

## A FIRST AMENDMENT OVERVIEW\*

*Ralph K. Winter\*\**

There's nothing like a good old-fashioned ideological argument. I've always enjoyed the clash of sharp ideological views between debaters, and I'm happy to serve as a moderating force between Professors Bert Neuborne and Henry Monaghan.

I would like to applaud Professor Neuborne for attempting to theorize about the first amendment because it seems to me to be a daunting task. First amendment issues are similar to many complex legal problems; they involve an amalgam of purposes without any clear system of priorities for weighing and applying those purposes. I'm willing, indeed, to accept the various purposes set forth by Professor Neuborne, although I have some serious qualifications as to how he weighs them. Those purposes include the dignity of the conscientious speaker, the free marketplace of ideas, the free flow of information — about which I'll say something in a couple of minutes with regard to commercial speech — and the problem we have in trusting the government to act as a disinterested censor of speech.

I have trouble according as much weight as Professor Neuborne does to what he describes as “tolerat[ing] a speaker's attempt at self-expression out of respect for human dignity.”<sup>1</sup> For one thing, I don't think that purpose provides quite the broad protection that he thinks it does and that most of us believe the first amendment affords. If you need an individual acting out of conscience to trigger first amendment protection, most political advertising in the United States would be excluded from that protection. Viewed realistically, such material is prepared by professional advertising agencies, and it may or may not be shown to the political candidate. Nevertheless, I think we'd all agree that we must protect political advertisements. Moreover, if the paradigm first amendment case is the individ-

---

\* These remarks were delivered from notes at the symposium.

\*\* Judge, United States Court of Appeals for the Second Circuit.

<sup>1</sup> Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOKLYN L. REV. 37, 47 (1989).

ual acting out of conscience, the media — corporations seeking a profit — get no protection at all. I really have trouble seeing where protection for the media comes from in that legal framework. I don't think it necessarily comes from the addition of the words "or freedom of the press," because those words are joined with freedom of speech, and clearly the two things were meant to describe the same genre of matters immune from government censorship.

I also think if individual dignity is the foremost goal of the first amendment, then the speech protected must be the speech that enhances dignity generally. If dignity is the goal, there is no reason to single out speech rather than other dignity-enhancing conduct for particular protection, unless there's some special relationship between dignity and speech. The only special relationship I see is the special role that communication plays in human development. Now that's a very important role, but let me assure you it includes the interests of the audience as well as of the speaker. You cannot separate speakers from hearers if you're talking about communication. If you do, then government can say to every would-be speaker, "You can get all the dignity you want off in the woods talking to yourself." Also, I was struck by Professor Neuborne's proffer of the *Skokie* case as an example of enhancing or tolerating individual dignity. It would seem to me that provocative actions by a Nazi group in an area in which many Jewish people live, including survivors of the holocaust, enhance neither group's dignity. I'm not suggesting that the first amendment necessarily does not protect it. I just think that it's very hard to say, as Professor Neuborne does, that *Skokie* involves "the self-affirming utterance of a human being whose conscience and sense of self is entitled to toleration."<sup>2</sup>

Consider libel, also. Libel used to be known as a "dignitary tort." The inherent nature of libelous speech is that someone else's dignity is damaged. I have trouble fitting restrictions on actions for libel into a free speech scheme based on dignity, although I do think the first amendment ought to have implications for the law of libel.

Turning to commercial speech, I think it is a very difficult subject to theorize about. And again, I applaud Professor

---

<sup>2</sup> *Id.* at 50.

Neuborne for what is a provocative attempt. Most constitutional scholars (although Richard Epstein and some other people are now arguing to the contrary) believe that, in the area of economics, government can prevent consumers or other citizens from making efficient and autonomous choices. In contrast, government can't prevent people from making certain choices in the political system, and certainly it follows that speech about those choices must be protected. It is less clear that speech about choices that government can deny to people, such as consumer decisions, must be allowed.

One thing that can be said about commercial speech involves the third purpose Professor Neuborne mentioned, the free flow of information.<sup>3</sup> Commercial speech, although not necessarily the speech regulated by the Securities and Exchange Commission, is very important in providing helpful, educative information beyond the particular markets in which the speech is made. Commercial speech generally creates aspirations among people that go beyond particular purchases and sales; it educates us to the possibilities of technological development; it educates, indeed, as to a lot of things having to do with human relationships; it educates generally about the culture. And I think because a lot of free commercial speech leads people to think about choices, it may add to thinking about things in a democratic way and thereby help create a democratic culture.

As I understand the developments in the Soviet Union right now, the debate is not over political speech. *Perestroika* does not include statements such as "Gee, maybe we need a political group to compete with the Communist Party." Largely, it seems to have to do with talking about how particular managers in the economy are behaving. And I, if I were in the Soviet hierarchy, would be afraid of allowing commercial speech in the Soviet Union because, for the reasons I've stated, it might lead to an unraveling of the whole system.

It doesn't follow, though, that because commercial speech accomplishes a lot of things that are good, that guidelines exist to fashion legal rules defining what the government can do in the way of censoring commercial speech. I really think that the Securities and Exchange Act demonstrates the difficulties here.

---

<sup>3</sup> *Id.* at 47.

The fact is that the registration provisions of the 1933 Act are not adequately analyzed by application of traditional first amendment doctrine. Traditional first amendment doctrine addresses contexts of willing speakers and willing hearers, but a lot of important values get excluded in that context. There are arguments made today that the function of the registration provisions of the 1933 Act — and I just will briefly explain them — really go way beyond preventing a speaker from saying false or misleading things to an investor. The arguments are essentially that the registration provisions enhance the efficiency of securities markets in various ways and thereby reduce the cost to all people in the markets.

The argument is a complex one, but basically it runs along the following lines. Absent mandatory disclosure, there will not be an efficient amount of voluntary disclosure because information is a public good and the owner of information cannot control its use or generate the full profits from creating it. Left free, a company may well decide not to disclose certain information because disclosure will help other firms in the industry raise capital. The market may thus, absent compulsory disclosure, generate too little or too much information. It has been claimed that before the enactment of the 1933 Act there were fewer analysts, many of whom were doing duplicative work, and because they were doing duplicative work, were not producing as much as they could. They were thus producing too much duplicative information, but because there were so few of them, they were producing too little. And it is claimed that the number of analysts has proliferated greatly since the legislation was put into effect.<sup>4</sup>

Thus, the function of securities legislation transcends ordinary discourse between a speaker and an audience. It mandates standard disclosure for all the firms it governs, so every firm is assured that its competitors and everyone else will generate and disclose information, too. It is analogous to governmentally defined weights and measures because it insures that everyone makes standardized disclosures. The fact that the disclosure is limited to historic costs, which can be precisely defined, allows

---

<sup>4</sup> See generally R. CLARKE, *CORPORATE LAW* 756-59 (1986); Coffee, *Market Failure and the System*, 70 VA. L. REV. 717 (1984); and Easterbrook & Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984).

firms to comply at a low cost. The legislation provides other efficiencies such as prior administrative review and safe harbors. By prohibiting sales without a written prospectus, it reduces the number of claims of oral misrepresentation. Periodic disclosure by large companies eliminates the problem of the waiting period as to them. It can be argued that all of this reduces the amount of litigation involved in issuing securities and leads to a disclosure that is helpful and does eliminate a lot of duplicative work. I think it's very hard to take those kinds of arguments into account when limiting first amendment analysis to speakers and audiences.