Duquesne Law Review

Volume 12 | Number 4 Article 15

1974

Constitutional Law - Freedom of Speech - Commercial Speech Doctrine - Use of Sex-Designated Classified Advertising Column Headings

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the task of the state legislature in this area becomes one of raising the educational standards of those receiving substandard educations to a level where they will be adequately educated, while at the same time not appreciably lowering the higher educational standards achieved by others.

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CONSTITUTIONAL LAW—FREEDOM OF SPEECH—COMMERCIAL SPEECH DOCTRINE—USE OF SEX-DESIGNATED CLASSIFIED ADVERTISING COLUMN HEADINGS— The Supreme Court has held that a municipal ordinance construed to forbid sex-designated classified advertising column headings does not violate newspaper publisher's first amendment rights.

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973).

On October 9, 1969, the National Organization for Women, Inc. filed a complaint with the Pittsburgh Commission on Human Relations alleging that the Pittsburgh Press Company had violated the Pittsburgh Human Relations Ordinance[1] by the use of sex-designated classified advertising column headings.[2] After conducting public hearings,[3] the Commission found the ordinance had been violated by this practice and issued a cease and desist order.[4] On appeal, the commonwealth court affirmed a modified order.[5] The Pennsylvania Supreme Court denied review, and the Supreme Court of the United States granted certiorari.[6]

1. Pittsburgh, Pa., Ordinance No. 75 § 8(j), Feb. 27, 1967, *as amended*, Ordinance 395, July 3, 1969, which states:
It shall be an unlawful employment practice . . . . [f]or any person, whether or not an employer, employment agency, or labor organization, to aid . . . or participate in the doing of any act declared to be an unlawful employment practice of this ordinance . . . or to attempt to directly or indirectly commit any act declared by this ordinance to be an unlawful employment practice.
2. Prior to October, 1969, the Pittsburgh Press headed its classified advertising columns, "Help Wanted Male," "Help Wanted Female," and "Male-Female Help Wanted." After the complaint was filed, but prior to judgment, it adopted the designations "Jobs-Male Interest," "Jobs-Female Interest," "Male-Female." *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 379-80 (1973).
3. After a complaint is filed with the Commission, public hearings are held pursuant to Pittsburgh, Pa., Ordinance No. 75 §§ 13(g), (h), (i) Feb. 27, 1967, in order to determine if the ordinance has been violated.
4. Order of Pittsburgh Commission on Human Relations, July 23, 1970.
5. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 4 Pa. Cmwlth. 448, 287 A.2d 161 (1972). The commonwealth court limited the order of the Commission to advertising for employment which was not exempt or excluded from the ordinance.
6. 409 U.S. 1036 (1972).

Affirming the decision,[7] the Court held that classified advertising headings are commercial speech[8] not protected by the first amendment.[9]

Initially, the Court reiterated that the first amendment does not provide the press with an absolute protection from regulation.[10] Thus, regulation has been allowed where a newspaper's operation was not endangered.[11] For example, the Sherman Act[12] and the Fair Labor Standards Act[13] have been applied to newspapers. The Court in *Pittsburgh Press* stated that the ordinance in question did not threaten the financial viability of the newspaper or its ability to function as a vehicle for free expression,[14] and was allowable. The Court next turned to the impact of the ordinance on publication of the newspaper. The Court relied heavily on precedent which draws a distinction between commercial and editorial speech. In the leading case, *Valentine v. Chrestensen*,[15] respondent sought first amendment protection to avoid a city anti-litter ordinance. Because its sole purpose was to avoid application of the ordinance, the Court held that political protest contained in the commercial leaflet was insufficient to require Constitutional protections for the commercial advertising found in the same leaflet.[16] It reasoned that the first amendment does not protect such commercial speech.[17] Because the advertising in *Pittsburgh Press* constituted proposals for employment, the Court applying *Chrestensen*, stated that there was an insufficient showing of a distinction between the advertising and the column headings to require separate treatment under the first amendment.[18]

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7. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (Burger, CJ., Douglas, Stewart & Blackmun, JJ., dissenting).

8. *Id.* at 385.

9. *Id.* at 384-85.

10. *Id.* at 381-82.

11. In the following, regulation was not allowed: Lovell v. Griffin, 303 U.S. 444 (1948): Grosjean v. American Press Co., 297 U.S. 233 (1936).

12. Associated Press v. United States, 326 U.S. 1 (1945) (where the Sherman Act, 15 U.S.C. § 1 (1970), was applied prohibiting petitioner from contracting with a Canadian press association to furnish news items exclusively to each other).

13. In Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946), the Court allowed application of the overtime compensation provisions of the Fair Labor Standards Act, 29 U.S.C. § 207 (1970), to respondent, a publisher of a daily newspaper.

14. 413 U.S. at 383.

15. 316 U.S. 52 (1942).

16. Id. at 55.

> . . . [T]he . . . facts justify the conclusion that the 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.

17. Id. at 54. ". . . [T]he Constitution imposes no such restraint on government as respects purely commercial advertising."

18. 413 U.S. at 387-88. The Court apparently rejected the idea that the newspaper's

Finally, the Court rejected the argument that the Commission's order constituted an impermissible prior restraint on expression.[19] It found that the order was narrow and was based on systematic, repetitive conduct;[20] not speculation as to the effect of the captions.

In a strong dissent, Mr. Justice Stewart rejected the application of the *Chrestensen* doctrine to these facts, saying that it had no application to the advertising pages of a newspaper. He argued that the exercise of judgment regarding column headings is a matter of editorial policy worthy of protection by the first amendment.[21] For him, the majority decision allowed the government far too much control over the publication of newspapers.[22]

The Court's use of the commercial speech doctrine in the present case is not surprising since it has acknowledged the viability of the editorial-commercial distinction consistently for three decades since *Chrestensen*. The *Chrestensen* distinction was formulated in terms of pure commercial speech[23] and is based on the theory that the first amendment was intended primarily to protect discussion of public issues.[24] Even though there is some constitutional history indicating

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disclaimer which preceded the columns in question separated the column headings from the advertising itself. The disclaimer appeared as follows:

> Notice to Job Seekers:
> Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances-local, state and federal, prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination.

Id. at 381 n.7.

19. In Near v. Minnesota, 283 U.S. 697 (1931), the Court struck down an ordinance forbidding publication of any scandalous or malicious information without good motive on the ground that pre-publication regulations unduly burden the press. The interests of those individuals involved are sufficiently protected in post publication actions, *e.g.*, criminal sanctions or private damages.

20. 413 U.S. at 390. The *Press* had followed the practice of using sex-designated column headings for years and deemed it desirable; thus the Court felt it did not have to guess as to future conduct or the effect of this practice.

21. *Id.* at 401.

22. *Id.* at 402-03.

> . . . [T]he Court approves today . . . a government order dictating to a publisher in advance how he must arrange the layout of pages in his newspaper.

23. *See* note 17 *supra*.

24. *See* Roth v. United States, 354 U.S. 476, 484 (1956); Near v. Minnesota, 283 U.S. 697, 717 (1931). Both of these first amendment cases rely on a letter written in 1774 by the Continental Congress to the inhabitants of Quebec, urging support for the colonists.

> The last right we mention regards freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union

broader goals,[25] one noted commentator views the first amendment as essential to the functioning of a democratic system and sees its protections attaching only to free expression which is related to the process of government.[26]

Nonetheless, the editorial-commercial dichotomy is questionable for two reasons. The distinction has little basis in first amendment theory. In addition, the flexibility in its application could result in uncertainty as to its application.

Even though there was ample precedent for the Court to rely on its decision, the commercial speech doctrine is not a theory explicitly demanded by the Constitution. The langauge of the first amendment[27] does not necessarily afford greater protection to political thoughts than it does economic considerations.[28] The expression protected by the theory of the first amendment should include not only great literature but also thoughts and writings an individual confronts in everyday life, even though it may not seem to have great societal value. This is even reflected in *Miller v. California*,[29] where the Court recently promulgated a three-pronged obscenity test. Under this test, the first amendment protects works which do not lack "serious literary, artistic, political, or scientific value."[30] *Miller* indicates that the protections of the

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among them, whereby oppressive officers are shamed or intimidated, into more honorable and just modes of conducting affairs.

1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774).

25. In his concurring opinion in Smith v. California, 361 U.S. 147 (1959), Mr. Justice Black examines Thomas Jefferson's view of the first amendment.

Thomas Jefferson's views of the breadth of the First Amendment's prohibition against abridgment of speech and press by the federal government are illustrated by the following statement he made in 1789. 'The first amendment thereby guards in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the other, and that libels, falsehoods, and defamation, equally with heresy and false religion, are withheld from the cognizance of the federal tribunals.'

Id. at 157-58 n.2.

26. *See* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

The First Amendment . . . protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility.

Id. at 255.

27. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

28. *See* Gardner, *Free Speech In Public Places*, 36 BOST. L. REV. 239 (1956):

The 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 . . . .

Id. at 246-47.

29. 413 U.S. 15 (1973).

30. *Id.* at 24. "The basic guidelines for the tryer of fact must be . . . whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

first amendment apply despite the general topic area of the expression, its correctness or its popularity. Similarly, in *Winters v. New York*,[31] the Court rejected the proposition that relative societal value of a literary publication is a relevant criterion in determining the applicability of the first amendment.[32] The first amendment thus has been interpreted as extending to numerous areas of non-political expression.

Because commercially-oriented speech may aid individual choice in economic areas[33] it seems incorrect to suggest that commercial speech should never be protected by the first amendment.

It is true that the Court has stated certain kinds of speech are not protected by the first amendment. For example, although often criticized,[34] the theory that exposure to pornographic material leads to anti-social conduct is reflected in the Court's obscenity decisions.[35] Another example is *Beauharnais v. Illinois*,[36] where the Court was faced with publication of racial slurs. It allowed prosecution for criminal libel due to the potential for disruption caused by the publication.[37] Further, in *Chaplinsky v. New Hampshire*,[38] the underlying rationale for the exclusion of "fighting words" from first amendment protection is that by their very nature they produce reactionary conduct and have

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31. 333 U.S. 507 (1948).
32. *Id.* at 510. "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."
33. *See* Redish, *Commercial Speech and Free Expression*, 39 GEO. WASH. L. REV. 429 (1970):
> By providing the consuming public information, commercial speech aids in the attainment and, more importantly, helps the individual to rationally plan his life to achieve the maximum satisfaction possible within the reach of his resources. In doing so it serves an important function as a catalyst in the achievement of personal self-realization.

Id. at 472.
34. REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 27 (1970), which stated:
> In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults.

35. Paris Adult Theatre I. v. Slaton, 413 U.S. 49 (1973), which stated:
> Although there is no conclusive proof of a connection between anti-social behavior and obscene material the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding *Roth*, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.'

Id. at 60-61.
36. 343 U.S. 250 (1952).
37. *Id.* at 259.
> . . . [W]ilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polygot community.

38. 315 U.S. 568 (1942).

slight value as an expression of ideas.[39] Nevertheless, while there may be a strong societal interest in order and a sense of morality which necessitates control of obscenity, libel and "fighting words,"[40] this interest would not seem applicable to commercial speech since it does not inherently threaten disruption.

Moreover, the scope of the commercial speech doctrine is unclear. Under the Court's current flexible approach to commercial speech, speech does not necessarily lose the protections of the first amendment merely because it has some commercial aspects. Printed material concerning religious activity is not subject to prohibition even though it is sold.[41] Advertisements which express ideas and convey information continue to enjoy first amendment protections.[42] The Court, however, has allowed local prohibition of door-to-door solicitation of magazine subscriptions.[43] Thus, the Court's effort to delineate the parameters of purely commercial speech could lead to some confusion and uncertainty which may produce a chilling effect on expression if a publisher desiring to express an idea is reluctant to do so because there is some commercial aspect present which could make first amendment protection inapplicable.

If the commercial speech doctrine were abandoned, what approach should be used? The absolutist view of the first amendment has never been accepted by a majority of the Court.[44] Rather, the Court usually seeks to weigh the competing interests by considering not only the necessity of the free flow of information, but also the aims of the legislation in question and the social policy behind it.[45] Where the legisla-

39. Earlier, the Court used this same rationale in Cantwell v. Connecticut, 310 U.S. 296 (1940). "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." *Id.* at 309-10.

40. 315 U.S. at 572.

41. Murdock v. Pennsylvania, 319 U.S. 105, (1943); Jamison v. Texas, 318 U.S. 413 (1942).

42. New York Times v. Sullivan, 376 U.S. 254, 266 (1963).

43. Breard v. Alexandria, 341 U.S. 622 (1950). The Court found a valid exercise of police power where communities deemed such sales to be obnoxious.

> It would be, it seems to us, a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents.

Id. at 645.

44. *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965), which said:

> . . . [T]he absolute view has not prevailed within the Court. A majority of the Justices from time to time have recognized some contexts in which government has power to curb speech as such.

Id. at 5.

45. The Court has expressed various methods of balancing the conflicting values in the area of the first amendment. For example: Williams v. Rhodes, 393 U.S. 23, 32 (1968):

tion is based on a paramount state interest which outweighs a societal need for the free dissemination of ideas, its regulatory effect is allowable.[46] Thus, in weighing the state interest in the *Pittsburgh Press* case, the Court following this approach would have considered the impact of sex-discrimination in employment practices on society,[47] and the relationship between sex-discrimination in employment and sex-designated classified advertising.

An alternative approach the Court could have used would have been to treat the column headings as conduct rather than speech. Because the Court has consistently rejected the proposition that pure speech and conduct should be treated identically under the first amendment,[48] it would have been necessary to distinguish between discussion

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In determining whether the state has the power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that only a compelling state interest in regulation of a subject within the State's Constitutional power to regulate can justify limiting first amendment freedoms.

United States v. O'Brien, 391 U.S. 367, 377 (1968):

. . . [W]e think it clear that a government regulation is sufficiently justified if it is within the Constitutional power of the government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest . . . .

Bates v. Little Rock, 361 U.S. 516, 524 (1969):

Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling. . . . [H]ere the question is . . . whether the State has demonstrated so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgement of associational freedom which such disclosures will affect.

NAACP v. Alabama, 357 U.S. 449, 466 (1958):

We hold immunity from state scrutiny of membership lists which the Association [NAACP] claims on behalf of its members is here so related to the right of the membership to pursue their private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment [and the first amendment]. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on free enjoyment of the right to associate which disclosure of membership lists is likely to have.

46. In Branzburg v. Hayes, 408 U.S. 665 (1971), a case involving news reporters' divulgence of confidential sources, the Burger Court used this type of test in holding the first amendment does not require such a privilege from divulgence where the state shows an overriding interest.

47. With the passage of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970), ". . . Federal positive law now includes a provision that had been desired for many years by those who were concerned with the economic, social, and political status of American women . . . ." L. KANOWITZ, WOMEN AND THE LAW, THE UNFINISHED REVOLUTION 105 (1970). Although the ultimate impact of this type of federal, as well as state, legislation is as yet unknown, by protecting a woman's right to obtain and hold a job previously denied on the basis of sex, a momentum has been created in American society demanding a re-examination of traditional female/male roles.

48. Cox v. Louisiana, 379 U.S. 536 (1965).

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

or advocacy of the desirability of sex-discrimination in employment as a societal policy, and conduct which actually encourages it.[49] Put another way, the discussion of ideas should be protected, but action may or may not be protected, depending on its effect. In the *Pittsburg Press* case, the Court rejected the idea that classified advertising column headings reflect editorial policy of the newspaper.[50] Therefore, because these classified advertising column headings might not constitute pure speech at all, the headings must be analyzed in order to determine proper Constitutional treatment.

In *Giboney v. Empire Storage & Ice Co.*,[51] the Court allowed a state anti-trade restraint statute to be applied to union pickets who were attempting to end a company's policy of selling to non-union distributors, even though such an agreement was prohibited by law.[52] In denying first amendment protection to this activity, the Court stressed the existence of conduct in violation of a state statute.[53] The Court rejected the idea that the first amendment protections extend to a course of conduct merely because it was initiated by speech or writing.[54] Analogously, because in *Pittsburgh Press*, sex discrimination in employement was found to violate the Human Relations Ordinance,[55] the want-ads and the column headings,[56] by promoting the act of seeking employment, clearly encouraged violation of the ordinance. Thus regulation of both would appear allowable.

The Court could have abandoned the commercial speech doctrine in

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by conduct . . . as these amendments afford to those who communicate ideas by pure speech.

Id. at 555.

49. The Court reaffirmed this principal in a case involving student protests by stating: The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and "advocacy directed to inciting or producing imminent lawless action . . . and likely to produce such action."

Healy v. James, 408 U.S. 169, 189 (1972).

50. 413 U.S. at 385.

51. 336 U.S. 490 (1949).

52. *Id.* at 492-93.

53. *Id.* at 498.

It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.

54. *Id.* at 502.

It is true that the agreements and course of conduct here were . . . brought about through speaking or writing. But it has never been deemed an abridgment 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.

55. 413 U.S. at 388.

56. *See* note 18 *supra*. The Court refused to separate the column headings from the want-ads for first amendment treatment.

this case. At least two alternatives consistent with traditional first amendment analysis were available. The first was an analysis of whether the Human Relations Ordinance reflects a compelling governmental interest, making regulation of the column headings allowable. Secondly, the Court could have concluded that the column headings represented conduct and not expression and thus were not protected by the first amendment. Either would allow the Court a wider range of inquiry in order to insure greater protection of the exchange of ideas and at the same time, permit governmental regulation where there is a great societal need.

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CONSTITUTIONAL LAW—FIRST AND TWENTY-FIRST AMENDMENTS—The United States Supreme Court has held the regulations of the California Department of Alcoholic Beverage Control which prohibit certain sexual acts and the display of specific parts of the body, as entertainment in licensed establishments, do not, on their faces, violate the United States Constitution.

California v. La Rue, 409 U.S. 109 (1972).

In 1965, a dancer in a California nightclub entertained with her breasts exposed. The Supreme Court of California in *In Re Giannini*[1] held that she could not be convicted of either lewd conduct or indecent exposure in the absence of proof that her dance was obscene. The Department of Alcoholic Beverage Control, which is the administrative agency vested by the California constitution[2] with primary authority for licensing and regulating the sale of alcoholic beverages within the state, became concerned in the years following *Giannini* with the progression from "topless" dancers to "bottomless" dancers, nude entertainers, and the showing of films displaying sexual acts in bars and nightclubs

1. 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655, *cert. denied*, 395 U.S. 910 (1968).
2. CAL. CONST. art. 20, § 22. That section provides in part:
The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with the laws enacted by the Legislature, to license the manufacture, importation and sales of alcoholic beverages in this State. . . . The Department shall have the power, in its discretion, to deny, suspend, or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals . . . .