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Kenneth G. Dau-Schmidt

Indiana University Maurer School of Law, kdauscm@indiana.edu

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COMMENTS ON COMMERCIAL SPEECH, CONSTITUTIONALISM, COLLECTIVE CHOICE

*Kenneth Dau-Schmidt**

I. INTRODUCTION

In his article Professor Cass demonstrates an impressive breadth of knowledge and thought on the subject of the first amendment and its application to commercial speech. Professor Cass provides a useful and concise summary of the various theories for interpretation of the Constitution, including the "negative theory" espoused by himself and others, and the law and economics theory espoused by Richard Posner.¹ Cass embraces much of Posner's economic analysis for the purposes of policy analysis as to what the Constitution ought to say, while adhering to the negative theory of constitutional interpretation to determine what the Constitution in fact says. Professor Cass finds that, with respect to the first amendment, there is a rough coincidence among our judicial tradition, the negative theory and Posner's law and economics theory.² In particular, with respect to commercial speech, current Supreme Court doctrine, the negative theory and Posner's law and economics theory, all agree that while there may be some first amendment protection for commercial speech, that protection should be less than the protection afforded political, artistic or scientific speech.³ Accordingly, Professor Cass concludes that the Court's recent decisions with respect to commercial speech are in keeping with constitutional history and precedent, as interpreted by the negative theory, and with sound policy analysis, as represented by the law and economics theory.⁴

While I find much to agree with in what Professor Cass has written, I would argue for amendment and clarification of Posner's economic model before fully embracing it as a sound basis for policy analysis. I believe that Professor Cass' preference for the negative

* Assistant Professor of Law and Economics at the University of Cincinnati College of Law; Ph.D. in Economics, University of Michigan, 1984; J.D., University of Michigan Law School, 1981. I would like to thank Beth Wayne for her research assistance and Gordon Christenson for his helpful comments.

1. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317, 1321-53 (1988).

2. *Id.* at 1332, 1359-60

3. *Id.* at 1320, 1334.

4. *Id.* at 1320, 1382. This statement is a simplification of Professor Cass' conclusion. Undoubtedly his belief that the Court's current commercial speech doctrine is founded on sound analysis is based on theories beyond Posner's law and economics theory.

theory over Posner's economic theory to provide positive answers in the interpretation of the Constitution is soundly based on the value of precedent and predictability in constitutional interpretation. This value has not yet been incorporated into Posner's economic theory of constitutional interpretation. Moreover, I believe that it is very important under an economic analysis of constitutional rights whether the objective function to be maximized is a social welfare function, as espoused by Professor Cass,⁵ or wealth as has been used by Professor Posner in some of his previous work.⁶ The adoption of the wealth maximization criterion implicitly assumes the appropriateness of the current distribution of property for the purposes of allocating constitutional rights. This assumption is inconsistent with our tradition, cited by Professor Cass,⁷ of allocating constitutional rights based on an egalitarian balancing of competing interests. Finally, I agree with Professors Cass and Posner that economic analysis suggests that it is appropriate that commercial speech receive less first amendment protection than political, artistic or scientific speech. However, while Posner and Cass' arguments focus primarily on the social costs of regulating speech, I would extend the economic arguments to the social benefits side of the cost-benefit analysis. I would argue that government regulation of commercial speech can yield more social benefits than government regulation of political speech because the government can act as an effective guarantor of the truthfulness of commercial speech, but suffers from a fundamental conflict of interest in guaranteeing the truthfulness of political speech. Additional arguments can be made as to the greater social benefits of the regulation of commercial speech over the regulation of artistic or scientific speech.

II. THE VALUE OF DOCUMENTATION AND PRECEDENT

Professor Cass begins his analysis with a lengthy outline and discussion of interpretivist and non-interpretivist theories for discerning the meaning of the Constitution.⁸ Interpretivist theorists answer questions concerning the meaning of the Constitution by referring to general principles they derive from the text of the Constitution, its history and judicial precedent. Non-interpretivist theorists

5. *Id.* at 1330-31. Cass attributes the adoption of a social welfare function as the objective function to Posner. *Id.* Since it is unclear to me whether the objective function in Posner's work is a social welfare function or wealth, I attribute this clarification of the economic model to Cass.

6. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 15, 230, 241 (3d ed. 1986); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119-36 (1979).

7. Cass, *supra* note 1, at 1332.

8. *Id.* at 1322-53.

answer questions concerning the meaning of the Constitution by reference to general principles that they develop independently of the text, history and precedent of the Constitution,⁹ but which they believe ought to be represented in the Constitution.

Among the interpretivist theories is Professor Cass' own favorite, the "negative theory" of the Constitution. Under this theory one should: examine the constitutional document, history and precedent; determine the *problems* with which the framers and prior courts were concerned, and their solutions; and apply analogous solutions to current problems, keeping as true as possible to the evidence of the original meaning of the Constitution and the applicable precedent.¹⁰

Among the non-interpretivist theories is Professor Posner's economic theory. As interpreted by Professor Cass this theory states that the Constitution should allow only that regulation of individual rights for which the benefits of the regulation exceed its cost, with benefits and costs both measured in terms of social welfare.¹¹ The objective of the theory is to maximize social welfare, which, when one adopts a Bergson-Samuelson social welfare function, amounts to the maximization of the total utility enjoyed by all members of society.

Professor Cass accepts most of Posner's economic arguments as public policy arguments as to what the Constitution ought to say, but prefers the negative theory to determine what the Constitution in fact says. The question is how to reconcile these positions. If in fact Posner has developed a workable theory of the Constitution based on the maximization of social welfare, why do Professor Cass and other interpretivist theorists cling to historical documents and precedent? Do they not care about social welfare, or is there some value in anchoring constitutional interpretation in documentation and precedent? Professor Cass gives us two arguments on the value of documentation and precedent, one of which I do not agree with, and the other which I believe goes to the heart of the matter.

The first argument is that it is valuable to discern the original meaning of the Constitution because it is a document that was drafted in greater accord with the general social welfare than other

9. A non-interpretivist may of course cite precedent or the Constitution's text or history when they support the principle which the theorist has adopted. However, for the non-interpretivist the meaning of the Constitution's text depends upon the principles which the theorist believes should be upheld, rather than the principles depending on precedent or the Constitution's text or history.

10. Cass, *supra* note 1, at 1351.

11. *See id.* at 1329-31.

documents, such as contracts or statutes.¹² The argument is Rawlsian: since a constitution is drafted to cover a longer period of time and a greater number of circumstances than other documents, its framers write from a perspective of greater uncertainty as to how a particular provision will affect their future self-interest and thus must draft it less in accord with their own narrow self interests and more in accord with the general social welfare. I agree that the Constitution was probably drafted more in accord with the general social welfare than most other documents, but disagree that this is a reason why discerning the original meaning of the Constitution is valuable. It seems to me that the Rawlsian argument applies equally well to the drafting of the original document or to its later interpretation by the Supreme Court. Whether a drafter or a Supreme Court Justice pens a new provision of the Constitution, both would be working under equal uncertainty as to how the provision would affect their own narrow self-interest and thus would be inclined to shape the provision in the interest of the general social welfare.

The second argument is that courts should use interpretive methods in discerning the meaning of the Constitution to increase judicial predictability.¹³ Judicial decisions generally apply retroactively, and consequently allow limited opportunity for affected parties to respond. Thus it is particularly important that judicial decisions be predictable to allow the affected parties to efficiently plan their affairs. This argument seems correct. Interpretivist methods, which are grounded in documents, history and precedent, would seem more exactly defined and predictable in their application than non-interpretivist methods grounded in general principle. Even if the general principle of a non-interpretivist method could be stated in terms as exact as the documents, history and precedent of the interpretivist method, the objective of the principle, for instance what constitutes social welfare, may change over time while the documentation, history and precedent remain unchanged. This static quality of interpretive methods adds to their predictability. The value of predictability and the corresponding costs of uncertainty in the planning of future affairs has long been recognized in the economic literature.¹⁴

It seems that Professor Cass and the other interpretivists have identified a value in documentation and precedent which has not yet been accounted for in Posner's model of constitutional interpreta-

12. *Id.* at 1348-49.

13. *Id.* at 1349-50.

14. See J. DREZE, *ESSAYS ON ECONOMIC DECISIONS UNDER UNCERTAINTY* 322-23 (1987).

tion.¹⁵ The problem is that Posner's model evaluates the optimal set of constitutional rights from a static perspective rather than a dynamic perspective.¹⁶ As a result, Posner's model does not examine the value of reducing uncertainty in people's planning or the fact that the satisfied desires that constitute social welfare may change over time.¹⁷ Query whether an economic model based on the general principle of the maximization of social welfare, but accounting for the value of documentation and precedent in that maximization process, would be an interpretivist or a non-interpretivist theory?

III. WEALTH MAXIMIZATION VERSUS SOCIAL WELFARE MAXIMIZATION

Professor Cass argues that Posner's economic model arrives at a balancing formula which is more consistent with our judicial tradition than other non-interpretivist theories of the first amendment. This is because Posner's theory, which is based on the individual interests and values of the members of society, allows "the sort of balancing of competing interests that has characterized the courts' approach to first amendment cases."¹⁸ This is true only if the eco-

15. There has been some work on the value of precedent in the law and economics literature. *E.g.*, Cooter and Kornhauser, *Liability Rules, Limited Information, and the Role of Precedent*, 10 *BELL J. ECON.* 366 (1979). In fact, although the value of precedent is not accounted for in his work on the first amendment, Professor Posner has been one of the primary contributors to this literature. *E.g.*, Landes and Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 *J. L. & ECON.* 249 (1976).

16. This is no great condemnation of Posner's model. It is not unusual for economic models to begin with a simple static analysis and progress to a dynamic analysis.

17. A simple outline of the dynamic portion of an economic model of constitutional interpretation might be built on the following assumptions: that people benefit both from predictability in their constitutional rights and from the correct determination of the socially optimal set of constitutional rights by courts; that the socially optimal set of constitutional rights can be determined and that it changes over time; that the courts' determination of the socially optimal set of constitutional rights can be changed by the amendment process or judicial fiat; and that, due to transaction costs, judicial fiat is sometimes a more efficient means of changing the Constitution than the amendment process. Under such a set of assumptions a court would maximize social welfare by following the Constitution's text, history and precedent, even when these sources are inconsistent with the evolving set or socially optimal constitutional rights, so long as the benefits of predictability in planning outweighed the costs of deviation from the set of socially optimal constitutional rights. In this model if the set of socially optimal constitutional rights were evolving consistently in a liberal direction, conservatives would become "strict constructionists" and if this set were evolving consistently in a conservative direction, liberals would become "strict constructionists." Society might regulate the speed with which precedent followed the evolution of the socially optimal set of rights by alternately electing liberal and conservative presidents to appoint liberal and conservative judges.

18. Cass, *supra* note 1, at 1332.

conomic model takes as its objective social welfare maximization as opposed to wealth maximization. Social welfare is a broad-based concept in which the valuation of a right depends on people's utility in the exercise of that right and each person's utility may be given equal weight. Wealth maximization is a constrained form of social welfare maximization in which the valuation of a right depends on people's willingness and ability to pay for that right and each person's utility is weighed in proportion to their wealth. As a result, the objective of social welfare maximization is consistent with the egalitarian balancing of competing interests which has characterized the allocation of rights under our constitutional tradition, while the objective of wealth maximization would favor the rich, allowing them to "out bid" others for constitutional rights, in contradiction of our constitutional tradition.¹⁹

From Posner's article on the first amendment²⁰ it is unclear to me exactly what values he believes we should attempt to maximize in interpreting the Constitution. Posner speaks only in terms of "benefits" and "costs" or "harms" without identifying whether these benefits and costs are measured according to increases and decreases in the hypothetical social welfare function or market values appropriate to a determination of the maximization of wealth.²¹ Professor Cass assumes that Posner seeks to maximize a Bergson-Samuelson social welfare function and cites several of Posner's

19. See *Tate v. Short*, 401 U.S. 395 (1971) (statute which imposes a fine, but mandates imprisonment if the defendant is unable to pay, held unconstitutional); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right of interstate travel cannot be denied indigents); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in a criminal proceeding not dependent on ability to pay); *Griffin v. Illinois*, 351 U.S. 12 (1956) (state may not grant appellate review in a manner that discriminates against convicted defendants due to their poverty); see also *Edwards v. California*, 314 U.S. 160, 184 (1941) (C.J. Jackson, concurring) ("we should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States"). Even though wealth is not a suspect classification under the equal protection clause, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the government's allocation of fundamental rights is subjected to strict scrutiny under that clause, *United States v. Carolene Products Co.*, 304 U.S. 144, 152-23 n.4 (1938). Wealth-based classifications for the purpose of allocating fundamental rights do not survive equal protection analysis. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (state's conditioning of the right to vote on payment of fee or tax violates the equal protection clause of the fourteenth amendment); *Lane v. Brown* 372 U.S. 477 (1963) (state limitations on the right to appeal based on the wealth of appellant violate the equal protection clause); *Griffin v. Illinois*, 351 U.S. 12 (1956) (same).

20. Posner, *Free Speech in an Economic Perspective*, 20 *SUFF. U.L.R.* 1 (1986).

21. *Id.* at 8-54. In fairness to Professor Posner, his failure to exactly define these values may be because he is writing for a broad audience for whom the subtleties of such a distinction might be confusing.

works in support of this assumption.²² Professor Cass' assumption may be right, but in many of his works Professor Posner has advocated the use of wealth maximization as a proxy for social welfare maximization or as an independent value for the allocation of legal rights.²³ Professor Cass himself goes on to cite a wealth maximizing rule as the guideline for the social welfare maximizing legal decision.²⁴ A simple example will demonstrate the importance of distinguishing between social welfare maximization and wealth maximization and the inappropriateness of the latter to constitutional interpretation. But first I will distinguish these concepts.

The concept of social welfare derives from the classical utilitarian or Benthamite tradition.²⁵ In accordance with this tradition it is assumed that each individual experiences a certain amount of utility from each possible distribution of legal entitlements, such as property²⁶ or the right of free speech, and that these individual utilities can be summed across all members of society in one social welfare function. To maximize social welfare, society, through its legislature and courts, selects the distribution of entitlements that leads to the greatest sum total of utility. Thus, if the maximization of social welfare is the objective of society, the Constitution should be interpreted to uphold regulations of speech that increase social welfare by adding more to total utility than they subtract from total utility.

Posner defines wealth as the value, in dollars, of everything in society, based on people's willingness to pay.²⁷ Under Posner's wealth maximization hypothesis, society should allocate legal entitlements to their most "valuable" uses. Society can generally count on competitive markets to perform this function, but where a market fails due to transaction costs, courts should "mimic" the market and award the entitlement to the party that would have purchased it in the marketplace absent transaction costs.²⁸ Thus, if wealth maximization is the objective of society, the Constitution should be interpreted to uphold regulations of speech that would be maintained in costless market transactions among the affected parties.

One such transaction might be that wealthy people would pay poor people to adhere to a regulation of silence on political matters. If the transaction costs of having all rich people and poor people

22. Cass, *supra* note 1, at 1330-31.

23. For examples of Posner's use of the wealth maximization criterion, see the sources cited in *supra* note 6.

24. Cass, *supra* note 1, at 1332-33.

25. J. Bentham, *The Principles of Morals and Legislation* (1789).

26. As used in this section, the term "property" refers to personal or real property.

27. Posner, *Utilitarianism*, *supra* note 6, at 119.

28. R. POSNER, *ECONOMIC ANALYSIS*, *supra* note 6, at 230.

negotiate such an arrangement prevented this transaction and the government stepped in and passed a law prohibiting poor people from voicing political opinions, a judge applying Posner's wealth maximization criterion would allocate the entitlement of the poor's free speech to those who most valued it, the rich, and uphold the statute as constitutional. Such an interpretation is of course inimicable to our conception of first amendment protections under the Constitution. Political speech in a public forum can only be subjected to reasonable restrictions as to time, place, and manner. Prohibiting speech based on content or because it is made by an identified class violates the first amendment.²⁹

The problem is that the objective of wealth maximization only ensures the maximization of utility between the parties to the transaction and only maximizes their utility given the current distribution of property.³⁰ As a result, it is a poor proxy for social welfare maximization in determining the allocation of legal entitlements. For instance, it may be that, although the purchase of the poor's right to speak by the rich may increase the sum total of utility between those two groups, there may be a third group, the middle class, who suffer a loss of utility from not hearing the poor's opinions. Due to such externalities of consumption, one cannot be sure that even a voluntary market transaction increases the sum total of utility for all members of society thereby increasing social welfare.³¹ Additionally, it may be that, although the poor would voluntarily sell their right to speak given the current distribution of property, if property were redistributed to maximize social welfare and the poor gained prop-

29. See *Widmar v. Vincent*, 454 U.S. 263 (1981) (having created a public forum open to students, university could not enforce content-based regulation to exclude religious groups); *Linmark Associated, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (ordinance restricting yard signs must be content-neutral); *Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (in public forum government may not discriminate among speakers based on their employment or the content of their speech).

30. There is another problem with Posner's rule for assigning entitlements based on the maximization of wealth in that he does not require the compensation of those people who do not receive the entitlement but who would have been compensated in the market transaction. See Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221, 237, 241-42 (1980). In the example at hand the poor would have received money for their silence in their hypothetical market transaction with the rich, but receive nothing under the statute prohibiting their speech.

31. The Bergson-Samuelson social welfare function traditionally assumes that there are no externalities of consumption among the members of the society. Samuelson, *Reaffirming the Existence of Reasonable Bergson-Samuelson Social Welfare Functions*, 44 ECONOMETRICA 81 (1977). This seems a questionable assumption when discussing a good such as speech which, in many circumstances, is a public good. It would be more appropriate to adopt a more primitive Benthamite social welfare function for the analysis of questions concerning entitlements to free speech.

erty, they might refuse to sell their right to speak, or might even pay the rich to remain silent. Market mimicry tells us the social welfare maximizing allocation of entitlements only if we are willing to assume that the current distribution of property maximizes social welfare.³²

Whether it is social welfare or some other ideal which one might seek to optimize in deciding the allocation of constitutional rights, our Constitution should and does require a more egalitarian basis for the allocation of rights than the maximization of wealth. All too often, a person's willingness to pay for an entitlement depends on his or her ability to pay. The idea that a person's constitutional rights should depend on his or her ability to bid for those rights is contrary to our constitutional tradition.

IV. EXTENSION OF THE ECONOMIC MODEL: THE GOVERNMENT AS GUARANTOR

With the recognition that Posner's model is a static model and the qualification that its proper objective should be the maximization of social welfare, I find much to agree with in Professors Posner and Cass' economic arguments. I agree that commercial speech is less of a public good than political, artistic or scientific speech and therefore is more resilient and less readily "chilled" by regulation.³³ I also agree that the social costs of regulation are lower with commercial speech than political, artistic or scientific speech. It is easier and cheaper to determine whether commercial advertising is false or misleading with respect to the price, quantity or quality of the good offered for sale than it is to determine whether political, artistic or scientific speech is false or misleading.³⁴ Moreover, it seems plausible that the government would be less likely to "mistakenly" repress true speech in the regulation of commercial speech than in the regulation of political speech because the government is less partisan with respect to commercial speech.³⁵ Accordingly, I agree that, *ceteris paribus*, it makes sense from a public policy perspective to allow greater government regulation of commercial speech, especially false commercial speech, than political, artistic or scientific

32. This fact also means that application of the wealth maximization criterion to the determination of property entitlements is tautological.

33. Cass, *supra* note 1, at 1368; Posner, *supra* note 20, at 40.

34. Cass, *supra* note 1, at 1370-71; Posner, *supra* note 20, at 39-40.

35. Although Posner does not discuss the relative impartiality of government with respect to commercial speech he does mention that government partiality with respect to political speech may add to the legal error costs of regulation *ceteris paribus* by increasing the amount of truthful speech repressed. Posner, *supra* note 20, at 25. Cass discusses this problem as an agency cost problem. Cass, *supra* note 1, at 1355-56.

speech.³⁶ However, these arguments examine only the relative social costs of the regulation of commercial speech and the regulation of political, artistic or scientific speech. I would extend the argument to the benefits side of Posner's cost-benefit analysis and argue that society can derive greater social benefits from the regulation of commercial speech than the regulation of political, artistic or scientific speech because the government can act as an effective guarantor of the former, but not of the later.³⁷

A "seller" of commercial or political "goods" may have incentive to deceive his or her customers with respect to certain qualities of those goods, in particular qualities which can best be discovered by the consumer through experience—for instance the safety, efficiency or durability of a product, or whether a candidate really has a secret plan to end the Vietnam War.³⁸ If a producer can mislead consumers in a way that can be discovered only after the consumer has purchased the good, the producer can increase his or her profits by selling a cheaper and inferior product, or candidate, to consumers. Not all producers will adopt this strategy, and in fact some producers may make a point of never lying to consumers in order to cultivate trust and loyalty. However, realizing producers' incentive to lie, a consumer would be foolish to fully believe all producer claims. The result is that society cannot fully benefit from the resources spent on advertising because some are spent to mislead consumers into wasteful purchases and the value of the remainder, even though spent on truthful advertising, is diminished since rational consumers discount the truthfulness of the advertisements.

One solution to this problem, at least with respect to commercial advertising, is to have the government act as the guarantor of the truthfulness of the advertising. The government can do this by prohibiting false advertising and testing products to ensure that they live up to advertising claims. Economies of scale can be realized by having the government conduct product tests on behalf of all consumers rather than having each consumer purchase a product

36. I accept these arguments only as public policy arguments as to what a constitution which maximized social welfare might say. I venture no opinion as to the correct documentary and historical interpretation of our actual Constitution.

37. Posner and Cass do discuss the benefits side of the cost-benefit analysis. Posner, *supra* note 20, at 29, 40; Cass, *supra* note 1, at 1369; see also Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, UCLA L. REV. (forthcoming) (material accompanying notes 167 and 168). However, their arguments with respect to commercial speech focus primarily on the costs of regulation. I seek to add a further argument concerning the relative benefits of regulating commercial speech and regulating political, artistic or scientific speech.

38. See Nelson, *Comments on Advertising and Free Speech*, in ADVERTISING AND FREE SPEECH 49, 53-54 (A. Hyman and M. Johnson eds. 1977).

to discover whether it performs as advertised.³⁹ Moreover, if the government adequately polices the truthfulness of advertising, consumers can fully rely on advertising claims in making their purchases. As a result, society would realize social benefit from all its advertising expenditures because resources would no longer be spent to mislead consumers into purchasing products they do not want and society would fully realize the benefit of the resources used for truthful advertising because consumers would no longer have to discount the claims of advertisers.⁴⁰

However, the government cannot act as a credible guarantor of political speech. The problem is that the government is a producer of political "goods" and has the same incentives to mislead consumers about the qualities of their goods, or their competitors' goods, as the other producers of political goods.⁴¹ The government might even go so far as to attempt to obtain a competitive advantage in the marketplace of political goods by banning the views of their competitors. The government's fundamental conflict of interest with respect to the regulation of political speech prevents society from realizing economies of scale or the full benefit of advertising resources through the regulation of political speech. Thus, *ceteris paribus*, one would expect the social benefits from the regulation of commercial speech to be higher than the social benefits from the regulation of political speech and could argue that affording com-

39. These economies of scale might also be exploited by private independent consumer testing services that would be developed to meet this need. However, the problem of people "free-riding" on the information produced by such services would seem to insure that the private sector would never provide an adequate amount of these services.

40. If consumers no longer had to discount advertising statements, producers too would realize an increased benefit from truthful advertising and one would expect that more resources would be committed to truthful advertising. The amount of resources dedicated to advertising might fall, rise, or stay the same depending on whether the increase in truthful advertising is less than, greater than, or equal to the decrease in untruthful advertising.

41. The fact that the government has a fundamental conflict of interest with respect to the regulation of political speech has been well recognized in the legal literature. The argument is usually stated in terms of free speech being necessary to the functioning of a democratic government. See generally A. Meikeljohn, *Free Speech and Its Relation to Self-Government* (1948); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). This fundamental conflict has been largely ignored in the law and economics literature and is glaringly absent from Coase's work on the first amendment. See generally Coase, *Advertising and Free Speech in ADVERTISING AND FREE SPEECH*, *supra* note 38, at 1-31; Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AMER. ECON. R. 384 (1974).

mercial speech less constitutional protection than political speech maximizes social welfare.⁴²

This same argument cannot apply in differentiating commercial speech from artistic and scientific speech. There is no obvious conflict of interest in the government regulation of artistic or scientific speech. Moreover, it may be that the government's determination of whether commercial speech is false and should be repressed may turn on its determination of whether certain scientific speech is false. For instance, a cigarette manufacturer may advertise that smoking its brand is less likely to cause lung cancer than smoking other popular brands, and have scientific studies and opinions to support this claim. Are there social benefit arguments to distinguish the regulation of commercial advertising from the regulation of artistic or scientific speech?

Professor Posner has given us a cursory statement of such an argument. He argues that a distinction between commercial speech and artistic or scientific speech can be made on the basis of the intended audience.⁴³ Commercial speech is intended for the public at large who, since we are not all skilled scientists, might benefit from a determination by government scientists that the manufacturer's scientific claim is reasonably grounded in sound scientific research. Artistic and scientific speech is intended, respectively, for artists and scientists who would benefit little, if any, from a government determination on the soundness of the speech. Of course artists or scientists may also seek to communicate their ideas directly to the public. An artist may build a statue in his front yard or a scientist may write a letter to the local newspaper to warn the public that there is evidence that smoking causes lung cancer and death. But with respect to artistic speech, one can readily argue that the public is more expert as to its artistic tastes and values than any government official. In fact, since artistic values are so subjective, it seems doubtful the government could ever beneficially regulate art aside from the prohibition of obscenity.⁴⁴ With respect to scientific speech, where

42. This "benefits" argument is distinct from Posner's argument that the partisan nature of government would add to the legal error costs of the regulation of political speech because a partisan government might repress truthful speech with which it did not agree. Posner, *supra* note 20, at 25. The repression of truthful speech by a partisan government is rightly categorized as a cost of regulation by Posner. My arguments go to the benefits of government regulation in removing untruthful speech from the public forum. These benefits consist of the realization of economies of scale in the testing of the truthfulness of speech and the allowance of greater reliance on the speech that is not repressed.

43. Posner, *supra* note 20, at 40.

44. Posner argues that obscenity yields negative net social benefits. Posner, *supra* note 20, at 44-45.

public opinions are not driven by commercial interests, Posner believes there are adequate incentives and resources for other scientists to contradict false or unfounded scientific claims and there would be little benefit to government regulation.⁴⁵

Thus it seems that, in addition to the arguments espoused by Professors Posner and Cass that the social costs of regulation of commercial speech are less than the social costs of regulating political, artistic or scientific speech, there are arguments that the social benefits from the regulation of commercial speech exceed those from the regulation of political, artistic or scientific speech. The lesser protection afforded commercial speech under the first amendment makes sense from both sides of the cost-benefit analysis in the maximization of social welfare.

V. CONCLUSION

Professor Cass is correct that the Supreme Court's current doctrine affording commercial speech less first amendment protection than political, artistic or scientific speech is consistent with sound economic analysis. Professor Cass' formulation of the economic model with the objective of the maximization of social welfare is consistent with the egalitarian allocation of constitutional rights which marks our constitutional tradition. Application of the economic model suggests that the social costs of regulating commercial speech are lower than the social costs of regulating political, artistic or scientific speech and that the social benefits of regulating commercial speech are higher than the social benefits of regulating political, artistic or scientific speech. Accordingly, it is consistent with the maximization of social welfare to give less constitutional protection to commercial speech. Even the precedential value with which the Court's opinions are imbued is consistent with economic analysis if that analysis takes account of the value of predictability in the efficient ordering of people's affairs. However, further work in the refinement and clarification of the economic theory of constitutional interpretation is needed.

45. *Id.* at 40.

