Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Free Speech/Commercial Speech

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**Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748** (1976)

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*The Virginia Citizens Consumer Council (the VCCC) was a nonprofit organization that lobbies for policies that members believe protect consumers. During the early 1970s, that organization sued the Virginia State Board of Pharmacy, a government organization that regulated pharmacists in Virginia, insisting that their declaration that pharmacists who advertised engaged in unprofessional violated the First and Fourteenth Amendment rights of consumers to have access to the prices of prescription drugs. The United States District Court for the Eastern District of Virginia agreed and declared the Virginia regulation unconstitutional. The Board then appealed, claiming a substantial state interest supported prohibiting pharmacists from advertising the prescription drug prices. The American Association of Retired Persons (AARP), a drug company and the Association of National Advertisers filed amicus briefs urging the justices to treat commercial advertising as constitutionally protected speech. "Consumers, especially older persons," the AARP brief asserted, "have a critical need for accessible price information on prescription drugs, and the flat prohibition against disclosure of such information deprives them of their First Amendment 'right to know.'"*

*The* Virginia State Board *litigation was one of many constitutional attacks on state regulation of advertising that took place during the 1960s and 1970s. Several state courts had declared bans on advertising violated the due process rights of businesses. In* Stadnik v. Shell's City, Inc. *(1962), the Supreme Court of Florida struck down a regulation on pharmacies similar to that at issue in* Virginia State Board. *The majority opinion declared,*

> *[t]he effect of the rule simply is that the druggist cannot advertise the price of a prescription drug even though he is prohibited by law from selling the drug except upon the prescription of a physician. There is simply no reasonable justification for such an administrative intrusion on private rights when the regulation is so completely lacking in public benefit.*

*In* Bigelow v. Virginia *(1975), the Supreme Court declared unconstitutional a Virginia law banning advertisements for out-of-state abortions. Justice Blackmun's opinion declared,*

> *The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' Portions of its message, most prominently the lines, 'Abortions are now legal in New York. There are no residency requirements,' involve the exercise of the freedom of communicating information and disseminating opinion.*

Bigelow *left open when an advertisement that merely proposed a commercial transaction might enjoy constitutional protection. That was the issue at stake in* Virginia State Board.

*As you read the opinions below, consider the analogies between commercial advertising and political speech. Justice Blackmun pointed out that many persons are more concerned with the price of cars than the politics of the automobile industry. Is that a sufficient basis for protecting commercial speech? What are the consequences of that position for celebrity gossip, which arguably is of more concern to most citizens than either the price of goods or ordinary politics? Consider also Justice Blackmun's argument that any advertisement can easily be converted into political speech. You might try to do this for some common products, such as cars, fast foods, and beer. Suppose a*

*local bar claims that "for an interesting perspective on the political and social life of the town, come to our happy hour." Is this political or commercial speech? What is the standard of review?*

JUSTICE BLACKMUN delivered the opinion of the Court.

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The present . . . attack on the statute is one made . . . by prescription drug consumers who claim that they would greatly benefit if the prohibition were lifted and advertising freely allowed. The plaintiffs are an individual Virginia resident who suffers from diseases that require her to take prescription drugs on a daily basis, and two nonprofit organizations. Their claim is that the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs.

Certainly that information may be of value. Drug prices in Virginia, for both prescription and nonprescription items, strikingly vary from outlet to outlet even within the same locality. It is stipulated, for example, that in Richmond "the cost of 40 Achromycin tablets ranges from $2.59 to $6.00, a difference of 140% (Sic)," and that in the Newport News–Hampton area the cost of tetracycline ranges from $1.20 to $9.00, a difference of 650%.

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The appellants contend that the advertisement of prescription drug prices is outside the protection of the First Amendment because it is "commercial speech." There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected. In *Valentine v. Chrestensen* (1942), . . . the Court upheld a New York statute that prohibited the distribution of any "handbill, circular . . . or other advertising matter whatsoever in or upon any street." The Court concluded that, although the First Amendment would forbid the banning of all communication by handbill in the public thoroughfares, it imposed "no such restraint on government as respects purely commercial advertising." . . .

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Last Term, in *Bigelow v. Virginia* (1975), . . . the notion of unprotected "commercial speech" all but passed from the scene. We reversed a conviction for violation of a Virginia statute that made the circulation of any publication to encourage or promote the processing of an abortion in Virginia a misdemeanor. The defendant had published in his newspaper the availability of abortions in New York. The advertisement in question, in addition to announcing that abortions were legal in New York, offered the services of a referral agency in that State. We rejected the contention that the publication was unprotected because it was commercial. *Chrestensen*'s continued validity was questioned and its holding was described as "distinctly a limited one" that merely upheld "a reasonable regulation of the manner in which commercial advertising could be distributed." . . . We concluded that "the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection," and we observed that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." . . .

We begin with several propositions that already are settled or beyond serious dispute. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. . . .

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Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. . . .

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees'

case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. The facts of decided cases furnish illustrations: advertisements stating that referral services for legal abortions are available. . . . ; that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals. . . . ; and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs. . . . Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not.

Moreover, there is another consideration that suggests that no line between publicly "interesting" or "important" commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. . . .

Arrayed against these substantial individual and societal interests are a number of justifications for the advertising ban. These have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists. Indisputably, the State has a strong interest in maintaining that professionalism. It is exercised in a number of ways for the consumer's benefit. . . .

Price advertising, it is argued, will place in jeopardy the pharmacist's expertise and, with it, the customer's health. It is claimed that the aggressive price competition that will result from unlimited advertising will make it impossible for the pharmacist to supply professional services in the compounding, handling, and dispensing of prescription drugs. . . . It is further claimed that advertising will lead people to shop for their prescription drugs among the various pharmacists who offer the lowest prices, and the loss of stable pharmacist-customer relationships will make individual attention and certainly the practice of monitoring impossible. Finally, it is argued that damage will be done to the professional image of the pharmacist. This image, that of a skilled and specialized craftsman, attracts talent to the profession and reinforces the better habits of those who are in it. Price advertising, it is said, will reduce the pharmacist's status to that of a mere retailer.

The strength of these proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject. . . .

The challenge now made, however, is based on the First Amendment. This casts the Board's justifications in a different light, for on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. . . . The only effect the advertising ban has on him is to insulate him from price competition and to open the way for him to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service. The more painstaking pharmacist is also protected but, again, it is a protection based in large part on public ignorance.

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There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. . . .

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. . . .

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[Virginia does not] claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. . . . Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely. . . .

Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way. . . .

What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions,[1] we conclude that the answer to this one is in the negative.

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JUSTICE STEVENS took no part in the consideration or decision of this case.

CHIEF JUSTICE BURGER, concurring.

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. . . I think it important to note . . . that the advertisement of professional services carries with it quite different risks from the advertisement of standard products. . . .

I doubt that we know enough about evaluating the quality of medical and legal services to know which claims of superiority are "misleading" and which are justifiable. Nor am I sure that even advertising the price of certain professional services is not inherently misleading, since what the professional must do will vary greatly in individual cases. It is important to note that the Court wisely leaves these issues to another day.

JUSTICE STEWART, concurring.

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[1] We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional Services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising. [footnote by Justice Blackmun]

. . . [G]overnment may take broader action to protect the public from injury produced by false or deceptive price or product advertising than from harm caused by defamation. In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. . . .

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The Court's determination that commercial advertising of the kind at issue here is not "wholly outside the protection of" the First Amendment indicates by its very phrasing that there are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other. . . . Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decisionmaking, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact.

Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services. The First Amendment protects the advertisement because of the "information of potential interest and value" conveyed, . . . rather than because of any direct contribution to the interchange of ideas. . . . Since the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought. Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking.

JUSTICE REHNQUIST, dissenting.

The logical consequences of the Court's decision in this case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed. Under the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage. Now, however, such promotion is protected by the First Amendment so long as it is not misleading or does not promote an illegal product or enterprise. . . .

. . .

The Court speaks of the consumer's interest in the free flow of commercial information, particularly in the case of the poor, the sick, and the aged. It goes on to observe that "society also may have a strong interest in the free flow of commercial information." . . . One need not disagree with either of these statements in order to feel that they should presumptively be the concern of the Virginia Legislature, which sits to balance these and other claims in the process of making laws such as the one here under attack. The Court speaks of the importance in a "predominantly free enterprise economy" of intelligent and well-informed decisions as to allocation of resources. While there is again much to be said for the Court's observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession. . . .

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The Court concedes that legislatures may prohibit false and misleading advertisements, and may likewise prohibit advertisements seeking to induce transactions which are themselves illegal. In the final footnote the opinion tosses a bone to the traditionalists in the legal and medical professions by suggesting that because they sell services rather than drugs the holding of this case is not automatically applicable to

advertising in those professions. But if the sole limitation on permissible state proscription of advertising is that it may not be false or misleading, surely the difference between pharmacists' advertising and lawyers' and doctors' advertising can be only one of degree and not of kind. I cannot 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. Nor is it apparent how the pharmacists in this case are less engaged in a regulatable profession than were the opticians in *Williamson v. Lee Optical* (1955). . . .

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There are undoubted difficulties with an effort to draw a bright line between "commercial speech" on the one hand and "protected speech" on the other, and the Court does better to face up to these difficulties than to attempt to hide them under labels. In this case, however, the Court has unfortunately substituted for the wavering line previously thought to exist between commercial speech and protected speech a no more satisfactory line of its own that between "truthful" commercial speech, on the one hand, and that which is "false and misleading" on the other. . . .

The Court insists that the rule it lays down is consistent even with the view that the First Amendment is "primarily an instrument to enlighten public decisionmaking in a democracy." . . . I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment. . . .

In the case of "our" hypothetical pharmacist, he may now presumably advertise not only the prices of prescription drugs, but may attempt to energetically promote their sale so long as he does so truthfully. Quite consistently with Virginia law requiring prescription drugs to be available only through a physician, "our" pharmacist might run any of the following representative advertisements in a local newspaper:

> "Pain getting you down? Insist that your physician prescribe Demerol. You pay a little more than for aspirin, but you get a lot more relief."
>
> "Can't shake the flu? Get a prescription for Tetracycline from your doctor today."
>
> "Don't spend another sleepless night. Ask your doctor to prescribe Seconal without delay."

Unless the State can show that these advertisements are either actually untruthful or misleading, it presumably is not free to restrict in any way commercial efforts on the part of those who profit from the sale of prescription drugs to put them in the widest possible circulation. But such a line simply makes no allowance whatever for what appears to have been a considered legislative judgment in most States that while prescription drugs are a necessary and vital part of medical care and treatment, there are sufficient dangers attending their widespread use that they simply may not be promoted in the same manner as hair creams, deodorants, and toothpaste. The very real dangers that general advertising for such drugs might create in terms of encouraging, even though not sanctioning, illicit use of them by individuals for whom they have not been prescribed, or by generating patient pressure upon physicians to prescribe them, are simply not dealt with in the Court's opinion. If prescription drugs may be advertised, they may be advertised on television during family viewing time. Nothing we know about the acquisitive instincts of those who inhabit every business and profession to a greater or lesser extent gives any reason to think that such persons will not do everything they can to generate demand for these products in much the same manner and to much the same degree as demand for other commodities has been generated.

Both Congress and state legislatures have by law sharply limited the permissible dissemination of information about some commodities because of the potential harm resulting from those commodities,

even though they were not thought to be sufficiently demonstrably harmful to warrant outright prohibition of their sale. Current prohibitions on television advertising of liquor and cigarettes are prominent in this category, but apparently under the Court's holding so long as the advertisements are not deceptive they may no longer be prohibited.

. . . [T]he societal interest against the promotion of drug use for every ill, real or imaginary, seems to me extremely strong. I do not believe that the First Amendment mandates the Court's "open door policy" toward such commercial advertising.