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Consitutional Law: The First Amendment and Commercial Advertising

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CONSTITUTIONAL LAW: THE FIRST AMENDMENT AND COMMERCIAL ADVERTISING—*Virginia State Board of Pharmacy v. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

I. INTRODUCTION

The first amendment of the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."[1] This restriction on legislative power applies to the state legislature as well as the United States Congress due to the adoption of the fourteenth amendment and subsequent decisions of the Supreme Court of the United States interpreting the first and fourteenth amendments.[2] Nevertheless, the Supreme Court, as the final interpreter of the Constitution, has been unwilling to give the force of law to the plain meaning of the above quoted language of the first amendment. The Court has consistently held that Congress or the states may abridge the freedom of speech if certain types of speech are involved.

Until *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[3] one such unprotected type of speech was "purely commercial advertising" or "commercial speech" as it was later identified.[4] Although it was not stated explicitly in any of the cases, the thought behind the exception seems to have been that the first and fourteenth amendments protected speech in the marketplace of ideas, especially if the idea was political or religious, but in the marketplace of products or services, the Constitution imposed no restrictions on either federal or state government in respect to purely commercial advertising.[5] As a result, these governments were free to regulate or prohibit commercial speech in almost any manner.

II. FACTS

The dispute in this case arose when a resident of Virginia, who was required to take prescription drugs daily for treatment of a disease, and two nonprofit organizations,[6] each with many members who used prescription drugs, brought suit in the United States Dis-

1. U.S. CONST. amend. I.

2. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809 (1975); Martin v. Struthers, 319 U.S. 141 (1943).

3. 425 U.S. 748 (1976) [hereinafter referred to as Board v. Consumers].

4. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942) (purely commercial advertising); Martin v. Struthers, 318 U.S. 141 (1943) (commercial speech).

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

6. In addition to the named plaintiff, the Virginia state AFL-CIO also joined in the suit.

trict Court for the Eastern District of Virginia. The plaintiffs challenged, under the first and fourteenth amendments, one section of a Virginia statute[7] which declared it to be unprofessional conduct for any pharmacist to advertise the price of any drug dispensed only by prescription. The defendants in the suit were the Virginia State Board of Pharmacy, the state agency which regulated the practice of pharmacy in Virginia, and its individual members. Among the Board's extensive regulatory powers were its authority to issue the license a pharmacist was required to have in order to practice pharmacy in Virginia, and to enforce the advertising prohibition by disciplining a pharmacist found guilty of unprofessional conduct by revoking or suspending the required license. Because the broad advertising prohibition applied to pharmacists, and since with few exceptions, only licensed pharmacists could dispense prescription drugs in Virginia,[8] normal advertising and effective dissemination of prescription drug price information was forbidden by the statute.[9]

The parties to the suit stipulated that pharmacy was a profession and that prescription drug prices varied within the same locality in Virginia by as much as 650 percent for the same prescription and as much as 1200 percent within the same locality in the nation. They also stipulated that ninety-five percent of all prescriptions were now filled with dosage forms prepared by the drug manufacturer and that, without the statute, some pharmacies in Virginia would advertise prescription drug prices.[10]

In striking down the Virginia statute, the district court[11] entered an order of injunction and a declaratory judgment for the plaintiffs. The statute had to fall because, in the court's view, it denied the plaintiffs their first amendment right to know, without an adequate justification of the denial by the Board.[12]

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7. VA. CODE § 54-524.35 (1974) reads in relevant part: "Any pharmacist shall be considered guilty of unprofessional conduct who . . . (3) published, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription."

8. *Id.* section 54-524.53. The provision excepts legally qualified practitioners of medicine, dentistry, osteopathy, chiropody, and veterinary medicine.

9. Board v. Consumers, 425 U.S. 752-54.

10. *Id.* at 752-55.

11. The district court sat as a three judge panel which consisted of Senior Circuit Judge Bryan, the author of the court's opinion, and District Judges MacKenzie and Merhige.

12. Virginia Citizens Consumer Council, Inc. v. Virginia State Board of Pharmacy, 373 F. Supp. 683 (E.D. Va. 1974).

III. HOLDING

On direct appeal the Supreme Court of the United States[13] affirmed, in an opinion written by Justice Blackmun.[14] The first issue decided by the Court was "whether, even assuming that First Amendment protection attaches to the flow of drug price information, it is a protection enjoyed by the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information."[15] The majority's answer, conditioned on the later finding that there was a right to advertise, was that a reciprocal right to receive advertising did exist and that this right could be asserted by the appellees in this case.[16] The Court arrived at this conclusion through the stipulation of the parties that, in the absence of the challenged statute, some pharmacies in Virginia would advertise; that is, a willing speaker existed. Using this basis, the Court relied on a series of cases[17] which held that the protection provided by the first amendment attached to the communication, and thus protected both the source of the communication and any recipient of the communication. Therefore, the appellees could assert their right to receive advertising if the advertising was found to be protected by the Constitution.[18]

The second issue before the Court was whether there existed a first amendment exception for commercial speech; that is, whether speech which merely proposed a commercial transaction and did not concern itself with ideas on the subjects of truth, science, morality, the arts, or government was beyond all protection of the first amendment.[19] The majority's answer was that there was no first amendment exception for commercial speech that was so broad as to place commercial speech beyond all protection of the first amendment.[20]

The Court reached this conclusion by examining the interests of the parties involved. Although the advertiser's interest might be purely economic, this alone did not disqualify him from first amend-

13. The defendants appealed under 28 U.S.C. § 1253: Direct appeals from decisions of three-judge courts.

14. Chief Justice Burger and Justice Stewart each wrote concurring opinions. Justice Rehnquist dissented and Justice Stevens did not participate.

15. Board v. Consumers, 425 U.S. at 756.

16. *Id.*

17. Procunier v. Martinez, 416 U.S. 396 (1974); Kleindienst v. Mandel, 408 U.S. 753 (1972); Lamont v. Postmaster General, 381 U.S. 301 (1965).

18. Board v. Consumers, 425 U.S. at 756-57.

19. *Id.* at 762.

20. *Id.*

ment protection, since an employer's economic interests had been held not to disqualify him from protection when he spoke on the merits of a labor dispute in order to influence its outcome. Consumers and society in general had a strong interest in the free flow of commercial information because such information would enable them to expend their scarce dollars and other resources more efficiently. The state, while it had a strong interest in maintaining a high degree of professionalism among its licensed pharmacists, could satisfy its interests in other ways. The advertising ban did not directly affect professional standards, but it did keep the public ignorant of the entirely lawful terms that competing pharmacists were offering.[21]

Whatever might by the proper bounds of time, place, and manner restrictions, they were clearly exceeded by this statute which singled out speech of a particular content and sought to prevent its dissemination entirely. There was no claim that prescription drug price advertisements were forbidden because they were false or misleading, nor that the transactions proposed in the advertisements were themselves illegal. The state could not suppress the dissemination of truthful information about a lawful activity merely because it feared the effect of the information upon the advertisers and the recipients.[22]

IV. Background

The commercial speech doctrine, as an exception to the first amendment, began with neither concurrence nor dissent in the three page opinion of *Valentine v. Chrestensen*.[23] There, Chrestensen sought an injunction against Valentine, the New York City police commissioner, to prevent police interference with the distribution in the city streets of a handbill that carried advertising for a commercial exhibit on one side and a protest against city action on the

21. *Id.* at 763-70.

22. *Id.* at 771-73.

23. 316 U.S. 52 (1942). Chrestensen, the owner of a former United States Navy submarine docked in New York City, prepared handbills to advertise tours of the boat for which admission was charged. He was advised that the distribution of the handbills in the streets would violate a city ordinance prohibiting the distribution in the streets of commercial advertising matter, but the ordinance permitted the distribution in the streets of handbills devoted solely to information or a public protest. Chrestensen revised his handbills: on one side was an advertisement of the submarine tours that did not mention the admission charge, and on the other side was a protest against the city dock department's refusal to permit Chrestensen to dock and exhibit his submarine at a city pier. The police still refused to permit the distribution of the handbills. This chain of events supported the Court's conclusion that the protest was added to the advertisement for the purpose of evading the ordinance, something the Court was reluctant to permit. Chrestensen brought suit initially in federal district court.

other side. Valentine sought to enforce a city ordinance that permitted the distribution of a public protest but prohibited the distribution of commercial advertising. The Supreme Court reversed the lower court's issuance of the injunction and held that although the Constitution clearly imposed restraints on government so that it may not unduly burden the use of the public streets for the exercise of the freedom of communication, nonetheless it was "equally clear that the Constitution impose[d] no such restraints on government as respects purely commercial advertising."[24] Due to the dual nature of the handbill, it could be classified as purely commercial advertising in substance but not in form. The Court was particularly concerned that the ordinance not be evaded on the grounds of free speech.

The commercial nature of the exception became more obvious the following year in *Martin v. Struthers*.[25] There, Martin was convicted of violating a municipal ordinance which prohibited persons from summoning occupants of a residence to the door in order to give them any sort of literature, even the religious literature Martin distributed. The distributor was subject to criminal punishment even if the recipient was glad to receive the literature. The Supreme Court reversed and held that since the ordinance's prohibition served no purpose but the naked restriction of the dissemination of ideas, it was invalid because it conflicted needlessly with freedom of speech and press. The freedom to distribute information to every citizen wherever he desired to receive it was vital to the preservation of a free society, and the dangers of distribution could be easily controlled through the traditional trespass theory, since the distributor was subject to arrest for entering the property of another after being warned, either verbally or by posted notices, to stay away. The Court noted that the ordinance was not directed solely at commercial advertising, thereby implying that the ordinance might have withstood constitutional attack if it were.[26]

The possibility of control of the distributor through the traditional trespass theory was not seriously considered and the commercial speech exception of *Chrestensen* was stressed in *Breard v.*

24. *Id.* at 54.

25. 319 U.S. 141 (1943). Martin's appeal was eventually dismissed by the Supreme Court of Ohio. The Supreme Court of the United States reversed in a five to four decision involving five written opinions. The City of Struthers, Ohio, sought through the ordinance to eliminate both the nuisance of door to door soliciting and the danger that it was a blind for criminal activity (burglars often posed as canvassers to discover empty houses).

26. *Id.* at 142-49.

Alexandria.[27] Breard was convicted of violating an ordinance which prohibited a solicitor from going to a private residence for the purpose of soliciting orders for the sale of goods without first having been invited for that purpose by an owner or occupant of the private residence. The Supreme Court of the United States affirmed the conviction because, among other reasons, the ordinance did not violate the guarantees of free speech and press. The Court stated that the fact that periodicals were sold did not put them beyond the protection of the first amendment, but did bring a commercial feature to the transaction. Because it was possible to subscribe to the publications without the annoyance of house to house canvassing, and because it seemed to the Court to be a misuse of the guarantees of free speech and press to force a community to admit solicitors of publications to the homes of its residents, Breard's convicton stood.[28] The Court thus increased the scope of the commercial speech exception from purely commercial speech concerning a purely commercial, unprotected activity in *Chrestensen,* to commercial speech concerning an otherwise protected activity in *Breard.*

Perhaps some erosion of the commercial speech exception, or at least some slight movement away from the exception, can be found in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.*[29] The newspaper was found to have violated a Pittsburgh ordinance in that it aided employers and employment agencies to place employment notices indicating sex discrimination in hiring by maintaining a sex-designated classification system in the help wanted section of its newspaper. The cease and desist order was affirmed by the Supreme Court of the United States. The majority

27. 341 U.S. 622 (1951). Breard's was a misdemeanor conviction in the City of Alexandria, Louisiana, and his conviction was affirmed by the Supreme Court of Louisiana. In the Supreme Court of the United States, the ordinance also withstood attacks on due process and commerce clause grounds.

28. *Id.* at 641-45.

29. 413 U.S. 376 (1973). Section 8 of the Pittsburgh ordinance declared it to be an unlawful employment practice for (a) an employer to discriminate in hiring because of sex, (e) an employer, employment agency, or labor organization to publish employment notices indicating discrimination in hiring because of sex, and (j) anyone to aid in the doing of an act declared to be an unlawful employment practice by the ordinance. The ordinance was to be implemented by the Commission. The Press, in its newspaper's help wanted advertisements, used columns headed "Jobs-Male Interest," "Jobs-Female Interest," and "Male-Female," an item being placed under a particular heading according to the wishes of the advertiser. Subsequent to the filing of a complaint, the Commission held a hearing and concluded that § 8(e) forbade employers, employment agencies, and labor organizations from submitting advertisements for placement in sex-designated columns and that the Press violated § 8(j) because it aided the advertisers to violate § 8(e) by maintaining a sex-designated classification system. The Pennsylvania Supreme Court denied review.

felt the critical feature of *Chrestensen* was that the advertisement there did no more than propose a commercial transaction as did the advertisements in this case. They characterized the ads as classic examples of commercial speech, even though the Press might exercise its editorial judgment in placing an advertisement. This was probably enough to sustain the cease and desist order, but the Court added that discrimination in employment was not only commercial activity, but also illegal activity under an unchallenged portion of the ordinance, and the restriction on advertising was incidental to a valid limitation on economic activity.[30] The commercial speech exception had grown again, this time to encompass editorial judgment in commercial speech. The only movement away from the exception was to sustain the holding on the alternate grounds the activity was also illegal.

If the movement away from the commercial speech exception was almost impossible to see in *Pittsburgh Press,* it was almost impossible to miss in *Bigelow v. Virginia.*[31] There, Bigelow, the responsible officer of a weekly Virginia newspaper, published a New York organization's advertisement announcing that the organization arranged placement in accredited institutions in New York, where abortions were legal with no residency requirements, for women with unwanted pregnancies. Bigelow was convicted of violating a Virginia statute which forbade any person, by publication or sale, to encourage or prompt the procurement of an abortion. The Supreme Court of the United States reversed Bigelow's conviction because the advertisement did more than simply propose a commercial transaction. It announced that abortions were legal in New York, a factual matter of clear public interest. Even though the advertisement was an exercise of the freedom of communication of information, it would be subject to a reasonable regulation that served a legitimate public interest. The Court balanced the public's

30. *Id.* at 388-91. The Court noted that the ordinance did not undermine the institutional viability of the press, it was not passed to muzzle or to curb the press, and the cease and desist order was not a prior restraint. *Id.* at 389-90.

31. 421 U.S. 809 (1975). Bigelow's misdemeanor conviction was affirmed by the Supreme Court of Virginia. The Supreme Court of the United States declined to rest its decision on the grounds of the overbreadth of the statute due to a revision of the statute's language since Bigelow's conviction, and examined the constitutionality of the statute as it was applied to Bigelow. The Court stated that *Chrestensen* did not indicate that speech was stripped of first amendment protection because it appeared in the form of a paid commercial advertisement, and the holding there was limited to and explained as a reasonable regulation on the manner in which commercial advertisements could be distributed. The majority also indicated that the advertisements in *Pittsburgh Press* would have received some protection if the commercial transactions proposed there had been legal.

right to know against Virginia's interest in regulating what Virginians read or heard about New York services. Because the advertisement was neither deceptive nor fraudulent, did not relate to a commodity or service which was illegal in either state, did not invade anyone's privacy, and was not thrust upon a captive audience, Bigelow's conviction was reversed.[32]

When *Board v. Consumers* came before the Supreme Court of the United States, the commercial speech exception had clearly been diminished in *Bigelow*. In the course of almost thirty-five years the commercial speech exception grew to exclude from the protection of the first and fourteenth amendments purely commercial advertisements for a purely commercial activity in *Chrestensen*, purely commercial advertisements for a protected activity in *Breard*, and commercial advertisements involving editorial judgment for a commercial activity in *Pittsburgh Press*. In *Bigelow*, the Court undercut the *Chrestensen* and *Pittsburgh Press* holdings on commercial speech, but did not meet the issue head on. The Court did face the issue in *Board v. Consumers*.[33]

V. ANALYSIS

The Court's answer to its first question, that if there was a right to advertise, there was a right to receive advertising which could be asserted by the appellees in this case, was not novel. That free speech and free press embrace both the right to distribute literature and the right to receive was recognized at least as far back as *Martin v. Struthers*;[34] indeed, these guarantees of freedom would be empty if there were free transmission of ideas and information but limited reception of them. The second part of the answer, that the appellees could assert their right to receive advertising, was also supported by precedent[35] and logic. This followed from the first part of the answer, since a right to receive communication is useless if one may not assert the right when it is infringed.

The answer to the first question was in line with the cautious and limited nature of the opinion. This decision depended on the later holding by the Court that there was a right to advertise,[36] for

32. *Id.* at 811-29.

33. The cases discussed above do not form a comprehensive list of cases dealing with the commercial speech exception. For additional background material concerning commercial speech in the federal courts, *see* Note, *Commercial Speech—An End in Sight to Chrestensen?* 23 DEPAUL L. REV. 1258 (1974); for background in the state courts, *see* 37 BROOKLYN L. REV. 617 (1971); 24 WASH. & LEE L. REV. 299 (1967).

34. 319 U.S. 141, 143 (1943).

35. Lamont v. Postmaster General, 381 U.S. 301 (1965).

36. Board v. Consumers, 425 U.S. at 758.

if there were no right to advertise, there would be no right to receive advertising. Thus, a right to receive some particular communication must be based on a showing that the communication is protected by the Constitution.

The second question before the Court was whether there existed a right to advertise, or, to put the question in the negative as the Court did, whether speech which merely proposed a commercial transaction and was devoid of any other matter which could claim constitutional protection was beyond all protection of the first amendment. The Court's answer to its own question, that it was not beyond all protection, indicated that there was a right to advertise purely commercial transactions and that this right was protected by the Constitution.[37] Something was lost in the translation from the negative to the positive, however, and this void indicated that the right to advertise will not be given the same protection that other first amendment rights have been given.

The Court supported its holding through an examination of the various interests involved. After assuming the advertiser's interest to be purely economic, the Court evaded the *Chrestensen* holding by citing various labor dispute cases which held that although the party's interests there were primarily economic, their statements concerning the dispute were still protected by the first amendment though subject to a number of restrictions.[38] The majority did not distinguish between this speech and purely economic speech, and the labor dispute cases do support the conclusion that speech involving one's economic interests is entitled to constitutional protection.[39]

The consumer's interest in the free flow of commercial information can be particularly keen. In the instant case, the aged were particularly hard hit by the suppression of drug price information.[40] Because of their limited income and greater expenditures for prescription drugs, they were more seriously affected by the wide variations in prescription drug prices fostered by the suppression of economic information.

In general, society also has a strong interest in the free flow of entirely commercial information. At a minimum, such speech should contain information concerning who is producing or selling what product, for what reason, or at what price. The Court consid-

37. *Id.* at 762.

38. *Id.* at 762-63.

39. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941).

40. 425 U.S. at 763.

ered this information to be essential to the intelligent and efficient allocation of resources in a free enterprise system and to enlightened public decision making. Here the Court interchanged economic theory and legal theory. It justified a legal decision on the basis that the result would change society to more closely resemble the classical economic model in some respects.[41] As a result of the decision, consumers would have better information concerning the availability of goods at various prices.

Opposing these interests was the interest the state had in maintaining a high degree of professionalism among its pharmacists. The Court felt that other existing regulations were adequate to serve this interest, especially since the emphasis in this case was on retail sales more than on professional standards. The advertising ban did not directly affect professional standards, and by seeking to protect its citizens, the state instead kept them ignorant of the lawful terms competing pharmacists were offering. Virginia was prohibited by the first amendment from regulating professional standards in this manner.[42]

The Court's precedents, arguments, and balancing of interests do seem to support the conclusion that commercial speech is entitled to some protection under the first and fourteenth amendments. Although this case may have sounded the death knell for the commercial speech exception, neither *Chrestensen*, *Breard*, nor the commercial speech aspects of *Pittsburgh Press* were specifically overruled. Even though the instant case finished the work that may have started in *Pittsburgh Press* and which was clearly evident in *Bigelow*, it does not appear that the holdings in the latter cases were expanded significantly.

The Court stated specifically that it did not hold that commercial speech could never be regulated in any way, and it indicated that time, place, and manner restrictions would be upheld if they were justified without reference to the content of the speech, served a significant governmental interest, and left open alternate channels of communication. Perhaps this restriction indicates that the bans on televised liquor and cigarette advertising will be upheld. The Court also pointed out that the holding that commercial speech enjoyed first amendment protection was not a decision that it was indistinguishable from other forms of protected speech. Indeed, the Court indicated that commercial speech was distinguishable from other forms of protected speech, particularly because it was more

41. *Id.* at 765.
42. *Id.* at 766-70.

durable and its truth more easily verified than other forms of speech. The majority also pointed out that it foresaw no obstacle to a state dealing effectively with false, misleading, or deceptive advertising, and the first amendment would not prohibit such regulation. The Court indicated additionally that advertisements that were in themselves illegal in any way would not be subject to first amendment protection. Another limitation placed on the holding was that it may not be automatically applicable to the special problems of the electronic broadcast media.

Finally, the Court appeared to be particularly impressed with the fact that ninety five percent of all prescriptions were filled with dosage forms prepared by the drug manufacturer.[43] Therefore, the pharmacist did little more than transfer a measured part of the contents of a large bottle into a smaller one and place the physician's dosage instructions on the smaller bottle. The Court viewed pharmacists as dispensers of essentially standardized products much more than as suppliers of individualized services. The pharmacist in the majority of cases merely filled the physician's order with little exercise of any professional judgment or skill on his part. Therefore, the advertising ban on prescription drug prices is not analogous to a ban on the advertisement of fees charged by physicians and attorneys for the individualized professional judgment services they rendered.[44]

VI. CONCLUSION

The Court's initial premise, that if there was a right to advertise, there was a reciprocal right to receive advertising, was firmly based on logic and precedent. Indeed, the right to advertise, or any other aspect of the right of free speech, would be meaningless without the right to receive what was sent and the right to attack, in court, infringements on one's right. In the free speech and free press areas, however, there was no right to receive and no right to assert if that which was sent was not constitutionally protected.

The second and major holding of the Court, that commercial speech was not beyond all protection of the first amendment, was justified and long overdue. The majority's economic arguments did no harm to individual rights in this case because the social goal of economic efficiency supported the individual right to know. Should an economic goal ever conflict with an individual right in a future

43. *Id.* at 752.
44. *Id.* at 773-75 (Burger, C.J., concurring).

case, it would be comforting to know that individual rights had received priority over economic goals in the present case, but no priorities were set here.

The major disappointment of the decision was that the commercial speech exception of the prior cases was not overruled and condemned outright. The decision did leave the *Chrestensen* holding little vitality, but did not strike down that part of *Breard* which held that a community might control solicitation for the distribution of protected literature, or that part of *Pittsburgh Press* which held that a municipal ordinance might control the editorial judgment of a newspaper. It appears that control in these areas will remain permissible.

The holding did not open large new areas of speech to the absolute protection of the first amendment, and because it is so narrow, it probably will not cause many dramatic changes in the present restrictions on commercial speech. Commercial speech is, however, entitled to some first amendment protection. The amount of protection is not yet clear, but it appears that it is entitled to less protection than many other types of first amendment rights.

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