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Purely Commercial Speech and Its Relationship to the First Amendment

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10(b). Such a rule could define the terms of the Section by using a scheme of liability in which a higher standard of scienter would be applied to defendants like Ernst & Ernst in the instant case than to corporate representatives and others upon whom greater reliance is placed by shareholders.[41] However, absent SEC rulemaking or congressional legislation, the courts must now continue the search for a uniform scienter standard.

William Deryl Medlin

PURELY COMMERCIAL SPEECH AND ITS RELATIONSHIP TO THE FIRST AMENDMENT

In 1942, the decision of *Valentine v. Chrestensen*[1] began what was later to become known as the commercial speech doctrine. From its initial pronouncement the doctrine was consistently invoked to reject first amendment attacks upon regulation of speech in a business context.[2] However, in recent years the commercial speech doctrine has become subject to increasing criticism[3] and was eventually overruled in *Virginia State Board of*

41. By promulgating such a rule, the SEC could maximize the remedial goals of the securities laws and at the same time avoid any impingement on the "logical growth of regulation of the securities market." Smallwood v. Pearl Brewing Co., 489 F.2d 579, 592 (5th Cir. 1974). For example, parties charged with the full and complete disclosure of corporate information, such as the accounting firm in the instant case, should be less amenable to suit so that the flow of information would continue. On the other hand, persons who more directly influence the decision of persons to buy and sell securities, and who have access to crucial information, should be held to a higher standard of performance. Other policy matters are considered at note 19, *supra*, and are equally relevant to the determination of the proper standard of culpability.

1. 316 U.S. 52 (1942).

2. *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Breard v. Alexandria, 341 U.S. 622 (1951); United States v. Hunter, 459 F.2d 205, 211-12 & n.6 (4th Cir. 1972) ("The [commercial speech doctrine] is supported by an unbroken line of authority from the Supreme Court down which distinguishes between the expression of ideas protected by the first amendment and commercial advertising in a business context."); Chrestensen v. Valentine, 122 F.2d 511, 517-26 (2d Cir. 1941) (Frank, J., dissenting) (articulating the reasons for relegating purely commercial speech to unprotected status); Note, 23 DEPAUL L. REV. 1258, 1264 nn.31 & 32 (1974).

3. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 820 n.6 (1975); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 393, 398, 401 (1973) (three separate dissents); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Note, 61 CORNELL L. REV. 640 (1976).

Pharmacy v. Virginia Citizens Consumer Council.[4] This note will attempt to analyze the commercial speech doctrine and to demonstrate that its repudiation was an unwarranted and potentially troublesome judicial act.

In *Valentine v. Chrestensen*[5] the Supreme Court found that a New York City ordinance prohibiting the distribution of "commercial and business advertising matter" on city streets did not violate the first amendment.[6] After declaring that such an ordinance would not be allowed to prohibit speech "communicating information" or "disseminating opinion," the Court concluded that "the Constitution places no such restraint on government as respects purely commercial advertising."[7] The doctrine that developed from this decision simply holds that purely commercial speech is not protected by the first amendment.

Perhaps the primary criticism of the commercial speech doctrine is that there are no objective criteria for identifying purely commercial speech.[8] Naturally, if these claims are correct the doctrine would be untenable. But Supreme Court decisions, while admittedly less than clear, indicate the presence of certain discernible elements of purely commercial speech.[9]

Post-*Chrestensen* decisions have been described as applying two distinct commercial speech tests.[10] In the earlier decisions the Court is said to have required that the primary purpose of an activity be commercial before placing the attendant speech in the purely commercial category. This primary purpose test is thought to have been replaced by a test that went

4. 96 S. Ct. 1817 (1976). This decision was an extension of recent judicial efforts to more clearly define unprotected categories of speech. *See, e.g.*, Gertz v. Robert Welch Inc., 418 U.S. 323 (1974) (libel against public figures); Miller v. California, 413 U.S. 15 (1973) (obscenity).

5. 316 U.S. 52. Chrestensen sought to distribute handbills soliciting customers for a submarine tour. Upon being told that such distribution violated a city ordinance, he printed a double-faced handbill which included the commercial solicitation on one side and a protest against the city dock board on the other. The Court found that Chrestensen could not be allowed to circumvent the law by appending protected speech to his otherwise commercial circular.

6. *Id.* at 54.

7. *Id.*

8. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817, 1827 (1976); Redish, *supra* note 3, at 430-32; Note, 23 DEPAUL L. REV. 1258, 1266 & n.45 (1974); Note, 24 EMORY L.J. 1165, 1187 (1975).

9. *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Breard v. Alexandria, 341 U.S. 622 (1951); Jamison v. Texas, 318 U.S. 413 (1943).

10. *See, e.g.*, Redish, *supra* note 3, at 451; Note, 44 CINN. L. REV. 852, 854, 855 & n.22 (1975); Note, 61 CORNELL L. REV. 640 (1976); Note, 42 TENN. L. REV. 573 (1975).

beyond the commercial nature of an advertisement by identifying protected expression in its content. Under this test if an otherwise commercial activity were found to contain a wealth of non-commercial protected speech it would not be relegated to unprotected status.[11]

While the aforementioned tests do provide relatively helpful descriptions of what the Court considered in classifying purely commercial speech, they are misleading as indications that the Court actually changed the criteria by which such speech was distinguished. In reality, since the inception of the commercial speech doctrine, Supreme Court decisions have indicated that purely commercial speech consists of two distinct elements.[12] First, the communication must be *primarily commercial*, that is, it must primarily involve the solicitation of purchases or contributions. Thus an advertisement which solicited funds but primarily "communicated information, expressed opinion, recited grievances, [and] protested claimed abuses . . ." was found to be protected speech.[13] Secondly, the speech must take place in a *business context* in order to be classified as purely commercial. For example, primarily commercial activity that ordinarily would be classified as purely commercial speech has been placed outside the purview of that category when the activity was promoted by a religious or other non-profit organization.[14]

Accordingly, the Court found speech to be purely commercial only if it primarily involved the solicitation of purchases or contributions for an enterprise whose main purpose was to make a profit. While a more precise definition is clearly desirable, in practice ". . . the problem of differentiating between purely commercial and other communications has not . . . proved to be a serious one."[15] Moreover, it is important to note that the renunciation of the commercial speech doctrine has not solved any problems that may exist in distinguishing purely commercial speech. Since the Court has not held that purely commercial speech is subject to *full* first amendment protection,[16] such speech will still have to be distinguished in order to

11. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

12. See note 9, *supra.*

13. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

14. *See* 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) (These cases found that otherwise permissible regulation of door to door solicitation could not be applied to religious groups.); *cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (One important factor in the Court's finding that the advertisement was protected by the first amendment was the non-business quality of the promoting organization.).

15. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 948-49 n.93 (1963).

16. 96 S. Ct. at 1830 & n.24.

determine the degree of protection applicable.[17]

The remaining question is whether, under the preceding definition, the commercial speech doctrine is supported by the first amendment. Although no precise theory regarding the scope of the first amendment has ever been agreed upon,[18] protection of the dissemination and reception of ideas[19] and opinions[20] rank as two of the most commonly articulated purposes of the first amendment's guarantee of freedom of expression. In addition the purposes of the amendment have often been viewed as including the protection of information important to self-government.[21]

Proponents of first amendment protection for purely commercial speech generally have not suggested that such speech involves the expression of ideas or opinions but have emphasized its qualities as a distributor of factual information.[22] Their basic contention is that factual information regarding private economic decisions is important to self-government and therefore any regulation which inhibits the dissemination or reception of such information violates the first amendment.[23] While this argument may be appealing to supporters of the current consumer movement,[24] it is not consistent with the jurisprudence and doctrine most often cited in support of the proposition that information necessary to make governing decisions is protected by the first amendment.[25] These opinions referred to information of a much higher order than that which simply relates to private economic

17. *Id.* at 1838 (Rehnquist, J., dissenting).

18. Emerson, *supra* note 15, at 877.

19. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

20. *See, e.g.*, Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

21. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964), and cases cited therein (expression, including information, on governmental issues); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT (1948) [hereinafter cited as MEIKLEJOHN]; Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245 (1961).

22. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817, 1827 (1976); Redish, *supra* note 3, at 429; Note, 81 YALE L.J. 1181 (1972). *But see* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 398 (1973) (Douglas, J., dissenting) (employment advertisements express ideas and opinions).

23. See note 22, *supra*.

24. *See, e.g.*, Preface to B. MURRAY, CONSUMERISM: THE ETERNAL TRIANGLE—BUSINESS, GOVERNMENT AND CONSUMERS at ix (1973) (policies encouraging market structures and pricing that deviate from the competitive norm are currently under attack by the consumer movement).

25. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964), and cases cited therein; MEIKLEJOHN at 94-104.

concerns. The term "important to self-government" was viewed as restricting protected factual information to that which concerned the advisability of a statute or the wisdom of a particular policy.[26] Accordingly, under this traditional analysis the first amendment would protect communications regarding the desirability of regulating purely commercial speech rather than information provided for the primary purpose of soliciting purchases. The latter category of information was seen as related "to a separate sector of social activity involving the system of property rights rather than free expression."[27]

Thus the commercial speech doctrine was not only reasonably well-defined, it was consistent with established views on freedom of expression and the first amendment. Perhaps in light of the current tendency to restrict the traditionally unprotected categories of speech[28] these conclusions alone would not be sufficient reason to continue to apply the doctrine. However, the commercial speech doctrine additionally served an important purpose in preventing judicial intervention in economic regulation.[29] Like the deferential due process[30] and equal protection[31] approaches, the commercial speech doctrine kept economic theory out of the Constitution by reserving economic decisions for appropriate legislatures.

26. See note 25, *supra*. *Accord*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) ("We emphasize that nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment.").

27. Emerson, *supra* note 15, at 948-49 n.93.

28. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (offensive language); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel against public figures).

29. *Compare* Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969), *with* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817 (1976). *See also* Florida Bd. of Pharmacy v. Webb's City, Inc., 219 So.2d 681 (Fla. 1969); Maryland Bd. of Pharmacy v. Sav-a-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971). (These three decisions applying an interventionist substantive due process approach, which has been abandoned by the federal courts, closely parallel *Virginia Citizens* in both approach and result.).

30. *See, e.g.*, North Dakota Pharmacy Bd. v. Snyder's Drug Stores, 414 U.S. 156 (1973); Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963); Ferguson v. Skrupa, 372 U.S. 726 (1963); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935); Nebbia v. New York, 291 U.S. 502 (1934).

31. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

An examination of the decision which overruled the commercial speech doctrine clearly illustrates the doctrine's role in preventing unwarranted judicial intervention into the economic sphere. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[32] plaintiff consumers sought declaratory and injunctive relief against the enforcement of a Virginia law barring pharmacists from advertising prescription drug prices. The Supreme Court found that even though such advertisements were purely commercial speech they were still protected by the first amendment.[33] The Court then concluded that the statute was invalid because state interests in prohibiting this type of speech were insufficient when balanced against the "substantial individual and societal interests" in publishing and receiving price information.[34]

At a minimum this decision will require every regulation of purely commercial speech[35] to be justified by a substantial state interest.[36] In order to determine whether such a state interest exists, courts, relying upon their preconceived notions of what a state's economic policies should be, will have to weigh competing interests and thereby judge the wisdom of legislative economic regulations.[37] While such an approach may initially be applauded for producing desired change more quickly than the legislative

32. 96 S. Ct. 1817 (1976).

33. *Id.* at 1826.

34. *Id.* at 1828-30.

35. *E.g.*, LA. R.S. 37:1225(11) (Supp. 1974) (prohibits pharmacists from advertising prescription drugs); LA. R.S. 37:1063(9) (Supp. 1974) and R.S. 37:1065 (1974) (prohibits the advertisement of optical services and prices by opticians); LA. R.S. 37:775 (Supp. 1974) (bans advertising of prices and services by dentists); LA. R.S. 37, ch. 4, app.; ARTICLES OF INCORPORATION, LOUISIANA STATE BAR ASS'N (Supp. 1976) (adopts ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101, which prohibits most forms of advertising by attorneys).

36. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817, 1828-30 (1976). The "substantial individual and societal interests" in the free flow of price information could not be overcome by anything less than an equally substantial state interest in regulating such information. While certain advertising bans may come closer than others to meeting this requirement, 96 S. Ct. at 1831 n.25, none of these regulations will be exempt from judicial determination of their substantiality and their corresponding constitutional status. *Id.*

37. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1817, 1835 (1976) (Rehnquist, J., dissenting); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955); Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting); Stephensen, *The Supreme Court and Constitutional Change:* Lochner v. New York *Revisited*, 21 VILL. L. REV. 217 (1976). *Cf.* Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 507, 530 (1965) (Black and Stewart, JJ., dissenting).

process, according these economic policy decisions constitutional stature may eventually prove to impede rather than aid development in the economic area.[38]

Allowing legislatures to make economic policy determinations is undoubtedly a more flexible method of decision making than the constitutional adjudication rendered necessary by the renunciation of the commercial speech doctrine. The wisdom of the prior method should not be ignored in an attempt to more speedily attain a currently desirable result. For if that result should prove to have been ill advised, any benefit derived from the speed with which the result was initially achieved will be more than offset by the burdensome process by which it must be changed.

In the due process area, where the Court first attempted to require more than a rational state interest in economic regulation,[39] the interventionist approach was found totally unworkable.[40] For several years substantive due process prevented the natural evolution of economic theory by allowing courts to impose their economic views upon legislatures.[41] This approach was finally abandoned by the federal courts[42] and replaced by a deferential due process test, created in recognition of the impropriety of judicial intervention in economic matters.[43]

Only a reinstatement of the commercial speech doctrine can prevent problems similar to those created by the application of substantive due process to economic matters from being repeated in the first amendment area. If courts seize upon the doctrine's abandonment as an opportunity to invalidate economic regulations which they feel are improper or unwise, significant barriers to solutions of economic problems will result.[44] Should

38. *Cf.* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV L. REV. 1, 12 (1959) "The man who simply lets his judgment turn on the immediate result may not, however, realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law. . . . [T]his type of *ad hoc* evaluation is, as it has always been, the deepest problem of our constitutionalism. . . .".

39. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

40. See note 30, *supra.*

41. See note 39, *supra*; Stephensen, *supra* note 37.

42. *E.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934). Some state courts continue to invalidate economic regulations on substantive due process grounds. *See, e.g.*, Maryland Bd. of Pharmacy v. Sav-a-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971).

43. See note 30, *supra.*

44. See note 37, *supra*; MEIKLEJOHN at 94-98.

this occur, the decision of *Virginia Citizens* is destined to join *Lochner v. New York* as the "twentieth century archetype of a judicial mistake."[45]

Paul Preston

STATE PROTECTION OF THE VIABLE UNBORN CHILD AFTER *ROE V. WADE*: HOW LITTLE, HOW LATE?

In 1974, Missouri enacted a statute prohibiting the abortion of a viable fetus, except when necessary to preserve the life or health of the mother.[1] Viability was defined as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."[2] Two physicians sued for injunctive and declaratory relief, claiming that abortion could not constitutionally be prohibited prior to the 28th week of gestation. The United States Supreme Court *held* that a state may prohibit the abortion of a fetus which might survive outside the womb, regardless of the period of gestation, unless the abortion is necessary to preserve maternal life or health. *Planned Parenthood of Central Missouri v. Danforth*, 96 S. Ct. 2831 (1976).[3]

Until recently, regulation and prohibition of abortion were generally thought to be constitutionally within the police power of the states. Abortion had been a crime at common law,[4] and specific anti-abortion statutes were

45. STEPHENSEN, *supra* note 37, at 218.

1. VERNON'S ANN. MO. STAT. §§ 188.010 - .085 (Supp. 1975), *enacted by* Missouri Laws 1974, p. 809 §§ 1-16.

2. *Id.* § 188.015(3) (Supp. 1975), *enacted by* Missouri Laws 1974, p. 809 § 2(3).

3. The Court's treatment of the following subjects in the instant case is not discussed in this Note: standing, state requirement of a woman's "informed consent" prior to an abortion, state requirement of spousal consent prior to an abortion, state requirement of parental consent prior to an abortion performed upon an unmarried minor, and reporting and record-keeping requirements. The Court's holding on a state prohibition of the saline amniocentesis method of abortion after the first 12 weeks of gestation is discussed in the text at notes 62-68, *infra*. The Court's holding on a state requirement that a physician take measures to preserve a fetus' life and health during abortion is discussed in the text at notes 58-61, *infra*.

4. 3 E. COKE, INSTITUTES *50; 1 W. BLACKSTONE, COMMENTARIES *129; 2 H. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE *279. But the Court expressed uncertainty as to whether the common law regarded abortion as homicide, or a lesser crime, or never "firmly established" as a crime at all, in *Roe v. Wade*, 410 U.S. 113, 132-36 (1973). The Court relied heavily on Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise*