A STEP FORWARD FOR THE CONSUMER: A CONSTITUTIONAL RIGHT-TO-KNOW IN PRESCRIPTION DRUG PRICE ADVERTISING

Consumerism[1] is on the rise in the United States.[2] The success of the consumer movement stems in part from the concerted activities of persons who have asserted their rights to the free flow of information premised upon the first amendment right to know.[3] The movement's success is evident in both recent legislation[4] and court decisions[5] recognizing and upholding the consumer's right to access of information.

Traditionally, however, legislative[6] and judicial[7] restraints, particu-

1. Consumerism has been defined as private and public activities of consumers "to inprove their relative positions vis-a-vis the suppliers and manufacturers of consumer goods." Conserned Consumers League v. O'Neill, 371 F. Supp. 644 (E.D. Wis. 1974).

2. *See generally* D. ROTHSCHILD & D. CARROLL, CONSUMER PROTECTION: TEXT AND MATERIALS (1973).

The work of the Ralph Nader Study Group attests to the public's increasing concern in matters relevant to the consumer. *See, e.g.*, D. BARNEY, THE LAST STAND: RALPH NADER'S STUDY GROUP REPORT ON THE NATURAL FORESTS (1974); CORPORATE POWER IN AMERICA (R. Nader & M. Green eds. 1973); R. FELLMETH, THE INTERSTATE COMMERCE OMISSION (1970); WHISTLE BLOWING (R. Nader, P. Petkas & K. Blackwell eds. 1972).

3. *See, e.g.* Terminal-Hudson Elec. v. Department of Consumer Affairs, 407 F. Supp. 1075 (C.D. Cal.), *vacated and remanded sub nom.* Board of Optometry v. California Citizens Action Group, 96 S. Ct. 2619 (1976) (state statute prohibiting advertising of prices & places to buy corrective eyeglasses is an unconstitutional infringement of consumers' first amendment rights to receive such information); Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975), *aff'd*, 96 S. Ct. 2617 (1976) (state statute prohibiting media advertising of prescription drug prices violated first amendment rights of consumers seeking such information); Concerned Consumers League v. O'Neill, 371 F. Supp. 644 (E.D. Wis. 1974) (consumer group's informational picketing about business practices is protected by the first amendment).

4. *See, e.g.*, Truth in Lending Act, 15 U.S.C. §§ 1601-1677 (1970). This Act requires that creditors extending consumer credit disclose essential credit terms before the credit is extended. This Act also includes disclosure in advertising as well as party-to-party transactions. *See also* Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1970). This Act regulates the contents and confidentiality of the reports of consumer reporting agencies and provides for consumer access to such reports. For a general discussion of numerous other federal statutes that directly affect consumer transactions see D. ROTHSCHILD & D. CARROLL, CONSUMER PROTECTION REPORTING SERVICE (1973). Consumer protection statutes (with varying provisions) have been enacted in many states.

5. *See* note 3 *supra*.

6. State statutes with respect to prescription drugs exemplify such restrictions. Eight states currently restrict the disclosure of prescription drug prices by statute. *See* ALASKA STAT. § 8.80.420(b) (Supp. 1972); CONN. GEN. STAT. ANN. § 20-175A (Supp. 1975); FLA STAT. ANN. § 465.23 (West Supp. 1973) (this statute has been repealed effective 1978); LA. REV. STAT. ANN. § 37:1225(11) (West 1965); N.J. STAT. ANN. § 45:14-12(c) (West

larly the commercial speech doctrine,[8] have limited the scope[9] of the consumer's right to know. The United States Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[10] dealt directly with the conflict between statutory restrictions on commercial speech and the consumer's right to know. In *Virginia State Board*, the Court recognized that the public has a constitutionally protected interest in the free flow of commercial information and held that a state may not, consistent with the first amendment, prohibit pharmacists from advertising the prices of prescription drugs.[11]

Plaintiffs in *Virginia State Board*, a state resident[12] and two nonprofit state organizations,[13] were consumers of prescription drugs in Virginia. They sought declaratory and injunctive relief[14] against enforcement of a Virginia statute[15] which made it unprofessional conduct

Supp. 1972-73); N.D. CENT. CODE § 43-15-10(1)(b) (1960); OKLA. STAT. ANN. tit. 59 § 736.1 (West 1972); TEX. REV. CIV. STAT. ANN. art. 4542(a), § 17(d)(3) (Vernon 1960).

7. *Cf.*, Kovacs v. Cooper, 336 U.S. 77 (1949) (municipal ordinance forbidding the use or operation on public streets of sound trucks does not violate first amendment). In *Kovacs*, the Court stated that "[c]ity streets are recognized as a normal place for the exchange of ideas by speech. . . . But this does not mean the freedom is beyond all control." *Id.* at 87.

8. Commercial speech "means a communication concerned solely with promoting the sale of commercial services or products, which services or products are themselves not speech traditionally protected by the first amendment." Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 432 (1970) [hereinafter cited as Redish]. For a general discussion of the commercial speech doctrine, its history and subsequent application, see Note, *The Commercial Speech Doctrine: The First Amendment at a Discount*, 41 BROOKLYN L. REV. 60 (1974).

9. *See* notes 26-35 and accompanying text *infra*.

10. 425 U.S. 748 (1976).

11. *Id.* at 770.

12. Plaintiff-appellee Lynn B. Jordan suffers from certain diseases which require her to take prescription drugs on a daily basis. Brief for Appellees at 8, Virginia State Bd. of Pharmacy v. Virginia State Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

13. Plaintiff-appellee Virginia Citizens Consumer Council, Inc., is a nonprofit, nonpartisan, volunteer organization, many of whose members are users of prescription drugs. Plaintiff-appellee Virginia State AFL-CIO is an unincorporated, nonprofit labor organization with approximately 69,000 members who are residents of Virginia, many of whom are users of prescription drugs. *Id.*

14. 42 U.S.C. § 1983 (1970) provides a right of action for deprivation of federal civil rights.

15. VA. CODE § 54-524.35 (1974) provides that:

> Any pharmacist shall be considered guilty of unprofessional conduct who . . . . (3) publishes, 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.

for a licensed Virginia pharmacist to advertise prescription drug prices. Plaintiffs alleged that the statute, in effect, deprived them of price information necessary to make a knowledgeable choice in purchasing prescription drugs. Plaintiffs contended that the first amendment secured their right to receive the information, independent of the pharmacists' right to disseminate the prices. In their view, given a willing speaker, constitutional protection extended to the source and the recipients of information.[16] The advertising ban substantially infringed recipients' rights.

Accepting this argument, a three-judge federal district court[17] held the state statute unconstitutional as a denial of the consumer's right to know.[18] The Supreme Court affirmed and concluded that although the state has a legitimate interest in regulating the professional standards of its pharmacists, consumers have a superior interest in their right to information regarding the prices of prescription drugs.[19]

The free flow of information is central to the preservation of the public's right to know.[20] The first amendment guaranty of freedom of speech includes, not only the right to speak, but the right to receive information.[21] Traditionally, judicial protection of the right to know

16. The plaintiffs did not claim that their first amendment right to receive the information implied a correlative right for them to compel the pharmacists to advertise. Brief for the appellees at 10-11, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

17. 28 U.S.C. § 2281 (1970) requires a three-judge court for the issuance of an interlocutory or permanent injunction against enforcement of a state statute.

18. 373 F. Supp. 683, 687 (E.D. Va. 1974). The district court concluded that the consumers' interest in access to the price information outweighed the interests of the state in suppressing it. The enforcement of the ban did not promote public health. "[O]n the contrary, access by the infirm or poor to the price of prescription drugs would be for their good." *Id.*

19. 425 U.S. at 769-70.

20. Branzburg v. Hayes, 408 U.S. 665, 725-26 (1972) (Stewart, J., dissenting). Concern for society's interest in the free flow of information underlies the first amendment freedoms. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964); Smith v. California, 361 U.S. 147, 155 (1959); Dejonge v. Oregon, 299 U.S. 353, 365 (1937); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); Stromberg v. California, 283 U.S. 359, 369 (1931). *See generally* Ervin, *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 871 (1972); Note, Privacy in the First Amendment, 82 YALE L.J. 1462 (1973).

21. The writings of James Madison reflected this principle.

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives."

Letter from James Madison to W. T. Barry, August 4, 1822, in 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910) *quoted in* Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311, (1971).

and the free flow of information was limited to political speech.[22] Courts have, however, recently recognized that freedom of discussion "must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period."[23] Thus many courts now hold that diverse matters of general public interest merit first amendment protection.[24] Under this

Over the years, courts have recognized that first amendment protection extends to the right to receive and know. *See, e.g.* , Procunier v. Martinez, 416 U.S. 396, 408-409 (1974) ("[T]he addressee as well as the sender of direct personal correspondence derives from the First . . . . Amendmen[t] a protection against unjustified governmental interference with the intended communication."); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (right to receive information recognized); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (right of the public to receive suitable access to social, political, esthetic, moral and other ideas); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (private possession of obscene material is constitutionally protected); Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (U.S. citizens have constitutional right to receive foreign political publications); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (constitutional right to receive contraceptives); Marsh v. Alabama, 326 U.S. 501, 505 (1946) (citizens living in company owned town have a right to receive literature; ordinance completely barring distribution is unconstitutional); Thomas v. Collins, 323 U.S. 516, 534 (1945) (union members have a right to fully and freely discuss and be informed concerning union membership); Martin v. Struthers, 319 U.S. 141, 143 (1943) (ordinance forbidding door-to-door distribution of literature violates constitutional right to receive such literature). *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1st ed. 1948).

22. Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927), stated:

> Those who won our independence believe . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies. . . .

Id. at 375. *See* Bond v. Floyd, 385 U.S. 116 (1966) (first amendment protects expressions in opposition to national foreign policy); Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (criticism of government is at the very center of free discussion); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (national commitment to the principle that debate on public issues be uninhibited). For a general discussion of the emphasis of political rights embodied in the first amendment, see Comment, *Freedom to Hear: A Political Justification of the First Amendment,* 46 WASH. L. REV. 311 (1972).

23. Thornhill v. Alabama, 310 U.S. 88, 102 (1940). *See* Bigelow v. Virginia, 421 U.S. 809, 820 (1975); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

24. *See, e.g.* Rosenbloom v. Metromedia, 403 U.S. 29 (1971) (radio's broadcast reporting petitioner's arrest for possession of obscene literature is constitutionally permissible regardless of his subsequent acquittal); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (news report of conspiracy to fix football game is a public issue and constitutionally protected); Time, Inc. v. Hill, 385 U.S. 374 (1967) (publication of a review of a play which related play to a true incident is protected); Anderson Clayton & Co. v. Washington State Dep't of Agriculture, 402 F. Supp. 1253 (W.D. Wash. 1975) (use of dairy terms in advertising margarine protected under the first amendment); Fur Information & Fashion Council, Inc. v. E. F. Timme & Son, 364 F. Supp. 16 (S.D.N.Y. 1973), *aff'd,* 501 F.2d 1048 (2d Cir. 1974) (artificial fur manufacturer's promotion of his products as an alternative to the extinction of fur-bearing mammals is of general public interest and constitutionally protected).

rationale, consumer groups assert that the public has a right to know and receive information necessary to the formulation of intelligent economic decisions.[25]

In the past, however, commercial communications were not constitutionally protected. The case law generally[26] supported the view, first enunciated in *Valentine v. Chrestensen*,[27] that the Constitution imposed no restraint on governmental regulation of commercial speech.[28] Although some decisions extended first amendment protec-

25. *See* note 3 *supra*.

26. United States v. Hunter, 459 F.2d 205, 211 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972) (prohibition on newspaper's publishing of discriminatory rental house ads held constitutional); SEC v. Texas Gulf Sulfur Co., 446 F.2d 1301, 1306 (2d Cir.) *cert. denied*, 404 U.S. 1005, (1971) (in holding corporation's purchase of stock to be in violation of Securities & Exchange Act, court stated that first amendment does not deal with commercial speech); SEC v. Wall St. Transit Corp., 422 F.2d 1371, 1379-81 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970) (no constitutional conflict inherent in fact that investment advisory newspaper might be required to register under Investment Advisers Act); New York State Broadcasters Ass'n v. United States, 414 F.2d 990, 996-97 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970) (prohibition on broadcasting lottery ads does not inhibit free speech); Banzhaf v. FCC, 405 F.2d 1082, 1101-02 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (FCC's authority to require media that carry cigarette ads to devote equal time to presenting case against cigarette smoking is constitutional); Jenness v. Forbes, 351 F. Supp. 88, 96-97 (D.R.I. 1972) (restrictions on commercial activities within military housing areas are constitutional); Patterson Drug Co. v. Kingery, 305 F. Supp. 821, 825 (W.D. Va. 1969) (state statute prohibiting pharmacists from advertising the prices of prescription drugs is constitutional).

27. 316 U.S. 52 (1942), *noted in* 30 CALIF. L. REV. 655 (1942) and 8 OHIO ST. L.J. 331 (1942).

28. *See* note 8 *supra*. In *Chrestensen*, the owner of a submarine attempted to circumvent a city ordinance forbidding street distribution of commercial and business matter by printing a protest against this restriction on the reverse side of a handbill soliciting visitors for the submarine for a stated admission fee. 316 U.S. at 52-53. Reversing the lower court, the Supreme Court held that the municipal ordinance did not abridge the first amendment even as applied to a commercial handbill with an attached protest of a matter proper for public information. *Id.* at 54.

In the course of the opinion, the Court enunciated the commercial speech doctrine:

> [T]he streets are the proper places for the exercise of the freedom of communicating information and disseminating opinion and . . . though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.*

Id. at 54 (emphasis added). The New York Court of Appeals recently held the ordinance in question in *Chrestensen* unconstitutional. People v. Remeny, 40 N.Y.2d 527, 355 N.E.2d 375, 387 N.Y.S.2d 415 (1976).

Although courts frequently applied the commercial speech doctrine, the *Chrestensen* decision was heavily criticized. Some commentators have asserted that the Court failed to define the scope of the doctrine. *See* 1975 BRIGHAM YOUNG L. REV. 797, 799; 23 DEPAUL L. REV. 1258, 1262-63 (1974); 12 DUQ. L. REV. 1000, 1004-05 (1975); 12 URBAN L. ANN. 221, 223-25 (1976). Others argued that the Court severed commercial speech from the first amendment without relying on first amendment language or theory. *See*

tion to certain communications of a commercial nature,[29] the commercial speech exception permitted statutory restrictions on dissemination of information proposing "commercial transactions" to the consumer.[30]

The recent Supreme Court decision in *Bigelow v. Virginia* [31] set aside much of the *Chrestensen* holding.[32] In *Bigelow*, the Court declared

Redish, *supra* note 8, at 429-30; 12 DUQ. L. REV. at 1005 (1975). Justice Douglas believed that there was no constitutional justification for denying protection to commercial speech. *See* Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 904-905 (1971) (Douglas, J., dissent to denial of *cert.*); Cammarano v. United States, 358 U.S. 498, 513-15 (1959) (Douglas, J., concurring). For a discussion of the view that commercial speech should be protected under the first amendment see 23 DEPAUL L. REV. 1258 (1974).

Court efforts to delineate the limits of "purely commercial speech" resulted in the use of three different standards. In *Chrestensen*, the Supreme Court used a primary purpose test. 316 U.S. at 55. Under this approach, courts scrutinized the motive or intent of the advertiser/distributor and refused to extend constitutional protection to publications intended to convey commercial information. *See* Redish, *supra* note 8, at 451-52. For cases which used the primary purpose standard to preclude first amendment protection to commercial advertising, see note 26 *supra*. Over the years, however, courts carved exceptions out of the primary purpose rationale and extended first amendment protection to certain communications with commercial qualities. *See* note 29 *infra*.

The second standard used by the courts was content oriented. *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (content standard used to hold help-wanted ads to be commercial speech and subject to regulation); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (content of political ad precluded commercial speech classification). *See also* 42 TENN. L. REV. 573, 575 (1975). Under content analysis, courts look beyond the commercial framework of the advertisement and examine the content of the message. On a case by case basis, courts assess whether the message expresses matters of social policy or political concern that are of the highest public interest warranting first amendment protection. 1975 BRIGHAM YOUNG L. REV. 797, 810; 23 DEPAUL L. REV. 1258, 1261 (1974).

The third approach to commercial speech employs a balancing standard. *See* note 34 and accompanying text *infra*.

29. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809 (1975) (newspaper's publication of abortion services advertisement was protected although profit motive involved); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (newspaper's publication of political advertisement was protected); Thomas v. Collins, 323 U.S. 516 (1945) (labor organizer's oral solicitations to recruit union members held constitutional even though a union was considered to be a business activity and the recruiter was paid for his services); Jamison v. Texas, 318 U.S. 413 (1943) (printed material concerning religious activity is not subject to prohibition even though it is sold).

30. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

31. 421 U.S. 809 (1975), *noted in* 1975 BRIGHAM YOUNG L. REV. 797; 42 TENN. L. REV. 573 (1975); 10 U.RICHMOND L. REV. 427 (1976); 12 URBAN L. ANN. 221 (1976).

32. The holding [in *Chrestensen*] is distinctly a limited one . . . . The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se*.

421 U.S. at 819-20 (emphasis in original). *See* People v. Remeny, 40 N.Y.2d 527, 355

invalid a Virginia law[33] which, as applied, prohibited a Virginia newspaper from publishing an advertisement for a New York abortion referral service. The commercial nature of the advertisement did not control the outcome as it did in *Chrestensen*. Through the use of a balancing approach, the Court determined that the public's interest in the information conveyed in the ad outweighed the governmental interests served by restriction.[34] The decision left open, however, the extent to which commercial speech of less interest to the public than abortion referral might be regulated.[35] The Supreme Court, in *Virginia State Board*,[36] clarified the remaining doubts and extended first amendment protection to pure commercial speech.[37]

The use of first amendment theory by consumers in prescription drug price advertising represents a new litigation approach.[38] Previous

N.E.2d 375, 387 N.Y.S.2d 415 (1976) (Fuchsberg, J., concurring); 1975 BRIGHAM YOUNG L. REV. 797, 806-808.

33. 1960 Va. Acts ch. 385, § 18.1-63: "If any person, by publication, lecture, advertisement, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." The state amended this statute shortly after Bigelow's conviction and again after the Supreme Court decision. VA. CODE § 18.2-76.1 (1975), *amending* VA. CODE § 18.1-63 (1972).

34. 421 U.S. at 821-26. "The advertisement in [*Bigelow*] did more than simply propose a commercial transaction. It contained factual matter of a clear public interest." *Id.* at 822.

In applying a balancing text, the Court weighs the public's interest in the free flow of information against the governmental interest served by restrictive legislation. 12 DUQ. L. REV. 1000, 1005 (1975). *See* Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (balancing approach used to uphold a statute which restricted the mailing of unsolicited erotic material); Linmark Associates, Inc. v. Willingboro Twp., 535 F.2d 786, *cert. granted*, 97 S. Ct. 351 (1976) (balancing test used to uphold township ordinance which barred the erection of "For Sale" and "Sold" signs on residential properties); Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975), *aff'd*, 96 S. Ct. 2617 (1976) (balancing test used to strike down statute banning prescription drug price advertising); Unemployed Workers Union v. Hackett, 332 F. Supp. 1372 (D.R.I. 1971) (handbill informing unemployed persons about food stamps, welfare and unemployment compensation was protected). *See also* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 908-16 (1963); 23 DEPAUL L. REV. 1258 (1974); 10 U. RICHMOND L. REV. 427, 430-33 (1976); 24 WASH. & LEE L. REV. 299, 303 (1967).

35. "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit." 421 U.S. at 825.

36. 425 U.S. 748 (1976).

37. The Court identified the question before it as whether the communication "I will sell you the X prescription drug at the Y price" is constitutionally protected. The Court characterized this communication as purely commercial and determined that it merited constitutional protection. *Id.* at 760-61, 770. In doing so, the Court did away with the commercial speech exception to the first amendment. *See* People v. Remeny, 40 N.Y.2d 527, 355 N.E.2d 375, 387 N.Y.S.2d 415 (1976).

38. *See* notes 39, 40 and accompanying text *infra*. *See generally* 6 CUM. L. REV. 711, 714-21 (1976).

challenges to similar statutes based on due process arguments by drug companies and pharmacists have been dismissed[39] on the ground that the regulations bore a reasonable relation to the state's interest in protecting public health.[40] When a first amendment theory is applied, however, as in *Virginia State Board*, the state must demonstrate a significant governmental interest[41] to justify such a restrictive regulation.

Using the balancing approach,[42] the Court in *Virginia State Board* determined that no significant governmental interest was served by

39. Due process challenges brought by drug retailers and pharmacists alleged that statutes which prohibit prescription drug price advertising cause substantial loss in business. Arguably the loss amounts to a taking of property without due process of law. In addition, it has been contended that legislatures have not expressly determined that such advertising would be deleterious to the public health or welfare.

Under this approach, due process claims asserted against bans on drug price advertising failed. Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969); Milligan v. Board of Pharmacy, 348 Mass. 492, 204 N.E. 2d 504 (1964); Supermarkets Gen. Corp. v. Sills, 93 N.J. Super. 326, 225 A.2d 728 (Ch. 1966), *noted in* 24 WASH. & LEE L. REV. 299 (1967). Other courts, however, have struck down such legislation, finding the laws to have little relation to public welfare. Florida Bd. of Pharmacy v. Webb's City, Inc., 219 So.2d 681 (Fla. 1969); Stadnik 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 242 (1973); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971), *noted in* 37 BROOKlyn L. REV. 617 (1972).

40. Since the mid 1930's, courts have followed a restrictive approach to judicial review of federal and state legislation. Courts have generally upheld government restrictions of economic activity if the restriction is reasonably related to a valid governmental purpose. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Olsen v. Nebraska, 313 U.S. 236 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).

41. *See* 425 U.S. at 771. Other Supreme Court decisions have phrased the standard as a compelling state interest. *E.g.*, NAACP v. Button, 371 U.S. 415 (1963). "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *Id.* at 438. *See* Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973); Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Lamont v. Postmaster General, 381 U.S. 301, 307 (1965); Sheldon v. Tucker, 364 U.S. 479, 488-90 (1960); Talley v. California, 362 U.S. 60, 62-64 (1960).

42. *See* note 34 and accompanying text *supra*. The Court rejected the primary purpose and content approaches. *See* note 28 *supra*. Regarding the "primary purpose" approach the Court cited prior cases which indicated that speech in the form of a paid advertisement or that which involves a solicitation to purchase does not lose first amendment protection. 425 U.S. at 761. *See* note 29 *supra*. With respect to the "content" approach, the Court concluded that although the advertisement did not report on any cultural, philosophical or political subject, purely factual matter of public interest may claim constitutional protection. 425 U.S. at 761-62.

prohibiting advertisement of prescription drug prices. In analyzing the importance of the free flow of commercial information, the Court regarded the interests asserted by plaintiffs *as consumers*[43] to be crucial. They suffered a direct harm from their inability to ascertain prices due to the advertisement ban.[44] This consideration distinguished *Virginia State Board* from *Patterson Drug Co. v. Kingery*,[45] an earlier attack by pharmacists[46] on the constitutionality of the Virginia statute.[47] As sellers, plaintiffs in *Patterson* asserted a prima facie commercial concern, whereas the *Virginia State Board* consumers asserted an interest in their own health that was "fundamentally deeper than a trade consideration."[48]

In addition, the Court recognized that since consumers in a free enterprise economy must make numerous commercial choices daily, society in general has an interest in being well informed about commercial information. Intelligent economic decisions require access to such information.[49] "To this end," the Court concluded, "the free flow of commercial information is indispensable."[50]

The Court did not, however, foreclose all state regulation of drug

43. The Court first determined that plaintiff-appellees had standing to assert their claim based upon a first amendment right to receive information. "[W]here a willing speaker exists . . . the protection is afforded to the communication, to its source and its recipients both." 425 U.S. at 756. *See* note 16 and accompanying text *supra*. In dissent, Justice Rehnquist argued that the Court overextended the standing doctrine. He reasoned that the plaintiffs-appellees did not assert their right to receive the information but rather the right of some third party to publish. The statute in question placed only a prohibition on the pharmacists to advertise and did not forbid anyone from receiving the information either in person or by phone. *Id.* at 781-83.

44. The facts indicated that drug prices vary strikingly from pharmacy to pharmacy and the consumers with the greatest need could afford them the least. In addition, they were the people who had limited access, because of age or disability, to channels of communication other than advertising. 425 U.S. at 754 n.11, 763-64 n.18.

45. 305 F. Supp. 821 (W.D. Va. 1969).

46. In *Patterson* a drug company and one of its pharmacists contended that the prohibition on prescription drug price advertising violated the first amendment, the due process and equal protection clauses of the fourteenth amendment, and the interstate commerce clause. *Id.* at 823. For a discussion of the due process issue *see* notes 39, 40 and accompanying text *supra*.

47. VA. CODE § 54.426.1 (Supp. 1968) (repealed 1970). The relevant text of this statute was similar to VA. CODE § 54-524.35 (1974). *See* note 15 *supra*.

48. 425 U.S. at 755. The district court relied on this distinction, 373 F. Supp. at 685-86. The Supreme Court accepted the district court's analysis and expanded upon it.

49. 425 U.S. at 764-65. *See also* FTC v. Proctor & Gamble Co., 386 U.S. 568, 603 (1967) (Harlan, J., concurring); Redish, *supra* note 8, at 472.

50. 425 U.S. at 765. *See also* A.MEIKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

price advertising. False, misleading or illegal advertising remain subject to state control.[51] In dissent, Justice Rehnquist argued that if these are the sole limitations on permissible state regulation of price advertising, fee advertising by physicians and attorneys would be the logical consequence of the Court's position.[52] The majority rejected that possibility. In a final footnote, the Court stated that it expressed no opinion as to other professions,[53] but noted that distinctions among professions may require the examination of different factors.[54]

Notwithstanding the Court's carefully limited holding,[55] consumer activists may justifiably consider a first amendment approach as the basis for future judicial intervention to invalidate state prohibitions against other professional advertising.[56] If the public has a right to know drug prices, arguably the right may extend to legal or medical prices.[57] Assuming that a legal or medical advertisement is not false, misleading or illegal, it should not be prohibited under the first amend-

51. 425 U.S. at 770-73. The Court also stated that reasonable restrictions concerning time, place and manner were permissible. But total prohibition under the Virginia statute exceeded reasonable limitations. *Id.* at 771. In a concurring opinion, Justice Stewart argued that the Court's decision should not preclude state and federal regulation of false or deceptive advertising since such regulation aids informed economic decisions by ensuring accurate information. *Id.* at 780-81.

52. *Id.* at 785.

53. *Id.* at 773 n.25. The parties agreed that pharmacy is a profession. *Id.* at 750 n.3.

54. *Id.* at 773 n.25. In a concurring opinion, Chief Justice Burger emphasized the sharp distinctions between the professional judgments in the legal and medical professions and the lack of professional judgment on the part of pharmacists in selling pre-packaged prescription drugs. *Id.* at 773-75.

55. *See* note 37 and accompanying text *supra*.

56. Terminal-Hudson Elec. Inc. v. Department of Consumer Affairs, 407 F. Supp. 1075 (C.D. Cal), *vacated and remanded sub nom.* Board of Optometry v. California Citizens Action Group, 96 S. Ct. 2619 (1976) (state statute prohibiting the advertising of prices and places to buy corrective eyeglasses infringed consumers' first amendment right to receive such information). *Cf.* Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975), *aff'd*, 96 S. Ct. 2617 (1976) (California statute prohibiting pharmacists from advertising prescription drug prices infringed consumers' right to access of such information).

57. Justice Rehnquist suggested that "the public's right to know the price of drugs and its right to know the price of title searches or physical examinations" cannot be distinguished. Virginia State Bd. of Pharmacy v. Citizens Consumer Council, Inc., 425 U.S. 748, 785 (Rehnquist, J., dissenting).

The Court's rationale may be extended to the medical profession. The Court indicated that the need for consumer access to commercial price information may outweigh a state's interest in suppressing it. An intelligent choice in the commercial market requires ready access to price information. If the drug price ban harms the public, and if the interest in knowing how much tetracycline costs is a protected interest, then the potential harm in not knowing, and the public interest with respect to how much the prescribing physician will charge, is that much stronger.

ment rationale of the *Virginia State Board* decision.[58]

Several factors, however, distinguish bans on prescription drug price advertising from other professional advertising restrictions. Pharmacists, in the dispensing of prepackaged prescription drugs, act as retailers, mere traders in commodities,[59] whereas other professionals, such as attorneys and physicians, in rendering services, exercise professional judgement.[60] In addition, different ethical considerations arise in professional-client relationships which are not present in a commercial transaction.[61] Finally, there is a potential for professionals who render services to engage in advertising intended to mislead the public as to the nature of the services rendered. This potential does not apply to pharmacists since their advertising would consist of listing

58. The Court's statement of the nature of the question as an offer of X drug for Y price appears to reduce the issue to its most simplistic form. *See* note 37 *supra*. Given this approach, there seems to be no reason why a physician could not advertise that he will provide a patient with a chest x-ray for $25. Assuming that the physician does, in fact, charge the stated price, the advertisement is not false or misleading. Unless a chest x-ray is found to be illegal, the rationale of *Virginia State Board* does not prohibit its publication.

59. The national market statistics indicate that 95% of all prescriptions are filled by selling pre-manufactured and pre-packaged dosage forms of prescribed drugs. Brief for Appellees at 29, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). *See* Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md 103, 114-15, 311 A.2d 242, 249 (1973) (pharmacy is rapidly evolving into almost exclusively a retail business); 37 BROOKLYN L. REV. 617, 623-24 (1971). *But see* Supermarkets Gen. Corp. v. Sills, 93 N.J. Super. 326, 338, 225 A.2d 728, 735 (Ch. 1966).

60. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 774 (Burger, C.J., concurring) (Professional judgment component is a large part of the services rendered by physicians and attorneys); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (The sale of eyeglasses may require professional judgment with regard to the prescription for the lenses and, therefore, state legislation is permissible.); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935) (practice of dentistry concerns treatment of bodily ills and requires standards of conduct different from those traditional in market place competition).

61. In Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935), the Supreme Court upheld a statute prohibiting dentists from advertising their prices. In the opinion, the Court reviewed the ethical considerations concerning professionals that treat bodily ills:

> The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous.

Id. at 612.

For a similar view with respect to other "service" professions, see Cohen v. Hurley, 366 U.S. 117, 124 (1961) (attorneys); United States v. Oregon State Medical Soc'y, 343 U.S. 326, 336 (1952) (physicians).

definite prices and quantities and would not be a description of the quality of services.[62]

Thus, although consumer access to price information is now a recognized first amendment concern, in future cases the balance of interests will not necessarily weigh in favor of the consumer. Given differences between pharmacists and professionals who render more personal services, a state may assert a significant interest in maintaining high standards for service professions.[63] Court decisions upholding state prohibitions on price advertisements by dentists,[64] optometrists[65] and attorneys[66] have supported this view. With respect to pharmacists,

62. Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935); Stadnik 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 242 (1973); Supermarkets Gen. Corp. v. Sills, 93 N.J. Super 326, 225 A.2d 728 (Ch. 1966); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971). *See generally* 37 BROOKLYN L. REV. 617 (1971).

In *Semler*, the policy of the statute prohibiting dentists from price advertising was, in part, to prevent the less ethical practitioners from resorting to advertising methods "to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them." The legislation aimed to prevent dentists from inducing patronage by representations of painless dentistry, professional superiority and guaranteed dental work. 294 U.S. at 612.

63. *See* notes 59-62 and accompanying text *supra*. With respect to the regulation of fee advertising by attorneys, the Code of Professional Responsibility of the American Bar Association offers an explanation of the state interests involved.

> Competitive advertising would encourage extravagant artful, self-laudatory brashness, in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by . . . advertisements of professional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions. History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.

ABA CODE OF PROFESSIONAL RESPONSIBILITY No. 2, EC 2-9 (1971). *But see* Wilson, *Madison Avenue, Meet the Bar*, 61 A.B.A.J. 586 (1975). The author argues that it is time to amend the Code of Professional Responsibility and lift the ban on advertising. To protect against advertisements that are in poor taste or unethical, sanctions could be imposed: "[S]ome of the fragile niceties of the lawyer-client relationship of days gone by may be lost. But far more would be gained, by legal needs met, by many new millions." *Id.* at 588.

64. Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935); Bashford v. Department of Registration & Educ., 390 Ill. 601, 62 N.E.2d 462 (1945); Levine v. State Bd. of Registration & Examination in Dentistry, 121 N.J.L. 193, 1 A.2d 876 (Sup. Ct. 1938); Goe v. Gifford, 168 Va. 497, 191 S.E. 783 (1937).

65. Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); State v. Rones, 223 La. 839, 67 So.2d 99 (1953); Abelson's Inc. v. New Jersey State Bd. of Optometrists, 5 N.J. 412, 75 A.2d 867 (1950).

66. *In re* Bates, — Ariz. —, 555 P.2d 640, *prob. juris. noted sub nom.* Bates v. Arizona State Bar, 97 S. Ct. 53 (1976) (court disciplinary rule prohibiting advertising by attorneys does not violate first amendment). Support for state regulation of competitive

other regulations, including education and licensing requirements,[67] are sufficient to protect the state interest.

In affirming the consumer's constitutional right to know the prices of prescription drugs, *Virginia State Board* has eliminated the remaining vestiges of the commercial speech doctrine. Equally important, the decision recognized the applicability of the first amendment as a consumer tool to obtain access to information of general public interest. The narrow scope of the decision, however, should not be overlooked. In *Virginia State Board*, the consumers sought only price information for standardized goods in a highly regulated industry. Arguably if they sought information about the quality of the prescription drugs or prices of nonstandardized services, the state's regulatory interest would have prevailed. How far the courts will extend the free flow of information to the consumer awaits future consideration. What will be crucial are the limits courts will attach to the definition of information of general public interest.

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practices of attorneys appears in dictum in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), which held that a minimum-fee schedule for title examinations published by the County Bar Association and enforced by Virginia State Bar violated § 1 of the Sherman Act. The Court recognized that the state has a compelling interest in regulating the practice of law. This regulatory power extends to usual forms of business competition that contravenes the profession's ethical standards. *Id.* at 792.

67. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 768-69 (1976). In Virginia, as in other states, the practice of pharmacy is highly regulated. VA. CODE § 54-524.21 (1974) provides, in part, for education and experience requirements. The applicant for a license must pass the examination prescribed by the Board of Pharmacy. Pharmacists are subject to fine, suspension or license revocation for specified acts. *Id.* § 54-524.22:1. The Court in *Virginia State Board* felt that these regulations were sufficient to protect the state's interest in promoting public health.