STATE REGULATION OF DRUGS: WHO MAY SELL “PATENT AND PROPRIETARY” MEDICINES

A network of federal and state law guards public health by regulating the retail sale of drugs. All toxic, habit-forming, or otherwise dangerous drugs may be sold only on the prescription of a licensed practitioner. Under state pharmacy laws, such prescriptions may be filled—and such drugs sold—only by a trained pharmacist, examined and licensed by the state. Similarly, drugs which are normally harmless but require compounding by the retailer are salable only by pharmacists. As a result, the pharmaceutical profession clearly has the exclusive right to sell all drugs, except those which are not harmful and which are sold in the manufacturer’s original package without further compounding.

1. Under the Federal Food, Drug and Cosmetic Act, as amended, habit-forming drugs and other drugs unsafe for use without professional supervision because of their toxicity or method of use may be sold only on prescription or authorization for refill and must bear the legend: “Caution: Federal law prohibits dispensing without prescription.” If these requirements are not met the drug is deemed misbranded. 65 Stat. 648 (1951), 21 U.S.C. § 353(b) (Supp. 1952). Misbranded drugs are subject to seizure, and the seller to injunctive and criminal proceedings. 52 Stat. 1043 (1938), 21 U.S.C. §§ 332-4 (1946), as amended, 62 Stat. 582 (1948), 21 U.S.C. § 334(a) (Supp. 1952). These provisions apply to drugs from the time they enter interstate commerce until they are purchased at retail by the ultimate consumer. United States v. Sullivan, 332 U.S. 689, 696-7 (1948). Drugs which do not enter interstate commerce are governed by state food and drug laws, which are patterned after the present federal act or the earlier act of 1906. See Herrick, Drug Regulations in Drug Research and Development 360 (Smith & Herrick ed. 1948).

Habit-forming drugs are also restricted to prescription sale by the Harrison Narcotics Act, 38 Stat. 786 (1914), as amended, 26 U.S.C. § 2554(c) (2) (1946), and in 43 states by the Uniform Narcotic Drug Act, 9A Uniform Laws Annot. §§ 2, 6 (1951). Medicinal preparations containing harmless quantities of certain narcotics may be sold without prescription. 38 Stat. 789 (1914), as amended, 26 U.S.C. § 2551(a) (1946); 9A Uniform Laws Annot. § 8 (Supp. 1952).

Poisons for non-medicinal purposes may be sold at retail without prescription by registered pharmacists if they are labeled with a warning and an antidote prescription, and if a register of all sales is maintained. See, e.g., 1 Me. Rev. Stat. c. 62, § 15 (1944); N.J. Stat. Ann. §§ 45:14-19, 45:14-20, 45:14-22 (1940); Cal. Health & Safety Code §§ 20751, 20752, 20755, 20757 (Deering, 1952).


3. The statutes do not distinguish between the compounding of dangerous drugs and of relatively innocuous ones. See, e.g., N.J. Stat. Ann. § 45:14-13 (1940). This policy is unquestionably sound. Correct compounding requires skill. And the consequences of error may be disastrous, however safe the intended end product would be.
NOTES

It is unsettled, however, whether the pharmacist's monopoly also includes the right to sell this residuary class of pre-packaged, non-prescription drugs. In general language, the pharmacy laws confine "drugs and medicines" to the drug store. But in every state except three, the statute contains a specific exemption, which permits non-pharmacist merchants to sell "patent and proprietary" medicines. This exemption has received two divergent constructions. The technical interpretation, followed in seven states, defines "patent

4. The class of non-prescription (and therefore "not harmful"), pre-packaged, completely compounded medicines is imprecisely referred to as "over-the-counter items" or "self-medicaments" by the literature of the drug trade.

5. See, e.g., 11 MINN. STAT. ANN. § 151.15 (1946); N.J. STAT. ANN. § 45:14-6 (1940); 2C N.C. GEN. STAT. § 90-71 (1950). The pharmacy acts which define "drugs" do so in the sweeping terms of the Federal Food, Drug and Cosmetic Act, 21 STAT. 1040 (1938), 21 U.S.C. § 321(g) (1946). Such a definition embraces all articles recognized in the official pharmacopoeial compendia, all other articles intended for the diagnosis, cure, mitigation, or prevention of disease, and all articles, other than food, intended to affect the structure or function of the body. See, e.g., 21 LA. REV. STAT. § 37-1171(3) (1951); 1-A OHIO GEN. CODE ANN. § 1296-1(2) (Page, 1946); WIS. STAT. § 151.06 (1951).

6. KAN. GEN. STAT. c. 65, art. 16 (1949); NEV. COMPILE. LAWS §§ 5040-62a (Supp. 1949); 4 N.M. STAT. ANN. § 51-901 (1941).

These laws are not entirely devoid of exceptions. The New Mexico statute allows sale of patent and proprietary medicines by non-pharmacists in towns, villages, and camps in which no registered pharmacist resides. 5 N.M. STAT. ANN. § 71-623 (1941). And a Kansas court in effect created an exception by holding that hydrogen peroxide was not a "medicine" and therefore not encompassed by the pharmacy act, even though there was no statutory exemption. State v. Hanchette, 88 KAN. 864, 129 Pac. 1184 (1913). In addition, the Kansas law now exempts "the usual domestic remedies and medicines." KAN. GEN. STAT. § 65-1611 (1949).

An exemption for "domestic" or "household remedies" often appears in statutes which also exempt patent and proprietary medicines. See, e.g., GA. CODE ANN. § 84-1317 (Supp. 1951); ILL. REV. STAT. c. 9, § 36 (1951); 2C N.C. GEN. STAT. § 90-71 (1949). This seldom considered exemption has been construed to except only those medicines which come into such general use that their effects are understood by people without medical knowledge. 21 LA. REV. STAT. § 37-1204 (1950); See Lewis v. Braimen, 6 Ga. App. 419, 422-3, 65 S.E. 189, 190-1 (1909).

7. Only a few of the statutes embody an adequate definition of "patent and proprietary." See notes 8, 14 infra.

8. The language of the Indiana and New Hampshire acts compels the technical definition. 11-1 IND. STAT. § 63-1114 (Burns, 1951) ("medicines of secret composition . . ."); 2 N.H. REV. LAWS c. 256, § 1(XI) (1942) ("certain individuals have the exclusive right to manufacture . . .").

Iowa, Minnesota, Oregon, Wisconsin, and probably New York have adopted the technical view by judicial decision. State v. Jewett Market Co., 209 Iowa 567, 228 N.W. 288 (1929); Minnesota v. F. W. Woolworth Co., 184 Minn. 51, 237 N.W. 817 (1931); State v. Combs, 169 Ore. 566, 130 P.2d 947 (1942) (harmless compendium articles may be sold by non-pharmacists who obtain permit from Board); State v. Wakeen, 263 Wis. 401, 57 N.W.2d 364 (1953); cf. Board of Pharmacy v. Matthews, 197 N.Y. 353, 90 N.E. 966 (1910).

The statute construed in the Matthews case, supra, contained no exemption. But the holding that the state can restrict to the pharmacy such harmless household remedies as spirit of camphor would seem to support a technical interpretation of the patent and proprietary
and proprietary medicines" as those protected by letters patent or produced exclusively by the owner of a secret formula or process. It does not exempt preparations listed in the United States Pharmacopoeia (U.S.P.) or other compendia, because formulae found therein are said to be neither patented nor secret. Applying this standard, one court recently held that aspirin, milk of magnesia, and camphorated oil are not proprietary medicines. Such a narrow construction gives pharmacists the exclusive right to sell all but a small exemption which was added to the statute after this decision. Board of Pharmacy v. Matthews, supra at 359, 90 N.E. at 968. No New York case has directly challenged the implication of Matthews. But dictum in a later case involving the display of the words "Patent Medicines" by a non-pharmacist indicates that New York might now take a broader view. People v. Bernstein, 237 App. Div. 270, 273, 261 N.Y. Supp. 381, 384 (2d Dep't 1932).

9. See Jewett, Woolworth, Combs, and Wakeen cases, supra note 8. A proprietary interest in manufacture of the preparation is the essence of the technical interpretation. This ownership may be found either in a patent or in the secrecy of the formula or process of manufacture. The courts do not discuss the problem, but presumably a licensing agreement by which the "owner" permitted others to manufacture his medicine would not destroy its proprietary nature. Under the technical view aspirin was considered proprietary so long as its German discoverer was able to shroud his process. See State v. Jewett Market Co., 209 Iowa 567, 570-1, 228 N.W. 288, 289 (1929). However, once the patent expires or the secret is discovered and competitors begin to manufacture the preparation, it ceases to be proprietary and is salable only by pharmacists. Ibid. See 15 Iowa L. Rev. 369 (1930).


11. See, e.g., Minnesota v. F. W. Woolworth Co., 184 Minn. 51, 54, 237 N.W. 817-18 (1931) (milk of magnesia U.S.P. not proprietary); Culver v. Nelson, — Minn. —, 54 N.W.2d 7, 13 (1952) (vitamin preparations not proprietary). Before vitamins were recognized by U.S.P. they were considered food supplements, not medicines. Board of Pharmacy v. Quackenbush, 22 N.J. Misc. 334, 39 A.2d 28 (C.P. 1940).

The stated policy of both U.S.P. and N.F. is not to list patented or secret preparations. U.S.P. Revision XIV, p. xxviii (1950); N.F., p. xxxv (8th ed. 1946). U.S.P. warns, however, that some of the formulae listed may be protected by a patent. U.S.P. Revision XIV, p. ii (1950). Obviously a formula listed in the compendium is no longer secret. But since the method of manufacture is not listed, it would seem that those U.S.P. items which require "know-how" on the part of the manufacture still fit the technical requirement of a secret process. Furthermore, U.S.P. has emphasized that its primary objective is to supply the medical profession with a list of medicines, not to aid in the enforcement of drug laws. U.S.P. Revision XIV, p. xi (1950).

class of pre-packaged, non-prescription medicines. In contrast, the seventeen jurisdictions which employ the common usage interpretation read "patent" and "proprietary" as interchangeable descriptions of all harmless, pre-packaged medicines properly labeled with directions for use. Adopting this view, a court recently held that aspirin, milk of magnesia, and hydrogen peroxide are proprietary. This construction permits non-pharmacist merchants to sell all pre-packaged preparations deemed safe for use without prescription.

In the

13. Patents are no longer granted for chemical formulae. See Fischelis, What is a Patent or Proprietary Medicine? 46 SC.INDIANA MONTHLY 25 (1938). It is still possible to patent a chemical process, but one court has said that patent and proprietary medicines in the technical sense have become a "rare class." See Wrigley's Stores v. Michigan Board of Pharmacy, 336 Mich. 583, 59 N.W.2d 8, 12 (1953).


Ten states have acts which define "patent and proprietary" in its broad, popular sense. These exemptions are of four types: (1) Original package medicines sold to the general public under a trade name or similar protective device and complying with the requirements of the Federal Food, Drug and Cosmetic Act. Ark. CODE ANN. § 67-1501(g) (Supp. 1952); 7 IAO. CODE § 37-2205 (1948); 21 LA. REV. STAT. § 37-1204 (1950); 5 S.C. CODE § 56-1316 (1952); 3 Wyo. COMP. STAT. § 37-1910(a) (Supp. 1953). (2) Original package medicines protected by a trade device. 4 N.D. REV. CODE § 43-1502(4) (1943) (registered or copyrighted); 7 V.A. CODE § 54-399(11) (1950). (3) Original package medicines in compliance with the Federal Food, Drug and Cosmetic Act. Ala. CODE tit. 46, § 256 (1940); 4 TENN. CODE § 7002.1 (Williams, 1941) (if put up by a pharmacist). (4) All medicines except those which must be sold on prescription. Vt. STAT. § 638 (1947).

In practice, all four definitions are the same. All non-prescription medicines which enter interstate commerce must comply with the Federal Food, Drug and Cosmetic Act. One requirement is that the medicine be labeled with the producer's name. 52 STAT. 1050 (1938), 21 U.S.C. § 352(b) (1940). Such a label would satisfy the demand for sale under a trade name. The need for a trade name is the result of efforts by courts and legislatures adopting the common usage definition to find some element of proprietorship in proprietary medicines. It is estimated that all but five percent of the largest selling packaged medicines travel in interstate commerce. Communication to the YALE LAW JOURNAL from Dr. Frederick J. Cullen, Vice-President of the Proprietary Association, dated November 25, 1953, in Yale Law Library.


16. Wrigley's Stores v. Michigan Board of Pharmacy, 336 Mich. 583, 59 N.W.2d 8 (1953). The court defined patent and proprietary as "pre-packaged, non-prescription, mass produced remedies put up for sale to the general public in the distinctive and original container, and under the trade name of the manufacturer...." Id. at 592, 59 N.W.2d at 12.

17. Since so-called "ethical proprietaries" are advertised only to the profession, they are not exempted by the definitions adopted in Arizona, Louisiana, South Carolina, Wyo-
twenty-two jurisdictions where neither legislature nor judiciary has defined "patent and proprietary," the power to delimit the statutory exemption rests in the state Board of Pharmacy.\textsuperscript{18} At least one board has adopted the technical interpretation,\textsuperscript{10} while nine have accepted the common usage.\textsuperscript{20} In the remaining jurisdictions, the boards' attitudes remain unclear.\textsuperscript{21}

Recently, economic forces have kindled litigation concerning the meaning of the "patent and proprietary" exemption. Supermarkets are expanding their drug departments,\textsuperscript{22} and manufacturers of proprietaries hope to increase their sales by establishing new retail outlets.\textsuperscript{23} Four times within the last two years the markets and the manufacturers have asked the judiciary to overthrow a board of pharmacy's technical definition in favor of the common usage interpretation.\textsuperscript{24} Two courts have done so.\textsuperscript{25} The pharmaceutical profession has viewed these two decisions with alarm,\textsuperscript{26} especially because the profession has


19. This is the Board of the District of Columbia. See note 21 infra.

20. Colorado, Florida, Maine, Maryland, Massachusetts, North Carolina, Oklahoma, Texas, and West Virginia. See note 21 infra.

21. A questionnaire was sent to the boards of pharmacy in the twenty-two states listed in note 18 supra. No reply was received from eight, and the replies of Delaware, Mississippi, Missouri, and Pennsylvania were ambiguous. One clearly indicated adoption of the technical view. See note 19 supra. And eight indicated use of the common usage interpretation. See note 20 supra. Replies to questionnaire in Yale Law Library.

22. Typical supermarkets now carry from 120 to 400 items in their health and beauty aids department. Communication to the \textit{Yale Law Journal} from National Ass'n of Food Chains, dated October 16, 1953, in Yale Law Library.

23. Communication to the \textit{Yale Law Journal} from Carl Willingham, Secretary-Treasurer of the National Ass'n of Chain Drug Stores, dated October 2, 1953, in Yale Law Library. At present there are 54,000 retail drug stores, which the druggist contends are sufficient to supply the consumer market. \textit{Ibid.}

24. Wrigley's Stores \textit{v.} Michigan Board of Pharmacy, 336 Mich. 583, 59 N.W.2d 8 (1953); Culver \textit{v.} Nelson,— Minn. —, 54 N.W.2d 7 (1952); Proprietary Ass'n \textit{v.} Board of Pharmacy, 27 N.J. Super. 204, 99 A.2d 52 (1953); State \textit{v.} Wakeen, 263 Wis. 401, 57 N.W.2d 364 (1953).

25. Wrigley's Stores \textit{v.} Michigan Board of Pharmacy, and Proprietary Ass'n \textit{v.} Board of Pharmacy, supra note 24.

lost four percent of the packaged medicine trade since 1950.\textsuperscript{27} By the same token, the decisions may well encourage the supermarkets and drug manufacturers to press for acceptance of the common usage definition in the eleven states which still adhere to the technical view or which provide no exception for patent and proprietary medicines.\textsuperscript{28} A pitched battle between advocates of the two interpretations seems to be under way.

The technical definition is objectionable. The public receives no protection from an interpretation which grants to the pharmacist the exclusive right to sell pre-packaged, non-prescription medicines. These items require no compounding. The pharmacist is relieved by statute from liability for injuries caused by the impurity, misbranding, or negligent compounding of such drugs.\textsuperscript{29} He has no duty to analyze them, learn their ingredients, or warn purchasers of possible danger in their use.\textsuperscript{30} Similarly, he is not required to limit or record his sales.\textsuperscript{31} He commits a misdemeanor if he engages in the practice of medicine by recommending drugs to his customers.\textsuperscript{32} In short, the pharmacist uses no professional skill and assumes no professional liability in the naked act of retailing harmless pre-packaged remedies.\textsuperscript{33} Often he does not even make the

\textsuperscript{27} In 1950, 75 percent of the $920,980,000 retail sales of packaged medications were made in drug stores. In 1952 the drug stores' share dropped to 72 percent of $933,000,000. These figures include $366,650,000 for packaged medicine sold on prescription in 1950 and $410,000,000 in 1952. With these amounts deducted, the druggists' share of "over-the-counter" (non-prescription) sales of packaged medicine dropped from 59 percent in 1950 to 55 percent in 1952. See \textit{What People Spent in 1952 for Products Sold in Drug Stores}, Drug Topics, August 10, 1953.

\textsuperscript{28} See notes 6, 8, 19 supra.

\textsuperscript{29} See, \textit{e.g.}, 11 MINN. STAT. ANN. § 151.22 (1946) (no liability for quality of drugs sold in original package); W. VA. CODE § 2905 (Supp. 1953) (same); 3 WYO. COMP. STAT. §§ 37-1910 (Supp. 1953) (same).

Such a provision nullifies the pharmacist's common law liability. Absent statutory immunity, he could be held liable to purchasers on a theory of implied warranty. And third persons might recover either for negligence in the sale of "inherently dangerous" articles, or else via strict liability based on the theory that the pure food and drug laws impose on the pharmacist an absolute duty not to sell bad items. See \textit{Prosser, Torts} 671-2, 676, 693 (1941).

\textsuperscript{30} See Noel v. People, 187 Ill. 587, 593, 58 N.E. 616, 619 (1900); State v. Donaldson, 41 Minn. 74, 82, 42 N.W. 781, 783 (1889); State v. Wood, 51 S.D. 485, 491-2, 215 N.W. 487, 489-90 (1927). Also see West v. Emanuel, 198 Pa. 180, 47 Atl. 965 (1901) (no action against druggist who, without prior analysis, sold fatally toxic patent medicine).

\textsuperscript{31} See State v. Childs, 32 Ariz. 222, 234, 257 Pac. 366, 369 (1927); State v. Wood, 51 S.D. 485, 490, 492, 215 N.W. 487, 489-90 (1927). While the statutes permit unrestricted sale of pre-packaged medicines by pharmacists, they often limit the quantity of prescription drugs which he may sell. See, \textit{e.g.}, 11 MINN. STAT. ANN. § 152.11 (1946) (prohibiting refills of barbital prescriptions). And poison laws typically require the pharmacist to record his sales of toxic substances. See, \textit{e.g.}, id. § 151.24.

\textsuperscript{32} See, \textit{e.g.}, id. §§ 147.10; 1-A OHIO GEN. CODE § 1286 (Page, Supp. 1952); 3 WYO. COMP. STAT. §§ 37-2007, 37-2013 (1945).

\textsuperscript{33} See State v. Donaldson, 41 Minn. 74, 81, 42 N.W. 781, 783 (1889) ("One man can do it just as well as another, if he can read the label on the package and make change with the purchaser.").
sale himself, leaving it to ordinary clerks or placing packaged drugs on self-service shelves. If a specific item is found to be dangerous, the way to protect the public is to permit sale on prescription only. Barring that, sale in the pharmacy offers little which sale in the supermarket cannot duplicate.

To be a valid exercise of the state's police power, a statute regulating the sale of drugs must bear a reasonable relation to public health. The objective of the pharmacy laws—to safeguard the public from mistakes in the preparation of medicines and from indiscriminate sale of dangerous drugs—is above reproach. But restricting the retail of pre-packaged medicines to the pharmacist when he has no duty to guard against error or to limit his sales is an arbitrary and ineffectual method of achieving the legitimate end. For this reason pharmacy acts have been held to violate due process when they contained no exemption for patent and proprietary medicines. In those cases,

34. See Wrigley's Stores v. Michigan Board of Pharmacy, 336 Mich. 583, 594, 59 N.W.2d 8, 13 (1953). Such methods of retailing may constitute a misdemeanor, if a court does not consider such sales to be made under "personal supervision of a registered pharmacist." See, e.g., 11 Minn. Stat. Ann. § 151.15 (1946). Violation or no, the growth of the self-service drug store indicates the absence of any pharmaceutical function in packaged medicine sales.

35. Cases adopting the technical interpretation have been hard put to demonstrate how the public will be protected. These courts have suggested that the pharmacist will know where to procure pure drugs. See State v. Zotalis, 172 Minn. 132, 133, 214 N.W. 766 (1927). Or that he will know how to preserve them and how to "advise prospective purchasers what products contain the vitamins they seek. . . ." Culver v. Nelson, Minn., 54 N.W.2d 7, 14-15 (1952). Or that he will protect the public from improperly compounded remedies. State v. Combs, 169 Ore. 566, 571-2, 130 P.2d 947, 949 (1942) (Quaere: how?). Or that he would have a tendency to protect the public by disapproving unsafe directions. In re Gray, 206 Cal. 497, 502, 274 Pac. 974, 976 (1929). The most recent case, State v. Wakeen, 263 Wis. 401, 57 N.W.2d 364 (1953), offers no reasons at all.

The pharmacist's self-interest as a businessman and his professional code of ethics might cause him to protect his customers' well being, but he is under no legal obligation to do so. See State v. Wood, 51 S.D. 485, 490, 215 N.W. 487, 489 (1927).


37. State Board of Pharmacy v. Cassidy, 115 Ky. 690, 705, 74 S.W. 730, 733 (1903); State v. Donaldson, 41 Minn. 74, 80, 42 N.W. 781, 782 (1889).


39. See text at notes 29-33 supra.

the statutes were held to deprive the non-pharmacist merchant of his property right to sell such articles, while producing no corresponding benefit to public health.\textsuperscript{41} This reasoning applies with equal force to the technical interpretation of “patent and proprietary.” Such interpretation narrows the exemption to a small and completely arbitrary group of pre-compounded drugs.\textsuperscript{42} Patented or secretly processed items are in no way more fit for public consumption than other non-prescription preparations.\textsuperscript{43} In fact, they seem less suited for unsupervised sale than those remedies for which U.S.P.—guided by professional acceptance and public demand—has established uniform standards of purity.\textsuperscript{44}

Courts should therefore hold that the technical interpretation violates substantive due process.\textsuperscript{45} Precedent for such a decision appears in two cases where state courts, accepting the technical definition, held pharmacy acts unconstitutional because they failed to exempt all harmless pre-packaged drugs.\textsuperscript{46} Courts are understandably reluctant to go this far and strike down the entire statute as unreasonable. But such drastic action is unnecessary. An interpretation which upholds a statute will be used in preference to one which would


\textsuperscript{42} See note 13 supra.

\textsuperscript{43} Obviously a patent or secret recipe has no relation to the safety of a medicine. The technical definition produces the anomalous result that only the newer, little demanded, and therefore relatively unreliable packaged medicines are exempted. See People v. Heron, 34 Cal. App. 2d 755, 765-6, 90 P.2d 154, 159 (1939) (concurring opinion); Brief for Respondents, pp. 16, 103, State v. Wakeen, 263 Wis. 401, 57 N.W.2d 364 (1953). There it was shown that aspirin is restricted to the pharmacy but that if caffeine is added to aspirin by a secret process it becomes a proprietary medicine which is freely salable even though more toxic.

\textsuperscript{44} See notes 10, 11 supra.

\textsuperscript{45} The United States Supreme Court has never been asked to pass on the interpretation of the patent and proprietary exemption. If it should grant certiorari, it is doubtful that the near-defunct doctrine of substantive due process would be revived. In this event, an equal protection argument could be made. See State v. Wood, 51 S.D. 485, 215 N.W. 487 (1927).

In another context the Supreme Court has rejected the technical definition of “proprietary.” Ferguson v. Arthur, 117 U.S. 482 (1886) (customs case). But the Court is reluctant to interfere with state health regulations of this type. See, e.g., Roschen v. Ward, 279 U.S. 337 (1929). That case upheld a state statute prohibiting the sale of eyeglasses without an optometrist on the premises, but not requiring him to make an examination. Mr. Justice Holmes stated: “There can be no doubt that the presence and superintendence of a specialist tend to diminish an evil.” Id. at 339.

Regardless of the Supreme Court’s attitude, state courts could be asked to hold the technical interpretation to be a violation of due process. But for discussion of state courts’ misuse of the substantive due process doctrine, see Paulsen, The Persistence of Substantive Due Process in the States, 34 Minn. L. Rev. 91 (1950); Note, 53 Col. L. Rev. 827 (1953).

render it unconstitutional. Courts should leave the pharmacy acts intact, but satisfy constitutional requirements by adopting the common usage definition of “patent and proprietary.”

Apart from constitutional issues, allowing non-pharmacist sale of all pre-packaged, non-prescription drugs is a sound policy. These preparations still would be subject to laws which prohibit adulteration and misbranding.

47. United States v. Delaware & Hudson Co., 213 U.S. 366, 407 (1909). This rule of construction has been employed to read the patent and proprietary exemption into a pharmacy act. State v. Donaldson, 41 Minn. 74, 83, 42 N.W. 781, 783-4 (1889).

48. The two most recent cases adopting the common usage definition carefully avoid constitutional arguments and turn on a fabricated legislative intent, despite the meagerness of evidence indicating what the legislature in fact intended. In Wrigley's Stores v. Michigan Board of Pharmacy, 336 Mich. 583, 59 N.W.2d 8 (1953), the court did not mention any constitutional cases even though they were cited in Wrigley's brief and strongly support the court's decision. In Proprietary Ass'n v. Board of Pharmacy, 27 N.J. Super. 204, 99 A.2d 52 (1953), the court cited such cases with approval but only hinted at the constitutional issue in holding the Board's all-encompassing definition of “drugs” to bear “no reasonable relation to the public health, safety and welfare.” Id. at 218, 99 A.2d at 60. In its final judgment, issued two months after the reported opinion, this hint was diluted to a statement that the Board's definition was not reasonable. Final Judgment, Proprietary Ass'n v. Board of Pharmacy, Docket No. L-7734-50 P.W., N.J. Super Ct., September 21, 1953, in Yale Law Library. Both Wrigley's Stores and Proprietary Ass'n would be stronger if they articulated the underlying premise, namely, that the alternative (technical) interpretation is unconstitutional.

49. The technical interpretation has proved unworkable; the vagueness of the standard of secrecy makes enforcement problematical. See Brief for Appellees, pp. 22-5, Wrigley's Stores v. Michigan Board of Pharmacy, 336 Mich. 583, 59 N.W.2d 8 (1953). There the Director of Enforcement of the Board of Pharmacy was unable to testify whether or not "Ex-Lax" was patented or produced secretly. The common usage interpretation would provide the non-druggist merchant and the Board with a test of what remedies were exempt; it would except any drug which is completely compounded and is not restricted to prescription sale by federal law or food and drug regulations. See Non-Drug Stores Win, Business Week, May 20, 1939, p. 42.


51. Section 352 of the Federal Food, Drug and Cosmetic Act deems misbranded a drug whose label does not contain conspicuously: (1) the name and address of the manufacturer; (2) a statement of active ingredients; (3) the name and quantity of any habit-forming substances and a warning of their habit-forming nature; (4) a statement of the quantity of alcohol and certain other dangerous substances; (5) adequate directions for use and warnings against use in conditions where it may be dangerous; and (6) precautions against deterioration. A drug is also misbranded when it is dangerous when used according to directions. 52 Stat. 1050 (1938), as amended, 21 U.S.C. § 352 (1946). Misbranded drugs are subject to the same sanctions as adulterated drugs. See note 50 supra.
prevent false advertising of curative powers,52 and require that the safety of new drugs be proved before they enter commerce.53 Moreover, an increase in the number of retail outlets will serve consumers' convenience, and it may expand manufacturers' markets. The only one possibly hurt by adoption of the common usage definition is the drug store owner, who may lose much of the trade which traditionally has been his.54 But he should not be heard to complain. While holding his drug patronage captive, he has been free to expand his merchandising in all directions. Today almost half his sales are unrelated to drugs.55 And he will retain his prescription filling business. Certainly his plight does not seem tragic enough to justify sheltering him from competition through use of the technical definition—a legislated monopoly masquerading as a health regulation.


53. The New Drugs section of the Federal Food, Drug and Cosmetic Act requires that an application be filed containing the results of investigations of the safety of the product, a statement of its composition and method of manufacture, specimens of the proffered label, and samples of the drug itself. 52 Stat. 1052 (1938), 21 U.S.C. § 355 (1946). This section was drafted as a result of the 73 deaths caused in 1937 by Elixir Sulfanilamide, which had been tested only for flavor before being marketed. Sen. Doc. No. 124, 75th Cong., 2d Sess. 1 (1937).

On a non-legal level the American Medical Association Council on Pharmacy and Chemistry also scrutinizes and approves new drugs under even stricter standards. See Smith, Professional Acceptance in Drug Research and Development 53-43 (Smith & Herrick ed. 1948).

54. Most consumers would probably find it more convenient to purchase drug products in the supermarkets. In addition, the drug store would probably lose sales because the public associates the drug store with retail price maintenance and higher prices. See Herzog, supra note 26, at 770. This would seem to be true in spite of the fact that supermarkets could not sell items under fair trade contract below the established price.

55. In 1952, 53 percent of drug store sales were of health, toilet, and beauty items. The remainder is attributable to household supplies (e.g., polishes), stationery, magazines, and newspapers, photographic equipment, sundries (clocks, light bulbs, etc.), tobacco, confections, soda fountain, alcoholic beverages, and "unclassified" items. This last category includes an ever-expanding variety of merchandise, such as electrical appliances, jewelry, cutlery, vacuum bottles, and musical supplies. The total amount of such sales increased from $9,390,000 in 1950 to $61,690,000 in 1952. See What People Spent in 1952 for Products Sold in Drug Stores, Drug Topics, August 10, 1953.