VIEWPOINT DISCRIMINATION AND COMMERCIAL SPEECH

*Robert C. Post**

Martin Redish's argument, if I grasp it correctly, is that the failure to extend "*full* First Amendment protection"[1] to commercial speech essentially amounts to "a form of impermissible viewpoint discrimination undermining of the very core of what the First Amendment is all about."[2] So far as Redish is concerned, viewpoint discrimination is rightly regarded as "the most universally condemned threat to the foundations of free expression"[3] because the prohibition of viewpoint discrimination prevents the regulation of expression from degenerating into "a struggle for political power."[4] "There can be no exceptions to the constitutional bar of viewpoint-based regulations," Redish writes, "because to permit one exception is effectively to permit all viewpoint-based regulations."[5]

I must confess that despite my great admiration for Martin Redish I am in complete disagreement with this argument. There is much I could say about our differences, but in this brief comment I shall confine myself to two points: First, the concept of "viewpoint discrimination" is too confused and uncertain to carry the weight that Redish imposes on it. Second, even if an intelligible meaning could be given to the idea of viewpoint discrimination, there are good, non-viewpoint-based reasons for extending to commercial speech forms of protection that differ from those extended to political speech.

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* David Boies Professor of Law, Yale Law School.

1. Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 68 (2007).

2. *Id.* at 108.

3. *Id.* at 69.

4. *Id.* at 107.

5. *Id.* at 109–10.

I. THE MEANING OF VIEWPOINT DISCRIMINATION

A commonsense understanding of the prohibition against viewpoint discrimination is that government should be prevented from intervening into an ongoing political controversy by silencing one side to the dispute. I would have thought, therefore, that Scenario 1 would represent a paradigmatic example of viewpoint discrimination:

> *Scenario 1*: A socialist who is running for President of the United States condemns the war in Iraq and urges citizens not to volunteer for the military. As a result, military recruitment drops precipitously. The government prosecutes the candidate on the basis of a statute that prohibits interference with the conduct of an ongoing war.[6]

Redish, however, seems to question whether Scenario 1 is properly an example of viewpoint discrimination. He writes that "the concept of viewpoint discrimination as employed in First Amendment analysis . . . is confined to governmental penalizations of expression for no reason other than disagreement with or disdain for the normative views expressed."[7] Redish seems to think that viewpoint discrimination is *exclusively* about the reason or motivation for government intervention; it is not about what the government actually does. Because in Scenario 1 the government does not penalize the speech of the candidate "for no reason other than disagreement with or disdain"[8] for the candidate's views, but instead for the reason that the candidate is in fact interfering with the prosecution of a war, Scenario 1 does not meet Redish's definition of viewpoint discrimination.

Although the definition offered by Redish is similar to that proffered in some Supreme Court opinions, it is untenable. The definition is so narrow and restricted that it would drain the concept of viewpoint discrimination of all practical value. Defined as Redish would define it, the concept of viewpoint discrimination would not even reach core cases like Scenario 1, much less accomplish the far-reaching work that Redish seeks to attribute to it in the present article.

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6. *See* Debs v. United States, 249 U.S. 211, 212 (1919).

7. Redish, *supra* note 1, at 110 n.121.

8. *Id.*

Redish knows this, which is why in his article he attempts to load the concept of viewpoint discrimination with meanings that are quite distinct from his definition. He argues, for example, that the distinction between "'harms' that flow from illegal . . . behavior, on the one hand, and harms that flow from . . . lawful behavior"[9] is relevant to the presence of viewpoint discrimination. But this distinction has nothing whatever to do with Redish's definition, which renders the nature of the harm regulated by the government irrelevant to existence *vel non* of viewpoint discrimination. Redish's definition identifies a regulation as viewpoint neutral so long as the government enacts it to avert harm rather than "for no reason other than disagreement with or disdain for the normative views expressed."[10] It is also mystifying why Redish classifies government regulations that suppress "speech . . . because of who the speaker is" as a "form of indirect viewpoint discrimination."[11] So long as different speakers can cause different harms, and so long as government attempts to prevent the harm caused by different speakers, such regulations would not seem to meet Redish's definition.

One is led to ask why Redish might propose such a uselessly narrow definition of viewpoint discrimination. I think it is because he is concerned about a case like Scenario 2:

> *Scenario 2*: *X* is one of a small minority of dentists who strongly believes that mercury amalgam fillings harm patients. *X* recommends that his patients replace their mercury amalgam fillings with gold or composition fillings. The official state dental association, which believes that mercury amalgam fillings are safe, threatens *X* with the loss of his license if he continues to give this advice to his patients. The association believes that replacing mercury amalgam fillings is professionally irresponsible because it will subject patients to considerable risk for no scientifically measurable benefit.[12]

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9. *Id.* at 115.

10. *Id.* at 110 n.121.

11. *Id.* at 117.

12. This scenario is based upon real cases that are discussed in Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 ILL. L. REV. 939, 947–50.

In Scenario 2 as in Scenario 1, the government suppresses one side of a public debate in order to avert harm.

Scenario 2, however, poses an awkward dilemma for Redish. Scenario 2 describes a form of legal regulation that is certainly constitutional and that happens every day throughout the United States. There are many forms of regulation that are analogous to Scenario 2. Consider the regulation of legal malpractice, which penalizes lawyers' opinions which are said not to meet "professional" standards. Consider prison administrators that permit inmates to invite outside speakers who oppose drug use but not speakers who advocate drug use. Consider what would happen if President Bush were to fire Secretary of State Rice because she stated in public that the Iraq war was a mistake.[13]

My guess is that Redish is unwilling to acknowledge that the regulation at issue in Scenario 2 constitutes viewpoint discrimination because that would imply that viewpoint discrimination happens routinely and constitutionally throughout the United States, and Redish wishes to maintain that viewpoint discrimination is universally condemned and everywhere unconstitutional. He thus offers instead an impossibly narrow and useless definition of viewpoint discrimination that would exclude even Scenario 1 and that is so limited that he refuses to abide by it even in his own article.

Redish is actually quite uncertain about the meaning of viewpoint discrimination, and in the course of his article he offers many different descriptions. The account I find most attractive is the one he develops in the section of his paper entitled "The Essential Characteristic of Viewpoint Discrimination."[14] Redish does not in this section define viewpoint discrimination in terms of "disagreement" or "disdain." He instead considers regulations that impose what he calls "First Amendment selectivity"[15]—by which I think he means regulations that suppress one side to a dispute—and

13. Redish seeks to distinguish this example because it involves "government subsidies and benefits," Redish, *supra* note 1, at 109–10 n.120, rather than "coercive regulations and prohibitions." *Id.* at 109. But the attempted distinction does not hold. Firing Rice is quite distinct from denying her a subsidy or a benefit. Consider, for example, what would happen if the State of California were to fire a Berkeley professor because she spoke out against the war.

14. *Id.* at 113–14.

15. *Id.* at 113.

he asks whether such regulations do so for reasons "that are 'internal' to the First Amendment."[16] Redish explains that

> Viewpoint discrimination . . . is grounded in considerations that are "external" to the First Amendment. By this assertion, I mean that the driving normative force has nothing to do with a good faith effort to determine the process or structural values of free expression. Rather, it flows from normative premises determined by entirely unrelated factors of political, social, economic, moral, or religious belief or concerns that are wholly external to the First Amendment itself.[17]

This account of viewpoint discrimination seems to me quite plausible. It suggests that the root idea of viewpoint discrimination is not whether the state suppresses views with which it disagrees, but instead whether selective state interventions can be justified by considerations that are "internal" to the First Amendment. I interpret this to mean that the question raised by viewpoint discrimination is whether selective government regulations are justifiable under the First Amendment.

This way of looking at the problem would explain why Scenario 1 seems to be an example of viewpoint discrimination. In Scenario 1, the government is attempting to avert harm by selectively intervening in public discussion to prevent speech from being persuasive. Because persuasion is a property of public debate that the First Amendment is especially concerned to protect, the intervention in Scenario 1 cannot be justified by considerations internal to the First Amendment. Although in Scenario 2 the government also selectively intervenes to avert harm that may be caused by persuasion, communications between dentists and patients are not only outside of public debate, they occur in a context in which the First Amendment permits society to prize truth and competence above persuasiveness.[18] The intervention in Scenario 2 is thus not considered viewpoint discrimination.

This way of conceptualizing the problem of viewpoint discrimination is both flexible and subtle. But it implies that whether

16. *Id.*

17. *Id.*

18. For a discussion, see Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353 (2000).

a particular regulation is viewpoint-based depends largely upon one's theory of the First Amendment. To condemn a "selective" regulation as viewpoint discriminatory is another way of saying that the regulation makes distinctions that are "external" to a proper understanding of the First Amendment. The hard analytic work must therefore be done by theorizing the First Amendment. The fundamental question will always be whether a correct interpretation of the First Amendment permits or condemns particular selective interventions. The label "viewpoint discrimination" seems to be nothing more than a term of opprobrium that encapsulates conclusions reached by independent First Amendment jurisprudence.

If I am correct in this line of analysis, Redish's extended discussion of viewpoint discrimination does not add much to his fundamental point, which is that the First Amendment should be interpreted to extend full protection to commercial speech. It is to this more fundamental point that I shall now briefly turn.

II. THE CONSTITUTIONAL STATUS OF COMMERCIAL SPEECH

Redish begins his argument with a certain picture of how the First Amendment works. His premise seems to be that speech is entitled to "*full* First Amendment protection"[19] unless "principled analysis"[20] can justify exceptional treatment.

I have argued elsewhere that this picture of the First Amendment is fundamentally misguided.[21] The problem with Redish's picture becomes apparent if we ask how we can know whether any particular form of communication should qualify as speech for purposes of the First Amendment. We might ask, for example, whether video games are protected speech. What about scientific research? Or computer source code? These questions cannot be answered by reference to the text of the First Amendment or to the original intent of the Framers. They can be answered only by specifying the values which the First Amendment serves and by determining whether the particular forms of communication at issue advance these values.

If I am right to conclude that First Amendment inquiry must proceed in this manner, Redish's underlying picture of the First

19. Redish, *supra* note 1, at 68.

20. *Id.* at 76.

21. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995).

Amendment cannot be correct. The questions I have identified imply that the First Amendment does not protect "speech as such,"[22] but only speech that serves relevant First Amendment values. The function of First Amendment protection is to ensure that speech can continue to serve these values. Because different forms of speech will serve these values in different ways, constitutional protection will extend differently to different forms of speech. It therefore makes little sense to speak of speech as being "fully" protected; what matters is that speech receive the forms of protection necessary to guarantee that it will continue to serve relevant First Amendment values.

Redish believes, and I agree, that "the First Amendment is a logical outgrowth" of "the democratic process."[23] We may thus ask how commercial speech serves the constitutional value of democracy. This question can be answered only if we have in hand a theory of constitutional democracy. Redish asserts that because democracy is ultimately about "self-development and self-determination," "private self-government" is a fundamental goal of constitutional democracy.[24] His basic point is that commercial speech serves this goal and as a consequence should receive the same constitutional protection as public discourse.

I disagree with Redish's premise. In my view, democracy is not about individual self-government, but about collective self-determination. Collective self-determination both requires[25] and is distinct from individual autonomy.[26] Democracy is a way of constructing government so that citizens can enjoy the political goods of living together and the fruits of social cooperation. It is a mistake to conflate democracy with libertarianism. Democracy may require that individual autonomy be limited so that a collective will

22. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 478 (1997) (Souter, J., dissenting).

23. Redish, *supra* note 1, at 111.

24. *Id.* at 81.

25. *See* Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997); Robert Post, *Democracy and Equality*, 603 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCIENCE 24 (2006) [hereinafter Post, *Democracy and Equality*].

26. *See* Robert Post, *Between Democracy and Community: The Legal Constitution of Social Form*, *in* DEMOCRATIC COMMUNITY: NOMOS XXXV, at 163 (John W. Chapman & Ian Shapiro eds., 1993).

can be forged and implemented,[27] and it may require that individual autonomy be limited so that the common values that underwrite the enterprise of collective self-determination can be maintained.[28] Most importantly, democracy requires individual autonomy only to the extent that citizens seek to forge "a common will, communicatively shaped and discursively clarified in the political public sphere."[29] Unlike various forms of liberalism, democracy does not focus on the protection of individual autonomy outside of participation within this public sphere.[30]

What Redish calls "*full* First Amendment protection"[31] is the constitutional standard by which the First Amendment determines the constitutionality of restrictions on speech that is deemed necessary to forge a common, democratic will. Elsewhere I have used the term "public discourse"[32] to designate this kind of speech. Within public discourse, the First Amendment protects speakers' rights so that speakers can participate as they deem necessary in the formation of public opinion. This protection follows from the premise that the purpose of the First Amendment is to protect processes of democratic legitimation, and from the claim that autonomy of participation in public discourse is necessary for democratic legitimation.[33] Speech outside of public discourse, by contrast, does not merit these protections, because autonomy of speech in such contexts is not necessary to ensure the democratic legitimation safeguarded by the First Amendment. Ultimately this is what distinguishes Scenario 1 from Scenario 2. For a citizen to oppose a war in public discourse is to participate in the process of democratic self-determination; for a dentist to recommend dental treatment to a patient is not.

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27. This is what would justify President Bush's firing of Secretary of State Rice if she were to speak in a manner inconsistent with the achievement of administration policies. For a full explanation, see Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

28. These complicated questions are discussed in ROBERT POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995).

29. 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 81 (Thomas McCarthy trans., Beacon Press 1987) (1981).

30. Various forms of individual autonomy may be required, however, in order to assure the possibility of participation within the public sphere.

31. Redish, *supra* note 1, at 68.

32. *See* Post, *Democracy and Equality*, *supra* note 25, at 26.

33. *See id.* at 27.

My own understanding of the constitutional status of commercial speech flows from this analysis. I have explained my views at length elsewhere,[34] and I will not repeat those views here. Suffice it to say that I regard communications that seek to sell toothpaste as different from communications that seek to influence the formation of democratic public opinion. I therefore regard commercial speech as distinct from public discourse, and I conclude that it should not receive the constitutional protections that accrue to public discourse.

Commercial speech does, however, circulate information to the public sphere within which democratic public opinion is formed, and this information might well be relevant to the formation of public opinion. Thus, "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising."[35] Commercial speech is protected so that citizens can receive information; it is not protected to insure that commercial speakers retain the autonomy to express themselves as they choose. This explains why commercial speech is routinely and constitutionally regulated to compel the disclosure of accurate information. Mandated disclosures of this kind would be anathema within the domain of public discourse, where the autonomy of a speaker to communicate or not to communicate is strictly protected.

Were Redish's conclusions accepted, the entire contemporary regulatory regime for advertising, which seeks to protect consumers by imposing content-based restrictions that prohibit "misleading" advertising, would be undermined. So also would be the vast regulatory apparatus that presently seeks to promote transparent and efficient markets through labeling requirements and other forms of mandated disclosures. Of course this is not a conclusive argument against Redish's position, but it does strongly suggest that society as a whole does not regard commercial speech as within the domain of public discourse.

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34. *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000); Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods, Zauderer, *and* Abood, 40 VAL. U. L. REV. 555 (2006).

35. Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n, 447 U.S. 557, 563 (1980) (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)).

I should note that the argument I am advancing about the constitutional status of commercial speech is not what Redish calls "ideological."[36] It is not hostile to commercial speech. The argument is also not what he calls "intuitionist."[37] The argument I am advancing seeks to apply a principled understanding of the purposes of the First Amendment. It is true that the argument does require a decision maker to make value judgments about which speech acts form part of public discourse and which do not. This is because the boundaries of public discourse must always and inevitably be set by normative criteria.[38] Such value judgments commonly occur in First Amendment analysis, as for example when courts determine whether or not communication is a "matter of public concern."[39] I do not think that Redish means to be so extreme as to imply that all legal value judgments are "intuitionist," for he himself asserts that First Amendment principles are to be determined by reference to the values that the First Amendment seeks to protect. The position I am advancing is therefore what Redish would call "rationalist."[40]

I rest my argument on a claim about the purposes of the First Amendment and on a claim about the precise ways in which speech serves to advance these purposes. The argument seeks to explain why the Court has concluded "that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'"[41]

Redish will no doubt disagree both with my explanation of the meaning of democracy and with my explanation of the ways in

36. *See* Redish, *supra* note 1, at 106.

37. *See id.* at 96.

38. *See* Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 667–84 (1990).

39. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 789 (1985) (discussing First Amendment protection in the context of credit reporting); Connick v. Myers, 461 U.S. 138, 149 (1983) (discussing First Amendment protection afforded public employees' communications); Gertz v. Robert Welch, Inc., 418 U.S. 323, 362 (1974) (discussing First Amendment protection afforded defamatory comments directed toward public persons).

40. *See* Redish, *supra* note 1, at 80.

41. Bd. of Trs. of State Univ. v. Fox, 492 U.S. 469, 477 (1989) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

which freedom of speech is necessary for democracy. From Redish's perspective, the account of commercial speech I advocate is underinclusive, for it would not protect commercial speech as if it were public discourse. Redish invokes the specter of viewpoint discrimination because of this underinclusiveness. But in truth the charge of underinclusiveness in this context signifies nothing more than that Redish and I disagree about what constitutional democracy is and how it must be served by freedom of speech. Such disagreements are the meat of academic discussion. It simply confuses such discussion to appeal to opprobrious and confused labels like viewpoint discrimination.