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Notes

Access of the Poor to Basic Economic Needs: A New Concern in Freedom of Speech Decisions

The Supreme Court has recently expanded the right of consumers to receive relevant product information by ruling that "commercial speech," information that concerns only financial transactions, is protected by the first amendment.¹ While commercial speech was formerly considered to be distinct from traditionally protected speech, which is the discussion of political, social and moral issues, the Court has ruled that commercial speech is protected because its content may be as important to a consumer as any political or moral debate, and because society has strong interest in knowing who is selling what products or services and for what price. Commercial information facilitates access to goods and services, particularly for the poor, who need to know where the lowest priced items may be found. The Court has recognized that society, especially the poor, may suffer from restrictions on advertising more than from its possible side effects such as fraud or reduction in quality of goods and services due to aggressive competition.

The right to commercial information is not the same as the right to goods and services. Courts normally decline to invalidate statutes merely because they limit or deny goods and services to certain people. But in the cases invalidating state restrictions on advertising, the Supreme Court has shown a strong concern for the poor's access to basic needs, such as prescription drugs and legal services, which suggests that statutes interfering with such access are more likely to be invalidated than would statutes not concerning the poor or important needs. The Court's attitude in these cases runs against the traditional judicial restraint applied to social and economic legislation. This Note will examine the ways in which these economic concerns appear in the professional advertising cases, and how they may affect future constitutional decisions in which basic economic needs are involved.

THE TRADITIONAL JUDICIAL APPROACH TO SOCIAL AND ECONOMIC LEGISLATION

When legislation restricting necessities such as welfare, food or housing is challenged on due process or equal protection grounds, the Court's response is ordinarily to place the statute under the category of "social and economic legislation," and apply the standard of minimum scrutiny, under which the legislation need only be an arguably rational means of achieving a legitimate end to be constitutional.² The primary justifica-

¹See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

²For example, the court continues to use the standard of minimum rationality in dealing with

tion for this approach is that the legislature needs a wide degree of latitude in order to effectively deal with social and economic problems. Accordingly, the Court should not sit as a "superlegislature," substituting its views for the judgment of those elected to pass laws, or insisting that statutes be the best means of solving the problems with which they purport to deal.³

A leading case which utilized this approach with a statute involving basic needs of the poor is *Dandridge v. Williams*.⁴ In *Dandridge*, the Court upheld against an equal protection challenge a Maryland regulation setting an upper limit on benefits a family may receive under the Aid to Families With Dependent Children (AFDC) program.⁵ The District Court held that the regulation was invalid for "overreaching" because it burdened a large number of recipients to which it did not expressly apply.⁶ The Supreme Court reversed. Justice Stewart found the concept of "overreaching" inappropriate as a means of invalidating economic and social legislation, preferring to limit the doctrine to cases involving a challenge to the statute based on the first amendment or on other "freedoms guaranteed by the Bill of Rights."⁷ The result was a hands-off acceptance of the regulation as a rational means for carrying out the alleged state purposes of "encouraging employment" and "avoiding discrimination between welfare families and the families of the working poor,"⁸ even though the Court did not dispute the charge that many welfare recipients were suffering because the regulation limited their benefits. The Court's position was that the task of devising welfare systems belonged to the legislature.

Justice Stewart recognized that the category of "economic and social"

fourteenth amendment challenges to government disability benefit statutes. *See, e.g.*, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Mathews v. Lucas*, 427 U.S. 495 (1976); *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

³*E.g.*, *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

⁴397 U.S. 471 (1970).

⁵42 U.S.C. § 601 *et seq.* (1970). Plaintiffs had argued that the statute violated the equal protection clause by discriminating against children in larger families, who received fewer benefits per child than those in smaller families.

⁶*Williams v. Dandridge*, 297 F. Supp. 450 (D. Md. 1968), *rev'd*, 397 U.S. 471 (1970). The legislative purposes advanced in the lower court were (1) discouraging desertion by wage earners, (2) encouraging the surviving parent to seek employment, and (3) promoting planned parenthood. The court found that even if the legislation advanced these purposes, it adversely affected *all* AFDC eligibles in families over a certain size—particularly the children, to whom these purposes did not apply—and thus was invalid for sweeping too broadly. *Id.* at 474-75.

⁷397 U.S. at 484. *See also* *Shapiro v. Thompson*, 394 U.S. 618 (1969), invalidating two states' one-year waiting periods for AFDC claimants, on grounds that they violated the constitutional right to interstate travel; *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974), striking down, as an infringement on the right to travel, Arizona's one-year county residence requirement for eligibility for free medical care granted to indigents by statute. *But cf.* Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Eventual Government Services*, 90 HARV. L. REV. 1065 (1977). The "right to travel" basis for these decisions is questioned, and an underlying "right to welfare" and "right to nonemergency medical services" is suggested as a partial explanation. *Id.* at 1079-80. Certain language in *Maricopa County* supports this position: "[M]edical care is as much 'a basic necessity of life' to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of government entitlements." 415 U.S. at 259. *But see* *Sosna v. Iowa*, 419 U.S. 393 (1975).

⁸397 U.S. at 486.

legislation usually concerns regulation of business and industry,⁹ while the administration of welfare "involves the most basic economic needs of impoverished human beings."¹⁰ Nevertheless, the importance of welfare in itself was not sufficient to alter the degree of scrutiny of the statute, or to elevate welfare to the level of rights which, under an equal protection analysis, must be provided equally for all beneficiaries once the state has decided to provide them in the first place.¹¹

Dandridge thus represented a defeat for the argument that because the poor are affected most by a restriction, or because a need as important as welfare is at stake, the statute deserves more than minimum scrutiny. The sharp line drawn between cases involving "social and economic" legislation and those involving personal liberties such as first amendment rights ensured that the Maryland legislature would be free to experiment in this area of public welfare, but many of those intended to be aided by the AFDC program suffered as a result.

The minimum scrutiny standard associated with "social and economic" legislation was also applied in the field of prescription drug advertising. In *Patterson Drug Co. v. Kingery*,¹² a Virginia statute prohibiting pharmacists from advertising prescription drug prices¹³ was challenged by a retail drug center, primarily on due process and equal protection grounds. The District Court upheld the statute, ruling that as dispensing of prescription drugs is a service that relies heavily on the professional skills of pharmacists in order to protect public health,¹⁴ the statute falls into the category of "social and economic" legislation.¹⁵ *Pat-*

⁹This point was emphasized by Marshall's dissent:

This case, involving the literally vital interests of a powerless minority—poor families without breadwinners—is far removed from the area of business regulation, as the Court concedes. Why then is the standard used in those cases imposed here? We are told no more than that this case falls in 'the area of economics and social welfare,' with the implication that from there the answer is obvious.

Id. at 520 (Marshall, J., dissenting)

¹⁰*Id.* at 485.

¹¹See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote); *Griffin v. Illinois*, 351 U.S. 12 (1956) (right to criminal appeal-free transcripts for indigent defendants); *Douglas v. California*, 372 U.S. 353 (1963) (right to criminal appeal-free counsel for indigent defendants). *But see* *Ross v. Moffitt*, 417 U.S. 600 (1974). Note that the Court has rejected the proposition that constitutional rights to welfare depend upon whether benefits to a particular recipient are considered a "right" or a "privilege." *Graham v. Richardson*, 403 U.S. 365 (1971).

¹²305 F. Supp. 821 (W.D. Va. 1969).

¹³VA. CODE § 54-524.35 (1950) provided that "any pharmacist shall be considered guilty of unprofessional conduct who . . . (3) publishes, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription."

¹⁴Pharmacists must have extensive knowledge of a wide range of drugs. Accuracy is essential; mistakes can be serious. A few prescriptions, but nevertheless a significant number, cannot be filled from drugs available in manufactured form, so the medicine must be compounded by the pharmacists. Some pharmacists, probably a minority, systematically monitor prescriptions by family records to avoid allergic reactions or the simultaneous use of antagonistic drugs, of which the patient's doctor may not be aware.

305 F. Supp. at 824.

¹⁵The case was accordingly ruled by the minimum rationality standards of *Williamson v. Lee Op-*

erson contained no mention of how the poor could gain greater access to necessities through advertising, other than a single reference to the anticompetitive effect of the ban.¹⁶ Like *Dandridge*, the *Patterson* court avoided speculation as to how much of the basic need the poor ought to have, leaving all consideration of less burdensome restrictions to the legislature.

THE PROFESSIONAL ADVERTISING CASES

In addition to upholding the statute on fourteenth amendment grounds, *Patterson* rejected a claim by the drugstore that the advertising ban infringed on pharmacists' rights of freedom of speech, finding that advertising was unprotected "commercial speech."¹⁷ But five years later, the same statute was successfully challenged on first amendment grounds. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁸ consumers of prescription drugs maintained that the state, by prohibiting pharmacists from advertising prices, violated their right to know this information.¹⁹ The District Court enjoined the defendants from enforcing the statute,²⁰ and the Supreme Court affirmed. Justice Blackmun observed that since the time *Patterson* had been decided, the principle that commercial speech should not be protected had been greatly weakened.²¹ Even if vestiges of the doctrine remained, there was an important distinction between the challenge by the drugstore and the present attack by *consumers*. The former was based on a "prima facie commercial approach,"²² while the latter contained a health interest in access to information about drug prices that was "fundamentally deeper than a trade consideration."²³ The first amendment was held to protect the consumer's right as a *recipient* of this information, rather than as a

tical of Okla., Inc., 384 U.S. 483 (1955), and *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935). These cases sustained, respectively, statutes forbidding solicitation of the sale of eyeglass frames and advertising of the price of dental work.

¹⁶305 F. Supp. at 825-26.

¹⁷The Court relied on *Valentine v. Chrestensen*, 316 U.S. 52 (1942), which had recognized commercial advertising as a distinct class of speech outside First Amendment protection.

¹⁸425 U.S. 748 (1976).

¹⁹The first amendment is applicable to the states through the fourteenth amendment. See, e.g., *Bigelow v. Virginia*, 421 U.S. 809 (1975).

²⁰*Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy*, 373 F. Supp. 683 (E.D. Va. 1974), *aff'd*, 425 U.S. 748 (1976).

²¹*Id.* at 755, quoting *Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy*, 373 F. Supp. 683, 686 (E.D. Va. 1974).

²²In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Court reversed a conviction of a newspaper editor for running an advertisement of a New York abortion placement service, on First Amendment grounds. The Court reasoned that the advertisement was truly a matter of "public interest," protected by the First Amendment, as it extended to readers with a general interest in the subject matter and how another state dealt with it, and to those seeking reform in Virginia. However, it was arguable that *Valentine*, *supra* note 17, still applied to advertisements stating nothing more than "I will sell you the X prescription drug at the Y price." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

²³*Id.* Note that the lower court decision, with its emphasis on the identity of the plaintiffs as consumers, preceded the *Bigelow* "commercial speech" decision by a year.

speaker,²⁴ a right that under a typical first amendment balancing approach outweighed the state interest in protecting the health of its citizens.²⁵

One year later, in *Bates v. State Bar of Arizona*,²⁶ the Court extended the first amendment holding of *Virginia State Board of Pharmacy* to the legal profession. This case arose when two attorneys placed an advertisement in a newspaper, listing prices of certain legal services, in violation of an Arizona disciplinary rule.²⁷ The Arizona Supreme Court upheld the constitutionality of the rule,²⁸ but the United States Supreme Court reversed, holding that the state may not prohibit attorneys from advertising the prices of routine legal services.

Justice Blackmun noted that certain differences in the nature of the professions had caused the Court in *Virginia State Board of Pharmacy* to limit its holding to the pharmaceutical profession.²⁹ Yet the Court used reasoning similar to that of *Virginia State Board of Pharmacy* its first amendment decision in *Bates*. The potential customers of the legal clinic, people of modest means who needed inexpensive legal services but who did not qualify for government legal aid, had an important interest in price information. The ban on advertising, by inhibiting the flow of commercial information and keeping the public in ignorance, violated the consumer's right-to-know under the first amendment, and could not be justified by the state interest in the welfare of its citizens.³⁰

The right-to-know doctrine does not in itself imply that a greater constitutional significance should be attached to basic economic needs of the poor; it still might be distinguished as a personal freedom wholly outside the category of "economic and social" interests. But economic concerns guided the Court in its first amendment balancing test. These concerns

²⁴"Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Id.* at 756. It has been said that the right to receive information is a necessary, though often overlooked complement to the right to speak or publish. *See, e.g.* *American Meat Inst. v. Ball*, 424 F. Supp. 758, 767-68 (1976). It has also been said that the state itself has its own rights of free speech, with respect to the federal government, in order to make available to consumers such information it believes to be in their best interests. *Id.* at 770 (dicta).

²⁵Those interests were argued to be (1) protecting pharmacists' professional services, such as compounding, handling, and dispensing of prescription drugs from erosion by aggressive price competition, and (2) preventing the loss of "stable pharmacist-customer relationships," and of pharmacist monitoring of customers to assure that customers take the proper drugs as they shop around for the lowest prices. Blackmun found these goals "highly paternalistic," and "on close inspection . . . rest[ing] in large measure on the advantages of [consumers] being kept in ignorance." 425 U.S. at 769.

²⁶433 U.S. 350 (1977).

²⁷D.R. 2-10(B), 17A ARIZ. REV. STAT. SUP. CT. RULES, rule 29 (a) (Supp. 1976).

²⁸*Matter of Bates*, 113 Ariz. 394, 555 P.2d 640 (1976), *rev'd*, 433 U.S. 350 (1977).

²⁹Although 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.

425 U.S. at 773 n. 25.

³⁰The justifications the Court dealt with were (1) the adverse effect on professionalism,

can be broken down into three components. The first two deal with the consumer's interest: the class of consumers affected most severely by the advertising restrictions, and the importance to that class of the goods and services themselves. The third involves the balancing process itself: the fact that these economic concerns outweighed the state interest in protecting the public against the dangers of professional advertising.

In both *Virginia State Board of Pharmacy* and *Bates*, the Court expressed a high level of concern for the poor, and for their interest in better access to price information. In each case, the Court scrutinized the role advertising plays in allocating goods and services in our economic system, and recognized that consumers, particularly the poor, were burdened by restrictions on commercial information. The Court went on to suggest that the free flow of information could improve the position of the poor by allowing them to compare prices and make informed decisions, and by lowering prices through increased competition.³¹ The poor would be in a more competitive position in the market with the rest of society, and thus a measure of wealth redistribution would be accomplished by the free enterprise system. This is especially important in *Bates*, for greater participation by the poor in the legal system could serve to advance their interests in other areas of society.

This suggests that the distinction between "personal" and "economic" liberties is not nearly as rigid in the professional advertising cases as it was in *Dandridge*. The poor, ignored by the legislature, were helped by the Supreme Court in obtaining an economic gain. The rationale of the professional advertising cases supports the proposition that the Court should scrutinize legislation more closely when basic economic needs of the poor are involved.

THE IMPACT ON THE POOR OF RESTRICTIONS ON ADVERTISING

In *Virginia State Board of Pharmacy*, Justice Blackmun, noting that a consumer's interest in price information may be greater than his interest

(2) the inherently misleading effect of attorney advertising, (3) the adverse effect on the administration of justice, (4) the undesirable economic effects of advertising, (5) the adverse effect on the quality of service, and (6) the difficulties of enforcement.

³¹ 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.

Virginia State Bd. of Pharmacy, 425 U.S. at 765. See also *id.* at 754 n. 11; *id.* at 765-66 n. 20 (Federal Trade Commission study concluded that lifting drug price advertising bans would save consumers millions of dollars per year). In *Bates*, Justice Blackmun suggested that the same would be true for services such as those offered by attorneys:

The ban on advertising serves to increase the difficulty of discovering the lowest-cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced. Although it is true that the effect of advertising on the price of services has not been demonstrated, there is revealing evidence with regard to products; where consumers have the benefit of

in important political or moral issues, stated that

[t]hose 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 as 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.³²

Of the three groups seen as primary victims of the advertising ban, one, the poor, was also mentioned by Blackmun in *Bates*:

Among the reasons for [the] underutilization [of lawyers] is fear of the cost....Advertising can help to solve this acknowledged problem: advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange. The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgable.³³

Thus the interest of the poor in the lifting of the prohibition is ultimately an interest in lower prices for prescription drugs and legal services. But once the Court begins speaking in terms of access to an economic benefit in a constitutional decision, it subjects itself to the criticism that it is legislating social policy. Justice Rehnquist, the lone dissenter in *Virginia State Board of Pharmacy*, claimed that the majority's concern for the poor and their right to know price information was a facade for judicial legislation.³⁴ The majority's language, in other words, is not consistent with the position taken in cases like *Dandridge*, that the legislature is the proper body to be examining the merits of the free market system and determining where government regulation is needed.

price advertising, retail prices often are dramatically lower than they would be without advertising.

433 U.S. at 377.

³²425 U.S. at 763-64.

³³433 U.S. at 376-77. The reference to the "not-quite poor" assumes that the poorest potential clients have access to government legal aid, an assumption that, despite noticeable gains by legal services programs in the last decade, is not particularly accurate. See H. STUMPF, *COMMUNITY POLITICS AND LEGAL SERVICES—THE OTHER SIDE OF THE LAW* 267-81 (1975). Even assuming such access, however, the emphasis in the *Bates* approach remains on how the *least* well-off potential clients of private legal offices stand to gain the most from price advertising.

³⁴The 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 . . . [and] of the importance in a 'predominantly free enterprise economy' of intelligent and well-informed decisions as to the allocation of resources . . . While there is . . . 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.

425 U.S. at 783-84 (Rehnquist, J., dissenting). See also Brief for Appellants at 18, 425 U.S. 748 (1976), which argues that the only real difference between *Patterson* and *Virginia Board of Pharmacy* was who was suing, and that to rule in favor of the consumers was to overturn *Patterson's* Fourteenth Amendment decision as well as its First Amendment holding.

In *Virginia State Board of Pharmacy* and *Bates*, the Court was concerned not only with the class most affected by the restrictions, but also with *what* many of these poor consumers were being denied. In both cases, the information dealt with goods and services that were important to consumers—drugs and legal services. It is difficult to imagine the Court showing such a concern for the poor if the information had involved less essential items such as cigarettes and alcohol.³⁵ But if the importance of a consumer item is to be taken into account in free speech decisions, the Court is faced with making moral or philosophical judgments as to the importance of other important goods and services. It also risks implications that the poor have a constitutional right to certain basic necessities, which the Court has been careful to avoid in prior cases such as *Dandridge*.

BALANCING THE CONSUMER'S INTEREST AGAINST THE STATE'S INTEREST

The balancing process in *Virginia State Board of Pharmacy* and *Bates* is significant because economic factors were prominent in evaluating the weight of both the consumer's and State's interests. For example, in *Virginia State Board of Pharmacy*, the Court found the State's arguments in favor of the restriction "paternalistic" because they interfered with economic decision-making by consumers.³⁶

A clear example of the Court's preference of the consumer's right to know commercial information over the State's protective interests was in *Bates*, in which the Court used economic arguments counteract serious objections raised by the dissent about attorney price advertising.

³⁵Yet the Court might be forced to differentiate among the various items being advertised in order to uphold restrictions on less essential or dangerous items. Justice Rehnquist feared such a line could be drawn under the majority's analysis.

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.

Id. at 789 (Rehnquist, J., dissenting). See, e.g., *Capitol Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd. sub nom.*, *Capitol Broadcasting Co. v. Acting Atty. Gen.*, 405 U.S. 1000 (1972), upholding the constitutionality of the ban on cigarette television and radio commercials, under the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335 (1970). The majority in *Virginia Board of Pharmacy* distinguished this case as one involving "special problems of the electronic broadcast media," 425 U.S. at 773, but the majority's emphasis on the importance of access to information, albeit commercial, appears to be in harmony with the *Capitol Broadcasting* dissent: "[No decisions] serve as precedent for the use of Government power to shut off debate on a vital public issue. If the First Amendment means anything at all, it means that Congress lacks this power. There is no constitutional warrant for Government censorship of any medium of communication." 333 F. Supp. at 591 (Skelly Wright, J., dissenting). The dissent went on to address the problem as one of whether the commercial speech doctrine applied, but once that doctrine was eliminated in *Virginia Board of Pharmacy*, the issue becomes one of "why prescription drugs, not cigarettes?" rather than "why television and radio, and not other forms of media?"

³⁶See generally 425 U.S. at 766-70.

Perhaps the most significant objection was that the majority underestimated the difficulties in advertising services. The dissent argued that it is extremely difficult for the professional to accurately determine in advance what the value of his time, efforts and expertise will be to a prospective client, and any attempt to put a price tag on his services would be misleading.³⁷ For the same reason, it is difficult to create a category of "routine" services in which price advertising is reasonably accurate, or is able to deal with the problem of unanticipated issues that might enter into a "routine" case after the lawyer begins work, consuming more of his time than was justified by the price.³⁸

The majority in *Virginia State Board of Pharmacy* found that the advertising of prescription drug prices is not inherently misleading to the customer.³⁹ But *Virginia State Board of Pharmacy* applied only to drug price advertising. This appeared to be based largely on the premise that what was being regulated was advertisement of tangible goods, not personal services.⁴⁰ Three justices who stood with the majority in that case dissented in *Bates* primarily on this issue, arguing that the State interest in *Bates* was sufficient to overcome the consumer's interest in price advertising. The majority did not dispute that the state maintains broad regulatory powers over the profession,⁴¹ but they chose to view the problem of pricing discretionary services as one best handled by the lawyers themselves.⁴² The reason was that it was more important that people who need these "routine" services have full access to them, by being informed of the prices attorneys were offering, than it was for the public to be protected from possible hardships due to miscalculation of what they would need to spend on a lawyer. The result was that the Court did not engage in the same depth of analysis in meeting this problem as it had in discussing the role of advertising in aiding access to basic necessities.⁴³

³⁷433 U.S. at 394-95 (Powell, J., dissenting).

³⁸433 U.S. 391-94 (Powell, J., dissenting).

³⁹The court noted, of course, that the State may restrict advertising that is actually false, deceptive or misleading, and found that these rulings should not impede the State's or the Bar's efforts to insure that advertising flow "both cleanly and freely." 433 U.S. at 383-84. See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-73 (1976).

⁴⁰This was emphasized in Justice Burger's concurrence. After noting the majority's observation that about 95% of prescriptions are filled with dosage units prepared by the manufacturer, rather than by the pharmacist, he added that

[o]ur decision today, therefore, deals largely with the State's power to prohibit pharmacists from advertising the retail price of *prepackaged drugs*. . . [Q]uite different factors would govern were we faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law . . . Attorneys and physicians are engaged *primarily* in providing services in which professional judgment is a large component, a matter very different from the retail *sale* of labeled drugs already prepared by others.

425 U.S. at 774 (Burger, J., concurring). See also note n. 29 *supra*.

⁴¹See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

⁴²But see *Bates v. State Bar of Ariz.*, 433 U.S. at 395-96 (Powell, J., dissenting), which argues that the problem has in fact usually been left to the profession.

⁴³For example, the majority's assurance that pricing problems can generally be solved at the initial consultation does not deal with the problem of issues that arise or become more complex after-

THE IMPACT AND CONSEQUENCES OF THE PROFESSIONAL ADVERTISING CASES

Although *Virginia State Board of Pharmacy* and *Bates* were first amendment cases, the Court's concerns for the poor's access to basic economic needs helped erode the distinction between "personal" and "economic" liberties. The issue now is how far the Court will go to find "other freedoms guaranteed by the Bill of Rights" in order to invalidate "economic and social" legislation that would otherwise withstand constitutional challenges.

In the first place, Justice Rehnquist's opposition to the "impact on the poor" language was in part based on disfavor of the right-to-know doctrine itself,⁴⁴ but he also raised the question of how much the Court was influenced by economic policy in reaching a first amendment decision. The right-to-know doctrine as applied to consumers generally would have been sufficient to determine the outcome, in light of the previous weakening of the commercial speech doctrine,⁴⁵ so that the "impact on the poor" language, with its implications of concern for what the poor *ought* to have, was unnecessary. Yet the language appears in both cases, to emphasize how important it is that price information flow as freely as possible. When this is combined with the Court's examination of the role advertising plays in economic decision-making, it is difficult to draw a sharp line between these decisions and cases like *Dandridge* in which what is being sought is an economic benefit.⁴⁶ For example, the state could attack the problem of the poor's access to prescription drugs by providing a form of direct relief, but it is questionable whether the fact that it has not done so should affect a first amendment holding.

Second, evaluation of the importance to society of the goods or services being advertised is usually a legislative function. But it does make sense

wards. Also questionable is the Court's refusal to deal with the question of whether assertions of professional qualifications or suggestive slogans such as "at the lowest prices" are permissible, and how to determine when such assertions have taken place. This might also be a problem in the advertising of drugs; for example it is unclear whether the advertising slogans—"Every Day is Savings Day on Everything at Revco" and "America's only Total Discount Drug Chain"—prohibited by the Virginia statute in *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821, 823 (W.D. Va. 1969), would be permissible even after *Virginia State Bd. of Pharmacy* and *Bates*.

⁴⁴At one point he referred to it as "the second class First Amendment rights which the Court has today created in commercial speech." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 786. (Rehnquist, J., dissenting).

⁴⁵Perhaps the ruling could have arisen from the inherent difficulties in determining whether or not the message carries "social import." See *Bigelow v. Virginia*, 421 U.S. 809 (1975).

⁴⁶For example, what the plaintiffs in *Dandridge* were really seeking were more welfare benefits. The State presently computed the family's standard of need according to the number of children and other economic circumstances. The upper limit, however, was imposed on families regardless of the standard of need. Due to the size of plaintiffs' families, the standard of need substantially exceeded the upper limit. See generally *Dandridge v. Williams*, 397 U.S. 471, 473-75 (1970). Yet had plaintiffs prevailed on the grounds that the regulation unconstitutionally discriminated against large families, Maryland could conceivably eliminate the family upper limit and *reduce* the standard of need for all recipients, in order to keep the program operating at the same budget level. The result would be that smaller families would be made *poorer* by the constitutional ruling.

that the Court is more concerned that the poor have access to prescription drugs and legal services than to less essential commodities and services. The problem here is the possible effect on other decisions when important needs are at stake. For example, if the Court is affected in constitutional decisions by notions of what disadvantaged people ought to have, there is no reason why the impact will be limited to challenges to government restrictions on free enterprise, and not affect decisions in which the poor are claiming the right to "the enjoyment of basic necessities" through government benefits.

The importance given to basic needs might also create problems for the Court in cases where the "personal" freedom claim is weak. For example, if welfare benefits were restricted to a certain group of poor people, the Court, influenced by the fact that limiting welfare may mean cutbacks in food, clothing, quality of housing, and health care, might find the restriction unconstitutional, as long as plaintiffs could advance some kind of "personal" liberty argument against the restriction.

Finally, if the state's protective interest is less important than access to commercial information, the states might be hindered in their efforts to restrict the use of potentially dangerous items. The state's protective interest may be stronger for the poor than for the rest of society, but it is possible that the Court might label it "paternalistic" and insist that free access to the information, and even to the goods or services themselves, is the best way to "protect" the poor.

Justice Rehnquist's approach is to avoid these problems by refusing to allow a free speech decision to be influenced by concerns for access to goods or services.⁴⁷ But such an approach seems harsh in the case of a disadvantaged person who finds it truly difficult to obtain price information without the help of advertisements.⁴⁸ The *Dandridge* minimal scrutiny approach is likewise harsh to the disadvantaged person who is not protected by the legislative process.

The proper approach in such cases is an "intermediate" degree of scrutiny of statutes that restrict access to important needs of the poor. The Court may be doing this already by an increased willingness to find other constitutional violations, which increases the probability that a statute will receive close scrutiny. One example of such a test is found in state cases which, prior to *Virginia State Board of Pharmacy*, invalidated statutes forbidding drug price advertising under the requirement that

⁴⁷For example, instead of reasoning that the more important the right, the more important it is to have access to information about it, Rehnquist suggested that "[a]ppellees who have felt so strongly about their right to receive information . . . must also have enough residual interest in the matter to call their pharmacy and inquire." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 782 (Rehnquist, J., dissenting).

⁴⁸This was emphasized in *Health Sys. Agency v. Virginia State Bd. of Medicine*, 424 F. Supp. 267 (E.D. Va. 1976), which held, on the authority of *Virginia State Bd. of Pharmacy*, that the State may not prohibit physicians from printing information of fees and services in a medical directory. The court found that the fact that plaintiffs could get the information from physicians personally did not extinguish the first amendment challenge, and pointed out that many people, particularly the poor, sick and aged, find it difficult to question individual physicians in order to select one best for their needs.

the statute have a *substantial* relationship to the goal of public health.⁴⁹ Another is the equal protection approach of the dissent in *Dandridge*, which takes into account the importance of the benefit being restricted or denied to the class being discriminated against.⁵⁰ A third approach involves an examination of the relationship between the legislature's actual purpose and the means, rather than permitting the state of Court itself to argue a variety of conceivable purposes.⁵¹

The Court should not bend too far to find infringements of "personal" liberties in challenges of social and economic legislation, or it is arguably delegating legislative powers to itself. This can be avoided if it sticks to personal infringements that are clearly defined. The "right-to-know" doctrine has a sound independent basis, so that it does not amount to a facade for a true fourteenth amendment challenge.⁵² Whether the Court will continue to show concern for the poor in other "personal" liberty cases remains to be seen.

CONCLUSION

The Court's approach to due process or equal protection challenges to economic and social legislation remains one of deference to the legislature. In order for such legislation to be constitutional, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."⁵³ This kind of legislation was successfully challenged on first amendment grounds in the professional advertising cases. But in these cases, the consumers' interest outweighed the state's regulatory interest largely because of economic factors. Particularly in its language showing concern for the poor and their access to basic needs, the Court has suggested that the first and fourteenth amendment approaches are not as distinct as once believed.

This development might concern traditionalists, who fear that the Court may be undermining the role of the legislature. But to others, the Court's concern for the poor may only be a reflection of the concern our society has for the poor, and not a new constitutional approach. Still, if the Court has made it easier to find other challenges to legislation that would have been upheld on due process or equal protection grounds, the effect is that a poor person who is economically burdened by a statute will have a better chance of seeing it invalidated. To the poor who would have received no relief from the legislature or from the traditional judicial approach, this is a welcome development.

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⁴⁹See, e.g., *Florida Bd. of Pharmacy v. Webb's City, Inc.*, 219 So.2d 681 (Fla. 1969); *Stadnik v. Shell's City, Inc.*, 140 So.2d 871 (Fla. 1962); *Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 311 A.2d 243 (1973); *Pennsylvania State Bd. of Pharmacy v. Pastor*, 441 Pa. 186, 272 A.2d 487 (1971).

⁵⁰397 U.S. at 520-21 (Marshall, J., dissenting).

⁵¹See Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

⁵²See, e.g., *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Stanley v. Georgia*, 394 U.S. 557 (1969). See also note 24, *supra*.

⁵³*Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).