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The Erosion of Commercial Speech - The Right to Know and the Informed Consumer - Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.

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THE EROSION OF COMMERCIAL SPEECH—THE RIGHT TO KNOW AND THE INFORMED CONSUMER—*VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CITIZENS CONSUMER COUNCIL, INC.*

The extent to which the First Amendment protects commercial speech from state regulation has presented particular problems. However, the United States Supreme Court recently has afforded purely commercial speech some degree of protection. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[1] the Supreme Court held that a statutory ban on prescription drug price advertising violated the consumers'[2] right to receive information about the cost of prescription drugs. The Court struck down a Virginia statute that defined as "unprofessional conduct" the advertising of prescription drugs by any broadcasted or published means.[3] By holding that consumers had a constitutional right to receive information concerning a certain commodity, the Court afforded speech which does "no more than propose a commercial transaction"[4] some level of First Amendment protection.[5] The Court also recognized that information contained in advertisements was closely related to that speech which promoted

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1. 96 S.Ct. 1817 (1976).

2. All of the plaintiffs were consumers. They included an individual required to take prescription drugs on a regular basis and two organizations, Virginia Citizens Consumer Council, Inc. and the State of Virginia AFL-CIO, whose members were prescription drug users. There were no pharmacists among the plaintiffs. *Id.* at 1821 n.10.

3. The statute stated:

> Any pharmacist shall be considered guilty of unprofessional conduct who . . .
> (3) publishes, advertises or promotes, directly or indirectly, or in any manner whatsoever, an 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.

VA. CODE ANN. §54-524.35 (1974).

4. 96 S.Ct. at 1826, *quoting* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973), where the Court limited the commercial speech doctrine's application to economically motivated messages.

5. Additionally, the decision offered structure to an area so muddled as to provoke confusion and criticism among commentators. *See, e.g.*, Note, *Commercial Speech—An End in Sight to Chrestensen?*, 23 DEPAUL L. REV. 1258 (1974); Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975); *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 153-60 (1973); Comment, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967).

"truth, science, morality, and arts, in general . . . ."[6] Consequently, the First Amendment was given greater applicability to individuals, especially consumers.[7]

Although the decision destroyed a large part of the "commercial speech" doctrine,[8] the application of *Virginia State Board of Pharmacy* has limitations. For instance, a state may regulate the time, place, and manner of dissemination of the information.[9] In addition to establishing regulations directed at the public's comfort and welfare, the state may also restrict commercial speech when it interferes with the public safety, as in the case of an advertisement that encourages the violation of legitimate statutes and ordinances.[10] Furthermore, *Virginia State Board of Pharmacy* does not extend constitutional protection to advertisements that are "false or misleading in any way."[11] Therefore, regulations

6. 96 S.Ct. at 1826, *quoting* Roth v. United States, 354 U.S. 476, 484 (1976). The Court in *Roth* discussed the general types of speech that would be afforded First Amendment protection.

7. The Court in *Virginia State Bd. of Pharmacy* recognized the important role that commercial advertising might play in aiding the public to make knowledgeable decisions about matters which affect its well-being. 96 S.Ct. at 1826. *See* text accompanying notes 79-86 *infra*. *See also* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Comment, *The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech*, 50 ORE. L. REV. 177 (1971).

8. The commercial speech doctrine had its genesis in Valentine v. Chrestensen, 316 U.S. 52 (1942). There, the Court ruled that an ordinance prohibiting the distribution of pamphlets did not violate the First Amendment when applied to commercial messages. Since that decision, there has been no First Amendment protection for advertisements which promote a purely business transaction. *See* text accompanying notes 16-21 *infra*. For a history of the development of the commercial speech doctrine, see Note, *Professional Price Advertising Set Free?—Consumers' "Right-to-Know" In Prescription Drug Price Advertising: Virginia Citizens Consumer Council, Inc. v. Virginia State Board of Pharmacy, 373 F. Supp. 683 (W.D. Va. 1974)*, 8 CONN. L. REV. 108 (1975).

9. 96 S.Ct. at 1830, *citing* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); Kovacs v. Cooper, 336 U.S. 77, 85-87 (1949); Saia v. New York, 334 U.S. 558, 562 (1948); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

10. *Cf.* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) There, the Court ruled that employment advertisements arranged in sex designated columns were commercial speech and thus could be regulated. In support of its conclusion, the Court, in dicta, commented on the advertisements' encouragement of sex discrimination in hiring practices, an activity prohibited by a city ordinance. *See* text accompanying notes 23-34 *infra*.

11. The Court emphasized that "untruthful speech . . . has never been protected for its own sake," indicating that a very strong purpose for allowing deceptive speech would have to be established before a statute regulating it would be overruled. 96 S.Ct. at 1830-31.

of deceptive advertising are still constitutionally acceptable.[12] The restrictions on commercial speech recognized as permissible by the Court in *Virginia State Board of Pharmacy* very closely resemble those which may be placed on traditionally protected speech.[13] Thus, the Court correctly recognized that a message concerning commercial transactions might contain important information needed to enable the members of society to cope with the exigencies of their times.[14]

This Note will outline the history of the commercial speech doctrine, describe and evaluate the future First Amendment standard to be applied to commercial advertising, and discuss the ramifications of *Virginia State Board of Pharmacy* on First Amendment freedoms. Prior to its decision in *Virginia State Board of Pharmacy*, the Supreme Court had been reluctant to give pure commercial speech any degree of First Amendment protection.[15] In *Valentine v. Chrestensen*,[16] the Court ruled that an ordinance prohibiting distribution of handbills did not violate the advertiser's First Amendment right to speak when it was applied to the promotion of a purely commercial transaction.[17] Even though *Valentine* seemed to have excluded commercial messages from constitutional considerations, subsequent decisions failed to clarify the perimeters of commercial speech.[18] The Court developed an approach whereby it examined the purpose of the speech in order to determine whether the speech fell within protected bounds.[19] Where the purpose of the adver-

12. *Id.* at 1830 n.24. *See also* Mr. Justice Stewart's concurring opinion for an extensive discussion of the decision's limitations in the area of deceptive advertising. *Id.* at 1832-35.

13. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding an ordinance that prohibited picketing "which disturbs or tends to disturb the peace and good order of (a) school session . . ."); Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding an ordinance that prohibited the use of sound trucks on public streets); Saia v. New York, 334 U.S. 558 (1948) (holding that an ordinance that required the speaker to obtain a permit before he could use a sound truck was unconstitutional but acknowledging that the "hours and place of public discussion can be controlled").

14. 96 S.Ct. at 1825, *citing* Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

15. *See* notes 18-37 and accompanying text *infra*.

16. 316 U.S. 52 (1942).

17. *Id.* at 54.

18. After *Valentine*, some paid-for advertisements were afforded First Amendment protection. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that a paid for political advertisement was not commercial speech); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (holding that the sale of religious books and pamphlets was not a business transaction which could be regulated by an ordinance); Jamison v. Texas, 318 U.S. 413 (1943) (holding that the distribution of handbills advertising the sale of religious books was not a purely commercial advertisement and could not be regulated).

19. This approach is sometimes referred to as the "primary purpose" or "motive" test. *See* Comment, *The Right to Recieve, supra* note 5, at 794 n.122.

tisement was primarily economic the Court invariably granted little or no First Amendment protection.[20] On the other hand, if the advertiser's motive was to disseminate information regarding government, religion, or other areas of public concern, the message was afforded full First Amendment protection.[21] This approach created confusion concerning the commercial speech doctrine and the validity of the *Valentine* decision.[22]

Two of the latest Supreme Court decisions, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*[23] and *Bigelow v. Virginia*,[24] failed to clarify the standard to be used in the commercial speech area. In *Pittsburgh Press*, the Court faced the question of whether First Amendment protection would extend to a newspaper that published employment advertisements in sex designated columns.[25] In refusing to extend the requested protection to the Pittsburgh Press Company, the

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20. *See, e.g.*, Breard v. Alexandria, 341 U.S. 622 (1951) (holding that door-to-door soliciting of secular magazine subscriptions was commercial speech).

21. *See* note 18 *supra*.

22. Although the practice of classifying the advertiser's purpose appeared to give some structure to the area, in reality, there was disagreement among the members of the Court concerning the scope of the commercial speech doctrine. For example, in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), five members held that the city was not obliged to sell advertising space on mass transit vehicles to a candidate for public office. However, Mr. Justice Brennan, writing for four dissenters, wrote:

> While it is possible that commercial advertising may be accorded *less* First Amendment protection than speech concerning political and social issues of public importance, it is 'speech' nonetheless, often communicating information and ideas found by many . . . persons to be controversial.

Id. at 314 (citations omitted).

23. 413 U.S. 376 (1973).

24. 421 U.S. 809 (1975).

25. The Pennsylvania court interpreted the Human Relations Ordinance of the City of Pittsburgh to forbid newspapers from publishing job advertisements which requested that the position be filled by a person of a particular gender. 413 U.S. at 378. Section 8 of the ordinance provided that it was unlawful:

> (a) For any employer to refuse to hire any person or otherwise discriminate against any person with respect to hiring . . . because of . . . sex.
>
> . . .
>
> (e) For any 'employer,' employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to 'employment' or membership which indicates a discrimination because of . . . sex.
>
> . . .
>
> (j) For any person, whether or not an employer, employment agency or labor organization, to aid . . . in the doing of any act declared to be an unlawful employment practice by this ordinance. . . .

Pittsburgh, Pa., Human Relations Ordinance 395, §8 (1969), *amending* Pittsburgh, Pa., Human Relations Ordinance 75, §8 (1967) (amended ordinance cited in 413 U.S. 376, 378 (1973)).

Court reasoned that the job advertisements were commercial in nature.[26] In addition, the decision noted that sex discrimination in employment was prohibited by an ordinance[27] and that unlawful conduct could not claim constitutional protection.[28] However, the Court did recognize in dictum that not all commercial speech was unprotected.[29]

Two years after *Pittsburgh Press*,[30] the Court was called upon again to define commercial speech. In *Bigelow v. Virginia*,[31] a newspaper editor was convicted for violating a Virginia statute[32] outlawing advertisements that aided in procuring legal abortions.[33] The Court struck down the statute on the basis of the First Amendment, finding that the advertisement was more than commercial speech.[34] The advertisement involved a topic in which the public was deeply concerned and on which the state had little authority to regulate.[35] Thus, as in prior decisions,[36] a message closely related to traditionally protected areas was protected by the First Amendment.[37] The Court in *Bigelow*, however, declined the

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26. The Court stated:

> In the crucial respects, the advertisements in the present record resemble the *Chrestensen* rather than the *Sullivan* advertisement. None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus examples of commercial speech.

413 U.S. at 385.

27. *See* note 25 *supra*.

28. 413 U.S. at 388-89.

29. *Id.* at 384, *citing* New York Times v. Sullivan, 376 U.S. 254 (1964). The Court recognized that paid-for advertisements which convey a political or religious message are entitled to First Amendment protection. *See* note 18 *supra*.

30. 413 U.S. 376 (1973).

31. 421 U.S. 809 (1975).

32. The statute under which Bigelow was charged provided:

> If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any manner, encourages or prompts the procuring of an abortion of miscarriage, he shall be guilty of a misdemeanor.

VA. CODE ANN. §18.1-63 (1960). The statute has since been repealed by Va. Act of Assembly 1975, cc. 14, 15.

33. Bigelow published an advertisement which gave information about legal abortions in New York and solicited subscribers to abortion referral agencies. 421 U.S. at 811-12.

34. *Id.* at 822.

35. *See* Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 176 (1973).

36. *See* note 18 and accompanying text *supra*.

37. In *Bigelow*, little deference was given to the language in *Pittsburgh Press* which indicated that commercial advertising is unprotected. The Court interpreted the commercial aspects of the Pittsburgh Press advertisements' lack of protection only in terms of their illegality. The Court concluded that ". . . the advertisements would have received

invitation to give constitutional protection to all commercial speech, although it did recognize that advertisements might provide the public with legitimate information.[38] As a result, after *Pittsburgh Press* and *Bigelow*, the degree of protection afforded to commercial speech was still unclear.[39]

In *Virginia State Board of Pharmacy*, the Court searched for a stan-

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some degree of First Amendment protection if the commercial proposal had been legal." 421 U.S. at 821.

38. The Court in *Bigelow* stated:

> To the extent that commercial acitivity is subject to regulation, the relationship of speech to that activity may be one factor, among others to consider in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products of services does not make it valueless in the marketplace of ideas.

Id. at 826.

39. An indication of the confusion in the area appeared in several lower court decisions. When presented with the question whether prescription drug advertising could be prohibited by statute, these courts searched for a standard which would be acceptable under the commercial speech doctrine. Frequently, statutes prohibiting prescription drug price advertising were found to violate the advertiser's Fourteenth Amendment due process rights. *See, e.g.*, Florida Bd. of Pharmacy v. Wells' City, Inc., 219 So.2d 681 (Fla. 1969); Stadnick v. Shell's City, Inc., 140 So.2d 871 (Fla. 1962); Maryland Bd. of Pharmacy v. Sav-A-Lot Inc., 270 Md. 103, 311 A.2d 974 (1973). *Contra*, Supermarkets General Corp. v. Sills, 93 N.J. Super. 326, 225 A.2d 728 (1966); Urowsky v. Bd. of Regents, 46 App. Div. 2d 974, 362 N.Y.S.2d 46 (1974); *cf.* Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975) (statute invalid because it infringed on consumers' First Amendment rights).

The due process approach consisted of an examination of the statutory purpose and the means employed to accomplish it. The courts required that the means bear a rational relation to the legislative purpose. Consequently, where the prohibition of the advertisement bore no rational relation to the states' purposes, the courts concluded that it violated the advertiser's due process rights. The courts found that the control of misuse and overconsumption of drugs were directly regulated by other statutes and professional regulations.

In addition, the courts noted factors which removed the constraint on drug price information even farther from the legislative purpose. Finding that the majority of drug users were among the aged and infirm and least able to attain the desired information by other means, the courts concluded that the health and welfare of the states' citizens was in fact detrimentally affected by advertising prohibitions.

The use of a due process analysis was not novel in decisions responding to issues concerning regulations of professionals. In fact, that was the most common approach. *See, e.g.*, Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963) (holding that a statute that prohibited advertising by optometrists did not violate an optometrist's due process rights); Williamson v. Lee Optical, 348 U.S. 483 (1955) (holding that a statute which prevented opticians from fitting eyeglasses did not violate an optician's due process rights); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935) (holding that a statute which prohibited advertising by dentists did not violate a dentist's due process rights).

dard to be applied in the commercial speech area.[40] In so doing it weighed the interests of the three parties affected by the Virginia statute. Considering, first, the interest of the pharmacist in advertising, the Court concluded that although it was primarily economic, and thus less weighty than other interests, that factor alone would not be sufficient to deny First Amendment protection.[41] Greater emphasis was placed on the consumer's right to receive information,[42] and consideration was given to all factors which made the consumer's need for drug price information more acute.[43] Finally, in weighing the state's interest, the Court examined the articulated purposes of the statute. They were: 1) maintenance of professionalism among pharmacists; and 2) pharmacists' monitoring of consumers' drug needs.[44] Although the Court accepted the purposes of the statute, it found the regulations to be too far removed from the legislative purpose in light of the First Amendment interest being asserted.[45] The decision noted that there were other regulations which controlled a pharmacist's professional conduct and the danger of the consumer's misuse of drugs.[46] After an examination of the three interests involved, the Court concluded that the consumers' interest in receiving drug price information, together with the pharmacists' economic interests, outweighed the paternalistic purposes of the statute.[47] Recognizing a First Amendment interest on the part of the consumer, the Court established a balancing of interests test as the constitutional standard to be employed in the area of commercial speech.[48]

The balancing of interests test established by the Court in *Virginia State Board of Pharmacy* is significant in that it allows courts to examine factors other than the bare message of the speech when evaluating the listener's interests.[49] In the past, the outcome of a case rested upon

40. 96 S.Ct. at 1825.

41. *Id.* at 1826.

42. *Id.* at 1826-27.

43. The Court considered such factors as the discrepancy in drug prices in small geographic areas, the social and economic status of the litigants, and the important part that the information played in the health and welfare of the prescription drug users. *Id.*

44. *Id.* at 1828-29.

45. *Id.* at 1829.

46. *Id.*

47. *Id.* at 1829-30.

48. *Id.* at 1826-29.

49. The Court in *Virginia State Bd. of Pharmacy* stated:

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate

whether the speech was purely commercial.[50] Using such an analysis, the Court was required to look at the content of the message in order to determine its nature. However, in all areas related to freedom of expression, content examination has been held to be a practice repugnant to the First Amendment.[51] By placing the listener's interest in balance with those of the state, the Court has developed a method whereby the content of the advertisement will be viewed only indirectly. This approach more closely complies with traditional First Amendment requirements.

Some form of balancing of interests test is always used in First Amendment analysis. Both the "clear and present danger"[52] and the "compelling state interest"[53] tests require the court to weigh First Amendment interests against those asserted by the state. In addition, when a First Amendment violation is asserted in a due process and equal protection context, a balancing of interests is required.[54] Where a state statute allegedly violates a fundamental interest, the court rigidly examines the statute.[55] The statutory means must bear a very close rela-

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amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

96 S.Ct. at 1826-27.

50. *See* notes 18-22 and accompanying text *supra*.

51. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (holding that an ordinance prohibiting the exhibition of films based on their content violated the First Amendment); Police Dep't v. Mosely, 408 U.S. 92 (1972) (holding that an ordinance which described permissible picketing based on the subject of the protest violated the First Amendment); Cohen v. California, 403 U.S. 15 (1971) (holding that a statute which prohibited "offensive conduct" violated the First Amendment because offenses would be determined by defining and classifying the expression). *See also* Street v. New York, 394 U.S. 576, 589 (1969); NAACP v. Button, 371 U.S. 415, 444 (1963); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); DeJonge v. Oregon, 299 U.S. 353, 365 (1937).

52. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Thomas v. Collins, 323 U.S. 516, 530 (1945); Schenck v. United States, 249 U.S. 47, 52 (1919).

53. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (freedom of speech); NAACP v. Button, 371 U.S. 415, 438 (1963) (freedom of speech); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (freedom of religion); Bates v. Little Rock, 361 U.S. 516, 524 (1960) (freedom of association); NAACP v. Alabama, 357 U.S. 449, 463 (1958) (right of association).

54. *See* note 53 *supra*.

55. *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1972), for a discussion of those interests which are found to be "fundamental" and the level of scrutiny to be applied. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965) (defining privacy as a fundamental interest requiring strict scrutiny of a statute which may infringe upon it); NAACP v. Alabama, 357 U.S. 499 (1958) (defining association as a fundamental interest requiring strict scrutiny of a statute which may infringe upon it).

tion to the legislative purpose, and only the most compelling state interest will be sufficient to uphold a statute that infringes upon a fundamental interest.[56] The *Virginia State Board of Pharmacy* Court employed an analysis analogous to this approach.

In the past, when commercial advertisements were not afforded First Amendment protection, suits attacking state regulation of professional advertising had been analyzed in terms of the Fourteenth Amendment Due Process Clause.[57] For the most part, due process claims were presented by the professional seeking to advertise his services.[58] The courts resolved the issue using traditional due process rationale and deferred to the states' legislatures for an applicable solution to the problem.[59] First Amendment violations were not asserted[60] and consequently, the courts were not obliged to examine that issue or to scrutinize the statutes in question.

In contrast, the plaintiffs in *Virginia State Board of Pharmacy* alleged a violation of the First Amendment: the right to receive information was restricted by the statute. The Court, after acknowledging the legitimacy of that interest,[61] proceeded to evaluate the statute using a more rigid scrutiny than is customarily employed in cases which do not involve a fundamental interest.[62] The Court found on "close inspection" that "[t]he advertising ban does not directly affect professional standards one way or the other."[63] By requiring that the means adopted[64] by the legislature bear a close relationship to the statute's purpose,[65] the Court demanded that the statute regulate with narrow specificity.[66] Therefore,

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56. *See* Dun v. Blumstein, 405 U.S. 330, 335 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); United States v. O'Brien, 391 U.S. 367, 376-77 (1968). *See also* note 66 *infra*.

57. *See, e.g.*, Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935). *See also* note 39 *supra*.

58. *See* note 57 *supra*.

59. *See* Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. at 432 n.12; Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. at 611-12.

60. In *Head v. New Mexico Bd. of Examiners in Optometry*, the plaintiff alleged a First Amendment violation. However, it was not timely and the Court declined to examine the issue. 374 U.S. at 432 n.12.

61. 96 S.Ct. at 1822-23.

62. *Compare* Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963), *and* Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935), *with* New York Times Co. v. Sullivan, 376 U.S. 254 (1964), *and* Jamison v. Texas, 318 U.S. 413 (1943).

63. 96 S.Ct. at 1829.

64. The means employed in *Virginia State Bd. of Pharmacy* was prohibition of advertising by pharmacists. *Id.*

65. *See* text accompanying note 44 *supra*.

66. 96 S.Ct. at 1829-30. Requiring that legislation be precisely drawn and narrowly

with commercial advertisements as well as with messages of a political or religious objective, a statute must be drawn in such a way that it minimally restrains the free flow of information. By examining the statute in this way, the Court exacted a criteria for commercial speech similar to that commonly required in traditionally protected areas.

However, the Court did not employ a traditional First Amendment analysis. Virginia was not required to show a compelling interest in upholding the regulation of speech.[67] Although the importance of the consumers' First Amendment interest was acknowledged,[68] the Court employed a simple balancing test requiring that the regulation be given "close inspection" rather than rigid scrutiny. Formerly, there appeared to be two levels of speech: that which received constitutional protection and that which did not.[69] The former was given full First Amendment protection requiring rigid examination of a statute allegedly infringing upon free speech. The latter was given no protection and First Amendment claims were summarily disposed of. By employing a standard of "close inspection," the decision produced an intermediate tier of examination in the First Amendment area[70] dependent upon the classification of the speech in question. Thus, although commercial speech was found to be protected, it was not entitled to the same level of protection given to speech of a political or religious nature.

A problem arises when courts are obliged to categorize the message in order to deduce the level of protection to be afforded. Some content examination will be necessary. Therefore, even though the approach used in *Virginia State Board of Pharmacy* allows the interest of the listener a broader scope by recognizing factors other than the bare message,[71] it may have the same effect as the "primary purpose" test[72] in

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tailored is a typical First Amendment approach. By exacting such measures, the Court views the possibility of First Amendment infringement as minimal. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 433 (1963).

67. *Compare* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S.Ct. 1817 (1976), *with* Police Dep't v. Mosely, 408 U.S. 92, 99 (1972), *and* United States v. O'Brien, 391 U.S. 367 (1968).

68. 96 S.Ct. at 1829.

69. *See* Redish, *supra* note 7, at 431 for the proposition that a second tier already exists in the First Amendment area which includes speech that is not protected, such as obscenity, "fighting words," and certain forms of libel.

70. See the dissent of Mr. Justice Stewart in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations* where he warns of the emergence of this kind of analysis. "So long as Members of this Court view the First Amendment as no more than a set of 'values' to be balanced against other 'values,' that Amendment will remain in grave jeopardy." 413 U.S. 376, 402 (1973) (Stewart, J., dissenting).

71. *See* note 43 *supra*.

72. *See* note 19 and accompanying text *supra*.

its liberal allowance of content examination.

Despite the possible problematic effects, *Virginia State Board of Pharmacy* nevertheless enhances the scope of the First Amendment in that it gives standing to the receiver of information and affords constitutional protection for speech pertaining to commercial transactions. Since the adoption of the First Amendment, great importance has been placed on the right to receive information.[73] Although several cases have contained language acknowledging the rights of the listener,[74] the Supreme Court has never held that such a right is embodied in that amendment.[75] In *Virginia State Board of Pharmacy*, the plaintiffs had a significant interest[76] in receiving information about the price of prescription drugs and were detrimentally affected by the Virginia statute.[77] By granting standing to these litigants the Court placed its imprimatur on the right to receive information as the legitimate partner of the right to speak.[78]

In addition, *Virginia State Board of Pharmacy* will promote some purposes of the First Amendment on an economic level.[79] First Amend-

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73. *See* Letters from James Madison to W.T. Barry, Aug. 4, 1822, in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 276 (1865), where James Madison stated: "A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy; or both." Justice Cardozo also commented on the importance of the right to receive, stating:

> There is no freedom without choice, and there is no choice without knowledge,—or none that is not illusory. Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and to beget . . . . At the root of all liberty is liberty to know.

B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 104 (1928).

74. Procunier v. Martinez, 416 U.S. 396 (1974); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969); Stanley v. Georgia, 394 U.S. 557 (1969); Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

75. *See* Redish, *supra* note 7; Comment, *The Right to Receive*, *supra* note 5, at 777-93; Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971). Mr. Justice Rehnquist's dissenting opinion in *Virginia State Bd. of Pharmacy* also indicated that the right to receive has never been acknowledged as a full First Amendment freedom. He stated that the ruling "extends standing to raise First Amendment claims beyond the previous decisions of this Court." 96 S.Ct. at 1835.

76. In order to have standing in a federal court, a party must allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962).

77. In order to gain standing in a federal court, a party must allege "injury in fact." Singleton v. Wulff, 96 S.Ct. 875 (1976); Simon v. Eastern Ky. Welfare Rights Org., 96 S.Ct. 917 (1976); Warth v. Seldin, 422 U.S. 490 (1975).

78. 96 S.Ct. at 1823 ("If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees"). *See also id.* at 1823 n.15.

79. *See* T. EMERSON, TOWARDS A GENERAL THEORY OF THE FIRST AMENDMENT (1966).

ment freedoms are more likely to be couched in terms of political or social debates;[80] however, there are pragmatic reasons for extending its protection to commercial exchange.[81] Wide dissemination of information concerning products will inform the public of available choices. In many ways, decisions about which product will be more serviceable or which will carry the greatest economic benefits can more intimately affect an individual than which candidate will be elected to public office.[82] In *Virginia State Board of Pharmacy*,[83] the Court recognized the importance of the consumer's interest in attaining information necessary to make an educated choice and to have real options from which to choose. Additionally, both the Court and commentators[84] have noted the importance of advertising because of its far-reaching and inexpensive manner of placing facts about products before the public.

Another function of advertising is that it creates needs.[85] As a result of a wide dissemination of commercial information, the public will be educated about new products and services.[86] Although a more comfortable life-style may not be a primary goal of the First Amendment, it is at least a benefit that might be derived from this new application of the amendment to commercial advertising. In holding that commercial speech is entitled to constitutional protection, the decision broadened the First Amendment's scope and extended its purposes to the "marketplace of products."[87]

Rita M. Novak

Professor Emerson defines two purposes of the First Amendment as the attainment of truth, *id.* at 7, and individual self-fulfillment. *Id.* at 4.

80. *See* A. MEIKLEJOHN, POLITICAL FREEDOM 55 (1965); Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

81. *See* note 7 *supra*.

82. *See* note 49 *supra*.

83. 96 S.Ct. at 1827. *See* Bigelow v. Virginia, 421 U.S. at 826. *See also* Goldfarb v. Virginia Bar, 421 U.S. 773 (1975), where the Court invalidated a price schedule for lawyers basing its decision on the important role lawyers play in commercial exchange. *See generally* Z. CHAFEE, FREE SPEECH TODAY 33 (1941).

84. *See* 96 S.Ct. at 1827; Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948); Kaufman, *The Medium, The Message and the First Amendment*, 45 N.Y.U. L. REV. 761 (1970).

85. *See* Brown, *supra* note 84, at 1168.

86. *See* Brown, *supra* note 84; Comment, *The First Amendment and Consumer Protection*, *supra* note 7.

87. 96 S.Ct. at 1825.