Constitutional Law--Restricting the Application of the Commercial Speech Doctrine

Stephen Lee Thompson

West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Constitutional Law Commons, and the First Amendment Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol79/iss2/5

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
The first amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." While this seems to be an extremely clear prohibition against any sort of regulation, experience tells us it has not been so read, or so applied. In the years since its adoption, the meaning of the first amendment has been a constant source of litigation, and it has undergone extensive scrutiny. The result of these examinations is that the amendment, seemingly written in uncategorical terms and in clear language, has been limited in its application. The issues raised have dealt with definitional problems: what constitutes "speech" for first amendment purposes, and thus is accorded the constitutional protection against "abridgement"? The best known and fully litigated exceptions to the privilege are in the obscenity area, and in the area referred to as "words tending to a breach of the peace." This article concerns another well-recognized exception—the area of "commercial speech," one not nearly so old nor fully developed as the two areas mentioned above, although one certainly becoming an area of increasing interest.

In every instance where free and unhindered speech is allowed, it must be borne in mind throughout that there are benefits accruing to three sectors of society. The first sector to benefit is the sector whose interest is being communicated, the "speaker". The speaker has an obvious interest in having his point of view communicated to others, whether they be potential voters, citizens to be recruited for a cause, or buyers in the marketplace, in which case the speaker is often denominated "advertiser".

The second sector to benefit from the interchange is that per-

---

1 U.S. Const. amend. I.
2 See, e.g., Roth v. United States, 354 U.S. 476 (1957); Ex parte Jackson, 96 U.S. 727, 736-37 (1877).
son or persons to whom the speech is directed or who happens to hear what is said, the "listener". Individuals have an interest in receiving the communications of others because it aids in their quest for knowledge about happenings around them—it aids in fulfilling their need to be informed—and assists in their making more knowledgeable and rational choices in the marketplace.4

The benefits afforded to the first two groups lead to the fulfillment of a still larger benefit for the third sector, society as a whole. This is true for at least two reasons. First, the free exchange of ideas leads to fuller consideration of the numerous facets on the issue under discussion. This in turn leads to more informed conclusions and to the best possible solutions; when one is more informed he is more likely to use his best judgment. This has as its ultimate result the benefit of society. Second, it seems that the backbone of a democracy—where each has a hand in the governmental process—is a well-informed populace. The only way to insure that such a group exists is to provide for the freest and widest possible access to an unbridled and unhindered press.5

There is no doubt that the restrictive reading of the first amendment has significantly hindered access to the free flow of ideas. The "commercial speech" doctrine had its origin in 1942 when the United States Supreme Court scrutinized a New York City sanitary ordinance forbidding the distribution of handbills, circulars or other advertising matter of a business and commercial nature. While reiterating the general proposition that the freedom of communicating information and disseminating opinion may not unduly be burdened or proscribed in public thoroughfares, the Court, in Valentine v. Chrestensen,6 concluded that "the Constitution imposes no such restraint on governments as respects purely commercial advertising." This statement has been interpreted to mean that "purely commercial speech" is not entitled to any first amendment protection,8 and, for a great period of time, it seemed

5 Id. at ch. II.
6 316 U.S. 52 (1942).
that no first amendment interests would be recognized if contained within "purely commercial speech."

Normative political theory considers the idea of "free speech" a value to be pursued as an end in itself. The goals to be achieved by the unhindered interchange of ideas serve to benefit society as a whole. Shown to be equally important will be the effects of speech containing not political ideas, but commercial ones. The implications of such a message upon both our political and economic systems have been only recently recognized and will be examined in the context of application of political theory to judicial decisionmaking.

The holding in *Chrestensen* was presaged by a number of cases involving not the substantive speech itself, but rather the mediums through which the material was distributed. The medium has become almost as important as the material itself. Before the Court had considered the specific question of commercial leaflet distribution, several questions had arisen concerning the amount of regulation which local governments could place upon the distribution of handbills. *Lovell v. Griffin,* the first case in the area, went quite clearly to the method of dissemination as it involved the regulation of distributing hand-to-hand leaflets, handbills, circulars, or literature of any nature within the city limits. *Lovell* involved a Jehovah's Witness who had failed to get the permission of the authorities required under the statute. The Court held the ordinance invalid as a prior restraint. By examining the primary purpose of the activity in the Jehovah's Witnesses cases, the Court had no problem finding that the activity went beyond the exercise of purely commercial speech and into the area of protected religious activity.

The next year, in *Schneider v. State,* the Court held that a municipality's interests in cleanliness and the prevention of littering were not alone sufficient to sustain ordinances preventing the distribution, either totally or with severe restrictions such as police examinations, of handbills and other literature. In a series of three cases, the Court found that the distribution of pamphlets in general could not be hampered through their submission to police

11 308 U.S. 147 (1939).
authorities whose duty it was to scrutinize the contents. The Schneider Court for the first time looked to the content of the literature. Whereas in Lovell the ordinance was invalidated because it swept too broadly, in Schneider the Court looked to the very speech sought to be prohibited. Mr. Justice Roberts, later to write for a unanimous Court in Chrestensen, stated that Schneider was "not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation" as the framers of ordinances may require. This language needs to be carried but one step before becoming the holding in Chrestensen. Judge Jerome Frank, dissenting in Chrestensen, contended that where there was no relationship between the commercial advertisement and the political protest, "the dominant purpose . . . [i] his sole purpose in trying to distribute the handbill . . . " , was commercial.

The Chrestensen standard has become known as the "primary purpose" or "motive" test. There the advertiser had attached to the advertising leaflet in question a statement of protest against the city, and contended the statement was no less protected because of the advertising. The Court rejected the distinction between public interests and private profit in favor of the intent with which the act was done, and explicitly refused to determine the extent to which the statement of protest was protected.

In determining the degree to which Chrestensen's handbill was to be given first amendment protections, the Court used two lines of analysis, either of which would have led to the same result. The Court first looked to the ordinance sought to be invalidated and found that it was one which furthered a legitimate interest of the state, while at the same time did not sweep so broadly as to fail meeting constitutional muster. Additionally, the ordinance fulfilled those other necessary prerequisites applicable to the regulated media.

12 Id. at 165 (emphasis added).
13 122 F.2d. 511, 519 (2d Cir. 1941) (Frank, J., dissenting opinion).
14 [T]he affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose of evading the prohibition of the ordinance.
The second line of analysis concerned the specific speech involved with the Court going behind the printed pages to discover the author's intent. Although the speech was within the specific prohibitions of the ordinance, the Court found it to be otherwise unprotected because the two statements "did no more than propose a commercial transaction." Apparently out of a desire to abstain from deciding a constitutional issue unless necessary, the Court used only this second path, with the resulting confusion.

The most significant case to arise in the commercial speech area over the next thirty years was *New York Times Co. v. Sullivan*,” in which the Court held a paid political advertisement was entitled to the same degree of constitutional protection as was any other speech. The Court rejected the contention that the ad was "purely commercial speech" within the context of *Chrestensen*. The advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. . . . That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."19

The Court's concern in this instance seemed to be that of dissemination of ideas through the only outlet available and marked the beginning of inquiry into the content, rather than the primary purpose of the speech. This shifting of emphasis has continued to the point where the examining of the speech in question on the basis of content has caused the Court to find first amendment protections in otherwise commercial speech. Certain commercial attributes alone do not necessarily cause speech to lose its protected status.

Gaining recognition in the speech area are two interests of a fundamental character. The first interest is that which individuals have in expressing themselves—the concept of man as a social animal. The individual's role in society often causes him to consider it his duty to speak, whether out of fear or out of frustration, on matters reflecting his interest in some vital particular. Man's

---

18 376 U.S. 254 (1964) [hereinafter cited as Sullivan].
19 Id. at 266.
second interest in speech is somewhat akin to the first and is directly related to his societal role. Communication which is designed to inform him of the decisions he must make in society requires a protected speech which aids him in the process of formulating governmental alternatives.

However, it is clear that not all speech is so fundamentally important as to gain protected status. This is graphically demonstrated in what may be the last case containing a viable "commercial speech" doctrine, Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations. Pittsburgh Press involved a complaint filed with the Pittsburgh Commission on Human Relations by the National Organization for Women, alleging that the sex-designated help-wanted advertisement columns used by the Press violated the Human Relations Ordinance of the City of Pittsburgh. This ordinance provided that it was unlawful for any employer to publish an advertisement indicating discrimination based on sex, or for any reason to aid in such discrimination, unless the Commission had certified that sex was in fact a bona fide occupational qualification. After a hearing, the Commission ordered the newspaper to cease the classification on the basis of sex. The Press had a disclaimer which preceded the columns in question, stating that there were various laws and ordinances which prohibited discrimination in hiring on the basis of sex and that the column arrangement was for the convenience of the readers only. It must be added that either the advertisers themselves designated into which column the ads would be placed, or the Press would attempt to ascertain into which column a given position belonged. The position of the Press was that the advertisements were protected speech, as was the advertisement in Sullivan, and that the Press's practice of exercising its editorial judgement in the use of the classification scheme raised it to the level of protected speech.

Mr. Justice Powell, writing for the Court, rejected both of these contentions. The Court stated first that the mere fact that speech appeared in the form of an advertisement was not, standing alone, sufficient to make it commercial and, therefore, unprotected. Nevertheless, this case was distinguished from Sullivan

---

21 Id. at 379-80.
22 Id. at 381 n.7.
23 Id. at 380 n.5.
24 Id. at 381.
25 Id. at 384.
since here the advertisements did no more than "propose a commercial transaction" in precisely the same fashion as did the leaflet of Chrestensen. The Court further distinguished this case by highlighting the very nature of the material in Sullivan, the social and political criticism which it raised on a vital social issue. This crucial aspect of the material was missing in Pittsburgh Press where no opinions were expressed, and no complaints of abuses were made. Because of these deficiencies, the advertisements were "classic examples of commercial speech."\(^2\fi\)

In rejecting the argument of the Press as to the editorial judgement allegedly used in the advertising process, the Court found that the disclaimer and the classification scheme, together with the advertisements themselves, constituted an "integrated commercial statement."\(^2\fi\) Furthermore, the Court explicitly pointed out that the entire scheme would remain unprotected where the activity itself (discrimination in employment) was illegal, and where the Court could assume that the practices in which the Press engaged furthered such activities, or, at the very least, aided the employers themselves in the practicing of discriminatory activities.\(^2\fi\) As the speech promoted an activity which was illegal, the speech could be regulated on that ground alone, though the Court never fully reached this issue.\(^2\fi\) Chief Justice Burger in his dissent questioned whether the Press was in fact engaging in continuing criminal activity.\(^2\fi\)

While adhering to the commercial speech analysis, the Court utilized a balancing test in determining the relative values of the conflicting interests involved.\(^2\fi\) The legislative social policy was clearly based on the state interest of furthering the right to equal access in employment which the Court determined to be paramount to the necessity of the free flow of ideas. The need for the free dissemination of ideas was not present here, for there were no "ideas" involved. Had the expression of opinions or ideas been involved, the determination of commercial speech would never

\(^2\) Id. at 385.
\(^2\) Id.
\(^2\) Id. at 388.
\(^2\) Id. at 388-89.
\(^2\) 413 U.S. at 395 n.2.
\(^2\) Id. at 389.
have been made, and a finding in this regard would have necessitated the use of some alternative mode of analysis.

In the event that the Court had failed to find the advertisements of the Press to be "commercial speech," the Court could have used the "speech-action" analysis in arriving at a similar result. The activity may be viewed as a continuum, at one end of which lies what the Court has referred to as "pure speech," subject to no restriction of any kind by the state, and at the other end of which lies "conduct," action subject to restriction by the state. While the discussion of ideas is, and should be protected, action, depending upon its effect, may or may not be so protected. Where the effect of the action would be the furthering of an illegal activity, such as job discrimination, the "action-speech" (some hybrid or combination of both speech and action and lying at some point midway in the continuum) would not be protected. It is possible also that the Court could have decided the case on the issue of "action" through another mechanism. Because the newspaper decided whether it would allow the advertiser to select the column, it was contended by the Press that it exercised editorial discretion in determining where the advertisements were to be placed. The Commission found, however, that in every case the Press deferred to the judgment of the advertiser. The Court nonetheless considered the issue of editorial discretion by determining that in some circumstances "a newspaper's editorial judgements... take on the character of the advertisement and, in those cases, the scope of the newspaper's first amendment protection may be affected by

So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. ... Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, ... he enters a realm where a reasonable ... requirement may be imposed.

Id. at 540.

We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct ... as these amendments afford to those who communicate ideas by pure speech. ... We reaffirm the statement of the Court ... that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed."

Id. at 555.
the content of the advertisement." This editorial-commercial dichotomy is justifiable solely on the theory that the first amendment values political propaganda more than that of a trade nature, although this distinction is nowhere expressed in the Constitution. It has been contended that "[t]he Constitution does not discriminate between different liberties. It leaves all liberties to compete for men's allegiance in a free field. In that competition the salesman has the same opportunity as the preacher, the scientist, the engineer, the soldier, and the politician..."

Through the exercise of its editorial discretion, the newspaper may allow itself to become so inextricably involved in the discrimination—hence, action—that the speech is not protected. This is the rationale for the Court's conclusion that the combination is "an integrated commercial statement." Inferentially, if the advertisement fulfilled the *Sullivan* requirements, then the advertisement would become not "purely commercial speech," but "protected speech" within the contemplation of the first amendment.

The Press's problem was that it furthered discrimination through the use of its advertisements. Had the Press advocated its views on the matter in some manner more consistent with the Court's holding in *Sullivan*, rather than implement or practice its views, then the Court would have had difficulty finding a furthering of discriminatory hiring practices by the newspaper itself, and may even have found the activity to have been protected. Here the disclaimer was such that the Court found it insignificant as an editorial statement. In no instance, however, could the Press have continued to print its advertising pages in such a manner as to further the unlawful hiring practices of its advertisers, though on

---

35 413 U.S. at 386.

36 Gardner, *Free Speech in Public Places*, 36 Bost. L. Rsv. 239, 246-47 (1956). This concept has been a popular one over the years, having such notable advocates as Mr. Justice Holmes in *Abrams v. United States*, 250 U.S. 616 (1919). "[T]he ultimate good desired is better reached by free trade in ideas—... the best test of truth is the power of the thought to get itself accepted in the competition of the market. ..." Id. at 630 (Holmes, J., dissenting opinion). Recent decisions indicate the concept to be growing in popularity. *Bigelow v. Virginia*, 421 U.S. 809, 825-26 (1975); Miller v. California, 413 U.S. 15, 24 (1973).


38 413 U.S. at 388.

39 See text accompanying note 19 supra.
each page of the ads it could print an editorial decrying equal opportunity and sex-less hiring. The distinction is obvious: we can say virtually all we want, we just cannot do the same.

The Court in *Pittsburgh Press* appears to have adopted as its basic tenet the “self-government” principle of first amendment theory espoused by Professor Alexander Meiklejohn. Meiklejohn’s contention is that where speech exists which is relevant to the decisions which a citizen must make in order to fulfill his role in the governmental scheme, the speech is absolutely protected from any interference by the state.

Meiklejohn has never contended that the “self-government” principle absolutely protects a speaker’s right to speak at any time, in any manner, or in any place. His view accepts any laws or ordinances requiring the speaker to conform to the necessities of the community, so long as the restrictions are not subterfuges by which the government attempts to suppress speech of “governing importance.” Under this analysis, the government has at least some power to regulate speech, protected or unprotected, in both manner and place. Such a reservation of power is reflected in the view of the “absolutists”, those who believe that the first amendment absolutely prohibits Congress from making laws abridging the freedoms contained therein, and, as applied to the states through the fourteenth amendment, imposes an identical restriction upon the state governments. Though the speech falls within the purview of the first amendment, it is the collateral aspects of the speech which fall beyond the scope of the amendment, and it is this aspect of speech, if any, which the government may regulate or suppress. It is when these collateral aspects come under consid-

---


41 In my view, “the people need free speech” because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others. And, in order to make that self-government a reality rather than an illusion, in order so that it may become as wise and effective as its responsibilities require, the judgement-making of the people must be self-educated in the ways of freedom. That is, I think, the positive purpose to which the negative words of the First Amendment gave a constitutional expression.

Id. at 263.


43 Cox v. Louisiana, 379 U.S. 559, 578 (1964) (Black, J., dissenting opinion).
eration that litigation arises over whether the regulation is or is not unduly broad, burdensome or restrictive.

The "absolutist" view has never commanded a majority of the Court, and the prevailing view is itself constantly in flux. The Court has, from time to time, explicitly held that first amendment rights are not absolute and, in the area of speech, are based primarily on the theory that the first amendment is intended to protect the discussion of public issues. This holding was reiterated in Pittsburgh Press, although questioned by Mr. Justice Douglas in his dissent.

Douglas however, seems to have misconstrued the holding of the Court as imposing some restrictions upon the ability of the press in general to criticize upon the basis of political creed or unjust rule of law. While reiterating his frequent stand against the holding in Chrestensen, Douglas attempted to demonstrate the unjustness inherent in the case by posing an issue falling not within the limits of Chrestensen, but instead clearly within the holding in Sullivan. However, he, too, explicitly recognized the Meiklejohn philosophy—a first amendment based upon a free-wheeling, independent people, whose Jeffersonian philosophy marks expression to action as the point of permissible government intrusion, and whose speech contains knowledge, a search for truth, and an intellectual curiosity serving the general welfare.

This concept was further elucidated in Bigelow v. Virginia, and seems now to be the dominant philosophy within the Court. Appellant Bigelow was a director and the managing editor of a newspaper with local circulation, particularly on the campus of the nearby University of Virginia. On the day he was directly responsible for the content, publication and circulation of the paper, an advertisement in the weekly by an organization in New York City announced that arrangements could be made through them to obtain abortion placements in low-cost, accredited hospitals and clinics in New York. The advertisement informed readers that abortions were legal in New York State, and that there were no residency requirements. According to the ad, the entire procedure was to be done in strictest confidence, and the organization would

---

44 Brennan, supra note 42, at 4-7.
41 U.S. at 398-99 (Douglas, J., dissenting opinion).
47 Id. at 399; MEIKLEJOHN, POLITICAL FREEDOM 42 (Oxford 1965).
offer interested parties information and counseling, as well as make all the necessary arrangements. Bigelow was charged with and convicted of violating a Virginia statute which prohibited advertising or publishing materials which encouraged the procuring of abortions. The Virginia Supreme Court of Appeals rejected Bigelow's claim that the ad was merely informational and found that it "constituted an offer to perform a service." The ad was considered commercial speech which may constitutionally be prohibited by the state as a valid exercise of police power. The Virginia court reconsidered in light of the decisions in Roe v. Wade and Doe v. Bolton, which made the right to procure an abortion a "fundamental right." Nevertheless, the court affirmed, noting that neither Roe and Doe "mentioned the subject of abortion advertising" and finding nothing in those decisions "which in any way" affected their earlier view.

In reversing Bigelow's conviction on first amendment grounds, Mr. Justice Blackmun, writing for the majority, looked to the facts involved in Chrestensen, Sullivan and Pittsburgh Press. The Court found more in the Bigelow ad than the mere propositioning for a commercial transaction. Looking to its earlier opinion in Sullivan to find a matter of "public interest and concern", the Court found that portions of the Bigelow ad involved other rights rooted in the first amendment as interpreted by Sullivan, namely that of communicating information and expressing opinion. This need for information and opinion so highly regarded by the Court is rooted in the Meiklejohn philosophy as the way for the governing populace to achieve its objective of self-government; it is the keystone of a viable democratic system. The holding, narrowly construed, is compatible with Chrestensen, as there was no attempt to evade a state or local regulation by trick or ruse using otherwise protected speech in an attempt to raise otherwise unprotected speech to a protected level. In this regard, the holding conforms also to the guidelines of Sullivan.

---

50 Id. at 193-95, 191 S.E.2d at 174-76.
51 Id. at 196, 191 S.E.2d at 176.
52 410 U.S. 113 (1973).
55 Id. at 342, 200 S.E.2d at 680.
57 376 U.S. at 266.
However, in *Bigelow*, the Court applied the Meiklejohn philosophy in a way in which it was not designed to be used. The Court implied that the right to the free flow of information was simply one of the factors to be considered in a weighing of various interests, without giving any indication as to the relative weight to be assigned to the right. The Court reiterated the balancing test alluded to in *Pittsburgh Press*, although it seems to have made it a test which is not only flexible and difficult to administer, but also one which would be imprecise and unpredictable. Such uncertainty could easily result in a chilling effect where speech of a questionable nature is involved. The Court has previously held that the mere existence of vague or overbroad statutes can create such an effect, irrespective of the manner in which they may be applied, and yet it appears to be this vague balancing test which is being adopted by the Court. The Court must be continually on guard to ensure stifling effects of the balancing test upon the press, for material falling within the zone of uncertainty will not, in all probability, be published for fear of criminal sanctions. This is analogous to the chilling effect so eschewed by the Court in the civil damage cases. The imposition of a rule such as this would result in a form of "self-censorship" as effective as any statute enacted by any legislative body, even in those instances where the would-be speaker believes the speech is of public importance. The ultimate result of such a rule is that it "dampens the vigor and limits the variety of public debate," something which would be, in the judgement of the Court, an unconscionable result.

*Bigelow* signalled the final blow to any semblance of a viable "commercial speech" doctrine. Any lingering doubts were dis-

---

58 See text accompanying note 32 supra.
59 Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 63 (1971) (Harlan, J., dissenting opinion). The term "chilling effect" is used to indicate a situation where would-be critics are deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of uncertainty in the facts, because of doubt whether it can be proved in court, or because of fear of the expense of having to do so. Such a situation breeds timidity and inhibits the expression of ideas. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).
pelled in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, involving a state statute which cited as unprofessional conduct the advertising of the prices of prescription drugs in any manner. Any pharmacist who was found by the Board to be guilty of unprofessional conduct was subject to a fine or to forfeiture of his license to practice. Challenge to the statute was made by citizens who frequently purchased prescription drugs and citizens groups. They alleged that the statute prevented them from making purchases of prescription drugs to their best advantage because they were unable to ascertain the prices of the drugs in advance of making their purchases. The Board contended that the ban on advertising was necessary in order to maintain high professional standards; they feared a number of pharmacists would advertise the marketing of inferior, low-cost products without denoting them as such, that many persons would unwittingly purchase such products, and hence the reputable pharmacists, who only market more expensive and superior products, would be driven out of business. The Court found this to be unpersuasive because the effects of any such misleading advertisements could be countered by advertisements from the reputable pharmaceutical dealers pointing out the true state of facts. Thus, as discussed above, the "marketplace" concept seems very much alive in speech-advertising analysis.

The Court has found it necessary to move from its initial position in viewing the considered material to one which places the emphasis upon the speech instead of the speaker. In order to achieve this change, the Court made the determination that the freedom of speech reflected in the first amendment is that which presupposes the right to "receive information and ideas." Limitations upon the exercise of the first amendment freedom of speech infringe upon the intended recipients of the ideas or thoughts, indeed, even upon the words themselves, with the inevitable con-

---

43 96 S. Ct. 1817 (1976).
44 *Id.* at 1829.
45 *See text accompanying note 36 supra.*
47 *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (hardship imposed on prisoner's correspondence because of prison censorship; first amendment rights of "outsiders" not to be abridged by unjustified governmental intrusion). *See also Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (interviews by media representatives of specifically designated inmates prohibited for fear of disciplinary and moral problems; other sources of information can be utilized although with greater
clusion that the right rests more in the listener to hear than in the speaker to speak.\textsuperscript{68}

The Court has seized upon the public interest inherent in any advertising by pointing out that “[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information,”\textsuperscript{69} regardless of how minimal. For the Court to make such a statement it was necessary to place all advertising on an equal footing. No additional protection was to be accorded advertising which was of a “public interest,” for indeed, under such circumstances all advertising would be of a public interest. The end desired was that of a well informed and intelligent populace, and the means to such an end was through the dissemination of the greatest amount of information possible.

We may examine the rationale of the Court through two methods. First, we may consider the idea of the marketplace, referring to the marketplace where products are bought and sold as commodities and not to the marketplace where there is a free exchange of ideas. If we are so willing to allow the proponents of unpopular, even radical and dangerous views to tender them forth, knowing full well that the intention of the proponents is to seek their adoption, then it seems absurd to restrain competitors from advertising and espousing the virtues of their products and services in an economic system which depends upon the unhindered and unregulated flow of goods for its vitality.\textsuperscript{70}

Secondly, we may examine the result in the context of the political forum. If the purpose of the first amendment is to aid in the political process, the freedoms guaranteed under its provisions are designed for aiding in the scheme of government, and once again no rational distinction can be made between political and economic advertising. In election years we are bombarded with political advertising of all types, that which appeals to our intellect and that which insults it. On these bases we make our political decisions. When we enter into “purely commercial transactions,” we do so on the basis of advertisements which appeal to or insult


\textsuperscript{69} S. Ct. at 1827.

\textsuperscript{70} See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting opinion).
our intellect. Speaking in economic terms only, the commercial transactions we enter into are sizeable. When we purchase goods, we are casting our economic "votes," in terms of dollars, towards that product which has impressed us most favorably, just as we do when we choose candidates for public office.

In both of these situations the rationale is the same. Both in the economic and political schemes we rely on information which is designed to assist in the individual decision-making process. Just as we require a free flow of information regarding the political process because we value the concept of political self-realization, so too should we require an open exchange of ideas and information in the economic framework to provide for a more satisfying personal life. To achieve truly the aims we have established necessitates the fullest possible flow of information to the decisions to be made.

Even if the Court was to assume that the first amendment was designed as an aid to the democratic system, it felt there could be elements contained in advertising which may serve that goal. Information is what is "indispensable to the formulation of intelligent opinions" as to how our free enterprise system ought to be regulated to provide proper allocation of our scarce resources. Inasmuch as our economic system is inextricably intertwined with our political system, any information aiding one affects, albeit indirectly, the other. Hence, such information should be accorded constitutional protection. The Court arrived at such a conclusion after making explicit that the case involved speech which, under past circumstances, would have otherwise been unprotected.

The Court found, however, that there was nothing in the first amendment history to indicate that it was designed to protect

---

71 Comment, Advertising Food and Drugs: Concealing a Truth, Hinting a Lie, 8 Akron L. Rev. 456 (1975).
72 Redish, supra note 6 at 445-46.
73 96 S. Ct. at 1827.
74 C. Beard, An Economic Interpretation of the Constitution of the United States (Free Press 1965); E. Seligman, The Economic Interpretation of History (Columbia 1949).
75 Our question is whether speech which does "no more than propose a commercial transaction," . . . is so removed from any "exposition of ideas," . . . and from "truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of government," that it lacks all protection.

96 S. Ct. at 1826.
interests of every nature but economic. Looking at circumstances
in which the interests involved were of an entirely private and
economic character, the Court found instances in which the protec-
tion of the first amendment had been accorded. Discussion which
has as its end merely the influencing of outcome was protected
even though the parties did not venture outside of the narrow
confines of their dispute or discussion.\(^7\)

In two respects the Court’s opinion in *Virginia Pharmacy* is
somewhat puzzling. The Court states that it is holding that
“purely commercial speech” is to be guaranteed the same constitu-
tional protections assured speech of otherwise political import-
ance. They have thus impliedly overruled the prior holding in
*Chrestensen* without doing so in a clear and unambiguous fashion.
The Court also rules that “[i]f there is a kind of commercial
speech that lacks all First Amendment protection therefore, it
must be distinguished by its content.”\(^7\) Further reading of the
opinion reveals, however, that permissible restrictions can be
made regarding the time, place, and manner of distribution of
commercial speech.\(^7\) These are restrictions which clearly do not go
to the content of the material, but rather go to the distributive
process. It is possible that the second issue, the distributive pro-
cess, is what prevented the Court from overruling *Chrestensen*
outright, because *Chrestensen* was a case involving leaflet distri-
bution. The Court does point out that there are certain safeguards
which must be met where such restrictions exist. If they are to be
upheld, such restrictions must be justified without reference to the
content of the regulated speech, must serve a significant govern-
mental interest, and must leave open ample alternative channels
for communication of the information.\(^7\) The broad holding in
*Virginia Pharmacy* seems to revitalize the older line of cases allow-
ing regulation of the advertising mediums.\(^5\)

Where regulations regarding commercial speech are involved,
it would appear that they will be upheld in certain instances where
content itself is regulated. Where the information conveyed is false
and misleading, the message itself may be regulated solely in terms

\[^7\] Id.
\[^7\] Id. at 1825.
\[^7\] Id. at 1830.
\[^7\] Id.
\[^5\] See text accompanying notes 8-12 supra. See also Note, Freedom of Expres-
STUDENT NOTES

of due process. As contrasted to speech of a political, social, or religious nature, fraudulent or misleading advertising is not protected by the first amendment. It has been contended that Sullivan does not protect statements in advertising which are made with knowledge of their inaccuracy. Conscious or intentional falsity does not seem to be protected. However, there has been language to the effect that where advertising is itself misleading, then the intention with which the ad was published is irrelevant. That no protection may be accorded deceptive advertising is reflected in both Bigelow and Virginia Pharmacy, and indeed some contend that speech of an untruthful nature is not at all protected.

Where the product is one which is or could be withdrawn from the market, or the service is one which could be curtailed by government regulation, then presumably the advertising itself can be regulated or perhaps even prohibited. Where the product is banned or withdrawn, then there is no reason why the advertising itself should not likewise be proscribable, since the power to prohibit sale or use necessarily implies the power to prohibit the advertising for it. Where the product or service is available, information about it is valuable to potential consumers, and advertising about it should be in the protected category.

The approach which it is hoped the Court will take is a test similar to that enunciated in Sullivan, where the Court looked to the need to advance society's interest in "uninhibited, robust, and wide-open" debate on public issues. This may be something of a "public interest" test, where information of a public interest is

---

81 E.g., Williamson v. Lee Optical, 348 U.S. 483, 489-90 (1955) (a legitimate end which is reasonably related to the means employed); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935); Packer Corp. v. Utah, 285 U.S. 105 (1932).
83 Redish, supra note 6, at 459.
85 421 U.S. at 827-28.
86 96 S.Ct. at 1830-31.
90 376 U.S. at 270.
protected from normal governmental intrusion by the first amendment.\footnote{Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (Marshall, J., dissenting opinion).} While the Court has all but explicitly rejected such an approach in the obscenity area,\footnote{Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).} this is the approach which could be utilized best in the commercial speech area,\footnote{See Note, Developments in the Law—Deceptive Advertising, 80 Harv. L. Rev. 1005, 1029-34 (1967).} since all speech, regardless of type, is measured against a public interest standard. The Court has determined that the public interest is not served by actionable words, slander, libel or other defamatory words, or obscene materials.

Under this approach, the Court will be forced to administer a vague test in attempting to determine what is and is not in the public interest. It is quite likely that a vast number of cases will be submitted for review. The standards are as yet undefined, for the Court must in every instance attempt to ascertain just what is the "public interest". The second step is to measure the speech sought to be regulated against the public interest, to determine whether or not it furthers the public interest. However, this is based solely upon a determination that the regulation involved inhibits the speech itself and not its distributive channels. Where the regulation goes only to the distribution process in some way, only due process restrictions must be met.

The principles of the first amendment have value to society wholly separate and apart from the protective functions normally associated with them. The first amendment serves to protect the political principles we hold dear. The potential is there, however, for the political protections of the first amendment to be expanded to encompass other interests of society. We have seen how this has been applied to protect economic considerations. In so doing, the Court is reading the first amendment less restrictively than ever before and with the apparent likelihood of other diverse interests being recognized and accorded protection.

Stephen Lee Thompson