NOTES

CONSTITUTIONAL LAW—PROFESSIONAL ADVERTISING BAN YIELDS TO CONSUMER RIGHT TO KNOW: COMMERCIAL SPEECH GRANTED FIRST AMENDMENT PROTECTION—*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817 (1976).

The Commonwealth of Virginia ascribed unprofessional conduct to the pharmacist who published or advertised the price of prescription drugs.[1] The Virginia State Board of Pharmacy, a "regulatory body" and "licensing authority," was charged with enforcement of the advertising ban.[2] A significant variance in the price of prescription drugs throughout the state[3] led the Virginia Citizens Consumer Council to bring suit against the board seeking both declaratory relief and an injunction to restrain enforcement of the statute.[4] Joining the council in this suit were Lynn Jordan, as an individual consumer, and the state AFL-CIO, whose membership included users of prescription drugs.[5] In seeking to invalidate the statute, these consumers al-

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[1] Section 54-524.35 of the Virginia Code provides in pertinent part:

> 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.

VA. CODE ANN. § 54-524.35(3) (Michie 1974).

[2] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817, 1820 (1976). The board is statutorily authorized to "[m]aint[ain] . . . the . . . efficacy of drugs . . . dispensed" and "the integrity of, and public confidence in, the profession." VA. CODE ANN. § 54-524.16(a), (d) (Michie 1974). In order to carry out its responsibilities, the board is empowered to promulgate rules and regulations for the maintenance of professional standards. *See id.*. § 54-524.17 (Supp. 1976). Pharmacists found guilty of unprofessional conduct could be subjected to license revocation, suspension, or fines. *See id.* § 54-524.22:1 (1974).

[3] Indicative of the wide range of price differentials for the same drug in Virginia were the following statistics submitted by the parties: in northern Virginia, Darvon prices reflected a 55% variance; in Richmond, Achromycin prices reflected a 140% differential; in the Newport News-Hampton area, Tetracycline prices showed a price differential of 650%. Appendix at 14, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817 (1976) [hereinafter cited as Appendix].

[4] Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683, 684 (E.D. Va. 1974), *aff'd*, 96 S. Ct. 1817 (1976).

[5] The Virginia State AFL-CIO asserted that many of its 69,000 members were users of prescription drugs. Lynn Jordan was a chronic sufferer of diseases for which she was required to use prescription drugs regularly. Appendix, *supra* note 3, at 9.

leged that the prohibition on drug-price advertising violated their first amendment right to receive such information.[6]

Since the constitutionality of a statute was at issue, a three-judge district court was convened.[7] The court declared the advertising ban embodied in section 54-524.35(3) of the Virginia Code[8] to be violative of the consumer's first amendment right to know.[9] In reaching this conclusion, the court distinguished an earlier district court ruling[10] which had upheld the statute against a fourteenth amendment due process attack brought by pharmacists.[11] Finding the present case dif-

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[6] Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683, 684 (E.D. Va. 1974), *aff'd*, 96 S. Ct. 1817 (1976).

[7] *See* Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683, 684 & n.4 (E.D. Va. 1974), *aff'd*, 96 S. Ct. 1817 (1976). The court was convened pursuant to the Three-Judge Court Act § 1, 28 U.S.C. § 2281 (1970) (repealed 1976), which read in pertinent part:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute . . . shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges . . . .

When Congress repealed this section, it noted that the original purpose behind the adoption of the three-judge requirement had been to protect state legislation "from hasty, ill-considered invalidations." S. REP. NO. 204, 94th Cong., 1st Sess. 2, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3153, 3161. However, the reasons for the promulgation of the original three-judge statutory requirement were considered no longer valid, especially in light of the significant countervailing arguments presented for its repeal. The arguments proffered consisted of the following: (1) the need to relieve the substantial case load of three-judge courts; (2) the need to eliminate existing uncertainties concerning procedures in three-judge courts; (3) the determination that the original purpose behind the enactment of the three-judge requirement had already been statutorily eliminated; and (4) a finding that safeguards in the area of federal injunctive action had been created through case law. S. REP. NO. 204, 94th Cong., 1st Sess. 3–4, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3162–63. Based upon these arguments, Congress repealed two sections of this Act on August 12, 1976. Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 1–2, 90 Stat. 1119.

[8] VA. CODE ANN. § 54-524.35(3) (Michie 1974), *quoted at* note 1 *supra*.

[9] Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683, 687 (E.D. Va. 1974), *aff'd*, 96 S. Ct. 1817 (1976).

[10] Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969), *discussed at* note 11 *infra*.

[11] Patterson Drug Co. v. Kingery, 305 F. Supp. 821, 823 (W.D. Va. 1969); *see* Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683, 685–86 (E.D. Va. 1974), *aff'd*, 96 S. Ct. 1817 (1976). In *Patterson*, the constitutionality of the Virginia advertising ban on prescription drug prices had been upheld. 305 F. Supp. at 823. The suit was brought by a discount drug chain and an individual pharmacist, both alleging, in part, that the ban was violative of the fourteenth amendment. *Id.* After having publicized discounts on prescription drugs, the plaintiffs were threatened with license revocation by the state board of pharmacy. *Id.* The court found that since "prescription drugs [were] so intimately related to the public health," the statute was a valid exercise of Virginia's police power and was not in violation of the fourteenth amendment. *Id.* at 826.

ferent in that the consumer's right to know was "fundamentally deeper than a trade consideration," the court granted the requested injunction.[12] Thereafter, the board of pharmacy appealed and the Supreme Court noted probable jurisdiction.[13]

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[14] the Supreme Court, with only Justice Rehnquist dissenting,[15] affirmed the district court's opinion and held that the advertising of prescription drug prices was not "wholly outside the protection of the First Amendment."[16] Furthermore, the Court found that the protection of the first amendment extended to consumers as receivers of the information.[17] Although the Court cautioned that its decision was one limited to the profession of pharmacy, it established a "content" test for determining whether various other types of advertising would be accorded first amendment protection.[18] Despite the fact that the purview of the first amendment was extended into the commercial area, the Court clearly indicated that the state still retained the power to regulate advertising in order to "insur[e] that the stream of commercial information flows cleanly as well as freely."[19]

The question before the Court in *Virginia Citizens* was whether commercial speech—communication which was devoid of "any . . . cultural, philosophical, or political" commentary and which had as its

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[12] Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683, 686–87 (E.D. Va. 1974), *aff'd*, 96 S. Ct. 1817 (1976). The court emphasized the fact that this was a suit brought by consumers seeking access to information *"not otherwise fairly available."* 373 F. Supp. at 685 (emphasis in original). This situation, plus the added factor that many of the consumers heavily relied upon prescription drugs for maintaining their health, led the court to distinguish the *Patterson* case from the one at bar. *Id.* at 685–86. For further discussion and analysis of the district court's opinion, see Note, *Professional Price Advertising Set Free?—Consumers' "Right-To-Know" in Prescription Drug Price Advertising*, 8 CONN. L. REV. 108 (1975); Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775, 793–94 (1975); 23 KAN. L. REV. 289 (1975). *See also* 37 BROOKLYN L. REV. 617, 619 (1971).

[13] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 420 U.S. 971 (1975).

[14] 96 S. Ct. 1817 (1976).

[15] *Id.* at 1835. Justice Blackmun wrote the majority opinion. *Id.* at 1819. Chief Justice Burger and Justice Stewart each filed a separate concurring opinion. *Id.* at 1831–32. Justice Stevens did not take part in the decision. *Id.* at 1831.

[16] *Id.* at 1825–31.

[17] *Id.* at 1822–23.

[18] *See id.* at 1825–26, 1831 n.25. For a brief summary of the content test, see text accompanying notes 32–34 *infra*.

[19] 96 S. Ct. at 1830–31. The Court noted that Virginia still retained the power to regulate advertising by means other than the total prohibition of price publication. *Id.*

primary purpose economic gain—was entitled to first amendment protection.[20] Commercial speech had long been considered outside the scope of the first amendment because it did not represent communication necessary to political decisionmaking.[21] The primary purpose of the first amendment was to "protec[t] the freedom . . . of thought and communication by which we 'govern.' "[22] Commercial speech was not communication of this order and therefore was not a proper subject for first amendment protection.[23]

The Court's acceptance of this traditional view was evident in *Valentine v. Chrestensen*[24] where the issue of extending such protection to commercial speech was initially raised. The Court held that "purely commercial advertising" could be effectively restrained by a state, thus marking the beginning of a judicially-recognized commercial speech exception.[25] In a brief opinion, the *Valentine* Court con-

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[20] *Id.* at 1825. The Court indicated that, for the pharmacist, commercial speech consisted of a communication which encompassed no more than the proposition that " 'I will sell you the X prescription drug at the Y price.' " *Id.*

[21] The principle that the first amendment was adopted to insure the continued vitality of a democratic form of government and was, therefore, limited to commentary within that scope, had been formulated by Dr. Alexander Meiklejohn. Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245; *see* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 434 (1971). For a general discussion of Dr. Meiklejohn's views, see Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Redish, *supra* at 434–38.

[22] Meiklejohn, *supra* note 21, at 255.

[23] *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). Various commentators questioned the Court's adoption of the restrictive Meiklejohn interpretation which excluded commercial speech from protection. Pointing to the increasing importance of an educated consumer, these writers argued that the achievement of an economically satisfying life was as important as a politically independent one. As a result, they concluded that commercial speech should be entitled to constitutional protection. *See, e.g.*, Goss, *The First Amendment's Weakest Link: Government Regulation of Controversial Advertising*, 20 N.Y.L.F. 617, 632 (1975); Redish, *supra* note 21, at 434–38; Comment, *supra* note 12, at 800–02.

[24] 316 U.S. 52 (1942).

[25] *Id.* at 54. The statement in *Valentine*, excluding commercial speech from first amendment protection, was rather cursory and was not supported by reference to any authority: "[T]he Constitution imposes no . . . restraint on government as respects purely commercial advertising." *Id.*

Justice Stewart, concurring in *Virginia Citizens*, characterized *Valentine* as creating an "anomolous [*sic*] situation," 96 S. Ct. at 1833, and indicated that it did not follow the line of reasoning previously adopted by the Court. *See id.* at 1832. He cited Thornhill v. Alabama, 310 U.S. 88, 102 (1940), for the establishment of a broad principle that freedom of speech encompassed all information of societal interest or importance. 96 S. Ct. at 1832. Justice Stewart further explained that the *Thornhill* decision was followed by Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), which created a narrow exception to first amendment protection for communication that "inflict[s] injury or tend[s] to incite an immediate breach of the peace," 315 U.S. at 571–73. *See* 96 S. Ct. at 1832. He

cluded that New York City could enjoin Chrestensen from distributing leaflets which advertised a tour of a submarine.[26] Chrestensen had been informed by the city police commissioner that only flyers of public interest or protest could be lawfully distributed in the streets.[27] In an attempt to evade the ordinance prohibiting purely commercial distribution, Chrestensen had affixed to the back of his advertisement a protest regarding the city's refusal to grant him wharfage facilities.[28] In upholding the validity of the statute, the Court appears to have been more concerned with Chrestensen's attempted subterfuge than with the mere interpretation of the ordinance.[29]

The conclusion of the *Valentine* Court, that commercial speech was not entitled to constitutional protection under the first amendment, was consonant with a prior decision which had found a professional advertising ban not violative of the fourteenth amendment.[30]

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then referred to *Valentine* as the next case in this series involving a first amendment issue and noted that it was decided without reference to *Chaplinsky*. *Id.* This omission, Justice Stewart implied, supported the Court's decision to finally abandon *Valentine* and the principle that it established in so cursory a manner. *Id.* at 1833.

Various authors have remarked on the lack of precedent for the *Valentine* holding. *See, e.g.*, Note, *The Commercial Speech Doctrine: The First Amendment at a Discount*, 41 BROOKLYN L. REV. 60, 64–67 (1974) [hereinafter cited as *The First Amendment at a Discount*]; Note, *Commercial Speech—An End in Sight to* Chrestensen?, 23 DE PAUL L. REV. 1258, 1263–65 (1974) [hereinafter cited as *An End in Sight to* Chrestensen?].

[26] 316 U.S. at 52–53, 55.

[27] *Id.* at 53. The New York City ordinance prohibited the distribution of any commercial matter on the city streets. *See id.*

[28] *Id.*

[29] *See id.* at 55. The Court reasoned that Chrestensen merely added the public protest to his flyer so he could lawfully distribute his advertisement in the streets. *Id.* The Court indicated that if Chrestensen's action proved successful in evading the prohibition of the statute, other merchants would quickly follow suit. *Id.*

[30] *Compare id.* at 54–55 *with* Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 611–12 (1935). In *Semler*, plaintiff was seeking to have declared unconstitutional, as violative of the fourteenth amendment, an Oregon statute prohibiting advertising by dentists. *Id.* at 608–09. The Court found that the state had the power both to regulate professions and to protect the public health and that, therefore, the statute represented a reasonable exercise of such police powers. *Id.* at 611–12. The conclusion of the *Semler* Court was later followed in Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424, 425–26, 428 (1963), and in Williamson v. Lee Optical, Inc., 348 U.S. 483, 487–90 (1955).

Several state courts, however, have invalidated statutes prohibiting advertising by pharmacists in suits brought on fourteenth amendment grounds. *See, e.g.*, Stadnik v. Shell's City, Inc., 140 So. 2d 871, 875 (Fla. 1962); Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 121, 311 A.2d 242, 252 (1973); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 199, 272 A.2d 487, 495 (1971). These state courts had obviously not felt constrained to follow the Supreme Court rulings; the Pennsylvania supreme court indicated that this was due to the fact that state and federal constitutional law had taken divergent paths. 441 Pa. at 190, 272 A.2d at 490. The respective courts concluded that the statutory advertising bans bore neither a reasonable nor a substantial

However, the *Valentine* ruling failed to establish a clear first amendment standard regarding speech in a commercial context.[31]

In subsequent decisions, the Court narrowed *Valentine*'s broad exclusionary holding by adopting a content analysis and balancing approach.[32] In order to determine if the commercial speech in question were entitled to first amendment protection, the content of the advertisement would be examined and then the state's interest would be contrasted with that of the individual.[33] If the content could be

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relationship to the ends sought to be achieved by the legislatures, such as maintaining professional standards or protecting public health. As a result, the statutes could not be sustained. 140 So. 2d at 874–75; 270 Md. at 119–23, 311 A.2d at 251–52; 441 Pa. at 197–99, 272 A.2d at 494–95.

[31] *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943); *cf.* Thomas v. Collins, 323 U.S. 516, 530–32 (1945). The *Jamison* Court, for example, on facts similar to *Valentine*, upheld the right of a Jehovah's Witness to distribute a leaflet which espoused religious beliefs on one side and sought a donation on the other. 318 U.S. at 414–16. This uncertainty led commentators to seek a standard by which such decisions could be distinguished and explained. The subsequent explanations proferred may be summarized as follows:

(1) The Court originally relied on a "primary purpose" test to determine if the speech in question was to be afforded first amendment protection—was the advertiser's motive primarily economic gain or was there present a worthier intent? *See* Valentine v. Chrestensen, 316 U.S. at 55; Redish, *supra* note 21, at 451; *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1028 (1967) [hereinafter cited as *Developments in the Law*]; *The First Amendment at a Discount*, *supra* note 25, at 66; Recent Development, *Prohibition of Abortion Referral Service Advertising Held Unconstitutional*, 61 CORNELL L. REV. 640, 642 n.8 (1976); *An End in Sight to* Chrestensen?, *supra* note 25, at 1262.

(2) This "primary purpose" test was superseded by a "public interest" test based upon content—did the advertisement contain enough information of value to the general public to raise it from the confines of purely commercial speech? *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384–87 (1973); *The First Amendment at a Discount*, *supra* at 84; Recent Development, *supra* at 646–48; *An End in Sight to* Chrestensen?, *supra* at 1267–68.

[32] *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 821–22, 826–28 (1975); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 386, 389 (1973); New York Times Co. v. Sullivan, 376 U.S. 254, 265–66, 271 (1964). For discussion of the Court's implementation of a balancing approach where first amendment issues are involved, see *Developments in the Law*, *supra* note 31, at 1028; Recent Development, *supra* note 31, at 650–53; *An End in Sight to* Chrestensen?, *supra* note 25, at 1272–75; 44 U. CIN. L. REV. 852, 856–58 (1975).

[33] Several cases brought before the Supreme Court required adjudication of the right of Jehovah's Witnesses to distribute leaflets which were characterized by the state as commercial, but which the plaintiffs claimed were religiously oriented. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jamison v. Texas, 318 U.S. 413 (1943). The asserted state interests in these cases ranged from preserving order in the public streets, *see* Jamison v. Texas, 318 U.S. at 415, to protecting citizens from unwanted intrusions or criminal schemes, *see* Martin v. City of Struthers, 319 U.S. at 144–45. In ruling in favor of the Witnesses in each case, the Court found the handbills to be religious in nature rather than commercial, and then

deemed to be of public interest or importance and the state could not sustain its burden of justifying the regulation, the speech would be accorded constitutional protection.[34]

In *New York Times Co. v. Sullivan*,[35] for example, the Court extended first amendment protection to statements which "communicated information, expressed opinion, recited grievances, [and] protested claimed abuses," despite the fact that these expressions appeared in a newspaper advertisement.[36] The advertisement, an attack on policies of the Montgomery, Alabama police department, was placed by a civil rights group.[37] Police commissioner Sullivan alleged that references made in the advertisement constituted a direct, personal attack on his character and argued, in part, that the advertisement was not entitled to first amendment protection because of its commercial character.[38] The Court dispensed with this contention by holding that speech would not be stripped of its constitutional protection merely because of its appearance in a commercial context.[39] In addition, the Court found that the right of *The New York Times* to print an advertisement concerning an issue of vital importance to contemporary society outweighed the state's power to redress libelous statements made against public officials.[40]

The Court, in *Pittsburgh Press Co. v. Pittsburgh Commission on*

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concluded that plaintiffs' first amendment rights outweighed those asserted by the state. Martin v. City of Struthers, 319 U.S. at 142, 149; Murdock v. Pennsylvania, 319 U.S. at 110–11, 114–15, 117; Jamison v. Texas, 318 U.S. at 414, 417.

[34] *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 822, 826 (1975), *discussed at* notes 46–51 *infra* and accompanying text; Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385–86, 389 (1973), *discussed at* notes 41–45 *infra* and accompanying text.

[35] 376 U.S. 254 (1964).

[36] *Id.* at 266. For discussion of the effect of the *New York Times* ruling on the commercial speech doctrine, see *The First Amendment at a Discount*, *supra* note 25, at 84; Recent Development, *supra* note 31, at 643; *An End in Sight to* Chrestensen?, *supra* note 25, at 1267–68; 44 U. CIN. L. REV. 852, 854–55 (1975).

[37] 376 U.S. at 256-57.

[38] *Id.* at 265. Sullivan's contention that the statements could not be constitutionally protected because of their appearance in a newspaper advertisement was based upon the *Valentine* holding excluding commercial advertising from protection. *Id.*

[39] *Id.* at 266.

[40] *See id.* at 270–71, 277–78, 283. The primary issue in *New York Times* concerned the validity of a judgment rendered against the newspaper under Alabama libel laws. *Id.* at 267–68. The advertisement was sponsored by a civil rights group and embodied a protest against racial discrimination. *See id.* at 257–58, 260; these facts were given great weight by the Court in its final determination to hold the first amendment rights advanced by the Times paramount to the regulatory interests asserted by the state. *See id.* at 264, 269–72.

Human Relations,[41] once again invoked a content test to determine whether an advertisement came within the commercial speech exception. Pittsburgh Press contended that a city ordinance which precluded it from publishing employment opportunities under sex-designated columns violated its rights of free speech and press.[42] The Court, after examining the substance of the advertisements, characterized them as being more akin to "the [*Valentine*] than the *Sullivan* advertisement" because they did "no more than . . . propos[e] . . . possible employment."[43] As a result, they were "classic examples of commercial speech" and not entitled to first amendment protection.[44] The Court further found that the governmental interest in preventing illegal discriminatory practices was greater than "[a]ny First Amendment interest . . . served by advertising an ordinary commercial proposal."[45]

Bigelow v. Virginia[46] marked another step in the Court's attempt to define the limits of the commercial speech doctrine through a content analysis and balancing approach. Bigelow, managing editor of a Virginia newspaper, advertised the availability of abortion services in New York in violation of a Virginia statute prohibiting such advertising.[47] In the Court's view, the *Bigelow* advertisement "did

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[41] 413 U.S. 376 (1973).

[42] *Id.* at 377–78. The ordinance permitted employment advertising under sex-designated columns only for certain specified types of jobs. *See id.*

[43] *Id.* at 385.

[44] *Id.* at 385, 391. Chief Justice Burger and Justices Stewart and Douglas strongly dissented in *Pittsburgh Press*. *Id.* at 393, 397, 400. These Justices indicated a reluctance to expand the *Valentine* exception in general and especially in cases where the facts were so significantly different. *Id.* at 393 (Burger, C.J., dissenting); *id.* at 398 (Douglas, J., dissenting); *id.* at 401 (Stewart, J., dissenting).

Pittsburgh Press has also been the subject of commentary because of its seeming support of the original *Valentine* commercial speech exception. *See, e.g.*, *The First Amendment at a Discount*, *supra* note 25, at 85–89; *An End in Sight to* Chrestensen?, *supra* note 25, at 1258–61, 1268–69, 1275; 48 TUL. L. REV. 426, 428 (1974).

[45] 413 U.S. at 389. The Pittsburgh Press Co. had contended that the first amendment exclusion for commercial speech should be abandoned. *Id.* at 388. The Court implied that such a change in direction might be warranted in the future, but indicated that the facts of the present case were not conducive to such a reversal since the advertisements in question represented "*illegal* commercial activity." *Id.* (emphasis in original). As a result, when the Court proceeded to balance the interests advocated by Pittsburgh Press against those of the state, the illegality of the advertising practice weighted the scales against Pittsburgh Press. *See id.* at 389.

[46] 421 U.S. 809 (1975).

[47] *Id.* at 811–12. The Court indicated that each state had the power to protect the health and welfare of its citizens, but concluded that Virginia could "not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." *Id.* at 824–25. The

more than simply propose a commercial transaction. It contained factual "material of clear 'public interest.' "[48] As such, it could be distinguished by its content from the advertisements in *Valentine* and *Pittsburgh Press* and accorded first amendment protection.[49] Before concluding that the *Bigelow* advertisement was constitutionally protected, the Court examined the reasons advanced by the state to justify its regulation of abortion advertising.[50] The Court found that rather than constituting a valid exercise of safeguarding the public health, the statute primarily succeeded in keeping Virginia citizens ignorant of medical services available in other states. When balanced against Bigelow's rights of free speech and press, the state's assertions were found to be insufficient.[51]

In *Bigelow*, as in *Pittsburgh Press*, the commercial speech exception had been attacked by litigants who were disseminators of the information.[52] In *Virginia Citizens*, however, the challenge had been brought by consumers—the recipients of the information.[53] This distinction led the Court to address the issue of whether the consumers had standing to bring the suit.[54] Relying on the broad principle, firmly established through prior case law, that the right of free speech extends to both speaker and receiver, the Court found that

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Virginia legislature therefore exceeded the bounds of legitimate exercise of state police power. *See id.* at 822–25.

[48] *Id.* at 822. The "material of clear 'public interest' " in the *Bigelow* advertisement concerned abortion services. *Id.* A woman's interest in having an abortion had recently been granted constitutional protection in Doe v. Bolton, 410 U.S. 179 (1973), and in Roe v. Wade, 410 U.S. 113 (1973). This factor led the Court to conclude that Bigelow's "First Amendment interests coincided with the constitutional interests of the general public," thus making Bigelow's position the stronger one in the balance-of-interests analysis invoked by the Court. 421 U.S. at 822, 826–28 (footnote omitted).

[49] 421 U.S. at 821–22. *Bigelow* has been noted as a significant attempt by the Court to restrict the impact of the *Valentine* holding. *See, e.g.*, Recent Development, *supra* note 31, at 648; 54 N.C.L. REV. 468, 469 (1976); 44 U. CIN. L. REV. 852, 856 (1975).

[50] 421 U.S. at 826–28. The state contended that regulation of abortion advertising was warranted because the public health might be affected. *Id.* at 827. The state expressed the fear that, as a result of advertising, women desiring an abortion would go to those mainly interested in reaping a profit rather than in rendering a quality medical service. *Id.*

[51] *Id.* at 826–29. Implicit in the utilization of a balancing approach is the Court's willingness to account for the unique circumstances present in each case. In *Bigelow*, the fact that the advertisement incidentally affected the constitutional right to an abortion was duly considered. *Id.* at 822. In both *Pittsburgh Press* and in *Valentine*, extenuating circumstances worked against the first amendment interests involved. *See* 413 U.S. at 389 (sex discrimination being an illegal activity); 316 U.S. at 55 (an attempt to circumvent the law).

[52] *See* 421 U.S. at 811; 413 U.S. at 376.

[53] 96 S. Ct. at 1821.

[54] *See id.* at 1822–23.

the consumers had standing to assert a right to receive such information.[55] The privilege of asserting this right was not negated by the fact that the public had access to the information by means other than publication.[56] The majority therefore concluded that if the advertisers had a constitutional right to publish, then the consumers had "a reciprocal right to receive the advertising."[57]

Justice Rehnquist questioned the Court's extension of standing to the consumers based on such a first amendment " 'right to receive.' "[58] He pointed out that the advertising ban did not foreclose members of the public from having access to drug prices through personal or telephonic inquiry at any pharmacy.[59] The dissenting Jus-

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[55] *Id.* at 1823. Statements by the Court acknowledging the existence of a right to receive have been numerous. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 408–09 (1974) (arbitrary censorship of prisoners' outgoing mail deprived addressees of their right to receive); Kleindienst v. Mandel, 408 U.S. 753, 756, 760 (1972) (American citizens have right to hear ideas and views of foreign Marxist journalist); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (general public has a right of access to different ideas); Marsh v. Alabama, 326 U.S. 501, 505 (1946) (right of public to receive religious literature is vital to "the preservation of a free society"); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (right of persons to receive literature found as important as the right to distribute it).

[56] 96 S. Ct. at 1823 n.15. The Court noted that the availability, through various channels, of information desired by the public did not preclude the assertion of a right to receive. *Id.* Furthermore, alternative means of access to information did not warrant abridgment of freedom of speech. *Id. See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 765 (1972). For a more general discussion of the public's right to know in the political sphere, see Comment, *The First Amendment and the Public Right to Information*, 35 U. PITT. L. REV. 93 (1973).

[57] 96 S. Ct. at 1823. Contrary to the argument advanced by the council that the right to receive is not derived from the right to free speech but rather is independent of the pharmacist's right to publish, *see* Brief of Appellees at 19, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817 (1976), the Court concluded that the right to receive drug-price information arises only if the right to disseminate such data were established. *See* 96 S. Ct. at 1823.

[58] 96 S. Ct. at 1835–36 (Rehnquist, J., dissenting).

[59] *Id.* Justice Rehnquist distinguished the right to receive advocated by the consumers from that which had been established by the Court in previous decisions on grounds of the accessibility of the desired information. *Id. Virginia Citizens* was viewed as being a situation in which the concerned purchaser could either telephone or visit his pharmacy to procure price information and one in which consumers, as a group, could collect and publish the information. *Id.* at 1836. This situation was found in sharp contrast to both that of Kleindienst v. Mandel, 408 U.S. 753 (1972) (litigants asserting their right to hear the ideas and beliefs of a Belgian Marxist which would have necessitated a trip abroad), and Procunier v. Martinez, 416 U.S. 396 (1974) (recipients of information would have had to travel to a state prison). 96 S. Ct. at 1836 n.* (Rehnquist, J., dissenting). The majority's countervailing argument was that alternative means of access, whether easily available, as by walking to the corner drugstore, or necessitating more vigorous efforts, as by traveling abroad, should make no difference in consideration of whether there existed a right to receive. *See id.* at 1823 n.15 (majority opinion).

tice further emphasized the fact that the statutory prohibition was only directed at pharmacists, thus not precluding the publication of prices by other groups such as interested consumers.[60] Based on the fact that no individual pharmacist had intervened in the suit, and that the information desired by the consumers was in fact freely available except through publication, Justice Rehnquist concluded that the consumers were "not asserting their 'right to receive information' . . . but rather the right of some third party to publish."[61] For the Court to extend standing on this basis was, in Justice Rehnquist's view, "troublesome."[62]

In deciding whether the advertisement of prescription drug prices should be accorded first amendment protection, the *Virginia Citizens* Court utilized the same approach taken in the *Pittsburgh Press* and *Bigelow* cases.[63] Its determination was based on a study of the content of the speech, followed by a balancing of the interests involved.[64] The Court found that a judgment on the basis of content was necessitated by traditional first amendment theory, which considered the amendment "primarily an instrument to enlighten public decisionmaking in a democracy."[65] Now, squarely confronted with

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[60] 96 S. Ct. at 1836. Justice Rehnquist emphasized not only the fact that the statute affected only pharmacists, but also that no pharmacist was party to the litigation. *Id.* In his view, this made the consumers' standing even more tenuous. *Id.* However, when the statute had been attacked in a suit brought by pharmacists on fourteenth amendment grounds, it had been held constitutional. Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969). Prior to *Virginia Citizens*, the only other case which had succeeded in overturning a drug-price advertising ban on first amendment grounds had been initiated by consumers. *See* Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975).

[61] 96 S. Ct. at 1836.

[62] *Id.* at 1835. Justice Rehnquist implied that the consumers were granted standing so that the end result of extending first amendment protection to commercial speech could be achieved. *See id.* Whether the Court would have reached the same conclusion had suit been brought by pharmacists, of course, can only be surmised.

[63] *Compare id.* at 1825–30 (majority opinion) *with* 421 U.S. at 821–28 *and* 413 U.S. at 385–89.

[64] 96 S. Ct. at 1825–30.

[65] *Id.* at 1827 (footnote omitted). The Court had consistently adhered to the Meiklejohn concept, *discussed at* notes 21–23 *supra* and accompanying text, of the purpose of the first amendment. *See, e.g.*, Roth v. United States, 354 U.S. 476, 484–85 (1957) (speech having no redeeming social value found not worthy of constitutional protection); Chaplinksy v. New Hampshire, 315 U.S. 568, 571–74 (1942) (speech inciting riotous behavior [" 'fighting' words"] is an exception to first amendment protection).

Justice Douglas appears to have been one of the first members of the bench to indicate a willingness to abandon the Meiklejohn interpretation which did not include first amendment coverage for commercial speech. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. at 398 (Douglas, J., dissenting) (arguing that commercial matter was entitled to first amendment protection); Dun & Bradstreet, Inc.

the issue of "whether speech which [did] 'no more than propose a commercial transaction' " should be afforded constitutional protection,[66] the Court held that such speech did in fact serve the accepted purposes of the first amendment.[67]

The majority reached this conclusion by analyzing the interests of the parties who might gain from a commercial transaction induced by an advertisement.[68] Beyond the interests of the advertiser[69] and the consumer,[70] the Court noted a substantial societal interest in the uninhibited dissemination of commercial information.[71] It found that advertising played an essential role in a free enterprise system, regardless of whether or not individual advertisements could be

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v. Grove, 404 U.S. 898, 905, *denying cert. to* 438 F.2d 433 (3d Cir. 1971) (Douglas, J., dissenting from denial of certiorari) (information needed for private decisionmaking considered as deserving of first amendment protection as "political expression").

[66] 96 S. Ct. at 1826 (quoting from Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. at 385).

[67] 96 S. Ct. at 1827, 1830.

[68] *Id.* at 1826–27. In Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975), the district court also focused upon the interests of the involved parties—the same approach that was taken later in *Virginia Citizens*. The plaintiff in *Terry* sought to have declared unconstitutional a California statutory ban on the advertising of prescription drug prices. *Id.* at 96. The court, in invalidating the statute on first amendment grounds, analyzed the interests of consumers and the general public and found them to be substantial. *Id.* at 103–04. For further discussion of *Terry* and its impact, see 6 CUM. L. REV. 711 (1976).

[69] The Court noted that the advertiser's concern was "purely economic," 96 S. Ct. at 1826, but found that this fact should not negate one's qualification for constitutional protection. *Id.* Pointing to examples in the labor field, the Court found that economic interests in the outcome of labor disputes did not disqualify statements made in such situations from first amendment protection. *Id.*

[70] The consumer's interest in the publication of prescription drug prices was considered vital. *Id.* For the poor, the sick and the elderly, learning the cost of drugs was not a mere convenience, rather "[i]t could mean the alleviation of physical pain or the enjoyment of basic necessities." *Id.* at 1827. Many factors account for these groups being the most adversely affected by an advertising ban; the elderly are often on a fixed income, are often physically unable to engage in comparison shopping, and are more often afflicted by disease than other age groups, thus requiring more medication. Consideration of such factors had led other courts to invalidate drug-price advertising bans. *See, e.g.*, Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94, 103–04, 109 (N.D. Cal. 1975); Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 105–06, 311 A.2d 242, 244 (1973); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 197–99, 272 A.2d 487, 494–95 (1971).

In addition to drug-price advertising bans, the differences between the drug market and markets for other types of products—such differences as the lack of choice regarding the amount and the type of drug to be purchased—may also adversely affect consumers in their purchase of drugs. *See* Note, *Retail Drug Advertising Bans are Bad Medicine for Consumers—Is There a Sherman Act Prescription?*, 15 ARIZ. L. REV. 117, 122–26 (1973).

[71] 96 S. Ct. at 1827.

deemed of public importance or interest.[72] Access to commercial information, whether it be of public value or not, leads to numerous, daily decisions concerning the allocation of economic resources, and eventually the success or failure of business enterprises.[73] Moreover, commercial information is also needed to formulate opinions as to how the free enterprise system might "be regulated or altered."[74] This line of reasoning led the Court to conclude that information needed to make economic decisions is as deserving of first amendment protection as information with political or social content.[75]

The interests of the advertiser, consumer and general public were weighed against the justifications advanced by the state in support of the statutory prohibition of drug-price advertising.[76] The arguments relied upon by the board of pharmacy concerned the effects that a lifting of the ban would have on pharmacists, consumers and society at large. The board argued that inferior service to the public would result from unrestricted advertising by pharmacists.[77] Consumers would begin to frequent pharmacies offering a lower price, thus causing a loss in established customer relationships.[78] These ill

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[72] *Id.* The Court found that advertisements, aside from promoting products, could also relate information of general interest. *Id. See* Bigelow v. Virginia, 421 U.S. at 812, 822 (informing public of availability of abortion services); *see also* Fur Information & Fashion Council, Inc. v. E.F. Timme & Son, Inc., 364 F. Supp. 16, 20 (S.D.N.Y. 1973) (advertising artificial furs as an alternative to real furs which necessitate the killing of endangered species).

However, the Court's refusal to rely upon a distinction between informational and other types of advertising in its determination of whether to accord constitutional protection to advertising seems wise; according to one author, even "[a] cursory examination of current . . . advertising reveals that . . . comparatively little commercial promotion performs . . . a purely informational function." Redish, *supra* note 21, at 433. However, Redish, like the Court, *see* 96 S. Ct. at 1827, concluded that even if advertising contained little informational value, it should still be entitled to first amendment protection. Redish, *supra* at 433.

[73] 96 S. Ct. at 1827. The conclusion reached by the Court, that the aggregate decisions of the public have far-reaching effects on our economic system, had been relied upon by several writers as a basis for proposing that first amendment protection be extended to commercial speech. *See, e.g.*, Goss, *supra* note 23, at 625–32; Redish, *supra* note 21, at 472; Comment, *The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech*, 50 ORE. L. REV. 177, 184–89 (1971).

[74] 96 S. Ct. at 1827.

[75] *Id. See* notes 21–23 *supra* and accompanying text.

[76] 96 S. Ct. at 1828–30.

[77] *Id.* at 1828. The board contended that the pharmacist's services, when properly performed, require time and effort. *Id.* Competition would force the conscientious pharmacist to forego rendering all but basic services in order to remain in the market, with resulting adverse effects on the consumer. *Id.*

[78] *Id.* at 1828–29 & n.22. The board claimed that a loss in stable, long-standing

effects would be compounded by a denigrated image of the professional pharmacist.[79] While acknowledging the significant state interest in maintaining high professional standards, the Court rejected the board's primary contention that such standards would be jeopardized by allowing price advertising.[80] Although these justifications had been considered adequate by the Court to sustain advertising bans on fourteenth amendment grounds, the first amendment approach relied on by the consumers here mandated that the state now vindicate the suppression of price information by a different rationale.[81]

The state's assertion that the best interests of the public were served by the advertising ban could not be justified because, in the majority's view, its foundation rested upon a public "kept in ignorance."[82] Potential misuse of drug-price information by the buying

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relationships between consumers and pharmacists would make "monitoring . . . impossible." *Id.* at 1828–29. Monitoring is the practice, engaged in by very few pharmacists, of keeping health records on each individual customer. *Id.* at 1828. Such records would indicate to a pharmacist, for example, the person's allergies to any drugs, and would list all medications taken by the individual. *Id.* This practice can only be effectively engaged in if an individual consumer purchases all his prescriptions at the same pharmacy. *See id.* at 1828–29. However, the Court pointed to several factors that had already contributed to making the practice obsolete, such as the mobility of the public and the availability of drugs without prescription. *Id.* at 1828 n.22. For a discussion of monitoring and other justifications advanced by the pharmaceutical profession in its attempt to uphold advertising bans, see 37 BROOKLYN L. REV. 617, 618–21, 624–26 (1971); 28 OKLA. L. REV. 350, 352–55 (1975).

[79] 96 S. Ct. at 1829. The board argued that the public image of the pharmacist as a highly skilled professional would be tarnished if he engaged in competitive advertising similar to that of the ordinary tradesman. *Id.* However, the belief that advertising is a negative reflection on professionalism has been questioned. *See* Alberti, *Why Don't the Professions Advertise?*, 59 CASE & COM. 3, 5–6 (1954) (advertising should no longer be considered beneath the dignity of professional groups); Freedman, *Advertising and Solicitation by Lawyers: A Proposed Redraft of Canon 2 of the Code of Professional Responsibility*, 4 HOFSTRA L. REV. 183, 184–87 (1976) (dignified advertising by lawyers should be allowed).

[80] 96 S. Ct. at 1829–30. The Court concluded that professional standards would be insured by the close supervision and regulatory practices of the board rather than by the advertising ban which in fact had no effect on those standards whatsoever. *Id.* The maintenance of professional standards through advertising bans had been considered too remote a justification for upholding such bans in other cases as well. *See, e.g.*, Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94, 105–06 (N.D. Cal. 1975); Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 112–16, 311 A.2d 242, 247–48 (1973).

[81] 96 S. Ct. at 1829. The Court had upheld professional advertising bans on grounds that such advertising did affect professional standards. *See* Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424, 426, 429 (1963); Williamson v. Lee Optical, Inc., 348 U.S. 483, 490 (1955); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 612 (1935).

[82] 96 S. Ct. at 1829. The Court found that although the state could enact legislation protecting the public welfare, such measures could not be predicated upon the suppres-

public not only was an insufficient justification for the statute but also exhibited a "highly paternalistic approach."[83] In the Court's opinion, neither the legislature nor the judiciary may make the "choice . . . between the dangers of suppressing information . . . and the dangers of its misuse if it [were] freely available" because such a determination is dictated by the constitutional guarantees of the first amendment.[84] The Court concluded that the suppression of price information could not withstand the mandate of the first amendment that the public possesses a right to know.[85]

Justice Rehnquist, in his dissent, clearly disagreed with the majority's liberalized interpretation of the first amendment, extending protection to commercial speech.[86] Adhering to a more conservative, traditional approach, the Justice contended that the first amendment should protect "public decisionmaking as to political, social, and other public issues, rather than the decision . . . as to whether to purchase one or another kind of shampoo."[87] In his view, the majority's ap-

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sion of information which consumers could use effectively to protect themselves. *See id.* at 1829–30.

[83] *Id.* at 1829.

[84] *Id.*

[85] *See id.* at 1829–31. In Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94, 98 (N.D. Cal. 1975), plaintiff's reliance upon a right-to-know approach proved successful in invalidating a state ban on prescription drug-price advertising. Several writers, commenting on the utilization of such an approach in *Terry* and *Virginia Citizens*, indicated that assertion of the right to know in this area would prove successful to litigants seeking to overturn drug-price advertising bans. *See, e.g.*, Comment, *supra* note 12, at 776–77; 6 CUM. L. REV. 711, 719–21 (1976); 23 KAN. L. REV. 289, 289–90, 294–300 (1975). However, one author has concluded that "courts should not use an incidental infringement on first amendment interests as an excuse to remedy an inadequate distribution of needed drugs to disadvantaged individuals." Note, *supra* note 12, at 108–13, 128.

[86] 96 S. Ct. at 1835 (dissenting opinion).

[87] *Id.* at 1838. Justice Rehnquist's dissent indicates an unwillingness to abandon the Meiklejohn interpretation of the first amendment which had prevailed in former adjudications by the Court. *See id.* For a discussion and critique of the Meiklejohn interpretation, see notes 21–23 & 65 *supra* and accompanying text. Other writers have also viewed the first amendment as the protector of ideas necessary to political and social decisionmaking, the purpose of which did not extend into economic pursuits. *See, e.g.*, T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3–15 (1966); Resnik, *Freedom of Speech and Commercial Solicitation*, 30 CALIF. L. REV. 655, 658–59 (1942).

One commentator, writing subsequent to *Virginia Citizens*, has indicated his support of the position taken by Justice Rehnquist. *See* Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976). In an extensive discussion, Professor Baker has argued that advertising is not worthy of constitutional protection since it "lacks the crucial connections with individual liberty and self-realization which exist for speech generally." *Id.* at 3. Professor Baker further contends that the Court's focus, in making constitutional determinations concerning speech, should be on the

proach elevated commercial speech to a level "previously reserved for the free marketplace of ideas."[88] Such a finding was unwarranted, Justice Rehnquist argued, because the determination regarding the validity of drug-price advertising was one that should lie with the state legislature.[89] For Justice Rehnquist, the Virginia legislature had acted well within the acknowledged police powers of the state to regulate professions and protect the health and welfare of the public.[90] He contended that the state's powers in these areas should not be overridden by the Court's desire to foster a public policy which allowed for the dissemination of economic information.[91]

Although the majority extended first amendment protection into the commercial area, they did indicate that commercial speech was distinguishable from other kinds of speech and, therefore, subject to regulation by the state.[92] Commercial speech differed from other forms of speech in several significant respects. First, its content could be verified by advertisers acquainted with the true attributes of their products. Secondly, since the primary purpose of advertising is to produce profits, there is little possibility that the presence of governmental regulation in the area would dissuade commercial speakers

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speaker rather than on the content of the speech and that the balancing approach adopted by the Court should be replaced by an absolutist theory. *Id.* at 3–4.

[88] 96 S. Ct. at 1835. Justice Rehnquist cited the dissenting opinion of Justice Black in Breard v. Alexandria, 341 U.S. 622, 649 (1951), in support of his contention that the first amendment was inapplicable to commercial activity. 96 S. Ct. at 1838. Yet, it should be noted that Justice Black was dissenting from a majority opinion which had denied the claim of a magazine salesman that the first amendment was violated by a city ordinance which prohibited door-to-door solicitation. 341 U.S. at 642–45, 649–50. Justice Black thought that such restrictions were violative of the right "to publish and circulate." *Id.* at 649–50 (Black, J., dissenting).

[89] 96 S. Ct. at 1836–37. The Justice felt that it was the role of the legislature to balance the factors necessary in making a determination as to whether or not drug prices should be advertised. *Id.* at 1836–38. Furthermore, he found controlling and indistinguishable the case of Williamson v. Lee Optical, Inc., 348 U.S. 483, 489–90 (1955), where the Court acknowledged the right of the legislature to prohibit eyeglass advertising. 96 S. Ct. at 1837.

[90] *See* 96 S. Ct. at 1836. The Court had previously upheld the power of state legislatures to prohibit professional advertising pursuant to their authority to protect the public health. *See, e.g.*, Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424, 428–29 (1963); Williamson v. Lee Optical, Inc., 348 U.S. 483, 487–88, 490 (1955); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 610–13 (1935). *But see* NAACP v. Button, 371 U.S. 415, 438–39 (1963), where a Virginia statute regulating solicitation of business by the legal profession was held violative of the NAACP legal department's constitutional rights.

[91] *See* 96 S. Ct. at 1836; Note, *supra* note 12, at 125–28 (adopting the same viewpoint as that of Justice Rehnquist).

[92] 96 S. Ct. at 1830 & n.24.

from engaging in advertising.[93] As a result, the Court concluded that regulation to insure the truthfulness and legality of commercial speech was warranted and constitutionally acceptable.[94]

Justice Stewart concurred in the majority's decision that constitutional protection of commercial speech did not preclude its regulation by the state.[95] He noted that constitutional protection and regulation were not mutually exclusive and in fact co-existed in certain areas of the law such as libel and labor relations, where first amendment protection is not regarded as absolute.[96] Relying on libel cases for illustration, Justice Stewart indicated that where harm or injury could result from false statements, certain limitations on speech were necessary.[97] If such restrictions were applicable in the area of libelous communication, then, by implication, they were warranted in the area of commercial speech where injury to the public could be even greater.[98]

The concurring Justice arrived at this conclusion by examining the unique factors present in the realm of advertising. Since advertisers could easily ascertain the truth about their products, there need be no fear that government regulation would chill the dissemination of accurate commercial communication.[99] Furthermore, if false and

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[93] *Id.* at 1830 n.24. Although the Court granted first amendment protection to commercial speech, it stipulated that the degree of protection for such speech would not be commensurate with that given other forms of speech. *Id.* The differences between commercial speech and other types of speech would also allow for a lower degree of tolerance by the state regarding inaccurate or deceptive statements, since there need be no appreciable "fear of silencing the speaker." *Id.* Furthermore, the state could make certain demands on commercial speakers to insure that advertisements were not deceptive. *Id.*

[94] *Id.* at 1830–31 & n.24.

[95] *Id.* at 1832–33.

[96] *Id.* at 1833–34. Justice Stewart cited several cases where first amendment rights, although recognized, did not preclude limitation on the speech in question. *Id.* For example, in NLRB v. Gissel Packing Co., 395 U.S. 575, 618–20 (1969), an employer's first amendment right to communicate his views concerning unionism did not preclude the Court from characterizing his statements as unfair and coercive and, therefore, not entitled to protection. *Accord*, NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941).

[97] 96 S. Ct. at 1833. Professor Emerson has justified governmental incursion in the area of libel regulation by reasoning that

> [t]he restriction on expression is imposed within narrow bounds, in a situation where the government can effectively perform the role of umpire. . . . Under all the circumstances it is unlikely . . . that the limitation results in any serious impairment of the right to freedom of expression.

T. EMERSON, *supra* note 87, at 68–71.

[98] 96 S. Ct. at 1833.

[99] *Id.* In a case such as *New York Times Co. v. Sullivan*, it would have been very difficult for the newspaper to properly ascertain the truth of the allegedly libelous ad-

deceptive advertising could be eliminated through state control, the real interests of first amendment protection would be served—making available to the public information needed for intelligent economic decisionmaking.[100] Justice Stewart concluded that since injury to the public by false advertising could be serious, and truthful information was easily determinable by the advertiser, commercial speech could properly be accorded the dual status of being constitutionally protected yet subject to governmental regulation.[101]

The lifting of the Virginia ban on the publication of prescription drug prices based on the first amendment right of the consumer to have access to information raises serious questions concerning the future of other types of professional advertising. The majority found that the differences between the profession of pharmacy and other professional groups would preclude the *Virginia Citizens* holding from being applicable in other cases.[102] The Court mentioned that certain features distinguished pharmacy from other professions, yet elaborated on this statement only by way of a single illustration.[103] Since other professions, such as law and medicine, ordinarily are not involved in dispensing products, but rather are engaged in rendering a myriad of services, advertising by these groups could prove inadvertently deceptive.[104] This is due to the fact that it is patently more difficult to accurately value intangible services than it is to determine the cost of actual commodities.

Chief Justice Burger concurred in the opinion that the holding of

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vertisement it published, *see* 376 U.S. at 279, to have upheld the state court judgment against The New York Times, Co., therefore, would have represented a serious infringement of free speech, perhaps resulting in a chilling effect in this area. *Id.*; *see* 96 S. Ct. at 1833. The *Times* situation was therefore distinguishable from the realm of commercial speech where advertisers could easily ascertain the truth of their statements prior to publication. *Id.*

[100] 96 S. Ct. at 1835. Justice Stewart, in reaching the conclusion that commercial speech was deserving of first amendment protection because of its role in economic decisionmaking, indicated acceptance of a liberalized reading of the amendment advocated by several commentators, *see* note 23 *supra*, and other members of the bench, *see* note 65 *supra*. 96 S. Ct. at 1835.

[101] 96 S. Ct. at 1833–35.

[102] *Id.* at 1831 n.25. The majority failed to devote any significant discussion to the effect, if any, of the *Virginia Citizens* decision on other professions. Reserving consideration of such questions for a later date, the Court emphasized the fact that *Virginia Citizens* only concerned the advertising of prescription drug prices by pharmacists. *Id.*

[103] *Id.*

[104] *Id.* Other writers have also pointed to the distinction between the selling of goods, which is the pharmacist's major concern, and the rendering of services, which is typical of other professional groups, as a factor limiting any analogy between pharmacists and other professionals. *See* Note, *supra* note 70, at 135–37; 23 KAN. L. REV. 289, 299 (1975).

Virginia Citizens could be limited to the profession of pharmacy and the advertising of prescription drug prices.[105] In his view the pharmacist's main concern in this instance was the dispensation of a pre-packaged drug.[106] This act more closely resembled a clerical function rather than a professional one since all the pharmacist was required to do was transfer the correct number of tablets from the manufactured package to the prescription bottle.[107] The Chief Justice stipulated that other factors would have to be considered if the Court were to validate an advertising ban which affected "the traditional learned professions of medicine or law."[108] In these occupations professional judgment is required, making the rendering of these services more difficult to price than a commodity.[109] It becomes apparent in the opinions of both the majority and the Chief Justice that the legitimacy of professional advertising bans rests on the distinction between the rendering of services and the sale of products.

Justice Rehnquist believed the Court's holding could not be so narrowly interpreted as to have no effect on advertising by other professional groups.[110] He noted that other professionals offered services for which standardized prices were charged, making the distinction between the sale of goods and the rendering of services a highly artificial one.[111] Furthermore, Justice Rehnquist indicated that if the state were now constitutionally restricted to prohibiting only that advertising which is false or misleading, then no valid distinction could be drawn between advertising by pharmacists and by other professional groups.[112] As long as the advertising meets the standard of

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[105] 96 S. Ct. at 1831–32.

[106] *Id.* at 1831. The Chief Justice stipulated that since approximately 95% of all prescriptions were already prepared in dispensable form, the pharmacist need only transfer the proper dosage into the prescription bottle and include the physician's instructions. *Id.*

[107] *Id.*

[108] *Id.* The Chief Justice noted that the state would have a more significant interest in the regulation of the legal and medical professions. *Id.* at 1831–32. Lawyers, for example, not only served clients, but were required to aid in the administration of justice. *Id.*

[109] *Id.* One writer has suggested that pharmacists, since they are engaged in supplying both a product and a service, could indicate separately on the customer bill the fee charged for the service and the price charged for the drug. *See* 49 CALIF. L. REV. 340, 347 (1961).

[110] 96 S. Ct. at 1836 (Rehnquist, J., dissenting).

[111] *See id.* at 1837. Justice Rehnquist stated that he could not "distinguish between the public's right to know the price of drugs and its right to know the price of title searches or physical examinations or other professional services for which standardized fees are charged." *Id.*

truthfulness, the first amendment now prevents the state from proscribing it.[113] The majority's holding, therefore, could not be limited to the facts of *Virginia Citizens* but, on the contrary, it could be extended to other kinds of advertising and various other professions.[114]

Whether the *Virginia Citizens* holding can be limited to the profession of pharmacy remains questionable in light of the Court's acknowledgment of a consumer right to know.[115] If first amendment protection is considered necessary to a general societal goal of informed economic decisionmaking,[116] then publication of professional, as well as non-professional, prices would seem warranted. Addition-

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[112] *Id.* Implicit in Justice Rehnquist's view is the presumption that if the only standard for first amendment protection of commercial speech is the truthfulness of that speech, then practically all groups would be able to comply and state prohibitions on professional advertising would thus be precluded. *See id.* at 1836–39 (Rehnquist, J., dissenting).

[113] Various writers have recognized that in the area of advertising, and especially in the realm of pharmaceutical advertising, complete truth and accuracy are the most important prerequisites. Only by demanding such requirements could the state effectively protect the health, safety and welfare of the public. *See, e.g.*, Zito, *Regulation of Pharmaceutical Advertising*, 20 CLEV. ST. L. REV. 339, 350 (1971); Comment, *Advertising of Food and Drugs: Concealing a Truth, Hinting a Lie*, 8 AKRON L. REV. 456, 478–80 (1975).

[114] 96 S. Ct. at 1837. The Justice concluded that if the only delineation between what was constitutionally protected and what could be governmentally prohibited centered on the truthfulness of the communication, then decisions in areas where commercial speech had been curtailed on the basis of other standards would have to be questioned. *Id.* at 1837–38. As an example, Justice Rehnquist pointed to court rulings in the field of labor relations where statements made by employers had been struck down when "found to be implicitly coercive." *Id.* at 1838.

[115] On the basis of the public's right to know, one commentator has advocated a lifting of advertising bans affecting lawyers. *See* Freedman, *supra* note 79, at 184–86. Professor Freedman has expressed agreement with Justice (then American Bar Association President) Powell's observation, included in the commentary to the Code of Professional Responsibility, "that when people are denied their day in court because ignorance has prevented them from obtaining counsel, there is a denial of the fundamental right to equal justice under law." *Id.* at 184. Since the public is unaware of the cost and availability of legal services due to the presence of advertising prohibitions, the public's constitutional rights are being violated and the profession's obligation to afford access to the legal system is undercut. *Id.* at 186. *See also* NAACP v. Button, 371 U.S. 415, 419–20, 444 (1963), where it was held that the activities of the NAACP's legal department, making known the availability of legal representation in desegregation cases, did not violate a statutory ban on solicitation by lawyers.

[116] There have been indicators from other sources supporting the Court's premise that publication of information utilized in economic decisionmaking is desirable. For example, in *The New York Times*, it was reported that "the California Citizen Action Group" conducted a survey regarding consumer knowledge "of the facts necessary to make intelligent purchases of eyeglasses." Cerra, *Buyer of Glasses Is Often Misled*,

ally, absolute advertising prohibitions seem incapable of withstanding a first amendment attack based on the right to know, since the Court has strongly supported both the individual consumer's and the public's claim to such a right.[117] The questions remaining in the area of professional advertising, therefore, will most likely concern the extent to which such advertising may be constitutionally regulated.

The Court has stated that first amendment protection for commercial speech does not preclude governmental regulation.[118] Yet the boundary between such protection and permissible regulation has to be more clearly delineated. Where bans which are permissive as to some forms of advertising are in question, a balancing approach will afford the state an opportunity to justify such a ban. A resulting counterargument to an asserted right to know may be a state claim that less restrictive advertising would prove deceptive or misleading.[119] In addition, the expressed hesitancy of the Court to analogize the *Virginia Citizens* holding to advertising by professionals other than pharmacists,[120] as well as its reliance upon a goods-services distinction in scrutinizing such bans,[121] may prove advantageous to those litigants seeking to uphold advertising prohibitions.

Whether these factors will indeed prove significant may become apparent in *Bates v. Arizona State Bar*,[122] a case now pending before the Supreme Court, in which a prohibition against legal advertising is being challenged.[123] Bates and O'Steen, two Phoenix attorneys, placed a newspaper advertisement listing certain legal services avail-

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N.Y. Times, Aug. 25, 1976, at 30, col. 1. The survey concluded that the public was "abysmally ignorant" in this area. *Id.*

[117] 96 S. Ct. 1826–27.

[118] *Id.* at 1830. For further discussion of the questions raised by *Virginia Citizens* concerning the extent of first amendment protection to be accorded commercial speech in the future, see *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 142, 149–51 (1976).

[119] The Court has clearly stated that its decision should in no way hamper the state in regulating advertising which may prove deceptive or misleading. 96 S. Ct. at 1830.

[120] *See id.* at 1831 n.25.

[121] *Id.* For discussion concerning the goods-services distinction and its effect on professional advertising, see pp. 85–86 & notes 104, 106 & 109 *supra*.

[122] 45 U.S.L.W. 3219 (U.S. Oct. 4, 1976) (No. 76–316), *noting prob. juris. to In re* Bates, 113 Ariz. 394, 555 P.2d 640 (1976) (en banc). The Arizona supreme court held that the rule prohibiting legal advertising was neither violative of the first amendment nor of the Sherman Act. 113 Ariz. at 397, 399, 555 P.2d at 642, 645. The court further found the due process, equal protection and vagueness claims of the attorneys to be without merit. *Id.* at 399–400, 555 P.2d at 645–46. On appeal to the Supreme Court, only the questions concerning the rule's possible violation of the first amendment and the Sherman Act are being considered. 45 U.S.L.W. at 3219–20.

[123] 45 U.S.L.W. at 3219–20. *See also Arguments Before The Court*, 45 U.S.L.W. 3497, 3497–99 (Jan. 25, 1977).

able through their office and the prices charged.[124] This was done in contravention of a state disciplinary rule forbidding such advertising.[125] On appeal to the Supreme Court, Bates and O'Steen have asserted that the advertising ban is violative of the first amendment and deprives consumers of information which would aid them in obtaining legal services.[126] The State Bar has argued that advertising would only serve to undermine professional integrity and that the problem of limited access to legal services by consumers can best be solved by individual state action rather than through Supreme Court mandate.[127]

Although the Court indicated that its holding was a limited one, *Virginia Citizens* effectively ended much of the uncertainty generated since *Valentine*. The general principle that commercial speech is entitled to first amendment protection has been established.[128] Notwithstanding the need for further clarification, this grant of protection for information needed in economic decisionmaking marks a significant step toward a more expansive interpretation of the first amendment.[129] Despite the Court's reluctance to acknowledge it as such, its opinion may be deemed a departure from traditional constitutional theory.[130] Furthermore, this decision lends valuable support toward affirmation of a first amendment right to know and as a result, represents a move in the direction of greater protection of consumer interests. Concomitant with the greater protection afforded the consumer, *Virginia Citizens* may well be considered a harbinger of the demise of the professional advertising ban.

Ellen Sperber Clarkson

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[124] *In re* Bates, 113 Ariz. 394, 395, 555 P.2d 640, 641 (1976) (en banc).

[125] *Id.*

[126] *Arguments Before The Court*, *supra* note 123, at 3497–98.

[127] *Id.* at 3498–99. See *Supreme Court Will Hear Lawyers' Advertising Case from Arizona*, 62 A.B.A.J. 1422 (1976), for additional discussion of this case and analysis of the Arizona supreme court decision.

[128] 96 S. Ct. at 1826.

[129] The *Virginia Citizens* holding may be viewed either as within the mainstream of established first amendment theory or as a significant departure from it. The Court concluded that its grant of constitutional protection to commercial speech served the established goals of the first amendment. *Id.* at 1837. But it may be argued that such a conclusion rests on too tenuous a base, and rather than attempting to bring its holding within established bounds, the Court should acknowledge the adoption of a new orientation.

[130] For a discussion of traditional first amendment theory, see notes 21–23 *supra* and accompanying text.