elevating speech above all other values.<sup>101</sup> This approach recognizes the reciprocal nature of the speech right, affirms the centrality of an antipaternalistic approach to legislation, and then weighs the utility of that legislation. Under this analysis, the nonsolicitation regulation does not withstand constitutional scrutiny.

### 1. Whose Speech Right Is It?

An analysis of the constitutional question at issue in *Shaffer* requires a court to identify whose speech right ought to be protected. As noted above, the liberty and self-realization theories answer this question differently. Under the self-realization theory, the right to free speech belongs to those who will be denied important information that might help them govern their lives.<sup>102</sup> Thus the antisolicitation orders, though

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<sup>100</sup> Shiffirin, *supra* note 73, at 1255.

<sup>101</sup> The eclectic approach is premised on views similar to those of intuitionists, who believe that the "complexity of the moral facts defies our efforts to give a full account of our judgments and necessitates a plurality of competing principles." Shiffirin, *supra* note 73, at 1254. See also JOHN RAWLS, A THEORY OF JUSTICE 39 (1971).

<sup>102</sup> The self-realization theory is discussed *supra* notes 74-85 and accompanying text. Although the speech being restricted is aimed primarily at homeowners in designated areas, the nonsolicitation regulation will affect the speech rights of a much larger audience. Since the regulation prohibits a wide range of communications, others who will be denied information include prospective homeowners seeking real estate listings as well as other members of the community using real estate advertisements as a source of information about the real estate market. [1992] 19 N.Y.C.R.R. § 178.5(a). See *supra* notes 35-36 and accompanying text.

commercial in nature, run afoul of the First Amendment. Conversely, according to the liberty theory, the right to free speech resides in the speaker. In the context of *Shaffer*, because the right-holder speaks in a commercial exchange, no speech right is implicated.<sup>103</sup> Both approaches are flawed.

The nonsolicitation order remains too prophylactic with regard to truthful noncoercive statements. Broad regulation prohibiting any solicitations by real estate agents, including truthful statements, is impermissibly restrictive. Justice Harry Blackmun has described such a blunt approach as an "absurdity," particularly in the context of residential real estate, which involves 'one of the most important decisions [individuals] have a right to make: where to live and raise their families.'<sup>104</sup>

Yet, even assuming that a speaker has free speech rights in this instance, a successful theory must solve the problem of how far these rights will extend. The recent decision in *R.A.V. v. City of St. Paul*<sup>105</sup> signals the danger of giving commercial speakers the same speech rights as private speakers. In *R.A.V.*, the Supreme Court struck down a city ordinance that criminalized the placement on public or private property of any symbol, such as a burning cross or Nazi swastika, "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."<sup>106</sup> According to the Court, the ordinance constituted an impermissible content-based restriction on free speech.<sup>107</sup>

Applying such an expansive view of the First Amendment to commercial speech undermines the very basis of consumer protection regulation. For example, the prohibition against content-based speech restrictions articulated in *R.A.V.* could allow blockbusters to engage in commercial hate speech. There must, however, be a balance. The speaker's right to speak needs to be balanced against the homeowner's desire to be free

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<sup>103</sup> For a discussion of the liberty theory, see *supra* notes 86-99 and accompanying text.

<sup>104</sup> *City of Cincinnati v. Discovery Network, Inc.* 113 S. Ct. 1505, 1520-21 (1993) (Blackmun, J., concurring) (quoting *Linmark Assocs. Inc. v. Willingboro*, 431 U.S. 85, 98 (1977)).

<sup>105</sup> 112 S. Ct. 2538 (1992).

<sup>106</sup> *Id.* at 2541 (quoting MINN. LEGIS CODE § 292.02 (1990)).

<sup>107</sup> *Id.* at 2547.

from unwanted speech. Certainly, a large part of commercial speech regulation aims to protect citizens from being inundated and manipulated by commercial forces.<sup>108</sup>

In short, a middle ground needs to be found between the poles of the self-realization and liberty theories that would acknowledge the speech right's reciprocal nature. As Justice Blackmun stated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising."<sup>109</sup> This middle ground would grant free speech protection to individuals who want the benefit of receiving real estate solicitations. Simultaneously, those who do not want to receive these communications should have a means to protect themselves from overly aggressive marketing pressures, particularly communications that infringe upon the privacy within the home. On the other side of the spectrum, the free speech right should be granted to commercial speakers whose livelihood depends on the ability to make representations to homeowners, prospective homeowners and those otherwise interested in the real estate market.

## 2. Balancing the Speech Rights: Beyond Paternalism

A successful balancing approach requires the development of guiding principles that avoid the uncertainty and unpredictability of the broad balancing approach of *Central Hudson*. One way to discern such a principle is by returning to *Virginia Pharmacy*, a case which marked a turning point in commercial speech doctrine. Indeed, much of the murkiness in current commercial speech doctrine can be traced to the Court's backpedaling from the principles enunciated in *Virginia Pharmacy*.<sup>110</sup>

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<sup>108</sup> See, e.g., BAKER, *supra* note 73, at 54-69 (arguing that speech that manipulates and/or coerces should be regulated).

<sup>109</sup> 425 U.S. 748, 757 (1975).

<sup>110</sup> In *Virginia Pharmacy*, the Supreme Court held for the first time that some commercial speech was protected by the First Amendment, applying a "least restrictive means" test. In essence, the Court affirmed that true commercial speech about lawful activity should receive as much protection as political speech. 425 U.S. at 772. Yet, within two years, the Court held that commercial speech should receive a "limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Assoc.*,

The underlying premise of *Virginia Pharmacy* is that first amendment scrutiny should be applied *whenever* the government seeks to suppress the dissemination of true statements.<sup>111</sup> In that case, the Supreme Court overturned a regulation prohibiting pharmacists from advertising drug prices.<sup>112</sup> The state argued that such advertising would most likely lead unwise consumers to make drug purchasing decisions based solely on price. As a result, price competition would lower the professional standards of licensed pharmacists, thereby lowering the level of health care in the state.<sup>113</sup>

The Court criticized the paternalistic view the state took of its citizens.<sup>114</sup> The problem with the state's approach is that it deprived consumers of valuable information, and also robbed them of their dignity. According to Professor Shiffrin, "when government prevents willing speakers from speaking the truth to audiences in order to manipulate their decisionmaking, it engages in an especially offensive form of paternalism."<sup>115</sup> Such paternalism offends the respect citizens are owed by government.<sup>116</sup>

Applying the antipaternalistic principle of *Virginia Pharmacy* to the statute and orders involved in *Shaffer*, the New York statute clearly fails. The nonsolicitation regulation, like the statute in *Virginia Pharmacy*, suppresses communication based on the fear that the response of the listening public will impact negatively upon society. Advocates of the nonsolicitation statute fear that if real estate brokers solicit listings and provide information about the housing market, homeowners will respond by selling their homes. Other homeowners

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436 U.S. 447, 456 (1978).

<sup>111</sup> "What is at issue is whether a State may completely suppress the dissemination of coincidentally truthful information about entirely lawful activity . . . [W]e conclude that the answer to this . . . is in the negative." *Virginia Pharmacy*, 425 U.S. at 770.

<sup>112</sup> *Id.* at 750-51.

<sup>113</sup> *Id.* at 766.

<sup>114</sup> *Id.* at 769.

<sup>115</sup> Shiffrin, *supra* note 73, at 1259.

<sup>116</sup> This view is reflected in both the self-realization and liberty theories. Professor Thomas Emerson, in his discussion of the self-fulfillment value as one of four values underlying the First Amendment also asserts the centrality of human dignity to first amendment analysis. ("[S]uppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature.") THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1966).



who see their neighbors selling their homes will be persuaded to do likewise. As a result, the neighborhood will become re-segregated.<sup>117</sup> This rationale, like the one rejected by the Court in *Virginia Pharmacy*, is based on the view that individuals will misuse information that they receive.

### 3. Balancing Antipaternalism: The Marketplace of Ideas

The principle of antipaternalism, though helpful, remains incomplete. Commercial speech does need to be checked in order to properly protect consumers from being unfairly manipulated. Other values, such as the promotion of racial diversity, may override the free speech value in a particular context.

Professor Shiffrin suggests that a principle that could help courts balance the interests of the consumer can be found by returning to John Stuart Mill's theory of the marketplace of ideas.<sup>118</sup> Mill's basic claim that government should not prohibit "false" speech derives from his belief in the fallibility of the government and from the possibility that the government may act out of bias or in an effort to repress minorities.<sup>119</sup> Mill did not reject all regulation of speech; rather, he offered a utilitarian approach. This approach provides an appropriate balance to the antipaternalistic approach, because it grounds the analysis in concrete facts. According to Mill, utility is

the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being. Those interests . . . authorize the subjection of individual spontaneity to external control only in respect to those actions of each which concern the interest of other people. If anyone does an act hurtful to others, there is a *prima facie* case for punishing him by law.<sup>120</sup>

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<sup>117</sup> See, e.g., *Shaffer*, 27 F.3d at 836. This paternalistic approach is articulated in the Secretary of State's statement in support of the nonsolicitation orders. See MEMORANDUM OF DEPARTMENT OF STATE, *supra* note 36, at 2251.

<sup>118</sup> MILL, *supra* note 77, at 6-7. See also, Shiffrin, *supra* note 73, at 1212.

<sup>119</sup> MILL, *supra* note 77, at 6-7. See also, F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 86 (1982) ("[f]reedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders").

<sup>120</sup> MILL, *supra* note 77, at 14. See also, John Stuart Mill, "Utilitarianism," in THE UTILITIARIANS 399-472 (Dolphin ed. 1961).

Hence, according to Mill's approach, speech cannot be suppressed simply because the majority disagrees with that speech. Speech can be suppressed, however, if it will cause significant harm.

In turning to the nonsolicitation statute and accompanying orders, an eclectic approach distinguishes the marketplace concern about improper government bias from the concern about ensuring the free flow of truth in the marketplace.<sup>121</sup> The first step, then, would be to ask whether the suppression of information represents an impermissible government bias. The normative answer would be, "No." Both sides in *Shaffer* agree that blockbusting is an evil that should be prohibited.

The resolution of the question then turns on whether governmental action, on balance, promotes utility. This question requires a fact-specific analysis of the regulation. Does the governmental action successfully halt resegregation or promote racial diversity? Are there other positive and negative externalities caused by the legislation? For example, does the legislation have the effect of limiting housing opportunities for minorities wanting to move into these communities? What is its impact on the real estate industry? Does the regulation promote racial stability or engender increased divisiveness?

The first question is whether the nonsolicitation scheme effectively stops the harm of resegregation. It can be assumed that a broad restriction, which prohibits practically all solicitations from real estate agents in certain areas, will be effective in stopping outright blockbusting. The pervasiveness of housing discrimination in our society suggests, however, that antiblockbusting regulations have not succeeded in curbing more subtle forms of blockbusting. Because fair housing remains the most controversial and emotional issue in the area of civil rights, less progress has been accomplished in fair housing than in any other area of civil rights.<sup>122</sup> Whites are "more opposed to living in an integrated neighborhood than they are to working with, or having their children go to school with minorities."<sup>123</sup>

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<sup>121</sup> Shiffrin, *supra* note 73, at 1270.

<sup>122</sup> Lamb, *supra* note 10, at 369; *see also*, C. BULLOCK & H. RODGERS, *RACIAL EQUALITY IN AMERICA: IN SEARCH OF AN UNFULFILLED GOAL* 196 (1975).

<sup>123</sup> Lamb, *supra* note 10, at 369.

Many reasons have been offered for the persistence of housing discrimination. One is the perception that whites gain as a result of housing segregation.<sup>124</sup> On a psychological level, segregated housing reassures whites that "there is someone beneath them on the social ladder."<sup>125</sup> White suburbs make their inhabitants feel more secure, shielded from the problems of the inner cities.<sup>126</sup> On an economic level, whites perceive that the entrance of minorities into white communities will inevitably cause property values to fall.<sup>127</sup> Although research has revealed that this perception is largely a myth, whites continue to maintain segregated housing to protect the value of their property.<sup>128</sup>

As a result of these factors, whites tend to abandon residential neighborhoods once blacks move into white areas. "Tipping" is the sociological term used to refer to the critical point at which whites, either a single family or collectively, leave a community, because of black entry into the neighborhood.<sup>129</sup> The tipping point is a "watershed—a point of black entry prior to which white residency is a self-sustaining condition and beyond which white departure is a self-sustaining process."<sup>130</sup> Although the tipping point varies with each community, ranging from twenty to sixty percent of black population, the average is reported to be in the twenty to thirty percent range.<sup>131</sup> Tipping cannot be predicted with certainty, but research suggests that white flight is a phenomenon that often becomes irrevocable.<sup>132</sup>

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<sup>124</sup> Lamb, *supra* note 10, at 368.

<sup>125</sup> Lamb, *supra* note 10, at 371 (quoting BULLOCK & RODGERS, *supra* note 122, at 6).

<sup>126</sup> Lamb, *supra* note 10, at 371. See also C. HAAR & D. IATRIDIS, HOUSING THE POOR IN SUBURBIA: PUBLIC POLICY AT THE GRASSROOTS 10 (1974).

<sup>127</sup> Lamb, *supra* note 10, at 371. See also, R. HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS (1969).

<sup>128</sup> Lamb, *supra* note 10, at 371.

<sup>129</sup> John M. Goering, *Neighborhood Tipping and Racial Transition: A Review of Social Science Evidence*, 44 J. AM. INST. PLANNERS 68, 70-76 (1978).

<sup>130</sup> Thomas C. Schelling, *A Process of Residential Segregation: Neighborhood Tipping*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 166 (Anthony H. Pascal, ed., 1972).

<sup>131</sup> Rodney A. Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs that Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891, 895.

<sup>132</sup> Bruce L. Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245, 255 (1974).

Nonsolicitation legislation aims to stop white flight from occurring in the first place. Unfortunately, the persistence of segregation in our society and the continuing trend of whites moving away from blacks suggests that antiblockbusting legislation, although well-meaning, is largely ineffective in promoting racial diversity. Though it may stop the pernicious blockbusting practices of the real estate brokers, it appears that by focusing exclusively on the acts of real estate professionals, the regulation fails to target the behavior of white homeowners.

Although the nonsolicitation legislation may not promote racial diversity effectively, it is not devoid of value. Some positive externalities result. The positive effects of the legislation reflect the values advanced by the liberty theory. Because they limit the actions of real estate agents, nonsolicitation orders serve to protect homeowners' legitimate privacy interests. Blockbusters prey on white homeowners by inundating them with solicitations of all types—phone calls and both door-to-door and mail solicitations. The sheer quantity of solicitation in itself becomes unnerving.<sup>133</sup> Moreover, the nonsolicitation ordinance protects homeowners from being manipulated by fear-peddling tactics.<sup>134</sup>

The nonsolicitation legislation also requires public hearings which serve a positive educational and community-building function. The hearings give the public an opportunity to voice its concerns about blockbusting in the community and provide a forum for education about the issue.<sup>135</sup> In addition, the hearing itself facilitates community organization. Since blockbusters aim to break apart neighborhoods, these hearings serve the vital function of helping to bring neighborhood residents together.<sup>136</sup>

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<sup>133</sup> See Note, *Blockbusting: A Novel Statutory Approach to an Increasingly Serious Problem*, 7 COLUM. J. L. SOC. PROB. 538, 541-42 (1971) [hereinafter "A Novel Statutory Approach"].

<sup>134</sup> A *Novel Statutory Approach*, *supra* note 133, at 542.

<sup>135</sup> Pursuant to § 442-h of the New York Real Property Law, the Secretary of State holds numerous public hearings in the process of drafting the nonsolicitation orders. N.Y. REAL PROP. L. § 442-h(2)(2) (McKinney Supp. 1995). These hearings are often well-attended and are reported in the press. See, e.g., Stuart Vincent, *Steering Complaints: Elmont Residents Heap Data on State Panel*, NEWSDAY, Mar. 25, 1993, at 37; Paul Vitello, *Suburban Form of Apartheid*, NEWSDAY, Jan. 31, 1990, at 6.

<sup>136</sup> Community organizing is one of the most effective ways to combat blockbust-

On the other hand, the nonsolicitation regulations strengthen negative externalities. First, such regulations suppress practically all real estate solicitations in a designated area, both those which are expressions of blockbusting and those which are not. This suppression restricts the free flow of information about the real estate market. Although the restrictions may be defensible as a means of protecting the privacy interests of white homeowners and promoting neighborhood tranquility, the legislation has the effect of obstructing blacks from moving into these neighborhoods. From the start, the legislation dissuades real estate brokers from opening the market to prospective minority homeowners.<sup>137</sup>

The legislation also closes the market to many prospective minority purchasers by raising housing costs. First, the regulations have the effect of raising the price of homes in the nonsolicitation area. The nonsolicitation orders, by making listings scarce and difficult to obtain, effectively give a monopoly to homeowners in the area. By chilling the market, those homes that are for sale will increase in price because the supply will be limited. This, too, will have the effect of slowing the move of those who seek to enter the housing market.

As the *Shaffer* court noted, nonsolicitation orders also raise costs, by not offering real estate agents a cost-effective method of obtaining listings.<sup>138</sup> The resulting increased costs of real estate broker in procuring listings will be passed on to the purchaser, if the market can bear the cost. If the market will not bear the cost, however, the real estate broker will bear the loss. In that case, the real estate broker working in a nonsolicitation zone will be singled out to pay the cost of promoting racial stability in a neighborhood. In essence, the real estate broker is bearing a tax.

The above analysis leads to the conclusion that the nonsolicitation legislation is of limited social utility. Little supports the view that this legislation effectively promotes diversity or stops resegregation. The legislation is socially useful in that it protects homeowners' privacy rights, and

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ing. See, e.g., Jim Bryant, *Neighbors Inc., Still Tackles Local Problems*, WASH. POST, June 29, 1983, at 25.

<sup>137</sup> A Novel Statutory Approach, *supra* note 133, at 551-52.

<sup>138</sup> *Shaffer*, 27 F.3d at 844.

serves as a vehicle for public education and community building. These positive features are outweighed, however, by the negative externalities: suppression of information, exclusion of blacks and minorities from neighborhoods, raising of housing costs, granting of a monopoly to homeowners and taxing of the real estate industry.

In sum, an eclectic approach leads to the conclusion that the legislation should be struck down. Due to the excessive paternalism of the legislation and its low social utility, the nonsolicitation legislation improperly impinges on free speech rights and is therefore unconstitutional. The statute authorizing the establishment of nonsolicitation zones is also a highly suspect infringement of free speech rights. Despite the Second Circuit's disclaimer that its narrow ruling striking down the nonsolicitation orders did not "reach the question of whether under certain facts and circumstances and under a different record, the Secretary might be able to justify some type of nonsolicitation regulation under 442-h,"<sup>139</sup> it is readily apparent that any future nonsolicitation order will be vulnerable to constitutional attack—unless it is utterly toothless.

One type of state remedy remains available to stop blockbusters and promote racial diversity. By statute, real estate brokers are prohibited from soliciting a homeowner who has stated to a broker, in writing, that he or she does not "desire to sell, lease or list such property."<sup>140</sup> This "cease-and-desist" statement protects homeowners' privacy rights and promotes community stability. Unfortunately this remedy can become time-consuming for the homeowner, since it requires the homeowner to contact each real estate firm individually. Another negative aspect of the cease-and-desist statement is that it is essentially private. It does not provide an opportunity for neighbors to alert each other about blockbusting in the neighborhood.

A more effective version of this remedy is the cease and desist zone. The Secretary of State has the authority to establish a cease-and-desist zone when it is determined that "some owners of residential real property within a defined geographic

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<sup>139</sup> *Id.*

<sup>140</sup> [1991] N.Y.C.C.R. § 175.17(b)(1).

area are subject to intense and repeated solicitation."<sup>141</sup> Homeowners located in the zone may file a statement with the Secretary of State asking not to be solicited by real estate brokers. The Secretary of State then compiles the list of these homeowners and sends them to real estate brokers. Brokers are prohibited from soliciting these homeowners. The cease-and-desist zone, besides being less costly and time consuming for the homeowner, ensures that all brokers fall under the order.

The cease-and-desist remedy properly balances free speech interests. Just as an individual has a right to the free flow of information, so too, does an individual have the right "to be let alone."<sup>142</sup> In balancing these interests, the Supreme Court "has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property."<sup>143</sup> A cease-and-desist remedy reflects the concerns of the liberty theory by respecting the rights of the autonomous individual while allowing the real estate broker to speak until he or she is asked not to.

The cease-and-desist remedy, however, lacks a community-awareness function. Whereas the nonsolicitation zone requires public hearings, which could galvanize community activism to combat blockbusters, the process of creating the cease-and-desist zone does not. Thus, public hearings should become part of the process of establishing cease-and-desist zones.

Although the cease-and-desist remedy remains a valid option, it is still too limited because it is merely a defensive action. Like the nonsolicitation order, it is not a direct solution to the problem of white flight or persistent resegregation.<sup>144</sup> Repressing speech to promote integration is a discount remedy with little impact. Without an accompanying policy supporting racial diversity, such laws reflect a lack of legislative seriousness or commitment. Repression of speech will not solve the problem of racial segregation and its attendant symptoms. If

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<sup>141</sup> N.Y. REAL PROP. L. § 442-h(3)(2) (McKinney 1995).

<sup>142</sup> *Rowan v. United States Post Office*, 397 U.S. 728, 736 (1970).

<sup>143</sup> *Id.* at 737; see also *Martin v. City of Struthers*, 319 U.S. 141, 148-49 (1943) ("[a] city can punish those who call at a home in defiance of the previously expressed will of the occupant").

<sup>144</sup> See DERRICK A. BELL, JR. *RACE, RACISM AND AMERICAN LAW* 745 (3d ed. 1992).

society wants seriously to promote housing diversity, more speech, not less, will be necessary.

## CONCLUSION

Racial segregation in residential housing remains one of the most intractable problems in the area of civil rights. In an effort to halt the phenomenon of "white flight" and resegregation, New York state has promulgated nonsolicitation legislation. This legislation, rather than directly addressing the problem of racial discrimination and prejudice, combats blockbusting by suppressing representations of real estate brokers. In doing so, the nonsolicitation remedy runs afoul of the First Amendment.

The Second Circuit erred by narrowly holding that the nonsolicitation orders were unconstitutional because the Secretary of State did not present sufficient evidence of blockbusting in each geographical area. The court's narrow holding has opened the door for the State to continue to test the limits of the commercial speech doctrine by promulgating new nonsolicitation orders, despite the likelihood that they, too, will eventually be struck down. The Second Circuit should have held that the nonsolicitation statute itself was unconstitutional, thereby foreclosing future attempts to suppress speech as a way of stopping blockbusting. It should have sent a signal to the legislature that new, more effective ways to combat housing discrimination and segregation, and promote diversity should be pursued.

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