I. COMMERCIAL FREE SPEECH IN THE MARKETPLACE OF IDEAS

A. The Honorable Alex Kozinski,* Moderator

I think this is an exciting topic we are starting off with—it is called commercial speech. I thought the panel might address it by trying to answer three questions. The first one is "what is commercial speech?" The second one is "what constitutional protections does it have, or should it have?" And the third one is "how do you distinguish commercial speech from noncommercial or pure speech?"

I would like to give a little overview on the subject. First of all, what is commercial speech? Well, we should stare the animal in the face. So, I have a tape recording of a commercial which will get us in the mood. Now I should warn everybody that this is a sample of pretty hard core commercial speech, and anybody that is faint of heart should feel free to get up and leave. Okay?

> So, you have legal problems? Do you have an attorney? Well you do now! Ralph Russo—attorney at large. Just call him at 359-5878. Just dial on the phone, 359-J-U-S-T. Remember, 359-J-U-S-T. Ralph Russo, 7829 Plaza 9, near the courthouse. He's an experienced, concerned attorney—for whatever you need him for—DWI, workman's compensation cases, personal injury, criminal cases—you never know when you're going to need an attorney. The next time there's a bright flashlight in your eyes and the police say "You got an attorney, boy?" What'll you do? You got Ralph Russo. Remember, write this number down, and keep it in your wallet, because you never know when you're going to need Ralph. Call 359-5878. One on one attention; keep in mind, your initial consultation is free! So remember, Ralph Russo. Call him at 359-5878. Just remember, he'll help you with *this* generation's problems. 359-J-U-S-T.

Those of you who live in the Washington area no doubt recognize this ad as the handiwork of a popular radio personality in that city. But, take my word for it, that was commercial speech. Ads like Russo's would not have been permissible when I was going to law school. In fact, in 1968, a survey showed that over half of the ABA's ethics opinions concerned questions of attorney ad-

---

* United States Court of Appeals for the Ninth Circuit.

vertising and solicitation.[1] As you know, the basis for this regulation was the Supreme Court's 1942 decision in *Valentine v. Chrestensen*,[2] which held that speech soliciting a commercial transaction could be regulated by the government just like the commercial transaction itself. The *Valentine* principle held until the mid-70's, and then we started getting cases like *Virginia Board of Pharmacy*,[3] *Bates*,[4] and *Linmark Associates*,[5] which I am sure the panel will mention.

In those cases, the Court held that speech is protected by the first amendment, even if the speech is for commercial purposes. The majority opinions of the cases tended to stress that in commercial matters, as in the political arena, people perceive their own best interests only if they are well enough informed, and the best means to that end is to open the channels of communication, rather than to close them. The dissenters, usually through the voice of Justice Rehnquist, accused the majority of incorporating the teachings of Adam Smith into the Constitution and of reconstituting the values of *Lochner*[6] as a component of freedom of speech.

What constitutional protections is commercial speech afforded? Everyone agrees that commercial speech is entitled to less protection than pure speech or noncommercial speech, and the reasons for that, again in the words of Justice Rehnquist, are that "in a democracy, the economic is subordinate to the political."[7] In its 1980 decision, *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[8] the Court announced a test for whether regulation of commercial speech can be sustained under the first amendment. It is a four-part test, and I mention it because I think it would be useful by way of background. The *Central Hudson* Court said that, first, the speech must concern lawful activity and not be misleading; second, that the government interests in regulating the speech must be substantial; third, the regulation

1. C. WOLFRAM, MODERN LEGAL ETHICS 65 (student ed. 1986).

2. 316 U.S. 52 (1942).

3. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

4. Bates v. State Bar, 433 U.S. 350 (1977).

5. Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977).

6. Lochner v. New York, 198 U.S. 45 (1905).

7. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 599 (1980) (Rehnquist, J., dissenting).

8. 447 U.S. at 557 (1980).

must directly advance a governmental interest; and fourth, the regulation must not be more extensive than necessary to achieve the objective.[9] So, if the activity is lawful and the speech is not misleading, then the government's regulation must advance a substantial purpose and be no broader than is necessary to advance that substantial purpose.

Here is the key question: How do you distinguish commercial from noncommercial speech? Now, that is the great mystery that our panelists will explore today. To guide our deliberations, I thought I would present three hypotheticals. The first one is a hypothetical advertisement, perhaps in *The Wall Street Journal*, and it reads as follows:

> America needs dirtier air. For the past two decades America has been obsessed with pollution. We at Mammouth Oil share the desire for clean air—we, too, have to breathe. But clean air is not cheap. It costs money, natural resources and jobs—jobs lost to other countries that allow cars to run on cheaper but dirtier fuel.
>
> Recent studies show that there is no statistical difference in the incidents of supposedly pollution-related illnesses between the United States and those other countries. We are paying a high price and getting nothing in return. We at Mammouth support S.128, which will roll back U.S. air quality standards and allow us to sell you cheaper fuel for your car. And to show our commitment, we will pay one cent for every gallon of gasoline we sell into a fund to support the passage of S.128. We urge you to join us in supporting S.128. Vote with your foot, every time you press the gas pedal.

The Federal Trade Commission has brought an action to enjoin further running of this ad. That is one hypothetical.

Let me give you a second one. The people of the State of California, by initiative, have passed a constitutional amendment which provides that any advertisement for a dating service must contain the following statement in bold print: FOR HETEROSEXUAL COUPLES ONLY.

And finally, a third and last hypothetical that perhaps raises some other issues. There is a service called the "Inside Trader Data Base." Limited to only fifty subscribers, it makes the following promises: "You get tomorrow's news today. With sources lo-

---

9. *Id.* at 566.

cated deep within the financial world, you will get access to information not available to the public. The cost, a mere $50,000 a year. You will make it up on the first transaction." ITDB is marketed to managers of mutual funds and other institutional investors. The SEC seeks an injunction against ITDB to prohibit publishing any information that will violate SEC Rule 10b-5.

B. BURT NEUBORNE*

Why is it that I feel, when confronted with those hypotheticals, that I am back here taking my first-year exams again?

I thought that what I would try to do this afternoon is to sketch for you my own attempt, as a first amendment lawyer and someone who has spent a fair amount of his career working in the first amendment area, in grappling with the new and very difficult problems that are created in first amendment theory by the expansion of the first amendment into the commercial area in the last ten or fifteen years.

The principal metaphor for free speech—you see it in the classrooms, you see it in the courtrooms—has always been the free market in ideas. I thought for many years, and still think now, it was an extraordinary irony that, having borrowed Adam Smith's metaphor to defend free speech for thirty years, the Supreme Court decided that free speech has nothing to do with free markets and, therefore, excluded commercial speech from any first amendment protection, as Judge Kozinski has pointed out.

For thirty years, the Supreme Court maintained a structural divide in first amendment theory that distinguished between political speech, which received a significant amount of constitutional protection, and speech about economic matters, which received essentially no protection at all. The net result under the structural divide was the breakdown of speech in the United States into six markets, or six different kinds of speech patterns. Speech about religion, speech about politics, and speech about aesthetics, on one side of the structural line, received very sub-

---

* Professor of Law, New York University School of Law. For fuller treatment of many of the ideas discussed here, see Neuborne, The First Amendment and Government Regulation of Capital Markets, to be published in 55 BROOKLYN L. REV. (1989).

stantial constitutional protection. On the other side of the structural line, speech about consumer affairs, speech about labor relations, and speech about capital formation received virtually no constitutional protection. So, you had this rather anomalous situation where the line was drawn right down the middle.

As early as 1960, but accelerating through the 60's and into the early 70's, that structural divide was subjected to a barrage of criticism that said in essence, "look at what you are doing,"—the speech about religion, politics, and aesthetics essentially guarantees that the government will not be able to interfere with the intelligentsia's business of discussing those ideas. Because, after all, that is the business that the intelligentsia is in, the discussion of ideas about religion, politics and art. On the other hand, the structural divide makes it virtually certain that the government will control the discussion about labor relations, capital formation and consumer affairs; and not only that, but the government that does the controlling will probably be dominated by the very intellectuals who wanted the government off *their* backs when they were making their arguments in their own world.

That barrage of criticism, I think, together with a whole host of doctrinal shifts in the conception of the first amendment (the *Bigelow*[1] case, and the cases dealing with *Virginia Board of Pharmacy*,[2] the constitutional protection for price advertising in pharmaceuticals) is what led to the breakthrough in the early 70's, which, over the past fifteen years, has resulted in a fairly well-defined body of law protecting speech in the consumer area. I take it, though, that it is now only a matter of time until the two other markets, the markets of labor relations and the markets of capital formation, also become subjected to some degree of first amendment analysis. As Judge Kozinski points out, that expanded conception of the first amendment now raises a whole host of very difficult doctrinal problems. And I think it is perhaps helpful to think about the reaction that has occurred, over the last couple of years, in response to the Supreme Court's commercial speech cases.

One set of critics decries the breakdown of the structural divide. They want to go back to the old days when there was that

1. Bigelow v. Virginia, 421 U.S. 809 (1975).

2. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). *See generally* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980).

structural divide between political speech and economic speech. Interestingly enough, they come from two directions. One set of critics is troubled by the political effect of the new doctrine, which is to empower institutions such as corporations and large business entities in ways that the critics find dangerous.[3] I do not consider that a serious critique, because it is a critique simply born out of an unhappiness about speech being permitted by people whom you do not like.

But the second critique argues that there is a real danger in permitting free speech into the economic arena. It is not that economic speakers are going to have too much power. It is not that corporations are going to be given too much power. It is that there will be an inevitable diluting of free speech doctrine once it moves over into the economic area, very much for the reasons that Judge Kozinski adverted to. There is an intuitive sense that the level of protection in the economic area will be lower than a level of protection in the traditional political sphere, and the fear is that *that* level of protection will become the baseline by which all speech is measured. As a result, one set of very thoughtful critics suggest that the expansion into commercial speech creates a danger of dilution across the board.[4]

The other set of critics applauds the breakdown of the structural divide. Those critics may be further separated. One set of breakdown proponents are applauding precisely because they feel it is the beginning of a utilitarian rethinking of free speech doctrine. It is the wedge by which free speech doctrine, which has developed essentially as a nonutilitarian doctrine in the political area (essentially a dignitary doctrine in a political area), is going to be rethought through utilitarian eyes and which will provide a general lowering of free speech protection across the society as a whole. If you want something to crystallize that, someone who is very troubled by the outcome of the *Skokie*[5] case (because they feel that the *Skokie* case did not pay enough attention to the utilitarian needs of hearers) will applaud the onset of a commercial speech application. The utilitarian thought processes that will inevitably drive the doctrine in that area are precisely the utilita-

3. *See, e.g.*, Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

4. *See, e.g.*, Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

5. National Socialist Party of America v. Skokie, 432 U.S. 43 (1977).

rian thought processes that they want to import back into the political speech area.

That summarizes the thoughts of one set of critics applauding the breakdown. The other set of critics applauds for exactly the opposite reason. They see it as an opportunity to import into the commercial speech area precisely the protections that exist in the political speech area and, further, they see it as a hammer to pound regulatory enterprise in an attempt to cut down on the degree to which the government can regulate the markets.

My own sense is if either one of those groups is correct, it strengthens the hands of people who said we should never have gone down this road in the first place. If the net effect of commercial speech is to threaten the degree of protection that we enjoy in the political sphere, then it may not be worth the candle. On the other hand, if the price of commercial speech is the elimination of regulations found to be necessary to protect consumers and to protect fragile markets from being exploited by powerful entities, then, again, it may not be worth the candle.

And that leads me to the third and the principal reason why I am attempting to think a little bit in this area. The third group of people say there is a difference, a discernible difference, between the six markets; that the religious, political and aesthetic speech markets are, in fact, different from the labor, capital and consumer markets in ways that should require the development of different doctrines governing the free speech rules in both places. In other words, they welcome the onset of commercial speech because they welcome the onset of a degree of first amendment protection in the commercial area; but at the same time, they argue that the first amendment protection in the commercial area will be substantively different than the commercial protection in the original, more traditional area, precisely because there is something fundamentally different about the two markets or the two types of markets.

I would like to try, very briefly, to sketch a theory of why that should be so, and to suggest to you what some of the attributes of commercial speech protection ought to be. I say this to you as a very vigorous supporter of commercial speech. I argued the *LILCO*[6] case, which was the companion case to *Central Hudson*,[7]

6. Long Island Lighting Co. v. New York State Pub. Serv. Comm'n, No. 77-C-972 (E.D.N.Y. Mar. 30, 1979), *aff'd in part, rev'd in part*, 633 F.2d 205 (2d Cir. 1980).

7. Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

and those cases concerned the rights of corporations to advertise. I support these cases vigorously, and have a very skeptical view of any government attempt to cut down on the free flow of information in the commercial area. But I reject the notion of levelers from both sides. I reject the notion that the same criteria should govern in both sets of markets, and that the choice that we have is either to raise the commercial level to the political level or to lower the political level to the commercial level.

My suggestion is that we can have an analytically precise set of doctrines tailored to both markets that will give us very powerful protection in the political arena, and the appropriate level of protection in the economic arena. It seems to me, if you think about the process of the speech universe, it consists of five different players. The players in the speech game, if you want to get your score card, consist of the following: there is a speaker, and increasingly in the modern world there is a conduit, which will consist of a newspaper or usually electronic media (that is the device by which the speaker's message is transmitted broadly), and then there is a hearer. Finally, there are the bystanders who are affected by the speech even if they do not directly hear it; and there is the government regulator that is sitting up across the top somewhere trying to control the process.

Those five players are the fundamental five players in almost any speech universe. If we take for a moment the usual arguments in favor of free speech, step back away from the cases, and just ask ourselves why do we have free speech, then what are the considerations? There are four traditional arguments about why we have free speech in this society. One of them is a nonutilitarian argument, which says that we have free speech in this society because speech is integral to the notion of human dignity. The nonutilitarian protection for free speech is based upon the dignitary notion that speech is integral to the human personality; that it is probably the only attribute not shared by any other species, and that speech is so integral to self-expression and to dignity that it is protected because of the relationship between speech and humanity. It is part of a nonutilitarian toleration-based recognition of the inherent dignity of us all. Speech thought about that way does not have to pay its way in a utilitarian sense, any more than any other dignitary notion of the

human spirit does not have to pay its way in the utilitarian sense. In a way, a possible analogy is freedom of religion. We do not ask whether religion is a good or bad thing for society before we decide that we will accord great toleration to "it." We simply say that it is part of the human spirit, and we tolerate it.

Speech, I think, is protected in large part because of that kind of thought process. But in addition we have two very traditional utilitarian justifications for free speech: First, we have the marketplace theory, which is the notion that if the speech comes out into the marketplace, we will be able to find truth faster, over time, through the clash of ideas and, ultimately, that process will lead to truth. The second utilitarian argument is the need to permit efficient or autonomous choice in those mechanisms that are designed to work by choice, such as democracy and capitalism. While the "marketplace of ideas" notion guarantees truth, the choice notion guarantees the efficient and appropriate operation of both our political and economic systems.

Finally, there is the argument that there is a special "suspicion" about government. This view argues that government cannot be trusted to control the flow of information because it is uniquely likely to be intolerant, and that the history of power in the world is such that one does not trust people with the power to suppress other people's speech because of the unique tendency toward intolerance and suppression that is an unfortunate aspect of almost any governmental structure.

That concept works very nicely in the traditional speech area. If you apply those arguments in the area of traditional speech, in the area of speech about religion, speech about politics, and speech about aesthetics, and think about it for a moment, those are precisely the areas in which you will have a powerful toleration-based speaker. This speaker has a powerful dignitary claim to being respected, not because he or she is saying something worth hearing, but solely because that person is saying something that is self-expressing; the degree to which the self-realization process triggers a sense of dignitary toleration is a nonutilitarian reason for tolerating speech, even speech we hate.

Now, re-enforcing that concept in the traditional areas are the very traditional notions of marketplace of ideas and choice factors. When you have them together, working together as they do in the traditional arena, that explains why our doctrine of free speech in that area is so powerful and so noncontroversial. What

changes and what makes the issue so difficult when you move from religion, politics, and art to labor relations, capital formation, and consumer affairs is that you lose the dignitary speaker; the dignitary speaker is no longer a part of that equation. You have a speaker addressing an issue that is important to him, but it is not the same thing as the conscientiously-based notions of self-expression that we had in mind when we thought about religion, political or artistic expression.

I believe that much of American free speech theory is based on toleration of the dignitary interest of the speaker; a nonutilitarian toleration of the speaker. When you move over to the area in which you have speech without a speaker, you have a very serious problem in developing first amendment theory. That is why I think first amendment theory was frozen, from 1942 when *Valentine v. Chrestensen*[8] was decided, until it was unlocked in the *Virginia Board of Pharmacy*[9] case. It was frozen, because when you confronted this free speech universe, you saw a speaker there that did not seem to have the dignitary interests that triggered the usual first amendment protection. In an analytic structure which was speaker-driven, such a non-dignitary speaker would lose.

There have been two significant changes leading up to *Virginia Board of Pharmacy* and its subsequent history. First, the Court was forced to deal with a series of traditional political cases, in which there were no qualified speakers, where the speech at issue was that of a foreign country (as in *Lamont*[10]), where the speaker was a felon who himself did not qualify for first amendment protection, or where the speaker was a corporation, which by definition does not possess an anthropomorphic conscience. The Court was confronted in those situations with whether or not they would give protection to that kind of speech. And what has evolved in those cases was not a speaker-centered jurisprudence, which is what we usually have, but a hearer-centered jurisprudence, which said that the interest of the hearer drives the speech process. If you think about that for a moment, the interest of the hearer in the process is almost always utilitarian. The interest of the hearer in the process is toward reaching truth, toward making

8. 316 U.S. 52 (1942).

9. *Virginia State Bd. of Pharmacy*, 425 U.S. at 748.

10. Lamont v. Postmaster General, 381 U.S. 301 (1965).

efficient choices, toward making autonomous choices. It should not surprise anyone that the substantive doctrine that will evolve out of a hearer-centered jurisprudence, which looks to the best interests of the hearer, will be very different than the jurisprudence that derives from a nonutilitarian speaker-centered jurisprudence, which looks to toleration of the speaker. I think that explains why it is perfectly predictable and, indeed, correct to suggest to you that we ought to have two-tier protection: a toleration-based protection which is essentially nonutilitarian and which makes the *Skokie*[11] case correct in the area of political speech; and a hearer-centered protection that will enable the government to zero in on the needs of the hearer and the protection of the hearer in the other areas, and which will at least permit additional theoretical power.

Let me end by saying I am not suggesting that two-tier protection creates an unlimited power of paternalistic suppression. The *Posadas*[12] case that was decided two terms ago seems to me to be exactly the wrong way to go about developing a hearer-centered theory of speech. In *Posadas* the Supreme Court upheld the constitutionality of restrictions, by the legislature of Puerto Rico, that forbade the advertising of gambling on the Island. Why? Casino gambling on the Island was legal. It was a lawful choice for the residents of Puerto Rico to make, but the legislature did not want them to have the information because they wanted to influence how the choice would be made. I find that an absolutely unacceptable vision of a hearer-centered speech, because at that point what the government is doing is trying to manipulate the choice by manipulating the flow of information. As long as the choice is lawful, the government has absolutely no business in attempting to manipulate the flow of information.

And so, when I suggest to you that there is a hearer-centered philosophy here, I am not suggesting that it is a paternalistic philosophy that allows the government to control what the hearer does; but unless the speaker can articulate a reason why it is in the interest of the hearer to get this information, to permit the hearer to make either a more efficient choice or an autonomous choice, then it seems to me that the speaker has nothing to bor-

11. *Skokie*, 432 U.S. at 43.

12. Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986).

row—he has no first amendment interest of his own. He has a fifth amendment property-based interest, which may well be protected under some other provision of the Constitution, but he does not have a first amendment speech-based interest that is his own, because that speech-based interest is toleration, at least when the speaker is involved. What he has is the ability to borrow the interests of the hearers and to raise them as a form of third-party standing. He raises those rights. But in order to raise them, there has to be some articulable hearer interest in receiving the information in the first place. If you cannot articulate a hearer-based reason for getting that information in the first place, then there is no reason to have free speech; there is no reason to have a special constitutional protection for free speech.

So, my suggestion is, in thinking about Judge Kozinski's hypotheticals, that the way to approach them is not to simply ask how they would be decided if this was about political speech, but to zero in on each one of them and to ask, is there or is there not an articulable hearer interest in receiving that information to permit the hearer to make choices that are both lawful and potentially more efficient? If so, the first amendment kicks in and the government has to justify its regulation by a very, very powerful burden. If not, there is no reason for first amendment protection, and the case should be handled under traditional fifth amendment analysis.

C. MICHAEL CARVIN*

I found myself vigorously taking notes during Professor Neuborne's presentation because I think he is right. I think we are in a period of transition in commercial speech, and it illustrates some of the fundamental tensions in other first amendment jurisprudence.

I would like to pick up on the point he made about looking at this from the listenter's perspective—hearer-centered jurisprudence. This relates to the second hypothetical most directly, the question of whether California could limit dating service adver-

---

* Senior Associate, McGuire, Woods, Battle & Boothe; Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice, 1987-1988.

tisements to heterosexual couples only. I believe that question has taken on a special urgency as a result of the *Posadas*[1] decision, which Professor Neuborne discussed. And I think what was articulated in the *Posadas* decision was a bold and sweeping new rationale to justify the suppression or regulation of commercial speech.

It clearly departed from past precedent, in applying the *Central Hudson*[2] test. But more importantly, the fundamental change that you got out of *Posadas* was Justice Rehnquist's rationale for why the government has an interest in prohibiting speech. It was a five-to-four decision, and the passage that has attracted the most attention and the most commentary said that since Puerto Rico can eliminate casino gambling, it can also exercise the lesser power to eliminate advertisements for casino gambling.[3] If you concede that the government has the power to eliminate a particular economic activity, then, Justice Rehnquist said, you have to concede that the government has the power to take the less intrusive step of diminishing demand for that economic activity, of discouraging advertising that encourages people to participate in that activity. I believe that this particular question goes to the heart of commercial speech. It seems to me the question would have to go like this: Since commercial speech, if you define it narrowly, relates only to economic choices, and since government, given the demise of economic substantive due process, can deny you the ability to make a particular economic choice entirely, does it follow that it can eliminate information whose only purpose is to facilitate that economic choice by informing the consumer and allowing him to make more intelligent choices about the purchase of goods? As I said, Justice Rehnquist answered that question affirmatively. The overwhelming response of the commentators and scholars was to denounce that affirmation as plainly inconsistent with basic first amendment jurisprudence for a lot of the reasons that were discussed.

It has always been a central premise of the first amendment that you cannot regulate speech to the same extent you can regulate conduct. The whole point of the first amendment is that ideas have a unique value in our society, and they have special

1. Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986).

2. Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

3. *Posadas*, 478 U.S. at 345-46.

constitutional protection. So if you level them, if you say that they are indistinguishable from widgits or other things that travel in commerce, then you are really making the first amendment a nullity—you are making it a large dormant commerce clause. You are saying that anything government can do with respect to direct business regulation, it can do with respect to commercial speech. Since, as I said, government can virtually do anything it wants to business, it can do anything it wants to speech about its products. That is a tautology that just proves too much.

Frankly, I think there is a lot of merit to that criticism. But, while I am not going to defend the more sweeping interpretation of *Posadas*—which holds that anything you can do to commerce you can do to commercial speech—I wonder if this criticism is a complete answer to Justice Rehnquist if you understand his opinion more narrowly; if you focus not on commerce in general, but on the things that government can quite easily demonstrate are harmful to society, that were either illegal in the past and we have decided to legalize them, or that we can prove are products that do harm society. The examples are obvious. You are talking about drugs or cigarette advertising or liquor or prostitution or, second amendment concerns aside, I suppose firearms. Can speech related to activities involving those products or services be limited? If a state decides that it is going to legalize drugs, does it automatically follow that it is thereby prevented from saying we are going to try and discourage people from taking something that will harm them?

I think the basic response to that, from one perspective, is no, you just cannot. The reason you cannot is because, as Professor Neuborne said, it is government paternalism; government making decisions for you, protecting you from yourself, telling you what you can do with the information about a perfectly lawful activity, and government does not have any interest in doing that.

I am not sure that is right, particularly in light of what the Supreme Court has said in other commercial speech cases. I think a basic tenet of the commercial speech doctrine (maybe we can disagree with this, although I do not), is that government can protect you from yourself: government can regulate speech simply because it leads to or relates to harmful conduct. The basic *Central Hudson* test is that commercial speech is not entitled to constitutional protection if it is either false or relates to illegal activ-

ity.[4] The constitutional rationale that has to support government intervention in that kind of speech, it seems to me, has to be that those activities lead to harmful conduct, conduct that is harmful to society. In the case of false advertising, it is harmful to the consumer, and in the case of illegal activity, it leads to harmful conduct that injures others in society. It harms society as a whole. Now that reasoning has to be premised on paternalistic notions. Let us examine them one at a time.

What is government's rationale for being able to suppress false speech? Let us assume a newspaper runs an advertisement for a movie and it says that Siskel and Ebert gave this movie two thumbs up, when in reality they had both put thumbs down on the movie. The harm there is obviously to the consumer; he is going to go to a movie under false impressions, or false pretenses. But you can cure that harm short of suppressing speech. Indeed in the political speech context the Court has indicated that you have to cure it, not by suppressing the false speech, but by introducing other speech—putting more speech in the marketplace of ideas. The notion is, we will let all the information come in and there will be competition among ideas; some are true, some are false, and the true ones will win out in the end. It has been a fairly consistent theme of the Court, and traditional first amendment theory, that the government has no ability to prevent false political ideas from coming into the marketplace.

But the Court has taken a markedly different approach when they are talking about commercial speech. They say yes, indeed, you can suppress that kind of false information, you can protect a consumer from his own ignorance because he does not have the ability or the inclination to go search out more speech and find out that this speech is false. In my hypothetical, the speaker could have gone to watch Siskel and Ebert, or read their reviews and found out that, indeed, they had not given this movie a good recommendation. That is the prescribed remedy in the political area, but the Court has taken a very different approach in the commercial area.

I think there is a similar reasoning behind the question of whether or not you can suppress speech that relates to illegal conduct. If you think about it, there is really nothing inherently wrong with speech that requests or solicits illegal activity, or pro-

4. *Central Hudson*, 447 U.S. at 564.

motes it. The harm results only if the listener takes you up on your proposition: by accepting the bribe that you are offering, or answering your advertisement for a contract killer. It is only when he does, that some harm to society results. Again, the rationale then for suppressing illegal speech has to be a paternalistic one; it has to be "we are going to protect this listener from the temptation of doing something that is illegal," something that is a harm to society. If that is so, then a similar rationale could exist with respect to activities that are not necessarily illegal, but are demonstrably harmful to society.

Again, the standard in terms of illegal speech in the commercial arena is much less than it is in the political arena where you need a "clear and present danger" of imminent, unlawful activity for government to be able to intervene in that speech. It is a much more deferential standard in the commercial arena. You do not have to justify it under a clear and present danger test, you do not even have to prove that advertising the illegal activity makes that illegal activity more likely to occur. Once it is found that the speech relates to unlawful activity, it is facially beyond the pale of the first amendment.

So, what I have tried to illustrate by comparing the *Central Hudson* test to *Posadas* is that there really are two principles that emerge from the sort of standard commercial speech doctrine that the Supreme Court is pursuing, and that has a certain similarity to what Justice Rehnquist was suggesting in *Posadas*. The two principles are that you can suppress speech to protect the listener against the temptation to do something wrong, and you can also suppress speech to protect the listener against his own ignorance, his own inability to gather enough information to make a correct or intelligent decision. In either case, the government's interest is the paternalistic one of protecting the listener from himself.

If you put those two principles together, I think you have a fairly persuasive argument that *Posadas* is consistent with Supreme Court precedent; it might even be right. The other hurdle you then have to get over is the one Professor Neuborne also talked about, the question of there being a difference between activity that is illegal and activity that is frowned upon but, nonetheless, legal. Government cannot assert that it has as strong an interest in discouraging activity that they have permitted their citizens to engage in, as it does with respect to prohibited

activities.

There is some truth in that, but I think it blinks at the reality of why a society or government would decide to refrain from making certain actions unlawful. There are a lot of costs in law enforcement. There are obvious ones, such as the benefit you get from eliminating the evil being outweighed because the law enforcement methods are too intrusive, too burdensome, and too costly. A state might decide that the cost related to controlling drugs is just too high—these costs have nothing to do with society's attitudes about the benefit of those drugs—but the costs are, one, the creation of a black market, where organized crime benefits; and two, you have indirect crimes, presumably, committed by drug addicts who need to rob other people to feed their habits. So, if a state came to a decision that prohibiting that activity was just too costly, it has not in any way said that they no longer have an interest in outlawing those drugs, it has said only that the cost is too high. If something is illegal, then a government has conclusively proved to a court that it has a compelling interest in eliminating speech that is related to that illegal activity. Once you pass a law, you have done that. But the question is, is that the only way government can show it has a strong interest in discouraging an activity? Is that the only way that it can further an interest by saying "we have got to eliminate certain speech because it will lead to harmful activity"?

An example I was thinking of was suicide. It is obviously often futile and burdensome to try and prohibit people from committing suicide, even though it is an activity that is harmful to society. But once the state decides, well, we are not going to get involved in the business of preventing suicide and putting people in jail for doing it, does that mean that *ipso facto* they have to permit advertisements for suicide kits? In the real world the encouragement of that sort of activity *is* going to affect vulnerable people in our society—children, etc. Particularly since in the real world, for adults and everyone else, speech does affect conduct.

The Supreme Court itself does precisely the same thing. In the abortion cases they said a state could not require a doctor to tell a woman seeking an abortion about the medical risks associated with that procedure, even though the information that the doctor

was conveying was fully accurate and fully correct.[5] The reason the Court said the state could not require that was because it discouraged exercising that constitutional right. Well, if the Court can suppress information in order to encourage activity it likes, like abortion (presumably), then I do not understand why a state cannot discourage information about activities it does not like.

I have gone through this to make as strong a case as I can for why Professor Neuborne is wrong. And the truth is that it did not convince me. I think that ultimately he is right. Let me briefly explain to you why that is.

First, there is a fundamental difference between false speech and speech which will lead you to do an activity that is harmful, albeit not illegal. First amendment jurisprudence is not always too complicated: the difference is, one is true, and one is not. Since the information is accurate, how can the government assert a sufficiently compelling interest to stop that speech, again looking at it from the listener's perspective? I do not think it can. While the government can protect somebody from his own ignorance, I do not think it can protect somebody from his own stupidity. It cannot prevent you from having the information you need to make intelligent choices simply because it believes you are going to stupidly use that information to make choices that are bad for you and, ultimately, for a democratic society.

It is true that under commercial speech doctrine, which I agree with, government does have a sufficient interest in suppressing information if you take that information and go out and do something illegal. But it seems to me that there is at least some diminution in the government's interest when you are talking about activity that it has not gone out and made unlawful; an absence of an affirmative prohibition by the government or the legislature suggests, at least partially, that they have not been able to develop a firm enough societal consensus or firm enough legislative consensus that this activity poses a direct threat to society. In the absence of that kind of consensus by the legislature, the case for the Court deferring to the legislative judgment seems to me proportionately weaker.

I guess the other thing that, in my own mind, tips the balance,

---

5. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); *accord* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

and that I think has appeal to people who believe in a free market economy and are generally perceived as conservative, is that you can solve this problem of inducing people to do bad things by going back to the classic first amendment solution: require more speech, require warning labels on cigarette packages or that kind of thing, and make sure that people are not making a decision out of ignorance, but, fully aware of the consequences, are going ahead and doing it any way. That is the approach I favor in terms of regulating the free market generally—where you require full disclosure to the consumer; you give him all the information available, but you do not ban the product. Since I believe in that approach in terms of economic transactions, it seems to me to follow all the more that it should be the rule in the first amendment context. But it is a close question and, as a matter of fact, the Court is going to be addressing it again this term; they recently took a case which involves banning the distribution through the mail of information about lotteries.[6] So, I think this debate, which I have gone back and forth on, may be resolved this term.

D. FLOYD ABRAMS*

I think commercial speech is an interesting topic—sort of. There may be more interesting topics, and surely more important ones, but I have little doubt that, although we would live in a free society whether or not we protected commercial speech, we surely live in a better informed one because we do afford some protection to commercial speech.

The decision to protect commercial speech is consistent with basic first amendment theory. It is, I think, a wise decision, as well. I also basically share the general conclusion, if not all the reasoning of Burt Neuborne, in saying that there should be different tests for protection of political, social, religious, aesthetic speech and of commercial speech. I do not think I agree with the

6. Minnesota Newspaper Ass'n v. Postmaster General, 677 F. Supp. 1400 (D. Minn. 1987), *prob. juris. noted*, 109 S. Ct. 51 (1988).

* Partner, Cahill Gordon & Reindel.

proposition that the reason for that is because of the presence of what Professor Neuborne calls the "dignitary interest" as it exists with respect to these other forms of speech and the absence of it with respect to commercial speech. At least off the cuff, and having just heard Professor Neuborne's speech, I am not prepared to say the reason I agree with the proposition that the Nazis should be permitted to march in *Skokie*[1] is because of some dignitary interest which exists to protect their right to do so—either because they choose to do so or because of some self-expressive interest in their doing so; quite the contrary. Were it not for the fact that I am deeply concerned about other risks which come to the fore, specifically the more general risk of the government making content decisions about who speaks and why, I would find far more attractive, much more appealing, the argument that because of the harm Nazi speech does, that we might consider limiting it as we would not limit other speech.

Now, we have heard discussion here today, if I may say so, on a very high level, with respect to a number of aspects of commercial speech theory in particular and of first amendment theory in general. I would like to use my time to comment a bit on some of the things that have been said. First, in passing, and just because I feel like it, I really do not think the abortion case was cited to you correctly.[2] That is not a case fairly understood as being one in which anyone was engaged in suppressing information about abortions. That was a case in which the Court said the state could not require, as a precondition for the exercise of a constitutional right, certain information defined by this state to be provided. I think there is a difference, and I think it is a difference not only of a factual nature, but of constitutional dimensions.

The *Posadas*[3] case, also discussed, is a fascinating one. Puerto Rico, at one and the same time, allows casino gambling and prohibits advertising of it. The Puerto Rican Legislature, so the argument went, thus sought to deter Puerto Ricans from engaging in casino gambling, while encouraging foreigners or Americans visiting the island to engage in that form of gambling. As the discussion we have heard here today indicates, it is very difficult to defend, and surely impossible for me to defend, Justice Rehn-

1. National Socialist Party of America v. Skokie, 432 U.S. 43 (1977).

2. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).

3. Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986).

quist's opinion in that case. He did say, in language which is reasonably clear, that because casino gambling could be banned, it therefore followed that the advertising of it could be banned. That is, simply and totally, an inversion of first amendment theory. Usually we say, do we not, that we control speech last, not first; that we control conduct first, not last. Usually we say that it is a good thing to put to the legislature the decision-making task of determining whether they really are against casino gambling or not. Usually we say to legislatures: bite the bullet. If you really care enough, if you really think that this is a bad enough thing, do something about the *thing* that you are concerned about. That thing is not speech, it is people engaging in casino gambling.

And so, I find Justice Rehnquist's opinion particularly difficult to accept, particularly, as has just been said, in light of the general first amendment principles that we live by: the notion that counterspeech, not suppression of speech, is the answer to wrongheaded speech; that more speech is better than less speech; and that we rely upon, indeed we depend upon, the notion that better speech will drive out worse speech. It does not always work. We know that. But we accept those concepts as articles of faith in first amendment theory with respect to political speech. And it seems to me that in the area of commercial speech, as well, it rests with the Commonwealth of Puerto Rico either to ban casino gambling or to engage in speech of its own designed to persuade people not to engage in casino gambling. But to go *first* after speech seems to me a troubling, a very troubling, way to approach a social problem. Worse yet is it for the Supreme Court to indicate, in Justice Rehnquist's opinion, that a way which is proper to deal with the subject is through the mechanism of ending speech rather than dealing with conduct. That seems to me plain wrong.

I was most interested in the hypothetical questions that Judge Kozinski asked at the start of this discussion, and I would like to come back to one of them, at least, and that was the first one that he cited. I am especially interested, in part because I am counsel in a case which has some aspects to it which are similar to the hypothetical that Judge Kozinski cites. I represent R.J. Reynolds in a case now before the Federal Trade Commission ("FTC"),[4] in which they published an editorial,[5] a full-page statement of posi-

4. *In re* R.J. Reynolds Tobacco Co., Inc., Docket No. 9206, Federal Trade Commission.

5. Reynolds' message commenced:

tion, a statement of opinion in newspapers and magazines around the country. Reynolds said in substance that there should be a single standard of science, not a double standard. They argued, urged, and advocated the position that the public was only hearing one side of the question of whether cigarettes caused heart disease. They argued that the public was not hearing about tests which did not suggest a causal connection, or at least did not prove the connection between heart disease and cigarette smoking. They cited a specific test, argued that the test had not proved a cause and effect relationship between smoking and heart disease, and pointed out that the general silence about that test was a disturbing example of a dual standard at work. The piece concluded that there should be a single standard of science, not a dual standard, and that you ought to learn something from that. Various health organizations protested, claiming that Reynolds had distorted in its advocacy the very test about which it was talking; that it had misstated both the purpose of the test and its

---

> This is the way science is supposed to work. A scientist observes a certain set of facts. To explain these facts, the scientist comes up with a theory. Then, to check the validity of the theory, the scientist performs an experiment. If the experiment yields positive results, and is duplicated by other scientists, then the theory is supported. If the experiment produces negative results, the theory is re-examined, modified or discarded. But, to a scientist, both positive and negative results should be important. Because both produce valuable learning. Now let's talk about cigarettes. You probably know about research that links smoking to certain diseases. Coronary heart disease is one of them. Much of this evidence consists of studies that show a statistical association between smoking and the disease. But statistics themselves cannot explain *why* smoking and heart disease are associated. Thus, scientists have developed a theory that heart disease is *caused* by smoking. Then they performed various experiments to check this theory. We would like to tell you about one of the most important of these experiments.

The message went on to give a summary of this research study, and concluded as follows:

> We at R.J. Reynolds do not claim this study proves that smoking doesn't cause heart disease. But we do wish to make a point. Despite the results of MR FIT (Multiple Risk Factor Intervention Trial) and other experiments like it, many scientists have not abandoned or modified their original theory, or re-examined its assumptions. They continue to believe these factors cause heart disease. But it is important to label their belief accurately. It is an opinion. A judgment. But *not* scientific fact. We believe in science. That is why we continue to provide funding for independent research into smoking and health. But we do not believe there should be one set of scientific principles for the whole world, and a different set for experiments involving cigarettes. Science is science. Proof is proof. That is why the controversy over smoking and health remains an open one.

results. A complaint was filed by the FTC staff. The first question was: Is this commercial speech or not? Now, what was lacking in that case that is present in Judge Kozinski's example is that the editorial that I am citing to you, and that Reynolds published, did not contain any overt advocacy of any particular piece of legislation. It did not say vote with your feet, it did not say support this bill. It said, loudly, "think about this." It said, in effect, "This is our position: there is another side to this; the debate over cigarette smoking and heart disease goes on."

I do not have any doubt that I would, if I were in the position to decide the dirty air case of Judge Kozinski, find it reasonably easy to say that even though there was more advertising of a product in that example than in the one I have cited to you in real life, the example should be deemed political speech. It is overt pleading for legislation which seems, at least on its face, not to be pretextual, not to simply be a way of saying "buy our brand" or "buy what we sell." I think that in deciding the question of what is commercial and what is political speech, it is important that the test be what the Supreme Court has called a "common sense" one. I think common sense leads to the conclusion that the advertisement cited by Judge Kozinski is predominantly, primarily, at its core, political.

But what about the one in my case? The administrative law judge of the FTC, with no little bravery, dismissed the complaint on the grounds that this was pure editorial speech, no different from an op-ed article in the *Washington Post* or *The New York Times*, which ought not to be treated any differently than such an article.[6] The FTC reversed that decision by four-to-one vote, the chairman dissenting, and the head of the consumer protection agency seeking, but being denied, the opportunity to file an amicus brief supporting our position.[7] The FTC did not, in so many words, hold that Reynolds' editorial was commercial speech, but all but said it was because of Reynolds' economic motivation in publishing it, and it remanded for further hearings on the issue.

What should the law be in this area? What should the law be, with respect to an economically motivated but public policy oriented editorial like this? It seems to me that something fairly de-

6. *In re* R.J. Reynolds Tobacco Co., Inc., 51 Antitrust & Trade Reg. Rep. (BNA) 219 (F.T.C. Aug. 4, 1986) (Hyun, A.L.J.).

7. *In re* R. J. Reynolds Tobacco Co., Inc., 54 Antitrust & Trade Reg. Rep. (BNA) 681 (F.T.C. March 4, 1988).

fined as commentary on public issues, even if it plainly is being written solely for the purpose of economically benefiting the person who writes it, should be as protected as any other form of editorial speech. There is no question, none, but that if the head of Reynolds had published an op-ed article in *The New York Times*, saying in exactly the same words what the Reynolds ad said, it would be wholly protected political speech; if the FTC started a proceeding against *The Times* or Reynolds with respect to that article, the response would have been, "What are you doing? You—a government entity—do not decide truth or falsity about op-ed pieces. It is not your business and it is unconstitutional for you to begin the process."

My view is that, functionally, our case is the same thing and should be treated as if it were. To say that because Reynolds paid for its ad makes it therefore unprotected speech is contrary to the core of the first amendment. Our opponents have argued and I was asked by the commission in oral argument, "Are you really telling us that you can lie, not just make a mistake? Suppose you know what you are saying is false; suppose there was no test and Reynolds just made it up. Do you really mean that the first amendment protects that speech?" And I said, in substance, we are allowed to lie, the American Heart Association is allowed to lie, op-ed writers are allowed to lie. Of course, people should not lie, organizations should not lie, but what is not permitted is for the government to decide what is and is not a lie in the political arena. The ultimate question is an old one: Who decides what sort of speech is permissible? The usual answer in this country has been that *that* power is simply off limits for government.

A final note. How important is commercial speech? How important is it that we at least afford it some qualified protection? The United States Senate has passed a bill which says that any person who uses, in connection with any goods or services, any word which misrepresents the qualities of his or another person's goods or services shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.[8]

8. After delivery of this speech, the bill was changed, in part due to first amendment concerns, to provide that a misrepresentation "of fact" made "in commercial advertising or promotion" would violate the Act. Trademark Law Revision Act of 1988, § 132, Pub. L. No. 100-667, 102 Stat. 3946, 3948 (1988) (amending section 43(a) of the Trademark Act, 15 U.S.C. § 1125(a) (1982)).

That is a proposed piece of legislation very close to being law. It would permit a competitor who, through commercial speech, claims that its cars, its VCR's, its machine tools work better than someone else's (or that someone else's handle less well or lasts less long), being liable for damages, imposed regardless of fault, incidentally, and regardless of whether these are mere expressions of opinion or statements of fact. Damages would be imposed if the jury believes that there has been a misrepresentation, and it would allow a newspaper, or magazine or television reviewer which ranks various products and says critical things about products to be held liable if a decision-maker decides that there is misrepresentation. It might even permit—on its face it probably would permit—any of us if we were said to misrepresent in a letter we wrote about some lemon of a car we got, to be liable for damages. In good part, it is only because commercial speech is now protected that it now seems to me so clear that at least in the form that I have seen the statute it would so likely be held unconstitutional. But for affording first amendment protection to commercial speech, we might well have a situation in which the first argument in defense of such a statute was that simply because it is commercial speech, no first amendment exists at all.

My own view, then, is that we have come a long way in the right direction in affording a considerable body of protection to commercial speech. I am prepared to negotiate with you about how much protection to afford, what standards are to apply, how the standards ought to be implemented. But this is an area, interestingly as we see on this panel and as we see in the scholarly literature, which cuts across the usual political-ideological divides in the area of first amendment or constitutional theory in the first place. This is an area where I think people who differ on a lot of other things can and should come together.

E. Questions and Answers

MR. BAKER: Burt Neuborne, I thought, gave a very powerful and persuasive, as well as quick analytic framework with which to think about commercial speech. It seems to me that the emphasis on utilitarian arguments and listener-oriented arguments for commercial speech is both consistent with what the Court has said

and is theoretically the best way of understanding the Court's protection of commercial speech.

The question that I have, and on balance I think I disagree with Burt on the answer, is whether utilitarian concerns are the type that ought to receive constitutional protection, or whether utilitarian claims ought to be left to a democratic process to evaluate further. Burt suggested that as long as the proposed behavioral choice is lawful, the government has absolutely no business manipulating the flow of information. It seems, offhand, that the government constantly gets involved with the flow of information, and when it gets involved, it is hard to say it is doing anything other than, in some degree, manipulating the flow. The government affects the flow when it speaks. The government is also massively involved in the speech arena when directly or indirectly subsidizing speech. Each of those subsidies results in a slightly different speech framework. But you implicitly replied to my point by saying that it is not the government's effect on the flow, but rather its paternalistic regulation of commercial speech that is bad.

At this point, I want to restate what seems to me to be Rehnquist's argument in *Virginia Board of Pharmacy*.[1] Rehnquist noted first that the government was not paternalistically saying that the consumer should not have this information. If a private individual wanted to give the information to the public, or if a consumer guide was published, they were not violating the law. It was only the commercial advertising that was banned. Rehnquist's suggestion, then, goes at least a little bit to Mr. Abrams' point. The commercial advertiser may be forced by market pressures, or have market reasons to want to promote one view or another.

One of the issues that Marx and Judge Posner agree on is that a free enterprise system, or market system, orients its entities to be profit-oriented, to try to make as much money as possible. And what Rehnquist suggested was that these market forces lead the drug advertiser to say "take more drugs." The government should be able to decide that these market forces are not the type of thing that we want to include in the range of factors leading people to make decisions one way or the other. If people speak on

1. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

the issue, dignitary interests require that we reject any paternalistic notion that the consumer should be insulated from that information. But Rehnquist argues that there are some forces that the government can say should not be part of the influencing process. And although this political evaluation and regulation of collective structures that influence values may be a form of paternalism, I think it is a weaker version than just the idea of suppressing information and trying to insulate the audience.

PROFESSOR NEUBORNE: For those of you who think the ACLU is a monolithic organization, Ed Baker and I have argued a long time about these issues within the ACLU.

Let me first try to answer Ed's question, which is essentially, if there is some merit to my suggestion that in the commercial speech area there is going to be more of a utilitarian thrust than there is in the more traditional areas, should not utilitarianism—which after all is the greatest good for the greatest number—be uniquely subject to resolution by democratic means as opposed to non-democratic means? Let me suggest to you why I think that is not so, at least in this area. The way to do it, I think, is to go back to the *Posadas*[2] case again and examine the unstated facts, which made *Posadas* so understandable to me when I went back and looked at it, and I owe this perception to an article by McChesney[3] on commercial speech in the *Connecticut Law Review* this summer. McChesney goes back and points out that the whole reason why the legislature of Puerto Rico passed this statute was to insulate the state lottery against competition from the casinos which were going to drain away all the gambling dollars. What you had is a government engaging in censorship to advance its own interests, and in a way, that is what Floyd Abrams pointed out before. What troubles him about the *Skokie*[4] case is not the Nazis toleration, it is the fear that there will be a censor some day; if you let them censor the Nazis, they will censor something else.

There is, in the area of information flow, a uniquely dangerous aspect about letting the government get on top of the flow, because it will manipulate that flow in its own interests, whether it

2. Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986).

3. McChesney, *A Positive Theory of the First Amendment*, 20 CONN. L. REV. 355, 362-63 (1988).

4. National Socialist Party of America v. Skokie, 432 U.S. 43 (1977).

is the economic interests of having the lottery of Puerto Rico soak up money that would otherwise be spent in private casino gambling, or advancing our own perceptions about what is good or what is bad in the society.

And so, my answer is that one of the reasons why we have free speech protection is that we realize that, in the information flow area, the usual utilitarian resolution mechanisms are at risk when you let the government control the information flow; that is exactly why you have to have a nondemocratic force, judicial review, which steps in to keep that information flow open. Ed and I will continue this debate later at the ACLU board meeting.

MR. CARVIN: There is a strain in commercial speech law that does bother me; you brought it up, and there is this notion that the motives of the speaker are somehow relevant to the protection you will give them, and that people with a profit motive are more likely to be unreliable in the information they will provide. And for that reason the government has a greater interest in suppressing the speech or regulating it.

I do not understand it as a jurisprudential or empirical matter. I mean, if nobody on this panel was getting an honorarium, or whether or not they are, or whether they are here to get clients, or whatever other personal motive there is (maybe there would not be any speakers if there was not), that really cannot have an effect on the protection that the speech issuing from the panel is afforded, and I question it on an empirical level as well.

It seems to me not at all true that RCA is more inclined to lie because its motive is to make money, than George Bush or Mike Dukakis is inclined to lie because their motive is to achieve elective office. And the reason I bring that up is because there is this case in the Supreme Court where, frankly, the Justice Department made a not dissimilar argument. And I found it very troubling. This is the *Minnesota Newspaper Association v. Postmaster General*[5] case, where a federal statute prohibits lotteries from going through the mail, and not only advertisements for lotteries, but newspaper reports concerning prize lists for lotteries. And the government's argument was that it was commercial speech if the newspaper's motivation for publishing the prize list was direct financial gain from the lottery, in which case it was okay to regu-

5. 677 F. Supp. 1400 (D. Minn. 1987), *prob. jur. noted*, 109 S. Ct. 51 (1988).

late it. But if they thought that they were just doing it out of the goodness of their hearts, then it was not okay because it was political speech.

That seems to me to be a fundamentally wrong-headed approach. First of all, I do not think you will ever be able to tell anybody's motives. They may run certain kinds of news information because it will attract advertisers, or you will have all kinds of indirect financial motives, always associated with the newspaper. And second of all, I cannot figure out for the life of me what difference it makes *why* somebody has said something. It seems to me it is what they said that is entitled to protection, and you get in an intellectually incoherent search if you try and probe their motives and proportionally adjust the kind of protection you are going to give them.

Frankly, I think that is what the Court has done in the libel area. They have looked at the speaker, they are trying to get some objective indicia of what kind of speech it is. They have looked at the speaker as to whether or not he is a public figure, and gotten away from this notion as to whether or not the libel story involved an issue of public importance, that Justice Brennan had pushed as the standard. I think the reason they were doing that is because they were afraid of getting the Court involved in sort of content-based distinctions between speech, but it seems to me a really misguided way of going about it.

SPEAKER: I think it is absolutely clear, as an empirical matter, that motive makes the difference in legal regulation of speech that is commercial in character. The term commercial speech in the Supreme Court has referred to commercial advertising, and we have been talking about something broader than that here.

It is very clear that whether speech is given for money is very important in terms of legal regulation. For example, that opening tape we heard was an advertisement by a lawyer—what do lawyers do? Lawyers speak for money. And there are prior restraints on whether or not they get to speak for money. The doctor who was going to be giving this government-mandated lecture to a person wanting to get an abortion was speaking for money, and we regulate whether or not those people can speak for money.

This actually cuts a wedge into Burt Neuborne's suggestion that there is a great divide between political markets and product markets and so forth. It makes a difference whether or not a cor-

poration is talking about its own internal affairs, about its securities and how good they are, or whether *The Wall Street Journal* is talking about it. One of the reasons why we will let the FTC regulate commercial advertising, I think, is that given a choice between a commercial advertiser with a profit motivation in putting out that particular product, we are likely to think the FTC is more likely to be correct; if, on the other hand, the FTC goes after *Consumer Reports*, who admittedly has a profit motive, or *The Wall Street Journal*, we are less likely to think that they are correct.

MR. ABRAMS: When did that sort of reasoning ever make a difference in first amendment theory, whether we believe the government is more or less likely to be correct?

SPEAKER: To the extent one is concerned about the government's negative capability, the government does not regulate speech very well. A major underpinning of the marketplace is that we do not trust government to intervene in the marketplace; we trust the marketplace rather than government. That back side of the first amendment, rather than positive values of the first amendment, has always been an element, as Burt Neuborne mentioned in his speech. I do not think it is the only element.

I will conclude by just giving one other ingredient in this. It seems to me that a major purpose of the first amendment is to protect dissenters. Protecting dissenters ends up, if you focus on it, protecting Schenck, Debs, Abrams; it also ends up protecting someone like Carlin in the *Pacifica*[6] case who is challenging existing customs, habits, and traditions but is not engaged in political speech. There are a lot of metaphors in the first amendment; one of them is self-government, one of them citizen rulers, one of them is marketplace of ideas, another one is content neutral government. On the other hand, if your impulse is to protect dissenters, you are less likely to think that commercial advertising is dissent. On the other hand, what makes Floyd Abrams' case more appealing, from a first amendment perspective, is that R.J. Reynolds is a dissenter here against the scientific orthodoxy of the society. We have some suspicion about government intervening with respect to editorials—the marketplace is working for you. Self-

6. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

expression is divorced, which is why it is a tough case and it speaks to the point that in fact, motivation does make a difference. As an empirical matter, it is true, and as a normative matter it ought to be a factor that plays a role in the decision-making process.

MR. FRIEDMAN: Professor Neuborne suggested that there was a special nonutilitarian case for freedom of speech because language is a uniquely human activity by which we define ourselves. Now, language, of course, is not a uniquely human activity, although humans have much more elaborate languages than other species we know about. There are lots of species that communicate by sound.

There is, however, another much more nearly uniquely human activity, and that is what our common friend Adam Smith referred to as the propensity to truck and barter. So far as we know, there are no species other than our own who contract, and it is not clear that there are any other species that engage in trade; certainly if they do, it is much less common than other species engaging in communication. And furthermore, while those of us who are professional intellectuals may define ourselves by what we say, quite a large part of the population of the planet defines itself by what it does, what it makes, what it sells, what it buys. So, if you really are going to create this sort of a nonutilitarian case for freedom of speech, have you not created an even stronger nonutilitarian case for economic freedom including, but not restricted to, freedom of commercial speech?

PROFESSOR NEUBORNE: This is hardly the audience to contest that. I can read it, I can read it pretty well. Let me say, I do not consider myself either a skilled anthropologist or a particularly qualified human psychologist. But I must say that what you just said sounds to me to be flatly wrong. Species do trade, species do—

MR. FRIEDMAN: Individual members?

PROFESSOR NEUBORNE: I will tell you this: they trade as much as they talk. Language, and the sophisticated use of language and self-expression, is one of the defining characteristics of the human species. While we do not know very much about whether or not porpoises talk, what we do know about the world

is that one of the unique attributes of the human spirit is the ability to conduct reasoned discourse through the use of language, and the capacity for self-expression and for self-regarding speech. Self-regarding speech is one of the attributes of the human experience. If other attributes that are unique to human dignity are also going to qualify for a degree of nonutilitarian protection, I would be the first one to embrace that. But my sense is, thus far, speech far outstrips any other candidate for it—that is just an ignoramus talking to you, but that is my sense.

JUDGE KOZINSKI: Let me use a moderator's privilege and pose a question to the panel. I kind of hoped this would come out, but it has not. No one has advocated the position that there really ought not to be two standards for speech, that speech is speech and whether commercial or political, if there really is no rational and clearly visible line one can draw between the two, that they ought to be treated the same. And my more experienced panel members may have an answer, I have not thought about it that much, but what would happen? Would democracy come to a crashing end if we said speech is speech and the first amendment protects whatever people speak, and we would not fool around with it whether it is commercial or noncommercial?

MR. ABRAMS: As a pragmatic matter—

JUDGE KOZINSKI: All of a sudden we are pragmatic.

MR. ABRAMS: Well, that is because you have asked if our democracy would come to a screeching end. I think we would wind up with less legal protection. I think that once we said that, we would fall right into the danger area that Burt imposed earlier, which is that we would have a single standard, the unitary standard of first amendment protection, and it would afford very little protection. We would have opinions like Justice White's opinion in the case involving sleeping in the park.[7] Is sleeping first amendment protected, he asked? Some of us were hoping he would say no. The position of counsel in the case, advocating an expansion of first amendment rights, was yes, because it is a form of expression.

---

7. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

PROFESSOR NEUBORNE: I wonder why Floyd always raises that case, since I was the counsel that made that argument and lost.

MR. ABRAMS: Once the answer is yes, sleeping on the streets is protected; once the answer is yes, haircuts are protected, for those of you that get haircuts; once the answer is yes, nude dancing is protected; once the answer is yes, all commercial speech is protected. The next thing the Court tends to say is, "all right, now, let's be serious. We have established that there is first amendment protection, but we are serious men and women. We know, don't we, that we cannot let all these things occur without regulation. So, we will regulate it. We are *really* going to regulate it."

Once we start saying that a scheme of regulation which we know on a pragmatic level would come into play in these areas would also come into play about political speech, aesthetic speech, social speech and the like, then it seems to me we should rethink the whole thing. I do not personally think that if we allowed full-scale protection for commercial speech it would lead to the loss of our freedom. I do think we would have a lot more junk speech. But we live with a lot of junk speech already. We can survive it.

There is a final point and it is historical in nature. I do not think that one can justify historically that any of the framers thought any of the speech we are talking about today was protected. It takes an expansion of doctrine, and that is something which should be undertaken slowly and with great thought and with great caution. And so for me, at least, I find it impossible to justify, either in historical terms or in terms of generally adopted first amendment theory, that commercial speech matters as much as political speech. That is a different approach, of course, than Burt has taken and a quite different approach than the thrust of the last question. But my view is that, although we should protect commercial speech, we need not say what I cannot say: that it is as important or as worthy of protection as political speech.

SPEAKER: I just have a comment on Professor Neuborne's analogy behind the reason why we have this difference between dignitary types of freedom of speech along the lines of language, versus commercial speech, because it is somehow inferior. Al-

though in my opinion the gentleman over there was quite correct in saying, like you, that we should defend dignitary freedom of speech, personal language speech, because Adam Smith's freedom of ideas is saying that if it holds true with commerce, it is part of the human kind's inner nature. But I think all you have to do is drop your abstract and artificial distinction, just say the biggest fear we have is that, if we have a unitary level, we are going to reduce our freedom of speech—and just leave it at that. I think we should stick with the fact that, if we go to unitary standards, we are going to lose our freedom standards more likely.

PROFESSOR NEUBORNE: Can I comment on your question for a moment? I tend to look at this like a poker player. I have been a civil rights lawyer now for twenty years. I tend to look at—I perhaps ought to look at questions from a little more pure perspective—but I tend to look at them from a strategic perspective. The strategic perspective that frightens me is the perspective of entering into a unitary standard that is significantly lower than the standard that exists now. It is a standard that will make possible what we intuitively feel is a highly significant degree of regulation in certain markets.

If you could persuade me, if I could be certain that the unitary standard that we would come to rest with is the unitary standard where we would import up the level of political protection into the level of market protection, I would be perfectly happy to live with that. It strikes me that there would be some junk speech, there will be some fraud, but we could work out after-the-fact damage remedies that would deal with most of the problems that get created by junk commercial speech, and the society could live with that.

But my sense is that is not what would happen. To the extent that you argue for a unitary standard, you are shooting crap with one of the most important sets of protections we have in this society, and if you lose, then we have lost something priceless that is going to take us a very long time to recover.