WASHINGTON LEGAL FOUNDATION

Legal Backgrounder

2009 MASSACHUSETTS AVENUE, NW • WASHINGTON, D.C. 20036 • (202) 588-0302

Vol. 11 No. 2 January 19, 1996

ACTIVIST FDA THREATENS CONSTITUTIONAL SPEECH RIGHTS

by

Robert H. Bork

In applying current constitutional doctrine, it is useful to recur to the original understanding of the provision at issue. Knowledge of what the Framers and Ratifiers understood themselves to be doing can prevent further departures from the intended meaning of the Constitution and might assist the courts in moving closer to the historic meaning of the document.

These thoughts are prompted by the recent proposal of the **Food and Drug Administration** (FDA) to restrict severely the First Amendment rights of American companies and individuals who, in one way or another, have any connection with tobacco products. These restrictions are **patently unconstitutional** under the Supreme Court's current doctrine concerning commercial speech as well as under the original understanding of the First Amendment.

Among the restrictions FDA proposes are:

- a ban on the use of anything other than black and white text in cigarette advertisements in magazines if the publication cannot prove that fewer than 15% of its readers are below 18;
- a ban on the use of cigarette brand names in sponsoring any events and in labeling any non-tobacco merchandise (e.g., Virginia Slims Tennis Tournament); and
- a requirement that tobacco companies create, and finance, a $150 million anti-smoking campaign.

Robert H. Bork served as a Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, from 1982 to 1988, and as Solicitor General of the United States, Department of Justice, from 1973 to 1977.

For the reasons discussed below, these restrictions on truthful speech about lawful products are unconstitutional no matter what mode of analysis is adopted.

The Original Understanding of the First Amendment and Commercial Speech

The First Amendment states simply that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. Because the constitutional text does not distinguish between commercial speech and other "types" of speech, we must examine the historical evidence to discern whether a particular category or type of speech falls within "the freedom of speech" protected by the Constitution.[1]

That evidence makes clear that the "the freedom of the press" protected by the Constitution extends to that which we now characterize as "commercial speech." The generation of the Framers employed no such characterization. To them, ads were news. In fact, the development of the concept of a free press and the rise of a commercial, advertising-driven text were linked. At the same time, it is clear that the common-law rules limiting misrepresentation survived the adoption of the Bill of Rights. Thus, the First Amendment, as historically understood, would permit the regulation of commercial messages concerning lawful products and services only to ensure that they are truthful and not misleading.

1. Advertising was an integral part of the commercial press in Colonial America.

The manner in which advertising was regarded and regulated in colonial America strongly suggests that it falls into the category of protected speech. As one journalism historian explained about colonial America, "[i]t was a commercial age, and it produced a commercial press." Verner W. Crane, BENJAMIN FRANKLIN'S LETTERS TO THE PRESS 1758-1775 xvi (1950). Few realize both the prevalence of advertising in colonial America and the way that Americans relied on it for information vital to their lives. For much of the colonial era, newspapers generally did not use layout techniques or differences in typeface to provide a visual distinction between the two. Kent R. Middleton, COMMERCIAL SPEECH IN THE EIGHTEENTH CENTURY IN NEWSLETTERS TO NEWSPAPERS: EIGHTEENTH-CENTURY JOURNALISM 281 (Donovan H. Bond & W. Reynolds McLeod, eds., 1977).

Moreover, the standard colonial newspaper was almost half-filled with local advertising. Lawrence C. Wroth, THE COLONIAL PRINTER 234 (1938). In 1766, for example, Hugh Gaines' *New-York Mercury* was 70% advertising, and 55% of the *Royal Gazette* consisted of commercial matter. Alfred M. Lee, THE DAILY NEWSPAPER IN AMERICA 32 (1937). The front pages of the Boston, New York, and Philadelphia newspapers were devoted almost exclusively to advertising. Without these advertisements, the vibrant colonial press so crucial to the Revolutionary cause would not have existed, for in the eighteenth century as in our own time, "[a]dvertising represented the chief profit margin in the newspaper business." Frank L. Mott, AMERICAN JOURNALISM, A

---

[1]Much of the discussion here relies on the research in Richard E. Wiley et al, *Commercial Speech and the First Amendment*, NLCPI WHITE PAPER (Nat'l Legal Ctr. Washington, D.C.), Feb. 1994.

ISSN 1056 3059

HISTORY: 1690-1960 56 (1963).

2. The colonial conception of free speech included advertising.

In fact, America's first sustained defense of a free press, and of the very notion of a "marketplace of ideas," came in response to an attack on an advertisement printed by Benjamin Franklin. In 1731, Franklin printed a notice for a ship's captain. The ad was not part of a newspaper; it was distributed as a stand-alone commercial handbill. The paper simply proposed a commercial transaction -- which, incidentally, is the modern definition of commercial speech -- by seeking additional freight and passengers for the captain's ship. At the bottom of the ad was the note, "No Sea Hens nor Black Gowns will be admitted on any Terms."

This handbill outraged local clergy (the "Black Gowns"), although it is unclear whether they were more offended by their exclusion from the pool of desirable passengers or from their placement in the same category as women of ill repute ("Sea Hens"). In response to attacks on the ad, Benjamin Franklin published an "Apology for Printers" in the June 10, 1731 edition of the *Pennsylvania Gazette*. In his "Apology," Franklin contended that "Printers are educated in the Belief that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick." This incident illustrates that, at least to Franklin, the "Opinions" stated even in advertisements should be "heard by the Publick."

In addition, one of the major precipitating events of the American Revolution also involved a defense of advertisements. In 1765, British authorities for the first time enacted a tax exclusively on the colonies. The Stamp Act of 1765 taxed each newspaper -- and imposed an additional two-shilling tax on each advertisement. This heavy tax galvanized the colonial press against the British government. The repeal of the Stamp Act one year after it had been enacted "was a powerful victory for an independent press and for advertising." Frank Presbrey, THE HISTORY AND DEVELOPMENT OF ADVERTISING 151 (1929).

3. The Framers' political philosophy, which equated liberty and property, did not distinguish between commercial and noncommercial messages.

The inextricable link between commercial and other speech reflects the Framers' political philosophy, which generally equated liberty and property rights. As one newspaper commentator put it, "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd that we cannot be said to possess the one without the enjoyment of the other." *Boston Gazette*, Feb 22, 1768, quoted in Clinton L. Rossiter, SEEDTIME OF THE REPUBLIC 379 (1953). This philosophy was based on that of John Locke, who defined the "state of perfect freedom" as the ability of people "to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of nature, without asking leave or depending upon the will of any other man." John Locke, SECOND TREATISE ON GOVERNMENT ch. 2, § 4 (1790).

The generation of the Framers firmly believed in the tie between liberty and property. For example, George Mason's Virginia Declaration of Rights stated that among the natural rights of every human being was "the Enjoyment of Life and Liberty, *with the Means of acquiring and possessing Property*, and pursuing Happiness and Safety." Virginia Declaration of Rights § 1,

ISSN 1056 3059

reprinted in Helen H. Miller, GEORGE MASON: GENTLEMAN REVOLUTIONARY 340 (1975) (emphasis added). Applying this view to the freedom of expression, Cato articulated the importance of free speech and its inextricable link with property rights as follows: "This sacred Privilege is so essential to free Government that the Security of Property, and the Freedom of Speech, always go together." 1 CATO'S LETTERS 95-103 (Essay No. 15, *Of Freedom of Speech: That the Same is Inseparable From Publick Liberty*, Feb. 4, 1720).

Given this history, it is clear that the "press" which the Framers specifically sought to protect encompassed truthful communications about commercial matters. As Richard Henry Lee of Virginia, perhaps the leading Anti-Federalist, said in his demand for a bill of rights, "a free press is the channel of communication to *mercantile* and public affairs . . . ." Letter XVI of Richard H. Lee, Jan. 20, 1788, in AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 152-53 (1962) (emphasis added).

4. The First Amendment did not displace the common law restricting unprotected false or misleading speech.

That "the freedom of . . . the press" includes advertisements does not mean, however, that false or misleading informative commercial speech is, or ever was, entitled to First Amendment protection. The First Amendment was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation. In the words of Sir William Blackstone, the author of the preeminent legal treatise of the Framers' era, "every kind of fraud is equally cognizable . . . in a court of law." William Blackstone, 3 COMMENTARIES ON THE LAWS OF ENGLAND 431 (1768). *See also* Joseph Story, EQUITY JURISPRUDENCE § 192 (1836) (treating law of misrepresentation in great detail).

The Supreme Court has noted that there is a "distinction between commercial and noncommercial speech . . . ." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1978) (citation omitted). Properly understood, however, that distinction is a far simpler one than current jurisprudence would suggest: The government may act to police the veracity of commercial speech, whereas its ability to regulate "false" or misleading political speech is far more constrained.

The First Amendment did not free advertisers to misrepresent their wares or displace the common law regulating commercial transactions. By defining misrepresentation in statutes, American legislative bodies merely carry forward a common-law tradition which the First Amendment did not displace. Free speech protections do, however, bar the government from restricting truthful commercial messages for illegitimate reasons, including the notion that advertisements are somehow inherently misleading, unsightly, or otherwise subordinate to noncommercial speech. The First Amendment also forbids the government from restricting commercial messages for illegitimate ends under the pretext of promoting a vague and generalized concept of "fairness" in every commercial transaction.

Applying this analysis to the FDA's proposed regulations confirms their patent unconstitutionality. The FDA essentially admits that cigarette advertisements are not misleading; indeed, given the warning on every package and every advertisement, it could not make such a claim. Accordingly, the federal government may not severely limit such protected messages absent

  ISSN 1056 3059

the most compelling circumstances, which FDA has not demonstrated exist here.

The Current Constitutional Analysis

Despite this history, the Supreme Court today distinguishes between "commercial speech" and other speech. For the last fifteen years, the Supreme Court has employed a test first identified in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557 (1980), to determine whether a restriction on commercial speech is unconstitutional. Specifically, that test asks:

1. Whether the regulated speech concerns lawful activity and is not misleading;

2. Whether the asserted governmental interest asserted is substantial;

3. Whether the regulation directly advances the interest asserted in a direct and material way in response to real harms that the restriction will in fact alleviate to a material degree; and

4. Whether the regulation is reasonably narrowly tailored to achieve the desired objective.

Balancing tests like this one are flawed because they give judges too much discretion to indulge their own predilections. However, a fair application of this balancing test confirms what the original understanding of the Constitution compels: a conclusion that the FDA's proposals are unconstitutional.

The restrictions on brand advertising and on advertisements in magazines fail because the FDA has not shown that brand identifications or cigarette advertising cause underage smoking or that eliminating them will reduce underage smoking in "a direct and material way." In fact, the evidence overwhelmingly shows that the primary reason that children smoke is because of their parents and peers. As the World Health Organization reported after a four-country survey, "[w]hen young people start smoking, the most important predictor is the smoking behavior and smoking-related activities of 'significant others.'" Aaro, et al., *Health Behavior in Schoolchildren: A WHO Cross-National Survey*, HEALTH PROMOTION 1(1): 17, 21 (May 1986).

Advertisers advertise a "mature" product like cigarettes to promote brand choice, not to increase smoking. As the President's Council of Economic Advisors stated just a few years ago that "[t]here is little evidence that advertising results in additional smoking. As with many products, [cigarette] advertising mainly shifts consumers among brands." ECONOMIC REPORT OF THE PRESIDENT 186 (1987). Thus, as a majority of the Federal Trade Commission has recently noted, "[a]lthough it may seem intuitive to some that the Joe Camel advertising campaign would lead more children to smoke or lead children to smoke more, the evidence to support that intuition is not there." *R.J. Reynolds Tobacco Co.*, F.T.C. No. 932-3162 (June 6, 1994). Because the FDA has not shown that the use of brand names in sponsorships and on merchandise causes children to smoke, it cannot demonstrate that barring such practices advances its goal in a material way.

ISSN 1056 3059

Moreover, these two regulations are not reasonably narrowly tailored to protect children, which is the FDA's stated purpose for its regulations. There is no plausible "fit" that is tailored to children in bans of the use of brand names at *all* events and from *all* non-tobacco merchandise. Likewise, in mandating its "tombstone ad" requirement, the FDA would apply its requirement to any magazine that cannot prove that fewer than one in six of its "readers" are children; the FDA would use the potential presence of one child to limit the reading of five adults.

More fundamentally, underage smoking could be reduced by enforcing the prohibitions against underage smoking without restricting speech at all. If the government were so convinced that advertisements persuade children to smoke, it could counter the tobacco companies' speech with speech of its own to persuade them not to smoke. Indeed, the Surgeon General has long engaged in such speech which has been widely publicized, and reinforced by package warning labels. Thus, in modern parlance, the FDA's proposed restrictions on tobacco advertising neither advance the desired goals in a material way, nor are they narrowly tailored. They are therefore unconstitutional.

Compelling Communication of Government-mandated, Noncommercial Messages Is Unconstitutional

The FDA proposal compelling tobacco manufacturers to establish a "national public educational" anti-smoking campaign at an industry cost of $150 million per year is unconstitutional as well. As the Court has said, "the right to freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). While compelled speech is almost always constitutionally offensive, it is especially problematic when the government's motivation in requiring the speech is to have the speaker counteract the effectiveness of its own protected speech. "[C]ompanies [cannot] be made into involuntary solicitors for their ideological opponents." *Central Illinois Light Co v. Citizens Utility Bd.*, 827 F.2d 1169, 1173 (7th Cir. 1987).

Such speech would not be "commercial" under any accepted definition of the term. Rather the content of these messages are to be educational in nature. It is clear "that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (citing *Buckley v. Valeo*, 424 U.S. 1, 35-39 (1976)). Any requirement of such speech would therefore be subject to strict scrutiny, which it would unquestionably fail.

In sum, even under the modern approach, the FDA's wide-ranging proposals are unconstitutional.

ISSN 1056 3059