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Research in brief

Commercial speech, protected speech, and political public relations

Marcus Cayce Myers, Ruthann Weaver Lariscy*

Department of Advertising & Public Relations, Grady College of Journalism & Mass Communication, University of Georgia, Athens, GA 30602, United States

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ABSTRACT

Political public relations play an unique role in American democracy because it occupies a dual role of providing both political and commercial speech. However, using analysis of the First amendment, public relations have increasingly been identified as commercial speech which receives limited protection under the U.S. Constitution. This study traces the evolution of the legal framework in which political PR has become associated with commercial speech, and how this association has made Constitutional analysis of political PR more complex. Implications for public relations practitioners and PR's role in democracy are discussed.

1. Introduction

The role of public relations in democratic society has been present since the beginnings of America. Even the development of the American system of Constitutional government has been categorized as one of the United States' first major public relations campaigns (Cutlip, 1995). This practice of public relations in creating an informed citizenry is characterized by early communications scholars Harold Lasswell and Myres McDougal as one of the most important, if not the most important, roles within a democratic society because it provides citizens with the awareness of what democracy is, how it works, and how it can be maintained (Lasswell & McDougal, 1943).

Under modern case law, federal courts characterize public relations as commercial speech. This distinction is important because commercial speech receives less protection under the U.S. Constitution's First Amendment which protects the freedom of speech of individuals and the press. However, complicating this issue of commercial speech analysis is that the U.S. Supreme Court recognizes that commercial speech oftentimes contains socially and politically important messages that prompts social discourse that is key to democracy. This study examines the historical evolution of commercial speech and provides insights into public relations dual role as commercial and political speech.

2. To protect or not to protect? The evolutionary path of commercial speech

Often associated with advertising, commercial speech affects corporate communications that includes both advertising and public relations materials. The genesis of the discussion concerning commercial speech began in 1939 with the U.S.

* Corresponding author. Tel.: +1 706 542 4986; fax: +1 706 542 2183.
E-mail addresses: mcmyers@uga.edu (M.C. Myers), rlariscy@uga.edu, rlariscy@gmail.com (R.W. Lariscy).

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Supreme Court decision in *Schneider v. State (Town of Irvington)*[1] (Schneider, 1939). In *Schneider* Justice Owen Roberts held that a city handbill application procedure which required residents to apply for a license, subject to a police officer's permission to pass handbills door-to-door, usurped citizens' First Amendment rights of free speech. While the speech in Schneider (1939) was ultimately protected, the Court's decision opened the door for commercial speech to be viewed as different under the U.S. Constitution.

Commercial speech within a political context was addressed by the Court in 1942 in *Valentine v. Chrestensen* (Valentine, 1942). In *Valentine*, the U.S. Supreme Court again dealt with city ordinances that affected handbill distribution. In New York City there was an ordinance that expressly forbade handbill distribution when the handbill was purely commercial.[2] Upon finding out about the NYC ordinance prohibiting commercial handbills, Chrestensen sought to get around the ordinance by including a political protest about public dock policies on his otherwise commercial flyer. The U.S. Supreme Court held that Chrestensen's use of the handbill was a violation of the municipal code even though he had some political content included and that applying the ordinance to his handbill was not a violation of the First Amendment (Valentine, 1942).[3]

In the post-World War II era the makeup of the U.S. Supreme Court changed and new, more progressive justices were appointed under the Kennedy and Johnson administrations. Because of this change in the legal stance on commercial speech, communication approaches in the field of public relations, including political PR, would change within the U.S. The first case in a series of cases concerning commercial speech is *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* et al. in which the constitutionality of want ads organized by sex was successfully challenged (Pittsburgh, 1973). In *Pittsburgh Press*, the Supreme Court held that commercial speech was an issue not only in terms of content but also editorial control.

Cases like *Pittsburgh Press*, where commercial speech was intertwined with social and political issues, would become emblematic of the type of commercial speech cases decided by the U.S. Supreme Court throughout the 1970s. In 1975 another case with political overtones was decided by the U.S. Supreme Court; this time it concerned the hot button issue of abortion. In *Bigelow v. Virginia* (Bigelow, 1975) a newspaper editor issued flyers in the University of Virginia community in Albemarle County, Virginia concerning the availability of abortion services in New York. While abortion was legal in New York at the time, it was illegal in Virginia and a state statute made it a misdemeanor to publish or distribute abortion advertisements.[4] The Court held that simply because this flyer was a form of advertisement and therefore was commercial speech it did not mean that it had no First Amendment protection.[5] Commenting on the earlier holding in *Valentine* the Court held that commercial speech was not simply denied First Amendment protection; rather limitations on commercial speech were viewed in terms of their purpose and level of restriction.[6]

The U.S. Supreme Court in *Bigelow* suggests that commercial speech is not mutually exclusive from other types of communication, especially political speech. Here the abortion issue was viewed as an important social and political issue, which led to the unconstitutionality of Virginia's statute. This rationale for commercial speech being more than merely commercial was seen again in *Virginia State Board of Pharmacy* et al. *v. Virginia Citizens Consumer Council* (Virginia State Board, 1976). In *Virginia State Board of Pharmacy* (1979) the Court again addressed the issue of state statutes banning certain commercial speech. In this case, the licensing board for Virginia pharmacists banned the use of advertising prices of drugs. Holding that commercial speech did have some protection under the First Amendment Justice Blackmun wrote that commercial speech can contain public interest that prompts important societal discourse.[7]

Bates et al. (1977) presented a new issue of commercial speech serving a community function. In *Bates*, two Arizona attorneys operating a low-income legal clinic placed an advertisement that explained their services along with pricing for these legal services. Such advertising was deemed to be unethical and in violation of the State Bar of Arizona's rules concerning attorney conduct. As a result the State Bar of Arizona temporarily suspended Bates' license to practice law for one week. The U.S. Supreme Court held that this regulation was in violation of the First Amendment concerning free speech.[8] Writing for the majority, Justice Blackmun wrote that this type of ban on attorney advertising was a violation of the First

[1] This case involves canvassing a neighborhood and issuing handbills related to the Jehovah's Witness faith. The lower courts uphold the appellant's convictions of these violations of the municipal code based on the case Lowell v. City of Griffin, 303 U.S. 444 (1938) which held that municipalities could regulate speech so long as the regulation was reasonable.

[2] New York City provided exceptions to this handbill ordinance for political speech.

[3] Id. at 921.

[4] The incident in this case began in 1971 prior to the opinion in *Roe v. Wade* which essentially legalized abortion within all 50 U.S. states.

[5] Justice Blackmun wrote that this protection of advertisements is rooted in *New York Times v. Sullivan* which involved a defamation suit that resulted in an advertisement in the New York Times.

[6] In *Bigelow*, Justice Blackmun wrote that the restriction in *Valentine's* commercial speech was reasonable given the circumstances. The holding [in Valentine] is a limited one: the ordinance was upheld as a reasonable regulation of a manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Valentine* is authority for the proposition that states regulating commercial advertising is immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected per se." *Bigelow*, 421 U.S. 809, 819–820.

[7] The Court cites multiple cases involving speech within labor disputes as support for this idea of receiver oriented justification of commercial speech protection. See, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575, 617–618 (1969); NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477 (1941); AFL v. Swing, 312 U.S. 321, 325–326 (1941); Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

[8] This case also involves a lengthy analysis of Sherman Act antitrust actions concerning application of the Sherman Act to state sovereigns. Bates et al.'s attack of this regulation on Sherman Act issues was unsuccessful at the state and U.S. Supreme Court.