

COMMERCIAL SPEECH

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1 **1 Introduction**

2 This paper will provide a brief overview on the subject of commercial speech. It will describe:

- 3 1. Definition of “commercial speech”.
- 4 2. Protected First Amendment Speech.
- 5 3. Origins of government authority to regulate speech generally.
- 6 4. Current and historical Supreme Court view of Commercial Speech Doctrine.
- 7 5. Situations in which the Commercial Speech Doctrine is it not applicable and why.
- 8 6. Application of the First Amendment to Injunctions involving speech.

9 This memorandum of law is intended to be submitted to a legal pleading and used by persons who are being wrongfully
10 persecuted for their political and religious views by abuses of the commercial speech doctrine.

11 **2 What is “commerce” within the federal sphere?**

12 A precise definition of “commerce” must be established before we can lend meaning to “commercial speech” within the
13 context of federal law. The power to regulate “commerce” is established by Article 1, Section 8, Clause 3 of the
14 Constitution as follows:

15 *Constitution, Article 1, Section 8, Clause 3*

16 *The Congress shall have Power . . .*

17 *To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;*
18 *[Constitution, Article 1, Section 8, Clause 3]*

19 The above provision is often called “The Commerce Clause” by the courts. Below are few state court rulings on the
20 meaning of “commerce” relative to the federal government:

21 *“‘Commerce’ in the sense in which the word is used in the constitution is co-extensive in its meaning with*
22 *‘intercourse.’”*
23 *[Carson River Lumbering Co. v. Patterson, 33 C. 334 (1867)]*
24

25 *“Term ‘commerce’ as employed in U.S. Const. Art. I §8, is not limited to exchange of commodities only, but*
26 *includes, as well, ‘intercourse’ with foreign nations, and between states; and term ‘intercourse’ includes*
27 *transportation of passengers.”*
28 *[People v. Raymond, 34 C. 492 (1868)]*
29

30 *“Commerce includes intercourse, navigation, and not traffic alone.”*
31 *[Lord v. Goodall, Nelson & Perkins S. S. Co., 102 U.S. 541, 26 L.Ed. 224 (1881)]*

32 The U.S. Supreme Court helped to define what is “commerce” under federal law with the following ruling:

33 **As used in the Constitution, the word ‘commerce’ is the equivalent of the phrase ‘intercourse for the**
34 **purposes of trade,’ and includes transportation, purchase, sale, and exchange of commodities between the**
35 **citizens of the different states.** *And the power to regulate commerce embraces the instruments by which*
36 *commerce is carried on. Welton v. State of Missouri, 91 U.S. 275, 280; Addyston Pipe & Steel Co. v. United*
37 *States, 175 U.S. 211, 241, 20 S.Ct. 96; Hopkins v. United States, 171 U.S. 578, 597, 19 S.Ct. 40. In Adair v.*
38 *United States, 208 U.S. 161, 177, 28 S.Ct. 277, 281, 13 Ann. Cas. 764, the phrase ‘Commerce among the*
39 **several states’ was defined as comprehending ‘traffic, intercourse, trade, navigation, communication, the**
40 **transit of persons, and the transmission of messages by telegraph,-indeed, every species on commercial**
41 **intercourse among the several states.’** *In Veazie et al. v. Moor, 14 How. 568, 573, 574, this court, after saying*
42 *that the phrase could never be applied to transactions wholly internal, significantly added: ‘Nor can it be*
43 *properly concluded, that, because the products of domestic enterprise in agriculture or manufactures, or in the*
44 *arts, may ultimately become the subjects of foreign commerce, that the control of the means or the*
45 *encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase*
46 *foreign commerce, or fairly im- [298 U.S. 238, 299] plied in any investiture of the power to regulate such*

1 commerce. A pretension as far reaching as this, would extend to contracts between citizen and citizen of the
2 same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense
3 operations of the collieries and mines and furnaces of the country; for there is not one of these avocations, the
4 results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals, or
5 railroads, from point to point within the several States, towards an ultimate destination, like the one above
6 mentioned.'

7 The distinction between manufacture and commerce was discussed in *Kidd v. Pearson*, [128 U.S. 1, 20](#), 21 S.,
8 22, 9 S.Ct. 6, 10, and it was said:

9 'No distinction is more popular to the common mind, or more clearly expressed in
10 economic and political literature, than that between manufactures and commerce.
11 Manufacture is transformation-the fashioning of raw materials into a change of form for
12 use. The functions of commerce are different. ... If it be held that the term includes the
13 regulation of all such manufactures as are intended to be the subject of commercial
14 transactions in the future, it is impossible to deny that it would also include all productive
15 industries that contemplate the same thing. The result would be that congress would be
16 invested, to the exclusion of the states, with the power to regulate, not only manufacture,
17 but also agriculture, horticulture, stock-raising, domestic fisheries, mining,-in short,
18 every branch of human industry. For is there one of them that does not contemplate,
19 more or less clearly, an interstate or foreign market? Does not the wheat-grower of the
20 northwest, and the cotton-planter of the south, plant, cultivate, and harvest his crop with
21 an eye on the prices at Liverpool, New York, and Chicago? The power being vested in
22 congress and [298 U.S. 238, 300] denied to the states, it would follow as an
23 inevitable result that the duty would devolve on congress to regulate all of these delicate,
24 multiform, and vital interests,-interests which in their nature are, and must be, local in all
25 the details of their successful management.'

26 And then, as though foreseeing the present controversy, the opinion proceeds:

27 'Any movement towards the establishment of rules of production in this vast country, with
28 its many different climates and opportunities, could only be at the sacrifice of the
29 peculiar advantages of a large part of the localities in it, if not of every one of them. On
30 the other hand, any movement towards the local, detailed, and incongruous legislation
31 required by such an interpretation would be about the widest possible departure from the
32 declared object of the clause in question. Nor this alone. Even in the exercise of the
33 power contended for, congress would be confined to the regulation, not of certain
34 branches of industry, however numerous, but to those instances in each and every branch
35 where the producer contemplated an interstate market. ... A situation more paralyzing to
36 the state governments, and more provocative of conflicts between the general government
37 and the states, and less likely to have been what the framers of the constitution intended,
38 it would be difficult to imagine.'

39 Chief Justice Fuller, speaking for this court in *United States v. E. C. Knight Co.*, [156 U.S. 1, 12](#), 13 S., 15 S.Ct.
40 249, 253, said:

41 'Doubtless the power to control the manufacture of a given thing involves, in a certain
42 sense, the control of its disposition, but this is a secondary, and not the primary, sense;
43 and, although the exercise of that power may result in bringing the operation of
44 commerce into play, it does not control it, and affects it only incidentally and indirectly.
45 Commerce succeeds to manufacture, and is not a part of it. ... [298 U.S. 238, 301]
46 'It is vital that the independence of the commercial power and of the police power, and
47 the delimitation between them, however sometimes perplexing, should always be
48 recognized and observed, for, while the one furnishes the strongest bond of union, the
49 other is essential to the preservation of the autonomy of the states as required by our dual
50 form of government; and acknowledged evils, however grave and urgent they may appear
51 to be, had better be borne, than the risk be run, in the effort to suppress them, of more
52 serious consequences by resort to expedients of even doubtful constitutionality. ...

53 'The regulation of commerce applies to the subjects of commerce, and not to matters of
54 internal police. Contracts to buy, sell, or exchange goods to be transported among the
55 several states, the transportation and its instrumentalities, and articles bought, sold, or
56 exchanged for the purposes of such transit among the states, or put in the way of transit,
57 may be regulated; but this is because they form part of interstate trade or commerce. The
58 fact that an article is manufactured for export to another state does not of itself make it
59 an article of interstate commerce, and the intent of the manufacturer does not determine
60 the time when the article or product passes from the control of the state and belongs to
61 commerce.'

1 **That commodities produced or manufactured within a state are intended to be sold or transported outside the**
2 **state does not render their production or manufacture subject to federal regulation under the commerce**
3 **clause.** As this court said in *Coe v. Errol*, 116 U.S. 517, 526, 6 S.Ct. 475, 478, 'Though intended for
4 exportation, they may never be exported,-the owner has a perfect right to change his mind,-and until actually
5 put in motion, for some place out of the state, or committed to the custody of a carrier for transportation to such
6 place, why may they not be regarded as still remaining a part of the general mass of [298 U.S. 238, 302]
7 property in the state?' It is true that this was said in respect of a challenged power of the state to impose a tax;
8 but the query is equally pertinent where the question, as here, is with regard to the power of regulation. The
9 case was relied upon in *Kidd v. Pearson*, supra, 128 U.S. 1, at page 26, 9 S.Ct. 6, 12. 'The application of the
10 principles above announced,' it was there said, 'to the case under consideration leads to a conclusion against
11 the contention of the plaintiff in error. The police power of a state is as broad and plenary as its taxing power,
12 and property within the state is subject to the operations of the former so long as it is within the regulating
13 restrictions of the latter.'

14 **In Heisler v. Thomas Colliery Co., 260 U.S. 245, 259, 260 S., 43 S.Ct. 83, 86, we held that the possibility, or**
15 **even certainty of exportation of a product or article from a state did not determine it to be in interstate**
16 **commerce before the commencement of its movement from the state.** To hold otherwise 'would nationalize all
17 industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control
18 the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of
19 Massachusetts and the woolen industries of other states at the very inception of their production or growth, that
20 is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet
21 unshorn, and coal yet unmined because they are in varying percentages destined for and surely to be exported
22 to states other than those of their production.'

23 In *Oliver Iron Co. v. Lord*, 262 U.S. 172, 178, 43 S.Ct. 526, 529, we said on the authority of numerous cited
24 cases: 'Mining is not interstate commerce, but like manufacturing, is a local business, subject to local
25 regulation and taxation. ... Its character in this regard is intrinsic, is not affected by the intended use or
26 disposal of the product, is not controlled by contractual engagements, and persists even [298 U.S. 238,
27 303] though the business be conducted in close connection with interstate commerce.'

28 The same rule applies to the production of oil. 'Such production is essentially a mining operation, and therefore
29 is not a part of interstate commerce, even though the product obtained is intended to be and in fact is
30 immediately shipped in such commerce.' *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 235
31 , 52 S.Ct. 559, 565, 86 A.L.R. 403. One who produces or manufactures a commodity, subsequently sold and
32 shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has
33 engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his
34 business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers
35 in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation
36 by the state; in respect of the latter, to regulation only by the federal government. *Utah Power & L. Co. v.*
37 *Pfost*, 286 U.S. 165, 182, 52 S.Ct. 548. Production is not commerce; but a step in preparation for commerce.
38 *Chassaniol v. Greenwood*, 291 U.S. 584, 587, 54 S.Ct. 541.

39 **We have seen that the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of**
40 **trade.'** Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such
41 intercourse. The employment of men, the fixing of their wages, hours of labor, and working conditions, the
42 bargaining in respect of these things- whether carried on separately or collectively-each and all constitute
43 intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer
44 and employee, which in all producing occupations is purely local in character. Extraction of coal from the mine
45 is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by
46 [298 U.S. 238, 304] force of these activities, but by negotiations, agreements and circumstances entirely
47 apart from production. Mining brings the subject-matter of commerce into existence. Commerce disposes of it.

48 A consideration of the foregoing, and of many cases which might be added to those already cited, renders
49 inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of
50 minimum wages, wage agreements, collective bargaining, and the Labor Board and its powers, primarily
51 falls upon production and not upon commerce; and confirms the further resulting conclusion that
52 production is a purely local activity. It follows that none of these essential antecedents of production
53 constitutes a transaction in or forms any part of interstate commerce. *Schechter Poultry Corp. v. United*
54 *States*, supra, 295 U.S. 495, at page 542 et seq., 55 S.Ct. 837, 97 A.L.R. 947. Everything which moves in
55 interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now
56 carried on, would practically disappear. Nevertheless, the local character of mining, of manufacturing, and of
57 crop growing is a fact, and remains a fact, whatever may be done with the products.

58 Certain decisions of this court, superficially considered, seem to lend support to the defense of the act now
59 under review. But upon examination, they will be seen to be inapposite. Thus, *Coronado Co. v. United Mine*
60 *Workers*, 268 U.S. 295, 310, 45 S.Ct. 551, and kindred cases, involved conspiracies to restrain interstate
61 commerce in violation of the Anti-Trust Laws. The acts of the persons involved were local in character; but the
62 intent was to restrain interstate commerce, and the means employed were calculated to carry that intent into
63 effect. Interstate commerce was the direct object of attack; and the restraint of such commerce was the

1 necessary consequence of the acts and the immediate end in view. *Bedford Cut Stone Co.* [298 U.S. 238,
2 305] v. *Journeyman Stone Cutters' Ass'n*, 274 U.S. 37, 46, 47 S.Ct. 522, 54 A.L.R. 791. The applicable law
3 was concerned not with the character of the acts or of the means employed, which might be in and of themselves
4 purely local, but with the intent and direct operation of those acts and means upon interstate commerce. 'The
5 mere reduction in the supply of an article,' this court said in the *Coronado Co. Case*, supra, 268 U.S. 295, at
6 page 310, 45 S.Ct. 551, 556, 'to be shipped in interstate commerce by the illegal or tortious prevention of its
7 manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the
8 intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the
9 supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a
10 direct violation of the Anti-Trust Act (15 U.S.C.A. 1 et seq.).'

11 Another group of cases, of which *Swift & Company v. United States*, 196 U.S. 375, 25 S.Ct. 276, is an example,
12 rest upon the circumstance that the acts in question constituted direct interferences with the 'flow' of commerce
13 among the states. In the *Swift Case*, live stock was consigned and delivered to stockyards-not as a place of final
14 destination, but, as the court said in *Stafford v. Wallace*, 258 U.S. 495, 516, 42 S.Ct. 397, 402, 23 A.L.R. 229, 'a
15 throat through which the current flows.' The sales which ensued merely changed the private interest in the
16 subject of the current without interfering with its continuity. *Industrial Ass'n of San Francisco v. United States*,
17 268 U.S. 64, 79, 45 S.Ct. 403. It was nowhere suggested in these cases that the interstate commerce power
18 extended to the growth or production of the things which, after production, entered the flow. If the court had
19 held that the raising of the cattle, which were involved in the *Swift Case*, including the wages paid to and
20 working conditions of the herders and others employed in the business, could be regulated by Congress, that
21 decision and decisions holding similarly would be in [298 U.S. 238, 306] point; for it is that situation,
22 and not the one with which the court actually dealt, which here concerns us.

23 The distinction suggested is illustrated by the decision in *Arkadelphia Co. v. St. Louis S.W.R. Co.*, 249 U.S. 134
24 , 150-152, 39 S.Ct. 237. That case dealt with orders of a state commission fixing railroad rates. One of the
25 questions considered was whether certain shipments of rough material from the forest to mills in the same state
26 for manufacture, followed by the forwarding of the finished product to points outside the state, was a
27 continuous movement in interstate commerce. It appeared that when the rough material reached the mills it was
28 manufactured into various articles which were stacked or placed in kilns to dry, the processes occupying
29 several months. Markets for the manufactured articles were almost entirely in other states or in foreign
30 countries. About 95 per cent. of the finished articles was made for outbound shipment. When the rough material
31 was shipped to the mills, it was expected by the mills that this percentage of the finished articles would be so
32 sold and shipped outside the state. And all of them knew and intended that this 95 per cent. of the finished
33 product would be so sold and shipped. This court held that the state order did not interfere with interstate
34 commerce, and that the *Swift Case* was not in point; as it is not in point here.

35 The restricted field covered by the *Swift* and kindred cases is illustrated by the *Schechter Case*, supra, 295 U.S.
36 495, at page 543, 55 S. Ct. 837, 97 A.L.R. 947. There the commodity in question, although shipped from
37 another state, had come to rest in the state of its destination, and, as the court pointed out, was no longer in a
38 current or flow of interstate commerce. The *Swift* doctrine was rejected as inapposite. In the *Schechter Case* the
39 flow had ceased. Here it had not begun. The difference is not one of substance. The applicable principle is the
40 same. [298 U.S. 238, 307] But section 1 (the Preamble) of the act now under review declares that all
41 production and distribution of bituminous coal 'bear upon and directly affect its interstate commerce'; and that
42 regulation thereof is imperative for the protection of such commerce. The contention of the government is that
43 the labor provisions of the act may be sustained in that view.

44 That the production of every commodity intended for interstate sale and transportation has some effect upon
45 interstate commerce may be, if it has not already been, freely granted; and we are brought to the final and
46 decisive inquiry, whether here that effect is direct, as the 'Preamble' recites, or indirect. The distinction is not
47 formal, but substantial in the highest degree, as we pointed out in the *Schechter Case*, supra, 295 U.S. 495, at
48 page 546 et seq., 55 S.Ct. 837, 850, 97 A.L.R. 947. 'If the commerce clause were construed,' we there said, 'to
49 reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce,
50 the federal authority would embrace practically all the activities of the people, and the authority of the state
51 over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory,
52 even the development of the state's commercial facilities would be subject to federal control.' It was also
53 pointed out, 295 U.S. 495, at page 548, 55 S.Ct. 837, 851, 97 A.L.R. 947, that 'the distinction between direct
54 and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental
55 one, essential to the maintenance of our constitutional system.'

56 Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word
57 'direct' implies that the activity or condition invoked or blamed shall operate proximately-not mediately,
58 remotely, or collaterally-to produce the effect. It connotes the absence of an efficient intervening agency [298
59 U.S. 238, 308] or condition. And the extent of the effect bears no logical relation to its character. The
60 distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the
61 effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of
62 a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects
63 interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the
64 number of men employed, or adding to the expense or complexities of the business, or by all combined. It is

1 quite true that rules of law are sometimes qualified by considerations of degree, as the government argues. But
2 the matter of degree has no bearing upon the question here, since that question is not-What is the extent of the
3 local activity or condition, or the extent of the effect produced upon interstate commerce? but-What is the
4 relation between the activity or condition and the effect?

5 Much stress is put upon the evils which come from the struggle between employers and employees over the
6 matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes,
7 curtailment, and irregularity of production and effect on prices; and it is insisted that interstate commerce is
8 greatly affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are
9 all local evils over which the federal government has no legislative control. The relation of employer and
10 employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the
11 doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or
12 about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the
13 object of the [298 U.S. 238, 309] act to regulate and minimize, are local controversies and evils affecting
14 local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however
15 extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance.
16 It does not alter its character.
17 [[Woodruff v. Parham, 75 U.S. \(8 Wall.\) 123 \(1868\)\]](#)]

18 **3 What is “Commercial Speech”?**

19 We will begin with a definition of the phrase “commercial speech”. In researching various legal dictionaries for a
20 definition, we found that there is none. This may be explained by the following comment:

21 “The problem of defining commercial speech continues to bedevil this area of First Amendment doctrine to the
22 present day.”
23 [[First Amendment Law In A Nutshell, Second Edition; Jerome A. Barron; West Group, St. Paul, Minn. 2000;](#)
24 [ISBN 0-314-22677-X, p. 152](#)]

25 Since neither Black’s Law Dictionary nor any other legal dictionary we could find defines the term, we have crafted our
26 own definition below to facilitate analysis found in this discussion:

27 Commercial speech: Speech which appeals strictly and narrowly to the economic interests of the speaker
28 and/or the audience. Its sole purpose is to convey information about products or services that are offered for
29 sale in order to facilitate, promote, or encourage a purchase. Most such speech would ordinarily be classified
30 as “advertising”. When the information advertising conveyed is false, then a tort has occurred because the
31 audience is being misled, which constitutes an injury.

32 The U.S. Supreme Court, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748,
33 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) defined “commercial speech” as speech which:

34 “. . .proposes a commercial transaction.”

35 In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341
36 (1980), the U.S. Supreme Court broadened the definition of “commercial speech” to include:

37 “. . .expression related solely to the economic interests of the speaker and its audience.”

38 Closely related to the definition of “commercial speech” is a doctrine originated by the U.S. Supreme Court called the
39 “commercial speech doctrine”, which prescribes the method by which strictly “commercial speech” may be lawfully
40 regulated by the government.

41 Commercial speech doctrine. Speech that was categorized as “commercial” in nature (i.e. speech that
42 advertised a product or service for profit or for business purpose) was formerly not afforded First Amendment
43 freedom of speech protection, and as such could be freely regulated by statutes and ordinances. *Valentine v.*
44 *Chrestensen*, [316 U.S. 52](#), 62 S.Ct. 920, 86 L.Ed. 1262. This doctrine, however, has been essentially
45 abrogated. *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Rights*, [413 U.S. 376](#), 93 S.Ct. 2553, 37
46 L.Ed.2d 669; *Bigelow v. Virginia*, [421 U.S. 809](#), 95 S.Ct. 2222, 44 L.Ed.2d 600; *Virginia State Brd. of*
47 *Pharmacy v. Virginia Citizen Council*, [425 U.S. 748](#), 96 S.Ct. 1817, 48 L.Ed.2d 346.
48 [[Black’s Law Dictionary, Sixth Edition, p. 271](#)]