

Conversations With...

Summer 2005



Washington Legal Foundation
Advocate for freedom and justice®

The Honorable Dick Thornburgh Floyd Abrams Eric Sarner

The Issue: Commercial Free Speech

This edition of Washington Legal Foundation's CONVERSATIONS WITH examines the ability of business enterprises to communicate about their products and services - a highly contentious issue implicating one of our Constitution's most cherished rights. Former Attorney General of the United States Dick Thornburgh moderates an informative discussion with two leading First Amendment experts - Floyd Abrams of *Cabill Gordon & Reindel LLP* and Eric Sarner of *Skadden, Arps, Slate, Meagher & Flom LLP*. The participants examine the Supreme Court's past and current approach to advertising restrictions, recent government regulatory threats to commercial speech, and why consumers and our economy would benefit if courts conferred greater protection to such speech.

Governor Thornburgh: Floyd, let's start out with a seemingly basic question - what is "commercial speech"?

Mr. Abrams: It's a surprisingly hard question since the definition of "commercial speech" has varied through the years. However, I think it is pretty well established by now that commercial speech is speech which

relates to the purchase or sale of commercial goods. Such speech does not include speech about public policy issues related to commercial goods. I view such speech - and I believe the courts do as well - as more political or social in nature than commercial - and thus think it's entitled to the full panoply of First Amendment rights afforded to the articulation of any political or social view. But speech that is simply related to the qualities of a product or its price would be considered commercial speech.

Governor Thornburgh: Eric, why have the courts struggled with defining speech as "commercial," versus non-commercial, and why is that distinction important?

Mr. Sarner: To answer the second part of your question first, the distinction is very important because under the current approach, speech that is deemed commercial is entitled to less protection than non-commercial speech. The key is the test: if you apply "strict" scrutiny to a government regulation, you can be pretty well assured that it will fail, while the "intermediate" scrutiny standard the U.S. Supreme Court promulgated for commercial speech in the 1980 case *Central Hudson Gas & Electric Corp. v.*



Dick Thornburgh
*Kirkpatrick & Lockhart
Nicholson Graham LLP*



Floyd Abrams
Cabill Gordon & Reindel LLP



Eric Sarner
*Skadden, Arps, Slate,
Meagher & Flom LLP*

Public Service Commission does not invariably bring about the same result.

Back to the first part of your question, I think that the struggle with finding the appropriate demarcation between commercial and non-commercial speech results from a general, historical inclination to treat advertising and commercial solicitations as somehow less important - that is, less worthy - in the hierarchy of speech protection. For instance, I think there is a fear among some of the current Justices of the Supreme Court that government will have a hard time protecting consumers if they provide the highest level of protection for what many see as advertising. In addition, some Justices seem to believe regulation of commercial speech is less troubling than regulation of political speech because the former is more objectively verifiable; a related school of thought is that commercial speech, because it is profit-based, is hardy and more able to withstand regulation. At the same time, however, even a pure commercial pitch can express an idea of the good life by suggesting that consumerism and capitalism are valid life choices, and thus may be considered a form of political expression.

Governor Thornburgh: So the Supreme Court provides commercial speech some protection, but not the same heightened level of respect it provides to political or artistic expression. Floyd, from a doctrinal perspective, why does commercial expression receive less protection than non-commercial speech? Should it receive even an intermediate amount of protection?

Mr. Abrams: Commercial speech received no constitutional protection until the late 1970s when advertisements for abortions and then drug prices were held protected by the First Amendment. Some members of the Supreme Court have treated commercial speech as simply less valuable in a democratic society than even the least significant political speech. My view is that advertising always deserved broad First Amendment protection, at least

“Suppressing speech based solely on the identity of the speaker is a particularly egregious form of content suppression.”

Eric Sarner

the sort of protection that what we refer to as "intermediate scrutiny" provides.

Governor Thornburgh: Eric, do you find these reasons compelling? What have constitutional experts had to say about this distinction?

Mr. Sarner: From a philosophical perspective, I accept the abstract proposition that speech proposing a commercial transaction - for example, a newspaper advertisement listing prices or announcing a "one-day sale" - seems to differ in quality from an op-ed article about foreign policy. My concern, however, is that acceptance of this proposition as a truism opens the door to government regulation of speech

that is far broader than the actual commercial transaction itself; it is almost an invitation to suppress speech and ideas that public officials dislike. We have seen this in connection with various efforts to restrict advertising of certain products.

In my view, suppressing speech based on its content presumptively violates the First Amendment, and suppressing speech based solely on the identity of the speaker is a particularly egregious form of content suppression. In pursuing legitimate policy goals, the government should not be allowed to declare a topic off-limits or silence the views of speakers with whom it disagrees; in this respect, paternalism is precisely the opposite of the marketplace of ideas contemplated by the First Amendment. As the Supreme Court stated in *Va. State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."

Commentators quarrel with the seeming impartiality of regulating commercial messages. As Professors Ronald Rotunda and John Nowak have noted, so-called objective commercial regulation typically benefits one group at the expense of another. In that case, they say, why should we expect an impartial result when courts rule one way or another? And, as federal appeals court Judge Alex Kozinski has noted with respect to the seeming objectivity of commercial speech, scientific speech is objective - but no one thinks it should receive a lower level of protection.

Besides, he adds, why permit increased regulation of speech that can be countered fairly easily with additional speech?

Ultimately, I believe that a better approach would be to look at the driving force behind regulation and apply strict scrutiny whenever the basis for the regulation is an attempt to restrict a speaker or a message because of a fear that people may act in response to the speech.

Governor Thornburgh: Floyd, whose rights are at issue in commercial speech cases, those of commercial speakers to speak, or those of consumers?

Mr. Abrams: Both. The rights of commercial speakers are real, and such speakers frequently sue to vindicate their rights. But the ultimate winner when the First Amendment is held to protect commercial speech is the consumer since it is the consumer who can become better informed, can pay cheaper prices or otherwise use commercial speech as he or she sees fit when such speech is protected.

Governor Thornburgh: Despite the criticisms you have mentioned, the current Supreme Court has adhered to the four-part test enunciated 25 years ago in the *Central Hudson* case. Eric, what does this test examine?

Mr. Sarner: The Supreme Court's *Central Hudson* test turns on an analysis of the following four factors: (1) whether the expression is protected by the First Amendment; (2) whether the governmental interest asserted is substantial; (3) whether the restriction directly advances the asserted interest;

and (4) whether the restriction is not more extensive than necessary to serve the asserted interest. Practically speaking, the first part of the test is answered in the affirmative if the speech addresses lawful conduct and is not misleading. As to the second part, it is hard to imagine a legitimate governmental interest that is not substantial. It is interesting to note that while some of the Justices have been critical of the test, the Court repeatedly has explained that it need not "break new ground" by deciding whether strict

“The ultimate winner when the First Amendment is held to protect commercial speech is the consumer.”

Floyd Abrams

scrutiny should be applied to commercial speech restrictions because the *Central Hudson* standard generally provides an appropriate resolution.

Governor Thornburgh: With regards to the first part of the test, how have courts determined when a commercial message is "misleading"?

Mr. Abrams: In a common-sense sort of way. Courts take testimony, hear experts and make what often read like seat-of-the-pants rulings in this area. In some cases, it may be possible to dispose of some claims that a message is misleading at an early stage, such as on a motion to dismiss.

Governor Thornburgh: Some lawsuits against advertisers rely on the notion that advertisements are "unfair" and "misleading" under consumer protection laws. Are these claims aimed at circumventing the first part of the *Central Hudson* test, and do you think they will succeed?

Mr. Abrams: These claims certainly do seek to circumvent *Central Hudson*. The whole theory of that case - and, more broadly, of protecting commercial speech generally - is that a legislature cannot deprive an advertiser of the right to speak well of, or even tout, a product simply by legislatively defining particular advertisements as unfair or misleading. There must be real proof of that; otherwise, the promise of *Central Hudson* will not become a reality. In the end, I do not think that these efforts will succeed.

Governor Thornburgh: In general though, most challenges to commercial speech restrictions hinge on a court's application of the third or fourth prong of *Central Hudson*, correct?

Mr. Sarner: Yes. The real battle is fought with respect to the third and fourth prongs.

Governor Thornburgh: When considering the third prong of the test - that the restriction must directly and materially advance the state interest at issue - what type and what level of proof has the Supreme Court demanded of government regulators? Why is this part of the test so critical?

Mr. Sarner: To satisfy the third prong of the *Central Hudson* test, the Supreme Court has demanded more than "mere

speculation or conjecture." More specific information is required, such as reference to actual data or studies, although the Court has stated that it will allow reference to studies and to anecdotal evidence from different geographic regions in order to justify speech restrictions. The third prong is critical because it gives teeth to the entire *Central Hudson* standard. The third prong prevents potentially limitless restrictions on commercial speech in the name of asserted interests, requiring instead that the state prove that the harms it recites are real, and that the restriction will in fact alleviate them to a material degree.

Governor Thornburgh: As part of its third prong inquiry, the Supreme Court and some lower courts seem to have embraced the notion that generally, advertising stimulates demand. Floyd, is this a fair assertion? Are you concerned that starting the analysis with this assumption allows regulators too much latitude in proving their case under the third prong?

Mr. Abrams: I don't think it is a fair assertion. While advertising is often used to stimulate demand - and sometimes succeeds in doing so - it is also used to persuade people to switch brands in a particular market. I am concerned that any analysis which simply presupposes that advertising stimulates demand will short-change the protections that the First Amendment provides - or should provide - for commercial speech.

Governor Thornburgh: Many of the recent Supreme Court commercial speech cases have focused on an application of the fourth part of the

Central Hudson test - that the restriction must be no more extensive than necessary to serve the government's interest. What type and what level of proof has the Court required here?

Mr. Abrams: The Supreme Court has been inconsistent about the nature of the requirement imposed by the fourth part of the *Central Hudson* test. More recently, however, the courts have demanded a high level of proof that

"I am concerned that any analysis which simply presupposes that advertising stimulates demand will short-change the protections that the First Amendment provides."

Floyd Abrams

the government's interest cannot be served by means - particularly obvious ones - imposing less of an imposition on free speech. Where there are other means available to serve the government's interest that do not impinge upon free speech, it appears likely that the government will be barred from relying on speech restrictions to further its asserted goal. This is a major step forward in protecting First Amendment interests.

Governor Thornburgh: Protection of children or those too young to use certain products seems to be a primary

justification of many commercial speech restrictions imposed today. How have the courts dealt with such justifications in the past, and will that treatment continue in the future? I'd like both of your thoughts on this important issue.

Mr. Abrams: After initially deferring, probably too much, to legislative decision-making in this area, the Supreme Court has increasingly taken account of the interests of adults in having access to advertisements touting the sales of goods that adults are free to purchase, even if some children may also be exposed to the materials. In this respect, recent cases dealing with the Internet in a non-commercial speech context seem relevant. If the Supreme Court will not allow, as it thus far has not, limitations on the Internet to protect children from pornography because of the constitutional right of adults to have access to such material, it seems to me unlikely that the Court will permit commercial speech directed primarily at adults to be substantially burdened simply because the speech may also be viewed by individuals who are not yet 18.

Mr. Sarner: It certainly has been the case that the protection of minors has been a prime justification for speech regulation. The Supreme Court has in several cases, however, held that this interest cannot override the interests of adults in receiving such information and the interests of those who wish to communicate with them.

For example, unintentional exposure of minors to communications intended for adults does not alter the basic First Amendment analysis. Most recently,

the Supreme Court addressed this issue in the context of communications about tobacco, and held in the *Lorillard Tobacco Co. v. Reilly* case that "[a]s the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication." And, as one leading case states, the interest in protecting minors may not lead to the level of discourse for adults being "limited to that which would be suitable for a sandbox." I think that this trend will continue, as the alternative - suppressing speech - is not particularly attractive.

Governor Thornburgh: Floyd, with regard to advertising that might be attractive to minors, what proactive steps can advertisers take to deflect regulators' and plaintiffs' lawyers' attention? For instance, what about voluntary advertising codes?

Mr. Abrams: Voluntary advertising codes are useful. For example, codes on video games have been of some use, and if that particular industry had an industry-wide standard, it would be helpful to address government attempts to regulate the advertising of such materials.

Governor Thornburgh: Advertising has long been a favorite target of public health regulators and activists seeking to alter the behavior of certain consumers. Obesity seems to be the next big issue. Floyd, do you foresee a major push to restrict promotion of food?

Mr. Abrams: Sure. Lawyers are lawyers and regulators regulate. There is no reason to think that the

promoters of certain types of food will not soon find themselves in the crosshairs of regulators.

Governor Thornburgh: Former Federal Trade Commission Chairman Timothy Muris wrote in *The Wall Street Journal* that permitting more speech, such as truthful health claims about foods, can aid in the fight against obesity. Might the FTC or the Food & Drug Administration take action along these lines?

Mr. Abrams: Maybe. So far, this has been an area in which government reg-

“The real issue is this: may government ban truthful and nonmisleading speech because of a fear that people may act on it? The answer from the Supreme Court in a wide array of settings has been no.”

Eric Sarner

ulators have been rather quiescent. However, so long as the health claims are true, they should be protected and it may well be the case that the FTC and the FDA agree with this.

Governor Thornburgh: Eric, in the framework of commercial speech values, what makes claims relating to health and health issues valuable? How should courts treat such claims?

Mr. Sarner: As an initial matter, I think that society is best served by robust discussions on a wide range of

topics, especially in an area as fundamental as health. To argue otherwise would run counter to the general proposition, exemplified by leading cases in this area, that people should be allowed to make their own decisions. As Justice Holmes noted in a different setting many years ago, "the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market."

The key constitutional question is whether or not the courts will apply strict scrutiny to efforts to restrict health-related claims. I believe they should, because the information sought to be communicated goes directly to the basic issue of health and certainly constitutes speech on a matter of public concern. The real issue is this: may government ban truthful and nonmisleading speech because of a fear that people may act on it? The answer from the Supreme Court in a wide array of settings has been no; paternalism is not an appropriate basis for restricting speech.

Governor Thornburgh: Some tobacco companies appear to be interested in making comparative claims, for example, that some cigarettes are safer than others, or that using smokeless tobacco is safer than smoking cigarettes. Eric, have government regulators weighed in on this?

Mr. Sarner: This issue arises from the concept of tobacco "harm reduction," which is an additional approach to tobacco control that recognizes that not all tobacco products are the same, and posits that cigarette smokers, if

they do not quit or use medicinal nicotine, should consider what these researchers view as other, less harmful forms of tobacco such as smokeless tobacco. As to government regulators, one smokeless tobacco company sought guidance from the FTC with respect to the acceptability of communicating the conclusions of researchers concerning tobacco harm reduction. There also were two congressional hearings in 2003 on the topic, including one at which then FTC Chairman Muris testified. At the hearing, he testified that truthful and substantiated claims for reduced harm tobacco products could provide a substantial health benefit to those consumers who cannot or will not quit smoking. From the FTC's perspective, the agency probably will be monitoring developments in order to carry out its obligations.

Governor Thornburgh: Let's stay with the speech and public health aspect for a moment. Floyd, what is FDA's track record in regulating the flow of information to patients and doctors?

Mr. Abrams: I would describe it as mixed. There have been several court decisions addressing the FDA's regulation of information. In one case a few years ago, the D.C. Circuit held unconstitutional FDA restrictions on food health claims that required such claims to be supported by "significant scientific agreement." More recently, the Supreme Court in 2002 struck down a federal ban on advertising certain pharmacy drug mixing services. About that same time, however, the FDA requested comments on these types of issues in an attempt to ensure

that its regulations, policies, and practices comply with the First Amendment. And recently, the FDA announced that it would be looking closely at direct-to-consumer communications.

Governor Thornburgh: There's been a lot of news lately about U.S. Attorneys and state attorneys general pursuing civil and even criminal investigations of drug makers' efforts to educate doctors about the "off-label" use of their products. Are these enforcement officials treading on protected speech rights? What about the criminal angle, does that concern you?

Mr. Abrams: It depends on whether what is involved can fairly be referred to as "education" or is simply pressure on doctors. If it is the former - notwithstanding that the intent of the drug makers is to sell their products - there should be definitive First Amendment protection. It would be particularly troubling from a constitutional perspective if the government began using criminal sanctions to punish accurate statements made by drug makers to doctors.

Governor Thornburgh: What are your thoughts on government-mandated "counter-speech," where government either forces businesses to run ads that place their products in a negative light or requires advertising mediums to carry "educational" messages in proximity to product ads?

Mr. Abrams: I find this sort of regulation particularly disturbing. The very notion that entities are required to denounce - or at the least seem to

denounce - their own products is offensive and potentially subject to legal challenge. I know that such remedies have been affirmed in the past, but I remain concerned that such requirements are antithetical to our general distaste for government-imposed compelled speech.

Governor Thornburgh: Let's go back to the critical question of what constitutes "commercial speech." Wasn't this the key issue in one of the most celebrated speech cases of the past few years, *Nike, Inc. v. Kasky*? What was the test that the California Supreme Court devised to distinguish political from commercial speech?

Mr. Sarner: In the *Nike* case, the California Supreme Court held that Nike's statements defending its labor policies constituted commercial speech and were thus subject only to the protections afforded by *Central Hudson*. In doing so, the California Supreme Court defined commercial speech very broadly, including in my view any speech by a business that relates to matters of public concern. According to the *Nike* Court, Nike's speech constituted commercial speech because its "intended audience was primarily the buyers of its products, and because the statements consisted of factual representations about its own business operations." In that Court's view, efforts by a product seller to make consumers think positively in the hope of fostering goodwill and sales make the communication commercial.

Governor Thornburgh: Floyd, why did the U.S. Supreme Court accept Nike's request for review, and then dismiss the case? Were you surprised

by Justice John Paul Stevens's explanation of the dismissal, given his track record on commercial speech?

Mr. Abrams: I think there were simply too many complexities in the case for a number of members of the Court. For example, the issue of the applicability of something like the "actual malice" test of *New York Times v. Sullivan* had not even been argued below but was raised powerfully in the Supreme Court. Moreover, the facts of the case seemed to some members of the Court to require a closer parsing than the record of the case permitted. That said, however, I found Justice Stevens's explanation of the dismissal to be unpersuasive and I view the Court's difficulty in deciding the case as troubling. It really wasn't that difficult - at least as I see it.

Governor Thornburgh: After the California Supreme Court's ruling, are businesses safe to speak out on public issues or even promote themselves as good corporate citizens?

Mr. Sarner: I think that the California Supreme Court's ruling has caused businesses to think twice about speaking out in any number of ways as well as explaining why they are good citizens. I imagine companies have consciously avoided making certain statements because of a fear that the California approach to commercial speech will be applied to their conduct. What company wouldn't want to foster goodwill by talking about what it does? Every time I open the newspaper and see an open letter to consumers, or some other public communication by a company, I wonder whether or not some enterprising plaintiff's lawyer or activist is going to assert a claim.

Governor Thornburgh: So in today's legal and regulatory environment, where activists and trial lawyers openly demonize businesses and their products to advance their agendas, businesses are, in essence, forced to fight with one hand tied behind their back, correct?

Mr. Sarner: That is the perfect metaphor. We are left with street fighting rules for the activists and trial lawyers and Marquis of Queensbury rules for the companies. In the long run, of course, consumers suffer because the flow of information is artificially limited by a fear of claims.

Governor Thornburgh: Floyd, a moment ago you mentioned the Internet's impact in situations similar to *Nike*. What broader impact will advancements in how we transmit and receive commercial information have on speech regulation and challenges to such restrictions?

Mr. Abrams: At the least, the technological advances will complicate things. I hope that we will not fall prey to a least-common-denominator approach, which will effectively permit more regulation, because commercial information appears in more places. The opposite should be true: because information is transmitted on the Internet, the courts should (and may well) ultimately apply a test which does not simply apply local law in any community into which the commercial information transmitted on the Internet appears.

Governor Thornburgh: One last question for both of you - where do you see the commercial speech doctrine headed in the next decade? Will the courts continue to view commercial

expression as being of lesser value than other speech, and is there a chance commercial speech restrictions will one day receive the same "strict scrutiny" as political or artistic speech?

Mr. Sarner: A few years ago I thought we were headed in a positive direction: the application of strict scrutiny whenever the speech restriction is designed either to keep people in the dark or limit discussion. The Supreme Court seems, however, to have become relatively comfortable using *Central Hudson* because it generally achieves the "right result" and avoids a tension I alluded to at the beginning of our discussion - the fear that we may not be able to control advertising if we apply strict scrutiny. I hope that we will reach the point at which any government effort to suppress speech because it is disfavored is governed by strict scrutiny.

In the *Thompson* case two terms ago, the Supreme Court may have given some hint of where it is headed. While the Court applied the *Central Hudson* standard rather than strict scrutiny to commercial speech restrictions, the opinion is perhaps the clearest application to date of a rigorous *Central Hudson* test, particularly with respect to the fourth prong.

The decision reaffirms, in strong language, earlier and more recent decisions granting protection to commercial speech, and casts a shadow on some of the more equivocal decisions in this area. The decision further confirms that there is, in practice, only a slight distinction - if one at all - between a rigorous application of *Central Hudson*

and strict scrutiny when it comes to regulations that paternalistically seek to restrict the communication of truthful information to consumers. On a systemic level, the majority opinion supports the notion that the First Amendment may act as a bar to wide-ranging administrative and regulatory action. I would note that Justice Breyer appears concerned about this, and fears that an "overly rigid" commercial speech doctrine could be used to substitute constitutional decision-making for legislative and regulatory decisions.

Mr. Abrams: I think there will be more protection for commercial speech in the future. I agree with Eric that it is tempting for the courts to continue to use a *Central Hudson*-rooted analysis since it does so often reach the "right" result. I think, however, that in future cases, it will neither be clear what result is "right" nor that *Central Hudson* can lead us there. When that happens, I think we are likely to see more protection rather than less and almost certainly more protection than *Central Hudson* offers on its face. As for whether commercial speech restrictions will be reviewed under a "strict scrutiny" test, I think not, but the intermediate scrutiny standard currently in use will likely be applied in a far more rigorous manner, approaching virtual strict scrutiny.

Washington Legal Foundation's (WLF) seventh and newest publication format, CONVERSATIONS WITH, provides an occasional forum for leading experts from business, government, academia, and the legal profession to discuss current legal policy issues. In spontaneous and informal question-and-answer

conversations, our participants give frank thoughts on a wide range of important contemporary subjects. To receive information about WLF publications, contact Glenn Lammi, Chief Counsel, Legal Studies Division at (202) 588-0302 or visit www.wlf.org.

Biographies

The **Honorable Dick Thornburgh** is a former Attorney General of the United States, Governor of Pennsylvania, and Under-Secretary-General of the United Nations. He is currently Counsel to the law firm *Kirkpatrick & Lockhart Nicholson Graham LLP*, and Chairman of Washington Legal Foundation's Legal Policy Advisory Board.

Floyd Abrams is a partner in the New York law firm of *Cabill Gordon & Reindel LLP* and is the William J. Brennan, Jr. Visiting Professor of First Amendment Law at the Columbia Graduate School of Journalism. His book entitled *Speaking Freely: Trials of the First Amendment* was published by Viking Press this year. Mr. Abrams was co-counsel to *The New York Times* in the *Pentagon Papers* case and has represented *The Times*, *Time Magazine*, *Business Week*, *The Nation*, *Reader's Digest* and other clients in trials and appeals.

Eric S. Sarnier is Counsel in the New York office of *Skadden, Arps, Slate, Meagher & Flom LLP*. He counsels clients on state and federal regulatory matters, including matters involving state attorneys general, First Amendment and related communications issues, and the liability aspects of corporate transactions. He was lead counsel for one of the petitioners in

Lorillard Tobacco Co. v. Reilly. The views and opinions expressed here by Mr. Sarnier do not necessarily represent those of *Skadden Arps*.