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## COMMERCIAL SPEECH AND FIRST AMENDMENT THEORY: A CRITICAL EXCHANGE

*In his article entitled Commercial Speech and First Amendment Theory, which appeared in the October 1979 issue of the Northwestern University Law Review, Professor Daniel Farber proposed a new framework for first amendment analysis of commercial speech. In the following exchange, Professor Lawrence Alexander criticizes certain aspects of Farber's theory. Professor Farber then responds to these criticisms.*

*Lawrence Alexander\**

In *Commercial Speech and First Amendment Theory*,<sup>1</sup> Professor Daniel Farber considered the level of first amendment protection afforded to commercial speech and concluded that a lower level of protection is justified for speech employed in the sale of products than for political speech. After all, the law of contractual liability for fraud and misrepresentation has not provoked any serious first amendment challenge. In his article, Professor Farber argues:

So long as a regulation relates to the contractual function of the utterance, the regulation should not be subjected to the intensive scrutiny required when a regulation directly implicates the first amendment function of language. Thus, the problem is to devise a test which will distinguish between regulations involving the first amendment, informative aspect of advertising and those involving its non-first amendment, contractual aspect.<sup>2</sup>

Professor Farber goes on to illustrate the application of his test to false and deceptive advertising and to affirmative disclosure requirements. It is at the end of his article, when he deals with *Ohralik v. Ohio State Bar Association*,<sup>3</sup> that he raises the point that is the subject of my concern. In a footnote, Professor Farber attempts to distinguish *Ohralik*, in which the United States Supreme Court upheld the disciplining of an attorney for soliciting tort clients, from its companion case, *In re Primus*,<sup>4</sup> in which the Court held unconstitutional the application of a state's antisolicitation rules to solicitation by the American

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<sup>1</sup> Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. Rev. 372 (1979).

<sup>2</sup> *Id.* at 387.

<sup>3</sup> 436 U.S. 447 (1978).

<sup>4</sup> 436 U.S. 412 (1978).

Civil Liberties Union (ACLU) in a civil rights suit. Professor Farber justifies the different outcomes as follows:

The difference in approaches is consistent with the theory propounded in this article. In *Primus*, unlike *Ohralik*, the Court found that the contemplated litigation itself was an expression of first amendment associational activity. Consequently, the formation of agreements to bring suit in *Primus* was itself subject to some measure of first amendment protection, unlike the typical commercial speech case, in which the state has a free hand in regulating the contractual relationship between the parties. Although the state's interest in *Primus* focused on what this article has called the contractual aspect of the speech, the state interest nonetheless directly implicates first amendment values and cannot be considered wholly unrelated to the suppression of free expression.<sup>5</sup>

In an earlier article on commercial speech, I raised "the question of the validity of bans on advertising transactions which are legal but which are nonetheless deemed undesirable."<sup>6</sup> That question, I wrote, "raises such basic issues as why the government . . . may be paternalistic regarding the purchase of goods but may not be paternalistic regarding information about those goods, as the Court in *Virginia State Board [of Pharmacy v. Virginia Citizens Consumer Council, Inc.]*, 425 U.S. 748 (1976) said it may not be."<sup>7</sup> Professor Farber seems to suggest that the government *should* be allowed to regulate, freer from first amendment constraint, advertising of transactions it could constitutionally prohibit or restrict. On the other hand, he maintains that if a transaction is itself constitutionally protected, the accompanying advertising should receive strong first amendment protection.

With all due respect, I think Professor Farber has come up with the wrong solution to the issues I raised in my earlier article. If advertising accompanying the sale of products receives a certain level of first amendment protection, any additional constitutional protection the advertising receives as a result of the constitutionally favored status of the transaction itself should derive from whatever constitutional provision protects the transaction, not from the first amendment.<sup>8</sup>

Consider advertising regarding the terms and conditions for performance of an abortion. A woman's right to obtain an abortion is constitutionally protected by the due process clause of the fifth and fourteenth amendments. Does it make sense to say that the ordinary laws regarding contractual liability, fraud, and duress in the execution

<sup>5</sup> Farber, *supra* note 1, at 407 n.164.

<sup>6</sup> Alexander, *Speech in the Local Marketplace: Implications of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. for Local Regulatory Power*, 14 SAN DIEGO L. REV. 357, 376 (1977).

<sup>7</sup> *Id.*

<sup>8</sup> An exception to this general rule occurs, of course, when the first amendment itself protects the transaction, as in the case of the sale of a religious tract. *See* *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

of contracts for the sale of goods and services are subject to stricter *first amendment* scrutiny when the service sold is an abortion rather than, say, housecleaning? If stricter scrutiny is called for at all, it must be as the result of the impact of the law of contract on the obtaining of an abortion, an impact that implicates the due process clause rather than the first amendment.

Of course, sometimes the sale of the product itself and not just the accompanying advertising will be protected under the first amendment rather than under some other constitutional provision, if it is protected at all. The sale of a book on politics or religion is a good example. Even here, however, it would seem that the first amendment analysis of advertising accompanying contracts of sale and the first amendment analysis of the content of the book should be kept distinct. In some cases that may be difficult—consider, for example, an advertisement such as, “This book will guarantee you the happiness that comes from glimpsing the Eternal Truth.” In most cases, however, it will not.

With respect to cases like *Ohralik* and *Primus*, a court would be ill-advised to begin comparing contracts to undertake personal injury litigation with contracts to undertake civil rights litigation if the object is to define the limits of first amendment protection of attorney solicitation. Professor Farber makes two unwarranted assumptions regarding *Ohralik* and *Primus*. First, he assumes that suits for personal injuries have little constitutional protection and therefore may be eliminated or severely restricted by the state. Thus, if “the greater includes the lesser,” the state may restrict solicitation of clients for such suits. Second, he assumes that the Court would, or at least should, have decided *Ohralik* and *Primus* as it did even if the ACLU had solicited the tort clients in *Ohralik* and the solicitation in *Primus* had been conducted face-to-face in the client’s home.

The distinction Professor Farber draws between the two cases based upon the first amendment associational rights implicated by the ACLU’s involvement in *Primus* blurs a bit if we consider the following hypothetical solicitation. An attorney with a nonprofit organization called Citizens United for Bodily Integrity (CUBI) speaks at a meeting of homeowners who are concerned about a rash of hit-and-run accidents in their neighborhood, and he offers to represent a woman at the meeting in a suit against a drunken driver who ran a stop sign and knocked her off her bicycle. In *Primus*, an ACLU attorney addressed a meeting of women who had been sterilized as a condition for receiving public assistance medical payments, and the attorney later offered to represent one of the women in a suit against the physician who had performed the sterilization. On one level, the hypothetical suit contemplated by the CUBI attorney and the ACLU suit in *Primus* are tort actions for personal injuries, although the ACLU action could also be phrased in constitutional terms. On another level, solicitations by the

hypothetical CUBI attorney and the ACLU fall within the penumbra of associational rights protected by the first amendment that seemed to concern the Court in *Primus*. Only if suits for personal injuries somehow lack constitutional significance would the CUBI solicitation be distinguishable from the ACLU solicitation in *Primus*.

It is doubtful that suits for personal injuries lack constitutional significance.<sup>9</sup> It is also doubtful that *Ohralik* and *Primus* would have been distinguishable to the Court but for the facts that *Primus* solicited for the ACLU and *Ohralik* solicited face-to-face for his own profit. Although I have difficulties with these bases for a first amendment distinction, difficulties well-expressed by others,<sup>10</sup> I have more difficulty with Professor Farber's distinction based on the constitutional status of the two contemplated lawsuits.

There is something almost irresistible about the "greater includes the lesser" approach in constitutional law. The approach surfaced in the heyday of the "right-privilege" distinction and is again manifested in the Supreme Court's two-step approach to procedural due process.<sup>11</sup> My question remains, however: why may the government paternalistically ban the sale of certain products but not paternalistically ban their advertisement? Although Professor Farber's general distinction between ordinary speech and contractual speech, which distinction is the main focus of his article, is useful, his answer to my question—government may paternalistically ban or restrict the advertising of transactions it may paternalistically ban or restrict—is unsupported by either the case law or any first amendment rationales. Although I do not wish to maintain that the first amendment is hermetically sealed off from the other constitutional provisions, it is those latter provisions, not the first amendment, that hold the key to my riddle.

*Daniel A. Farber\**

Before I respond to Professor Alexander's comments, perhaps a brief recapitulation is in order. The thesis of my article, *Commercial Speech and First Amendment Theory*,<sup>1</sup> was that advertising serves two

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<sup>9</sup> See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82-94 (1978).

<sup>10</sup> See Pulaski, *In-Person Solicitation and the First Amendment: Was Ohralik Wrongly Decided?* 1979 ARIZ. ST. L.J. 23.

<sup>11</sup> See Alexander & Horton, *Ingraham v. Wright: A Primer for Cruel and Unusual Jurisprudence*, 52 SO. CAL. L. REV. 1305 (1979).

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<sup>1</sup> Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979).

distinct functions. It serves both as the initial stage in the creation of a contractual relationship and as a means of communicating product information. That is, an advertisement serves both a contractual function like that of a formal offer and an informational function like that of a consumer report. Although the informational function is protected by the first amendment, the contractual function generally is not so protected because commercial contracts are subject to virtually plenary state regulation. Attempts to regulate the contractual function of commercial speech, however, have spillover effects on the informative function. These spillover effects necessitate first amendment scrutiny<sup>2</sup> under the balancing test enunciated in *United States v. O'Brien*.<sup>3</sup> With this background in mind, Professor Alexander's comments and my responses should be clearer.

Professor Alexander raises three separate points. First, he takes issue with my reading of the opinions in the attorney solicitation cases, *Ohralik v. Ohio State Bar Association*<sup>4</sup> and *In re Primus*.<sup>5</sup> Second, he believes that my analysis of these cases implies that government may "paternalistically" ban advertising about purely commercial transactions based on its power to ban the transactions themselves.<sup>6</sup> Finally, he believes that the constitutional status of the underlying transaction should be irrelevant to the first amendment analysis of advertising. In general, these areas of disagreement do not detract from the more important areas of our agreement about the usefulness of distinguishing the contractual function of commercial speech from its informational function.

Let me begin with our narrowest area of disagreement. Professor Alexander appears to argue that the only distinction between *Primus* and *Ohralik* is factual: the ACLU lawyer in *Primus* did not engage in face-to-face solicitation as did the personal injury lawyer in *Ohralik*.

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<sup>2</sup> *Id* at 386-91. On the other hand, direct attempts to regulate the informative function itself stand on the same footing as attempts to regulate the speech of consumer groups, since the unique contractual function of advertising is no longer involved. Rather than raising peculiar "commercial speech" issues, attempts to regulate the informative function must be assessed under some more general first amendment theory. Some of the rudiments of a broader theory are discussed in Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 725 (1980).

<sup>3</sup> 391 U.S. 367 (1968). Under *O'Brien*, a government regulation must be supported by a constitutionally permissible justification; the justification must be significant; the justification must be "unrelated to the suppression of free expression"; and the "incidental restraint on speech must be no greater than is essential to further the interest." *Id.* at 377. As Professor Ely has pointed out, the last element of the *O'Brien* test actually calls for balancing. See Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484-90 (1975).

<sup>4</sup> 436 U.S. 447 (1978).

<sup>5</sup> 436 U.S. 412 (1978).

<sup>6</sup> At least some of our disagreement about these cases and their implications may stem from a lack of clarity caused by my attempt to compress my discussion of *Primus* into a footnote.

The opinions in the two cases clearly reveal, however, that the Supreme Court found a more fundamental distinction between these cases. The opinion in *Ohralik* stresses that the lawyer was engaging in a "business transaction,"<sup>7</sup> and that since speech undertaken as part of a business transaction "occurs in an area traditionally subject to government regulation,"<sup>8</sup> such speech enjoys lesser constitutional protection.<sup>9</sup> As the Court viewed *Primus*, however, the ACLU lawyer's offer to represent a potential civil rights client was not simply part of a business transaction. The Court held that the ACLU lawyers were engaged in a kind of associational activity implicitly protected by the first amendment. Indeed, this was the precise ground on which the Court in *Primus* distinguished *Ohralik*.<sup>10</sup> The regulation in *Primus* was subjected to greater scrutiny because, "[i]n the context of political expression and association, . . . a State must regulate with significantly greater precision."<sup>11</sup> Given the Court's view of the different constitutional status of the litigation activities involved in the two cases, the dissimilar treatment of the cases is entirely understandable. In both cases the state's goal was to regulate the making of offers, but in *Primus* the resulting agreement was itself thought to enjoy constitutional protection while in *Ohralik* it was an ordinary business transaction. Of course, it is arguable that the Court is mistaken in holding that some litigation-related agreements are subject to greater constitutional protection than others. After *Ohralik* and *Primus*, however, the Court appears to have taken a clear position on the matter.<sup>12</sup>

Beyond the question of the correct reading of these cases, Professor Alexander argues that my analysis indicates that the state is always free to suppress information about transactions whenever the state could constitutionally ban the transactions themselves.<sup>13</sup> My discus-

<sup>7</sup> 436 U.S. at 457.

<sup>8</sup> *Id.* at 456.

<sup>9</sup> *Id.* at 455-56.

<sup>10</sup> 436 U.S. at 438 n.32. Earlier cases make it clear that this right protects a broad range of litigation-related conduct including method of compensation, *see* *Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 223-25 (1967) (union entitled to employ lawyer on salaried basis); *United Transp. Union v. Michigan Bar*, 401 U.S. 576, 584-85 (1971) (upholding union restriction on fees charged its members by attorneys); compensation for investigation expenses incurred by nonattorneys, *see id.* at 582; and of course, solicitation of the kind involved in *Primus*, *see* *NAACP v. Button*, 371 U.S. 415, 428-31 (1963).

<sup>11</sup> 436 U.S. at 437-38.

<sup>12</sup> Professor Alexander's comments regarding the dangers of the "greater includes the lesser" approach in constitutional law are, therefore, more appropriately addressed to the Supreme Court rather than to my reading of the Court's holdings in the attorney solicitation cases.

<sup>13</sup> In an earlier article, Professor Alexander used the term "paternalistic" to refer to attempts to suppress information about activities as an indirect means of suppressing the activities. *See* Alexander, *Speech in the Local Marketplace: Implications of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. for Local Regulatory Power*, 14 SAN DIEGO L. REV. 357, 376 (1977).

sion of *Primus* was not intended to indicate this view. Neither *Ohralik* nor *Primus* involved an attempt to justify a deliberate decision to prevent information from reaching consumers. Hence, neither case raises the issue of whether purposeful, "paternalistic" attempts to suppress information are ever justifiable. As I indicated elsewhere in my article, the Court's apparent view that all attempts to suppress information are *per se* invalid gives me some qualms, but I certainly do not mean to adopt the contrary view of *per se* validity.<sup>14</sup>

It does seem to me, however, that paternalistic bans on advertising are more *clearly* unconstitutional when the underlying transaction is itself immune from regulation. For example, in *Bigelow v. Virginia*,<sup>15</sup> the Court was confronted with a Virginia ban on abortion advertising as applied to an advertisement for a New York abortion referral service. The Court acknowledged that the right to travel protected the interest of a Virginia resident in traveling to New York for this service.<sup>16</sup> This finding is directly relevant to the first amendment analysis of the advertising ban under the *O'Brien* balancing test. As I argued in my article, the *O'Brien* test is appropriate when a government regulation implicates a course of conduct involving both "speech" and "non-speech" elements.<sup>17</sup> To pass this test, the statute must, among other factors, be necessary to achieve a permissible state goal. The state's asserted goal in *Bigelow* was to prevent Virginia residents from using the New York referral service. Essentially, this amounted to an attempt to prevent the exercise of the constitutional right to travel to New York to use the service. This goal is clearly impermissible,<sup>18</sup> and the statute therefore failed the *O'Brien* test. This does not necessarily mean that a direct right to travel claim would have succeeded. The newspaper probably would not have had standing to raise the travel rights of its audience.<sup>19</sup> Furthermore, no direct penalty on travel was involved. Hence, the case did not fall within the relatively small class of cases that have been subjected to heightened scrutiny under the right to travel rationale.<sup>20</sup> The right to travel was nevertheless relevant to

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<sup>14</sup> Farber, *supra* note 1, at 401-02. As I later stated in regard to the paternalism cases and attempts to restrict the flow of information: "Since the basic issues in these cases are essentially unrelated to the contractual nature of the speech, the ultimate solutions will depend on developments in general first amendment theory, not on the evolution of distinctive commercial speech doctrines." *Id.* at 405. See generally Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 532 (1979).

<sup>15</sup> 421 U.S. 809 (1975).

<sup>16</sup> *Id.* at 824-25. See Farber, *supra* note 1, at 378.

<sup>17</sup> See Farber, *supra* note 1, at 387-88.

<sup>18</sup> *Id.* at 378, 400.

<sup>19</sup> See *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (real estate developer lacks standing to raise travel claims of potential buyers).

<sup>20</sup> So far, the Court has used strict scrutiny only when laws either directly regulate interstate

assessing the legitimacy of the state's interest once scrutiny under the first amendment was triggered.

As this example illustrates, the *O'Brien* test is incompatible with Professor Alexander's view that the nature of the underlying transaction is irrelevant to first amendment analysis. In order to pass muster under *O'Brien*, a regulation must significantly further a government interest that is "unrelated to the suppression of free expression" and is otherwise within the government's power.<sup>21</sup> If the state's goal is to affect the underlying transaction, the analysis will be influenced greatly by the constitutional status of that transaction. If the underlying transaction is itself protected by the first amendment or by some other constitutional provision, a court must decide if the state interest in regulating that transaction is constitutionally permissible. This is simply not a problem in most cases involving advertising for normal commercial transactions. In these cases, we can usually take for granted the legitimacy of the state's interest in regulating the underlying commercial transaction, and simply apply the *O'Brien* test in considering whether the means chosen by the state impermissibly intrude on the informational function of the advertising.

Although the first amendment test used in *O'Brien* makes the nature of the underlying transaction a highly relevant factor, this is not due to any peculiarity of the *O'Brien* test. Under any first amendment test that involves an appraisal of competing individual and governmental interests, the nature of the underlying transaction will always be relevant. If the underlying transaction is itself constitutionally protected, this will generally diminish the state's interest in regulating speech relating to the transaction and strengthen the individual's interest in receiving information about the transaction. Nevertheless, the restriction on the state's power derives not from whatever constitutional provision protects the underlying transaction, but from the first amendment itself. Ignoring the constitutionally protected nature of the underlying transaction as an important component of any first amendment analysis, as Professor Alexander proposes, would significantly weaken the first amendment protection accorded to all forms of speech.

In conclusion, I would simply like to reiterate that I view our area of agreement as more significant than any of these disagreements. My primary purpose was to argue for a distinction between regulations aimed at the unique contractual function of commercial speech as a means of making offers, and those aimed at the informational function that commercial speech shares with other forms of speech. In my view, the *O'Brien* test is proper for contractually based regulations, but regu-

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movements or impose burdens on short-term residents. See J. NOWAK, R. ROTUNDA & N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 668-74 (1978).

<sup>21</sup> See note 3 *supra*.

lations aimed at the informational function need stricter scrutiny. If I understand him correctly, Professor Alexander finds this analysis useful, and I am gratified at our apparent agreement on this point.