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Urowsky v. Board of Regents

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UROWSKY v. BOARD OF REGENTS

CONSTITUTIONAL LAW—*First Amendment—Due Process—Advertising of discount prescription prices is unprotected commercial speech the regulation of which is rationally related to the state's interest in preserving local pharmacies and preventing harmful competition.* 38 N.Y.2d 364, 342 N.E.2d 583, 379 N.Y.S. 2d 815 (1975).

The issue of whether a pharmacist has the right to advertise discount prescription prices has been the subject of many state and federal lawsuits in recent years.¹ In *Urowsky v. Board of Regents*² the New York Court of Appeals adopted the minority view³ and declined to recognize such a right.

The petitioner in *Urowsky*, a pharmacist and pharmacy owner, challenged the validity of a Board of Regents regulation prohibiting pharmacists from advertising discount prices for prescription drugs.⁴ In February 1972, the Board of Pharmacy, an

1. *Terry v. California State Bd. of Pharm.*, 395 F. Supp. 94 (N.D. Cal.), *appeal docketed*, 44 U.S.L.W. 3155 (U.S. Sept. 2, 1975) (No. 336); *Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharm.*, 373 F. Supp. 683 (E.D. Va. 1974), *prob. juris. noted*, 420 U.S. 971 (1975); *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821 (W.D. Va. 1969); *Florida Bd. of Pharm. 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 Pharm. v. Sav-A-Lot, Inc.*, 270 Md. 103, 311 A.2d 242 (1973); *Mississippi State Bd. of Pharm. v. Steele*, 317 So. 2d 33 (Miss. 1975); *Supermarkets Gen. Corp. v. Sills*, 93 N.J. Super. 326, 225 A.2d 728 (1966); *Oregon Newspaper Publishers Ass'n, Inc. v. Peterson*, 244 Ore. 116, 415 P.2d 21 (1966); *Pennsylvania State Bd. of Pharm. v. Pastor*, 441 Pa. 186, 272 A.2d 487 (1971); *Osco Drug, Inc. v. Wisconsin Pharm. Examining Bd.*, 61 Wis. 2d 689, 214 N.W.2d 47 (1974).

2. 38 N.Y.2d 364, 342 N.E.2d 583, 379 N.Y.S.2d 815 (1975).

3. *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821 (W.D. Va. 1969); *Supermarkets Gen. Corp. v. Sills*, 93 N.J. Super. 326, 225 A.2d 728 (1966).

4. At the time Urowsky was charged, the definition of "unprofessional conduct" included:

[A] registered pharmacist, or the owner of a pharmacy participating in any plan, agreement or arrangement which advertises fixed or discount prescription prices or permitting any agent or any other person, group or organization to use such advertising in his behalf

Urowsky v. Board of Regents, 38 N.Y.2d 364, 367, 342 N.E.2d 583, 584, 379 N.Y.S.2d 815, 817 (1975).

While the litigation was pending, the section was amended to provide:

[A]dvertising of fixed fees or prices for professional services or the use of the words 'cut rate,' 'discount' or other words having a similar connotation in connection with the offering of professional services by a pharmacist, the owner of a pharmacy or by any other person, group or organization in behalf of and with the permission of a pharmacist or the owner of a pharmacy

8 NYCRR 63.3(c) (1972).

agent of the Board of Regents, filed a complaint which charged that Urowsky had placed an advertisement offering discount certificates for “‘all drug needs,’”⁵ and that he had thereby engaged in unprofessional conduct.⁶ Before a hearing was held on these charges, Urowsky filed suit in state court alleging that the regulation violated his rights secured by the state and federal constitutions.

After issuing an order temporarily restraining the Board of Pharmacy from holding a hearing on the charges, the court held a trial on the merits⁷ and found that the state has a legitimate interest in preventing “destructive competition” through advertising. It determined that the regulation was not unreasonable and arbitrary in violation of the due process clause of the fourteenth amendment.⁸ In affirming the decision, the appellate division⁹ further ruled that there was no validity in Urowsky’s claim that his constitutional guarantee of free speech was violated by the regulation. The court concluded: “[I]t is by now well settled that ‘commercial speech,’ such as the advertising here, is unprotected by the First Amendment [citations omitted].”¹⁰

The New York Court of Appeals affirmed the determination of the appellate division with respect to both the due process and the free speech claims.¹¹ The court focused primarily on the ques-

5. *Urowsky v. Board of Regents*, 38 N.Y.2d 364, 366, 342 N.E.2d 583, 584, 379 N.Y.S.2d 815, 816.

6. See note 4 *supra*.

7. *Urowsky v. Board of Regents*, 76 Misc. 2d 187, 349 N.Y.S.2d 600 (Sup. Ct. Albany County 1973).

8. *Id.*

9. *Urowsky v. Board of Regents*, 46 App. Div. 2d 974, 362 N.Y.S.2d 46 (3d Dep’t 1974).

10. *Id.* at 975, 362 N.Y.S.2d at 48.

11. *Urowsky v. Board of Regents*, 38 N.Y.2d 364, 342 N.E.2d 583, 379 N.Y.S.2d 815 (1975). The petitioner also argued that the regulation prohibiting discount advertising was outside of the rulemaking power delegated to the Board of Regents by the New York State Legislature. Brief for Plaintiff-Appellant at 7, *Urowsky v. Board of Regents*, 38 N.Y.2d 364, 342 N.E.2d 583, 379 N.Y.S.2d 815 (1975). The court of appeals, however, did not find any merit in this claim. The court concluded that the Board of Regents was delegated the authority to adopt such regulations under N.Y. EDUC. LAW § 6506 (McKinney 1972), which provides:

The board of regents shall supervise the admission to and the practice of the professions. In supervising, the board of regents may

(9) Establish by rule, standards of conduct with respect to advertising, fee splitting, practicing under a name other than that of the individual licensee, . . . proper use of academic or professional degrees or titles tending to imply professional status, and such other ethical practices as such board shall deem necessary.

Several state courts have invalidated similar rules on the ground that they exceeded the

tion of whether such advertising constitutes unprotected commercial speech in light of the recent Supreme Court ruling in *Bigelow v. Virginia*.¹²

The principle that advertisements are purely commercial expressions not sheltered by the Constitution was first clearly adopted by the United States Supreme Court in *Valentine v. Chrestensen*.¹³ Without citing any precedent,¹⁴ the Court held that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising."¹⁵ In *Pittsburgh Press Co. v. Human Relations Commission*,¹⁶ the Court retreated from the unequivocal language of *Chrestensen*. *Pittsburgh Press* concerned the constitutionality of a city ordinance which forbade the publication of "help wanted" advertisements which indicated any discrimination on the basis of gender. Referring to *Chrestensen*, the Court stated: "Subsequent cases have demonstrated . . . that speech is not rendered commercial by the mere fact that it relates to an advertisement."¹⁷

Contending that commercial speech should be "accorded a higher level of protection"¹⁸ than granted it by the *Chrestensen* Court, the plaintiff in *Pittsburgh Press* unsuccessfully argued that "the exchange of information is as important in the commercial realm as in any other . . ."¹⁹ The Court found the disputed employment advertisement to be a "classic"²⁰ example of purely commercial speech and thus upheld the ordinance. It

authority of the particular administrative agency. *Mississippi State Bd. of Pharm. v. Steele*, 317 So. 2d 33 (1975); *Oregon Newspaper Publishers Ass'n, Inc. v. Peterson*, 244 Ore. 116, 415 P.2d 21 (1966); *Osco Drug, Inc. v. Wisconsin Pharm. Examining Bd.*, 61 Wis. 2d 689, 214 N.W.2d 47 (1974).

12. 421 U.S. 809 (1975). For a discussion of *Bigelow* see text accompanying notes 24-30 *infra*.

13. 316 U.S. 52 (1942). *Chrestensen* involved conduct—the distribution of handbills advertising a tour of a submarine in violation of a New York City ordinance—rather than pure speech.

14. The *Chrestensen* decision has been criticized by many commentators. *E.g.*, DeVore & Nelson, *Commercial Speech and Paid Access to the Press*, 26 HASTINGS L.J. 745 (1975); Note, *The First Amendment and Commercial Advertising: Bigelow v. Commonwealth*, 60 VA. L. REV. 154 (1974).

15. 316 U.S. 52, 54 (1942).

16. 413 U.S. 376 (1973).

17. *Id.* at 384. The cases referred to by the *Pittsburgh Press* Court include *Ginzburg v. United States*, 383 U.S. 463 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); and *Smith v. California*, 361 U.S. 147 (1959).

18. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973).

19. *Id.*

20. *Id.* at 385.

acknowledged, however, that the plaintiff's argument might have validity "in other contexts."²¹ The Court noted that the advertisement proposed *illegal* conduct; the illegality would have been sufficient in itself to hold against the newspaper. The Court stated:²²

Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

The Court has since emphasized that the illegality of the advertisement was the basis for holding against *Pittsburgh Press*.²³

The informative aspects of advertising in the "other contexts" referred to by the *Pittsburgh Press* Court were more fully explored in *Bigelow v. Virginia*.²⁴ The appellant in *Bigelow*, a newspaper editor, printed an advertisement concerning various abortion services available in New York City. Accepting the appellant's claim that the statute prohibiting such advertising violated the first amendment, the Court held that the advertisement had informative value and was therefore not purely commercial speech under *Chrestensen*.²⁵ Justice Blackmun, writing for the Court, explained the *Chrestensen* holding:²⁶

[It] is distinctly a limited one. . . . [It is not] authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se*.

The *Bigelow* Court concluded that the abortion services advertisement "did more than simply propose a commercial

21. *Id.* at 388.

22. *Id.* at 389. Thus, the Court suggested a balancing test. The fact that the advertisement promoted an illegal activity (discrimination in employment) proved to be a more compelling concern than the first amendment interest at stake.

23. *Bigelow v. Virginia*, 421 U.S. 809, 821 (1975).

24. 421 U.S. 809 (1975).

25. *Id.* at 821-22. The Court found that portions of the advertisement "involve the exercise of the freedom of communicating information and disseminating opinion." *Id.* at 822.

26. *Id.* at 819-20.

transaction. It contained factual material of clear 'public interest.'"²⁷ The Court held that such communication enjoys protection under the first amendment.

The *Bigelow* Court specifically declined to identify "the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."²⁸ The *Urowsky* majority concluded that the New York regulation does not prohibit "the dissemination of knowledge concerning services intimately related to the exercise of a constitutional right [citation omitted],"²⁹ and that the state may therefore freely regulate the advertising of prescription prices. This approach is inconsistent with *Bigelow*. The *Bigelow* Court emphasized the necessity of "assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."³⁰ Rather than employing this kind of balancing test, the *Urowsky* court simply concluded that the speech involved was not entitled to first amendment protection. Thus, the court avoided the reasoned evaluation of conflicting interests demanded by *Bigelow*.

Courts which have applied a balancing test have invalidated regulations which restrict the right of pharmacists to advertise.³¹ In *Virginia Citizens Consumer Council v. State Board of Pharmacy*,³² a federal three-judge court held that provisions simi-

27. *Id.* at 822. The majority reasoned:

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.

Id.

28. *Id.* at 825.

29. *Urowsky v. Board of Regents*, 38 N.Y.2d 364, 370, 342 N.E.2d 583, 586, 379 N.Y.S.2d 815, 819 (1975).

30. *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). Other courts have also followed this approach. See *Terry v. California State Bd. of Pharm.*, 395 F. Supp. 94 (N.D. Cal.), *appeal docketed*, 44 U.S.L.W. 3155 (U.S. Sept. 2, 1975) (No. 336); *Population Servs. Int'l v. Wilson*, 398 F. Supp. 321 (S.D.N.Y.), *appeal docketed sub nom. Carey v. Population Servs. Int'l*, 44 U.S.L.W. 3239 (U.S. Sept. 20, 1975) (No. 443).

31. *Terry v. California State Bd. of Pharm.*, 395 F. Supp. 94 (N.D. Cal.), *appeal docketed*, 44 U.S.L.W. 3155 (U.S. Sept. 2, 1975) (No. 336); *Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharm.*, 373 F. Supp. 683 (E.D. Va. 1974), *prob. juris. noted*, 420 U.S. 971 (1975).

32. 373 F. Supp. 683 (E.D. Va. 1974), *prob. juris. noted*, 420 U.S. 971 (1975). Relying on the first amendment right to receive information, a consumer organization challenged a state statute which prohibited pharmacists from advertising the prices of prescription drugs.

lar to those considered in *Urowsky* offended the first amendment. The court found that the value of prescription price advertising to the public, particularly to the poor and the chronically ill, is immeasurable. As the court observed, not only are prescription drugs quite costly, but there is a vast difference in the prices of prescription medicines, even in pharmacies located within the same city.³³

The United States Supreme Court recently agreed to hear an appeal from the decision in *Virginia Citizens*.³⁴ The ultimate decision of the Supreme Court in the Virginia case, however, will not necessarily dispose of the issues raised in *Urowsky*.³⁵ The *Urowsky* court found that the petitioner did not have the requisite standing to assert the rights of consumers. Thus, *Urowsky* was not permitted to raise the argument that consumers have the "right to know," through advertisements, of discounts on the price of prescription drugs. The court held that this issue could be raised only by "an organizational or individual representative of the class of persons whose rights are claimed to have been violated [citations omitted]."³⁶ It was concluded that as a pharmacist *Urowsky* did not satisfy this requirement.

The "right to know" argument is based on the principle that "the Constitution protects the right to receive information and ideas."³⁷ New York courts have consistently recognized this

33. *Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharm.*, 373 F. Supp. 683, 684-85 (E.D. Va. 1974), *prob. juris. noted*, 420 U.S. 971 (1975); see Berg & Werbel, *Prescription Drugs and Consumer Rights*, N.Y.L.J., Jan. 29, 1976, at 1, col. 1; *What's the Price of an rx Drug?*, 35 CONSUMER REP. 278 (May 1970).

Several other courts have also found that prescription price advertising is of vital importance to the public. See *Terry v. California State Bd. of Pharm.*, 395 F. Supp. 94 (N.D. Cal.), *appeal docketed*, 44 U.S.L.W. 3155 (U.S. Sept. 2, 1975) (No. 336); *Maryland Bd. of Pharm. v. Sav-A-Lot, Inc.*, 270 Md. 103, 311 A.2d 242 (1973); *Pennsylvania State Bd. of Pharm. v. Pastor*, 441 Pa. 186, 272 A.2d 487 (1971).

34. *Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharm.*, 373 F. Supp. 683 (E.D. Va. 1974), *prob. juris. noted*, 420 U.S. 971 (1975).

35. It is not clear whether the Court's ruling in *Virginia Citizens* will settle the issue in New York. The Virginia case involves a prohibition against *all* prescription price advertising while the *Urowsky* decision concerns the advertising of *discount* rates for prescription drugs. Also, New York pharmacists are required to post prescription prices in their stores. N.Y. EDUC. LAW § 6826 (McKinney Supp. 1975). The court of appeals distinguished *Urowsky* from *Virginia Citizens* on the basis of this statute. Its value as an aid to consumers seeking price information is questionable, however, since prospective customers must still go from store to store or incur the expense of calling each pharmacy in order to obtain the needed information.

36. *Urowsky v. Board of Regents*, 38 N.Y.2d 364, 369, 342 N.E.2d 583, 586, 379 N.Y.S.2d 815, 819 (1975).

37. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *Stanley v. Georgia*, 394 U.S. 557,

right.³⁸ *Urowsky*, however, was the first New York case to raise the issue of whether an advertiser may assert the consumer's right to know. Although the federal law of standing is not binding on state courts, the *Urowsky* court relied primarily on Supreme Court decisions.³⁹ *Tileston v. Ullman*⁴⁰ and *NAACP v. Alabama*⁴¹ were cited to support the conclusion that *Urowsky* did not have standing to advance the interests of consumers. Those cases do appear to support that holding; however, the court failed to consider subsequent Supreme Court decisions evidencing a more liberal approach to the issue.⁴²

The Supreme Court has repeatedly permitted disseminators to represent the interests of receivers.⁴³ In *Eisenstadt v. Baird*,⁴⁴ Baird was allowed to challenge the constitutionality of a state statute on the ground that it violated the right of single people to obtain contraceptives although he was not a member of that class of persons. The Court concluded that Baird was not merely a distributor but was, instead, "an advocate of the right of persons to obtain contraceptives."⁴⁵ Mr. Justice Brennan, writing for the Court, reasoned that "more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests."⁴⁶ The District Court for the Southern District of New

564 (1969). See generally DeVore & Nelson, *Commercial Speech and Paid Access to the Press*, 26 HASTINGS L.J. 745 (1975); Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975).

38. See, e.g., *Figari v. New York Tel. Co.*, 32 App. Div. 2d 434, 303 N.Y.S.2d 245 (2d Dep't 1969); *People v. P.A.J. Theatre Corp.*, 66 Misc. 2d 373, 321 N.Y.S.2d 26 (Crim. Ct. New York County 1971), *aff'd*, 70 Misc. 2d 790, 334 N.Y.S.2d 645 (App. Term 1st Dep't 1972), *vacated and remanded on other grounds*, 413 U.S. 912 (1973).

39. *Urowsky v. Board of Regents*, 38 N.Y.2d 364, 342 N.E.2d 583, 379 N.Y.S.2d 815 (1975), *citing* *NAACP v. Alabama*, 357 U.S. 449 (1958); *Tileston v. Ullman*, 318 U.S. 44 (1943). The only New York case noted was *NOW v. State Div. of Human Rights*, 34 N.Y.2d 416, 314 N.E.2d 867, 358 N.Y.S.2d 124 (1974). In that case NOW was granted standing to challenge the legality of employment advertisements in which there were separate "male" and "female" columns. The court did not hold that standing is limited to only organizational representatives.

40. 318 U.S. 44 (1943).

41. 357 U.S. 449 (1958).

42. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (for further discussion see text accompanying notes 43-46 *infra*); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (disseminators of birth control information have standing to assert the rights of the receivers of the information).

43. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

44. 405 U.S. 438 (1972).

45. *Id.* at 445.

46. *Id.*

York recently held in *Population Services International v. Wilson*⁴⁷ that distributors who engage in the retail sale of nonprescription contraceptives satisfy the *Baird* advocacy requirement. The *Wilson* court noted that the distributors “have an adequate incentive to assert vigorously the rights of those they seek to represent.”⁴⁸

Urowsky clearly had a strong incentive to argue the rights of consumers since their interests “have bearing on [the pharmacy owner’s] own freedom of speech; his interests are intertwined with the public’s.”⁴⁹ Consequently, the wisdom of the court’s decision to deny Urowsky standing to argue the rights of consumers is questionable with respect to both its effect on the petitioner’s ability to effectively present his own case and its effect on the interests of the public.

The refusal to grant Urowsky standing is inconsistent with the liberal approach taken in other recent court of appeals decisions.⁵⁰ As the court has stated:⁵¹

[R]estriction on standing is largely of judicial creation, often used to avoid difficult issues or unpleasant results; generally standing should be expanded rather than contracted.
[Citations omitted.]

It is difficult to reconcile the result in *Urowsky* with this expansionary policy.

Urowsky also challenged the regulation on due process grounds. He claimed that the provision was not “reasonably related to the health and welfare of the public.”⁵² Judge Gabrielli, writing for the court, disagreed and found that the regulation was rationally related to “this State’s interest in the preservation of local pharmacies . . . and in the prevention of destructive com-

47. 398 F. Supp. 321 (S.D.N.Y.), *appeal docketed sub nom. Carey v. Population Servs. Int’l*, 44 U.S.L.W. 3239 (U.S. Sept. 20, 1975) (No. 443).

48. *Id.* at 328. It may be argued that the distributors were granted standing because there were other plaintiffs whose standing was not in dispute. The court, however, clearly permitted the distributors to assert the rights of consumers independent of this fact.

49. *Urowsky v. Board of Regents*, 38 N.Y.2d 364, 376, 342 N.E.2d 583, 590, 379 N.Y.S.2d 815, 825 (1975) (Fuchsberg, J., dissenting).

50. *Boryszewski v. Brydges*, 37 N.Y.2d 361, 334 N.E.2d 579, 372 N.Y.S.2d 623 (1975); *Burke v. Sugarman*, 35 N.Y.2d 39, 315 N.E.2d 772, 358 N.Y.S.2d 715 (1974).

51. *Burke v. Sugarman*, 35 N.Y.2d 39, 45, 315 N.E.2d 772, 775, 358 N.Y.S.2d 715, 719 (1974).

52. Brief for Plaintiff-Appellant at 26, *Urowsky v. Board of Regents*, 38 N.Y.2d 364, 342 N.E.2d 583, 379 N.Y.S.2d 815 (1975).

petition in the pharmaceutical profession.”⁵³

The *Urowsky* court, relying on the Supreme Court’s decision in *North Dakota State Board of Pharmacy v. Snyder’s Stores*,⁵⁴ applied a rational relation test. In contrast, several state courts, in dealing with the issue of prescription price advertising, have required that the regulation in question meet a more stringent test.⁵⁵ Where statutes are challenged under state constitutions, the state court is not bound to follow federal law.⁵⁶ Thus, state courts are free to apply a substantive due process test even in areas where the Supreme Court has clearly refused to do so.⁵⁷ In a Pennsylvania case concerning the right of pharmacists to advertise prescription prices, the court explained this policy:⁵⁸

While this [the Supreme Court’s] test may mean that in the federal courts the “due process barrier to substantive legislation as to economic matters has been in effect removed,” the same cannot be said with respect to state courts and state constitutional law. This difference between federal and state constitutional law represents a sound development, one which takes into account the fact that “state courts may be in a better position to review local economic legislation than the Supreme Court.” [Footnote omitted.]

Due to the extraordinary lobbying power of pressure groups, many individuals are unable to prevent the enactment of legislation which infringes upon their rights.⁵⁹ Thus, the courts often provide the only recourse. The doctrine of substantive due process allows the courts to invalidate state economic regulations which are found, after due consideration of the competing interests involved, to be unconstitutionally oppressive.⁶⁰ The retention of

53. *Urowsky v. Board of Regents*, 38 N.Y.2d 364, 368, 342 N.E.2d 583, 585, 379 N.Y.S.2d 815, 818 (1975).

54. 414 U.S. 156 (1973) (for further discussion see text accompanying notes 67-69 *infra*).

55. *Maryland Bd. of Pharm. v. Sav-A-Lot, Inc.*, 270 Md. 103, 311 A.2d 242 (1973); *Pennsylvania State Bd. of Pharm. v. Pastor*, 441 Pa. 186, 272 A.2d 487 (1971); see *Stadnik v. Shell’s City, Inc.*, 140 So. 2d 871 (Fla. 1962) (the court employed what it termed a reasonable relation test which, in effect, operated as a substantial relation test).

56. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. U.L. Rev. 226 (1958).

57. *Id.*

58. *Pennsylvania State Bd. of Pharm. v. Pastor*, 441 Pa. 186, 272 A.2d 487, 490 (1971).

59. See Hetherington, *supra* note 56, at 248-49.

60. *Id.* at 249.

substantive due process by many state courts is significant in still another respect:⁶¹

State courts, since their precedents are not of national authority, may better adapt their decisions to local economic conditions and needs [W]here an industry is of basic importance to the economy of a state or territory, extraordinary regulations may be necessary or proper. Local variations in economic conditions thus may justify varying local standards of economic due process

The *Urowsky* case exemplifies the need for state court scrutiny of legislative action. The application of a substantial relation test to the *Urowsky* regulation reveals the weak basis for the prohibition against prescription price advertising. The *Urowsky* majority postulated that the intent of the promulgators of the regulation was to preserve neighborhood pharmacies "which serve a vital function in the convenient, rapid filling of prescriptions"⁶² and to prevent "destructive competition in the pharmaceutical profession."⁶³ The court did not, however, cite any authority to support the view that the Board of Regents designed the regulation to ensure the survival of local pharmacies. While the preservation of local pharmacies may be a legitimate interest of the state, the conclusion that advertising will lead to their demise is not so easily reached.⁶⁴ Moreover, since the legislature has not offered any facts to support this conclusion, the nexus appears even more tenuous.

With regard to the prevention of "destructive competition" in the profession, several courts have distinguished the advertising of prescription prices from the advertising of such professional services as dentistry and optometry.⁶⁵ Pharmacists may not dispense prescription drugs without the written approval of a physician. Consequently, they are severely restricted in their dealings

61. *Id.* at 250.

62. *Urowsky v. Board of Regents*, 38 N.Y.2d 364, 368, 342 N.E.2d 583, 585, 379 N.Y.S.2d 815, 818 (1975).

63. *Id.*

64. The court did not give any reason for its apparent assumption that neighborhood drugstores do not offer discounts or, correlatively, that discount pharmacies are not conveniently located.

65. *Terry v. California State Bd. of Pharm.*, 395 F. Supp. 94 (N.D. Cal.), *appeal docketed*, 44 U.S.L.W. 3155 (U.S. Sept. 2, 1975) (No. 336); *Maryland Bd. of Pharm. v. Sav-A-Lot, Inc.*, 270 Md. 103, 311 A.2d 242 (1973); *Pennsylvania State Bd. of Pharm. v. Pastor*, 441 Pa. 186, 272 A.2d 487 (1971).

with the public. The likelihood of promoting an “artificial”⁶⁶ market and increasing competition among pharmacies is therefore small. Since the harms that would result from the activity left unregulated are vague in comparison to the clearly deleterious effects of the regulation,⁶⁷ the ban on advertising prescription prices should be invalidated.

Although the *Urowsky* court was free to follow Supreme Court precedent,⁶⁸ the Court’s decisions do not necessarily support the application of a rational relation test in this case. The *Urowsky* majority relied on *North Dakota State Board of Pharmacy v. Snyder’s Stores*,⁶⁹ a case in which a unanimous Supreme Court explicitly rejected the substantial relation test previously set forth in *Liggett Co. v. Baldridge*.⁷⁰ The *Snyder’s Stores* Court upheld a state statute requiring that a pharmacy be owned by either a licensed pharmacist or a corporation in which pharmacists own the majority stock. Thus, this case involved the regulation of a purely economic activity.

Unlike the petitioner in *Urowsky*, *Snyder’s Stores* did not assert the claim that a specific constitutional right, such as free speech, was at stake. Similarly, the petitioners in the cases where the Supreme Court upheld state legislation restricting advertising by licensed professionals⁷¹ did not assert, and the Court did not consider, infringements on the first amendment right of free speech. Therefore it is arguable that where there is a violation of a specific constitutional right, due process requires the application of a stricter test.

As Judge Fuchsberg reasoned in his dissent in *Urowsky*, the regulation banning the advertising of discount prescription drugs runs afoul of the constitutional guarantee of free speech.⁷² Thus, it is distinguishable from “those [cases] which involve merely economic regulation by the State of commercial activities within its borders.”⁷³ Judge Fuchsberg concluded that the state must

66. *Terry v. California State Bd. of Pharm.*, 395 F. Supp. 94, 102 (N.D. Cal.), *appeal docketed*, 44 U.S.L.W. 3155 (U.S. Sept. 2, 1975) (No. 336). An artificial market is one in which advertisers and promoters create a demand for a product.

67. See text accompanying note 33 *supra*.

68. See text accompanying notes 55-57 *supra*.

69. 414 U.S. 156 (1973).

70. 278 U.S. 105 (1928).

71. *Head v. New Mexico Bd.*, 374 U.S. 424 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Semler v. Dental Examiners*, 294 U.S. 608 (1935).

72. *Urowsky v. Board of Regents*, 38 N.Y.2d 364, 372, 342 N.E.2d 583, 588, 379 N.Y.S.2d 815, 822 (1975) (Fuchsberg, J., dissenting).

73. *Id.* at 371, 342 N.E.2d 583, 587, 379 N.Y.S.2d 815, 821 (1975) (Fuchsberg, J., dissenting).

therefore meet a more rigorous test.

The Supreme Court has suggested that where a particular constitutional right is involved, due process requires more than is demanded by the rational basis test. Justice Stone set forth this concept in *United States v. Carolene Products Co.*:⁷⁴

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. [Citations omitted.]

A more stringent due process test was recently applied by a federal three-judge court. In *Population Services International v. Wilson*,⁷⁵ the District Court for the Southern District of New York held that a state statute prohibiting the advertising of contraceptives encroached on the right to privacy of those who seek such products. The court stated:⁷⁶

The Due Process Clause requires . . . that the Court *carefully scrutinize* each provision of the statute to determine whether, as drafted, *it is in fact sufficiently related* to a legitimate State interest to justify its infringement of the right at stake.

The *Wilson* court further explained:⁷⁷

[I]f the answer to this inquiry is in the affirmative . . . the Court . . . [should] consider whether this particular aspect of the right . . . is "fundamental," requiring a "compelling" state interest to justify its abridgement.

The right of free speech, like the right of privacy, is basic to the concept of personal freedom. Economic regulations which limit or prohibit speech should therefore be subject to close scrutiny by the courts.⁷⁸ When a state regulation is challenged on due process grounds, the abridgement of a specific constitutional right should not be ignored. Rather, it is more reasonable to sub-

74. 304 U.S. 144, 152 n.4 (1938) (dictum).

75. 398 F. Supp. 321 (S.D.N.Y.), *appeal docketed sub nom. Carey v. Population Servs. Int'l*, 44 U.S.L.W. 3239 (U.S. Sept. 20, 1975) (No. 443).

76. *Id.* at 331 (emphasis added).

77. *Id.*

78. *Terry v. California State Bd. of Pharm.*, 395 F. Supp. 94 (N.D. Cal.), *appeal docketed*, 44 U.S.L.W. 3155 (U.S. Sept. 2, 1975) (No. 336); *Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharm.*, 373 F. Supp. 683 (E.D. Va. 1974), *prob. juris. noted*, 420 U.S. 971 (1975).

ject the legislation to a stringent test. The *Wilson* court's two-step test is a rational and much needed approach which should be given serious consideration by courts.

The application of such a test to the *Urowsky* regulation exemplifies the test's several advantages. First, the need to make artificial and arbitrary distinctions between different types of speech would be eliminated.⁷⁹ Secondly, and more importantly, this kind of test requires a close examination of the facts in order to determine the precise nature of the interests involved. The result of an informed court comparing the alleged purposes of the legislation in question with its actual effects would be the invalidation of such harm-producing regulations as the one prohibiting discount prescription price advertising.

Although the *Virginia Citizens* case⁸⁰ will hopefully settle the issue of whether prescription price advertising constitutes unprotected commercial speech, the *Urowsky* decision is significant in its own right. The failure of the *Urowsky* court to employ the *Bigelow* balancing test is a step backward in constitutional adjudication. Similarly, the court's refusal to confer standing on the petitioner is inconsistent with the liberal trend apparent in both federal and New York decisions.⁸¹ The court's unwillingness to engage in a thorough, fact-sensitive analysis, however, is most visible in its quick dismissal of Urowsky's due process claim. Considering the fact that a first amendment right was involved, the petitioner's claim should have been given closer attention.

The *Urowsky* decision highlights the need for judicial scrutiny of state economic regulations. As previously stated, the *Urowsky* regulation has little, if any, real relation to the alleged legislative goals and is in fact detrimental to the interests of both the advertiser and the consumer.⁸² A workable compromise between the *Urowsky* court's test and reinstatement of pure substantive due process is clearly needed. As suggested by Judge Fuchsberg and the *Wilson* court, application of a substantial relation test in a situation where a specific constitutional right is at stake is a sound alternative.

Doria Saletsky

79. For a discussion of the commercial speech doctrine see text accompanying notes 13-33 *supra*.

80. *Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharm.*, 373 F. Supp. 683 (E.D. Va. 1974), *prob. juris. noted*, 420 U.S. 971 (1975).

81. See text accompanying notes 42-50 *supra*.

82. See text accompanying note 33 *supra*.

