Conversations With...

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The Intellectual Godfather of Commercial Speech Protection

The Honorable Jay B. Stephens
Professor Martin H. Redish

In this edition of Washington Legal Foundation's CONVERSATIONS WITH, the Chairman of WLF's Legal Policy Advisory Board, **Jay B. Stephens**, directs a discussion with **Martin H. Redish**, the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University Pritzker School of Law, on the evolution of First Amendment protection for commercial speech and the intensifying threats such expression faces today from judicial, legislative, regulatory, and academic critics.

Introduction

In a 1971 GEORGE WASHINGTON LAW REVIEW article written as a Harvard Law School student, Martin Redish made a compelling case that after nearly two centuries of being treated as free speech's neglected stepchild, commercial speech merited full First Amendment protection. Such speech, the article argued, advances the same First Amendment interest in self-governance as does the free flow of political information.

Five years later, the US Supreme Court finally embraced constitutional protection for commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*. Justice Blackmun's rationale for such protection echoed Mr. Redish's scholarly argument: "[T]he consumer's interest in the free flow of commercial information … may be as keen, if not keener by far, than his interest in the day's most urgent political debate."

The decisions that followed the 1976 breakthrough in *Virginia Pharmacy* made clear, however, that the Court would not scrutinize restrictions on commercial speech as intensely as curbs on political or scientific expression. The Burger Court developed and applied the four-part "intermediate scrutiny" test set out in the 1980 *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* decision with generally positive results for commercial speech. Similar results continued under the Rehnquist Court.

The First Amendment fortunes of commercial speech have been brighter than ever during the tenure of Chief Justice Roberts, however, even though the Court has continued to apply the same four-part "First Amendment Lite" test, as Professor Redish has called it. The far more robust protection seen in rulings such as *Sorrell v. IMS Health*, decided in 2011, has not deterred local, state, and federal regulators and legislators from targeting commercial speech, especially as a means of chilling demand for products and services they disfavor. Greater judicial support

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for commercial speech has also triggered an ideologically-driven backlash from some respected academics and media opinion-leaders.

WLF discusses these developments and more with Professor Redish, whose scholarship continues to focus on the value of commercial speech and why the Supreme Court's justification for extending any lesser protection to such expression remains intellectually unstable.

Jay Stephens: Professor, much of what you advocated in your 1971 GEORGE WASHINGTON LAW REVIEW article has transpired. What motivated you to take on that issue as a law student, and has it been gratifying to see the Supreme Court embrace many of your ideas?

Professor Martin Redish: My motivations in writing it can be viewed on two levels. On one very practical level, I knew as a law student that I wanted to go into academia, and I wanted to find a "man bites dog" topic that would contain a thesis counterintuitive to all preexisting scholarship so I could make something of a splash. Mission accomplished on that front, I suppose.

On a more intellectual level, I had studied free-speech theory as an undergraduate at Penn and was both fascinated and troubled by the political-speech theory of Alexander Meiklejohn. Early in my third year in law school, as I searched for a topic, I thought about Meiklejohn's theory that the First Amendment was not about a speaker's right to speak but rather solely about citizens' ability to receive information and opinion to enable them to perform their collective self-governing function more effectively. It dawned on me that ironically, his theory, which had been designed exclusively to protect political speech, logically dictated protection of commercial speech too. When individuals receive information about commercial products and services, they do so in order to enable them to perform their *private* self-governing function, which shares the DNA of the *collective* self-government on which Meiklejohn focused. Indeed, when individuals make private self-governing decisions, they are exercising 100% of the decision-making power, rather than the diluted power they exercise in the collective. At that point, I knew I had a provocative article, even though I hadn't yet written a word. After that the paper basically wrote itself.

I am of course enormously gratified that the Court has largely come around to my way of thinking. I think it is unfortunate, however, that the Court occasionally splits on these issues along ideological lines. I do not consider commercial speech to be something conservatives should favor and liberals should oppose. Rather, it should be viewed as an expressive category to be protected as a matter of the logic of First Amendment theory, whether one is committed to capitalism or socialism. Whether one agrees or disagrees with the political underpinnings of the expression must of course play no role in determining the level of its constitutional protection.

Mr. Stephens: In another article, a 1982 piece in the UNIVERSITY OF PENNSYLVANIA LAW REVIEW, you stated that the First Amendment's guarantee of free speech "serves only one true value … 'individual self-realization.'" Under that rationale, why does commercial speech merit First Amendment protection?

Prof. Redish: In many ways that article, *The Value of Free Speech*—written some eleven years after my first commercial-speech article—functioned as a prequel to the earlier piece. I used some of the ideas I had broached in the first article to develop a much broader theory of the First Amendment.

Note that when I asserted that the First Amendment serves only one true value, self-realization, it was *not* to exclude other asserted values, such as facilitating democracy or checking government. Rather, my point was that ultimately all of those values are in reality merely sub-values of the deeper self-realization value. The reason we have a democratic system in the first place, and the reason we want to check government to prevent it from degenerating into tyranny, is because we value the ability of the individual to grow and evolve. As John Stuart Mill once wrote, the concept of a benevolent dictator is oxymoronic, because in a dictatorship individuals cannot grow intellectually or personally.

I conceptualized the self-realization value as the underpinning of all sub-values of free speech, in order to address illogical distinctions between different categories of expression drawn by other scholars. Under my approach, one cannot protect only political speech in order to facilitate democracy, because democracy itself was chosen to foster broader values that are equally fostered by non-political forms of expression.

The reason that commercial speech fosters self-realization is that it serves a facilitative or catalytic function, by providing information and opinion that facilitates the effective performance of the individual's self-governing function, which in turn fosters the foundational normative value of self-realization.

I should note that unlike Meiklejohn, I reject the notion that the First Amendment exclusively serves the interest of the listener. The First Amendment is not a zero-sum game. There is no reason why the Amendment cannot simultaneously serve the interests of both listener and speaker. Therefore commercial speech may also serve the self-realization interest of the speaker.

Some suggest that commercial advertisers have no self-realization interest, either because they are robotic, soulless profit-maximizers (C. Edwin Baker's theory) or because they are not attempting to contribute to public discourse (Robert Post's theory). Neither theory is valid, however. Scholars who focus solely on the corporate form ignore that there are human beings who formed the corporation in order to self-realize. Indeed, the modern corporation took on its current form during the Jacksonian period, as a means of democratically enabling the small business person to compete with the wealthy industrialists of the North or the landed gentry of the South. Thus, the corporate form performs a catalytic function in fostering self-realization. As for the intent of the speaker to contribute to public discourse: it is simply wrong to assume mutual exclusivity between the desire to benefit by one's expression and the desire to contribute to public debate. There is absolutely no basis, *ex ante,* to paint with such a broad brush.

Mr. Stephens: Has the Supreme Court embraced your view as to why protection for commercial speech is justified?

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Prof. Redish: Yes and no. In *Virginia Board,* the justices groped towards it, but ultimately failed to recognize the theoretical gravity of the commercial-speech issue and therefore gave commercial speech far less protection than it deserves. Justice Stevens's plurality opinion in *44 Liquormart* in 1996 comes closest. He recognized that allowing government to suppress commercial speech because it feared that citizens would make unwise (albeit lawful) choices represented a kind of paternalism that is pathological to liberal democracy.

Mr. Stephens: Have the courts taken benefit to consumers into account, as you strongly believe they should, when reviewing commercial-speech restrictions or mandates?

Prof. Redish: I believe the Court did in *Virginia Board* when it pointed to the interests of consumers in obtaining price information. I would have hoped, however, that the Court would have taken the next step and viewed that theoretically superficial economic interest (as important as it of course is) as an exercise of a form of private self-government growing out of our system's recognition of the individual as an integral whole, worthy of respect. Justice Stevens's *44 Liquormart* opinion recognized the interest of the consumer in a different, darker way: the fear that government would breach the implicit social contract in a liberal democracy by paternalistically treating its citizens as children.

Mr. Stephens: In your 2013 book THE ADVERSARY FIRST AMENDMENT, you argue that those who accord commercial speech less constitutional protection than political speech are engaging in a form of viewpoint discrimination. What do you mean by that and is such discrimination especially antagonistic to First Amendment values?

Prof. Redish: Many free-speech scholars reject First Amendment protection for commercial speech on grounds that apply equally to speech to which they readily extend full First Amendment protection. For example, scholars who reject protection for commercial speech because speech about commercial products doesn't rise to the level of First Amendment interests have no trouble providing full protection to CONSUMER REPORTS magazine, even though the subject is of course the same. Some of them seek to distinguish between commercial advertisers and CONSUMER REPORTS on the ground that one is objective and the other is self-interested, yet they support extending full First Amendment protection to self-interested speakers in the non-commercial realm.

Judges are guilty of the same offense, however. In *Bose v. Consumers Union,* the Supreme Court didn't hesitate to extend full First Amendment protection to the magazine, yet it continued to grant lesser protection to commercial speech. Indeed, the Court's definition of commercial speech to include only speech that does nothing more than promote a commercial transaction is presumably designed to draw an obvious viewpoint-based distinction. When Ralph Nader criticizes the Chevrolet Corvair for being unsafe, he has full protection for his expression. When General Motors seeks to respond, it has only reduced protection. What could be a more blatant viewpoint distinction between differing speakers?

Also, in *Nike v. Kasky,* the California Supreme Court held that when Nike

sought to respond to public accusations that it ran sweat shops it had only the reduced protection of commercial speech while its critics had full First Amendment protection for their attacks. The Supreme Court granted *certiorari* and heard arguments, but ultimately dismissed *cert.* as "improvidently granted."

Mr. Stephens: Justice Kennedy wrote in his *IMS Health* opinion that viewpoint-based limits on commercial speech merited "heightened scrutiny." Has that opinion moved courts closer to eliminating the constitutional distinction between commercial and non-commercial speech?

Prof. Redish: As much as I was pleased to see the Court in *IMS Health* move towards this insight, there is, I'm afraid, a terrible irony in the Court's conclusion. The Court holds, as I read it, that when government treats similar commercial and non-commercial speech differently the disparate treatment is tested under strict scrutiny, which demands the showing of a truly compelling interest to justify the disparity. Yet the Court's own *Central Hudson* test does the exact same thing—*i.e.*, it treats commercial and non-commercial speech differently for First Amendment purposes, even when the sole basis of distinction is that one speaker is commercial and the other speaker is non-commercial. In short, the Supreme Court's commercial-speech test *violates its own strong presumption against distinguishing between commercial and non-commercial speech*.

Mr. Stephens: Critics assert that if courts increase scrutiny of commercial-speech restrictions, consumers will be beset by false advertising and other misleading product claims. Is that a valid concern?

Prof. Redish: In a recently published article, *False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle,* 25 Wm. & Mary Bill Rts. J. 765 (2017) (coauthored with Kyle Voils), I argue that the First Amendment should have only a limited impact on regulation of false speech. I would apply the principle of *New York Times Co. v. Sullivan* that falsity is protected absent a showing of knowledge of falsity or reckless disregard of the truth. Such knowledge should often not be difficult to infer simply from the nature of the false claim. But unlike most false claims in the political process, I would allow suppression of such knowingly false claims.

This distinction is not because of the different value of the two forms of speech, but rather because of the differing nature of the harms usually caused. False commercial speech can cause serious financial harms or harms to health. Because the First Amendment is not an absolute, I would categorically deem these harms to constitute a sufficiently compelling interest to justify suppression. This should also be true in the non-commercial context, and I believe that is in fact the current view. A politician who defrauds citizens out of their money on the basis of a knowingly false claim is no more protected by the First Amendment than is a commercial advertiser.

The fact remains, however, that such compelling harms will be found far more often in the commercial context than in the political context. But once again, I should emphasize that any resulting variance in treatment has nothing to do with any assumption about the differing expressive values between commercial and political speech.

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"[T]he mere fact that expression urges conduct does not transform it into that conduct. [...] *Expressions Hair Design* is certainly helpful in emphasizing this important distinction. The Chief Justice's opinion, while often criticized for its 'minimalist' nature, perhaps did a great deal of good by confining the reach of his holding to this simple but vitally important point."

Mr. Stephens: One tactic regulators frequently use to avoid constitutional scrutiny is arguing that their rules target commercial *conduct* rather than speech. The Supreme Court recently addressed such an effort in its *Expressions Hair Design v. Schneiderman* decision. How will that ruling impact attempts to couch speech limits as mere conduct regulation?

Prof. Redish: I think it is absurd to view commercial advertisements as conduct (as scholars have on occasion suggested). True, there are occasions where words can be so close to conduct that they effectively become part of that conduct. But the mere fact that expression urges conduct does not transform it into that conduct. Most fully protected expression urges conduct. As Justice Holmes once said, every idea is an incitement.

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Mr. Stephens: Some critics of the Supreme Court's newfound respect for commercial speech have invoked the specter of *Lochner*. Do you think there is reason to be concerned that upholding commercial-speech rights will empower judges to strike down regulations without justification?

Prof. Redish: I have long heard the false comparisons to *Lochner.* Indeed, I would suggest that the long-held animosity to First Amendment protection for commercial speech during the 1940s and 50s may have had a lot to do with the New Deal Court's animosity towards *Lochner.* But the differences between the two situations should be obvious.

First, and most important, *Lochner* concerned commercial *conduct,* not commercial *speech.* I could spend a great deal of time explaining the normative bases of the speech-conduct constitutional dichotomy (indeed, I did so in my 1982 University of Pennsylvania Law Review article you referred to earlier), but such a detailed inquiry is unnecessary at this point. Suffice it to say that the First Amendment protects speech, not conduct, and the *Lochner* Court protected conduct, not speech.

Second, the conduct protected in *Lochner* actually finds no home in the text of the Constitution. In stark contrast, the text of the First Amendment explicitly guarantees the right of free speech, and it draws no distinction on its face between commercial and non-commercial speech.

Mr. Stephens: Regulators have also increasingly turned to commercial-speech mandates—compelling producers to communicate, and pay for, an unflattering message—as a way to chill demand for disfavored commerce. How has the Supreme Court viewed such speech mandates?

Prof. Redish: It is difficult to distill the Court's doctrine down to a few sentences. In some instances, the Court has employed such speech mandates as a means of fostering commercial-speech interests, when it views them as alternatives to outright suppression. Basically, it seems to come down to this: when the compelled speech provides valuable information to a consumer that is not disputed by the commercial speaker, it will be upheld. This

conclusion adopts a rather Meiklejohnian view, valuing the right of the listener over the right of the speaker not to speak.

It should be noted, however, that the Court has on occasion forced even a political speaker to speak in the interests of the listener, as when it upheld legislative compulsion of campaign contributors to reveal their contributions. Thus the right not to speak is not unlimited in both commercial and non-commercial contexts, at least under certain circumstances.

Mr. Stephens: At least four federal circuit courts have interpreted Supreme Court compelled-speech precedents in a manner that broadens government power. Do you expect the Court to wade back into this area soon?

Prof. Redish: It is difficult to predict, but I would not be surprised to see the Court return to the subject. There is much more work to be done.

Mr. Stephens: Can a case be made that laws which force commercial entities to communicate the state's message (via a warning label or mandatory disclosure) don't in fact involve "commercial speech"? If they do not, how then should courts judge them under the First Amendment?

Prof. Redish: In my view, such regulations *do* involve commercial speech, but commercial-speech regulations generally give rise to the exact same pathologies as do regulations of non-commercial speech. I view these similarities through what I call the "regulatory-centric" model of the First Amendment. Here the concern is neither the interest of the speaker or the listener, but rather the pathological dynamic of how government is relating to its citizens. If government imposes a kind of paternalism in selectively censoring or modifying speech out of fear that consumers will make wrong decisions, the liberal democratic social contract has been violated, regardless of whether the speech in question is commercial or non-commercial.

Citizens are either sheep, or they are not. If they are deemed sheep and in that way selective, paternalistically-driven suppression of expression is upheld, there is no logical reason to invalidate the exact same form of paternalistic suppression in the political realm. Thus, both forms of governmental paternalism violate the core notion of the liberal democratic social contract; liberal democracy cannot function if government treats its citizens in such a manner.

Mr. Stephens: Professor Redish, thank you for participating in this discussion.

Prof. Redish: Thank you for inviting me to participate. If I could, I would like to note one other thing. In the fall of 2016, the Northwestern University Pritzker School of Law, where I have taught for the last 44 years, held a conference to commemorate the 45th anniversary of the publication of my 1971 GEORGE WASHINGTON LAW REVIEW article on commercial speech. Leading scholars from all over the nation participated, and the papers were recently published in the WILLIAM AND MARY BILL OF RIGHTS JOURNAL. If, when I was working so hard on my third-year paper at Harvard, I could have even imagined such an event so far into the future, I would no doubt have been completely overwhelmed. I am deeply indebted to Northwestern and its dean, Dan Rodriguez, for giving me such an honor.

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