

# REMEMBERING MELVILLE NIMMER: SOME CAUTIONARY NOTES ON COMMERCIAL SPEECH

William Van Alstyne\*

## INTRODUCTION AND PART I

The First Amendment law of commercial speech is currently in confusion. It suffers in at least two ways. First, there is no clear agreement what "commercial speech" is, i.e., what speech is within the subset of speech called commercial speech, as distinct from what is outside that subset. But second, there is also no clear agreement as to why this matters, i.e., *how much difference* it makes for First Amendment purposes to say that something is or is not (or is not merely) *commercial* speech.

To be sure, the Supreme Court is generally of the view—and has been for twenty years—that commercial speech is not some kind of orphan left out in the cold under the First Amendment. It went out of its way to say so, dispelling strong earlier impressions to the contrary, in 1976:

Some fragment of hope for the continuing validity of a "commercial speech" exception [to the First Amendment] might have persisted [notwithstanding recent decisions of the Court because each could be explained whether one thought there was such an exception or not] . . . .

Here, in contrast, the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist [wishes merely to advertise prescription drug prices, nothing more. He] does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y

---

\* William and Thomas Perkins Professor of Law, Duke University. This Article is adapted from the Melville B. Nimmer Memorial Lecture, delivered at UCLA on November 2, 1995.

price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.

....

... Our answer is that it is not.<sup>1</sup>

This decision, *Virginia Pharmacy*, was far from trivial—if only because of what the opposite decision would have meant. Specifically, the opposite decision would have meant that no matter *what* the effect of a particular regulation (limiting how, when, where, or in what form any such communication would be permitted to appear), if it were merely a regulation of *commercial* speech, any attempt to challenge it on First Amendment grounds (and not merely on the basis of the Commerce Clause,<sup>2</sup> the Due Process Clause,<sup>3</sup> or the Equal Protection Clause<sup>4</sup>) would be subject at once to demurrer. The opposite decision, that is, would have meant that in respect to “purely *commercial* speech,” no claim may arise under the First Amendment *at all*. It is assuredly just this proposition that is denied and laid firmly to rest in the *Virginia Pharmacy* case.<sup>5</sup>

---

1. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760–62 (1976); *see also id.* at 776 (“Today the Court ends the anomalous situation created by *Chrestensen* and holds that a communication which does no more than propose a commercial transaction is not wholly outside the protection of the First Amendment.” (Stewart, J., concurring)) (internal quotation marks omitted).

2. I.e., as an “unreasonable” or “discriminatory” state-imposed burden on interstate commerce invalid under the negative voice of the Commerce Clause. *See, e.g., Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333 (1977).

3. I.e., as depriving an entrepreneur of his “liberty” (to pursue a lawful occupation) or “property” (in respect to the disposition of goods and services) without sufficient justification (i.e., without “substantive due process”). *See also infra* note 5.

4. I.e., as arbitrarily forbidding one class of entrepreneurs from doing what others meaningfully indistinguishable from them are permitted to do.

5. Justice Rehnquist dissented alone in *Virginia Pharmacy*, observing that the Court had previously treated regulation of commercial advertising practices as subject only to minimum rationality substantive economic due process review. He protested that the decision in this case “extends the protection of [the First Amendment] to purely commercial endeavors which its most vigorous champions on this Court had thought to be beyond its pale.” 425 U.S. at 781. He doubtless had in mind Justices Douglas and Black. *See infra* note 25. For a supportive review of Justice Rehnquist’s position, *see* Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 25 (1979). *But see* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983). In fact, however, the Court had previously distinguished between “commercial speech” (advertising, sales solicitations) for commercial goods and services not protected by the First Amendment (e.g., pots and pans) and commercial speech for those protected by the First Amendment (e.g., books, newspapers, magazines). *See, e.g., Breard v. Alexandria*, 341 U.S. 622, 642 (1951) (“We agree that the fact that periodicals are sold does not put them beyond the protection of the First Amendment.” (emphasis added)).

Although the Court has put that matter to rest,<sup>6</sup> disagreement remains rife, even these twenty years later. And it is rife on both of the points we have just noted: What is “commercial” speech,<sup>7</sup> and, as to all that is concededly included within merely commercial speech, what residual constitutional *difference* does it make? More specifically still, how, if at all, may commercial speech be treated *differently*, or less favorably, than other speech (namely, varieties of “noncommercial” speech)? That commercial speech, whatever it is, is “within” the First Amendment, may not tell us very much, if the conclusion yields little by way of protection that would otherwise be lacking had it remained fenced outside.<sup>8</sup>

---

6. Though not entirely. See, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 346 (1986) (suggesting that insofar as a product or service could be banned by a legislature without successful complaint under the Due Process Clause, the legislature may take the lesser measure of tolerating legal traffic in the product or service but discouraging consumer interest by forbidding those engaged in it from advertising its lawful availability). For further discussion of *Posadas*, see *infra* note 8.

7. Is it “any speech engaged in primarily for economic ends” (e.g., to earn a fee or to make a profit)? Evidently not. See *Board of Trustees v. Fox*, 492 U.S. 469, 482 (1989) (“Some of our most valued forms of fully protected speech are uttered for a profit.”); see also *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995) (as applied to those under civil service grade GS-16, an act of Congress forbidding federal employees to accept compensation for speeches, books, or articles, whether or not related to their regular work in government, held void on First Amendment grounds); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (paid advertisement for commercial out-of-state abortion service held protected, overruling state court’s distinction between carrying the information as a news feature (which the state court acknowledged would be fully protected) and carrying it for hire, i.e., as a mere third-party ad). But see *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (pamphlets sent through the mail promoting the sender’s brand of prophylactics held to be “commercial speech,” whether or not they also provide more general information on birth control and venereal disease); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding a newspaper protected by the First Amendment from libel action for content appearing in a paid advertisement soliciting contributions to the same extent as any standard news story or editorial the newspaper might have run); see also *Fox*, 492 U.S. at 482 (distinguishing a fee-charging attorney, or a fee-charging tutor, invited to meet with students in their dormitory, from a Tupperware representative likewise invited, identifying only the latter as a “commercial” speaker because he, but not the attorney or tutor, would be “propos[ing] a commercial transaction, which is what defines commercial speech”). For a close, critical review of the Court’s various definitions, see Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 638–48 (1990).

8. See, e.g., *Posadas*, 478 U.S. at 346 (holding that insofar as a kind of business—casinos—could be forbidden were the government inclined to do so (although it is not forbidden and, indeed, is currently entirely lawful to engage in, exactly in the manner the company wishing to advertise accurately represents), the government may take the “lesser” step of permitting it and simultaneously “reduc[e] . . . demand through restrictions on advertising,” to the very end of suppressing correct information about it, and to do so for the express purpose of minimizing public awareness of the service and the terms on which it is available to them). In short, *Posadas* suggests that “truth in advertising” is not a virtue the legislature need respect insofar as the advertising may stimulate demand for a product or service the state deems ill-advised for people to

Recently, however, we have been receiving very strong signals from the Supreme Court—or at least from some members of the Court—that commercial speech, even of a most ordinary sort according to a lay person's understanding, is more than merely within the First Amendment. We have been receiving strong signals that perhaps it is sometimes even *fully as much* within the Amendment as *any* other kind of speech may be—including speech on political affairs.

Indeed, this somewhat startling latter possibility was obliquely foreshadowed even in the seminal case of *Virginia Pharmacy* by Justice Blackmun. Justice Blackmun observed the following when he presumed to compare the general public's interest in information about various commercial products and services with its interest in public issues, in candidates for office, in political parties, or in matters of war or of peace:

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.<sup>9</sup>

And if that is so, and no doubt it truly often is,<sup>10</sup> then the hint appears to

want. And insofar as the state does not want them to want it (because it regards it, and their desire for it, as ill-advised), the state may forbid even truthful advertising of that good or service. On this rationale, advertisements for automobiles giving less than a certain minimum miles per gallon of fuel could be flatly prohibited, though presumably, news stories featuring such cars could not be prohibited, nor could their inclusion in assessments by *Consumer Reports* or *Road & Track* be forbidden, assuming such publications received no fee from manufacturers or distributors. Likewise, advertisements for motorcycles of any kind might similarly be banned, assuming the state could outlaw them outright (though it neither has done so nor is there any likelihood that such legislation could in fact pass). Advertisement of debt adjustment services provided by non-lawyers could, in principle, similarly be forbidden, since it would not be unconstitutional to outlaw such services. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963); see Philip B. Kurland, *Posadas de Puerto Rico v. Tourism Company*: "Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful," 1986 SUP. CT. REV. 1, 12-13. For the most recent critical review of the *Posadas* doctrine, see Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371 (1995). See also *id.* at 386 n.76 (collecting previous reviews). For the most recent developments, see 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996).

9. *Virginia Pharmacy*, 425 U.S. at 763 (emphasis added).

10. After all, as the *National Enquirer* likes to observe, "Inquiring Minds Want to Know." They "want to know" about the kind of creme rinse Cyndi Lauper uses as much as, perhaps even more than, they want to know whether the CIA may have helped bring down the government in South Vietnam. Cf. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523, 527:

[T]he most influential free-speech theorists of the eighteenth century—those who drafted the First Amendment and their mentors—placed great emphasis on the role free expression can play in guarding against breaches of trust by public officials. Indeed, if one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate.

be a strong one that, given this equal (or even greater) intensity of interest, perhaps the "free flow of commercial information" is itself to be deemed *equally* important for First Amendment purposes as the "free flow" of "the day's most urgent political debate." If this is so, it is assuredly a matter of consequence indeed. It suggests that the state must treat with equal respect commercial and noncommercial speech. And evidently, that is what Justice Blackmun had in mind.<sup>11</sup>

But if the latitude one may have for advertising, say, Carter's Little Pills<sup>12</sup> is to be the same for First Amendment purposes as the latitude one may have for advertising one's views on Proposition X,<sup>13</sup> then, in order to maintain a level playing field, it is obvious enough that one of two things must also happen the instant one so declares. Either the freedom to advertise Carter's Little Pills must be treated as *equally important* as the freedom to advertise Proposition X (Justice Blackmun's view<sup>14</sup>), or the freedom to advertise Proposition X must be treated as *equally inconsequential* as the freedom merely to advertise Carter's Little Pills, a possibility others noted could well happen were Justice Blackmun's view equating the two to pre-

---

*Id.*; Harry Kalven, Jr., *If This Be Asymmetry, Make the Most of It!*, CENTER MAG., May/June 1973, at 36; Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995).

11. See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 777-78 (1993) (Blackmun, J., concurring) ("I again disengage myself from any part [of the Court's opinion], or inference therefrom, that commercial speech that is free from fraud or duress or the advocacy of unlawful activity is entitled to only an 'intermediate standard' [of protection, rather than the full measure of protection that noncommercial speech is accorded under the First Amendment].").

12. An uncontroversial example within the lay person's most ordinary understanding of "commercial speech."

13. An example of a political "Proposition X" might be the forthcoming referendum proposition on the California 1996 ballot which would, if adopted, forbid the state to classify persons by race for allocating opportunities under law by race (unless required to do so by federal law under threat of forfeiting federal assistance grants).

14. And ostensibly the view of Judge Alex Kozinski as well. See *Kozinski & Banner, supra* note 7, at 627; see also *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (holding unauthorized parody of identifiable celebrity to promote a commercial product not protected from a common law misappropriation of likeness claim, though no such action (whether for misappropriation, libel, or intentional infliction of emotional distress) would survive a First Amendment defense of protected political parody not incidental to a mere promotional cultivation of consumer sales of the advertiser's products), *reh'g denied*, 989 F.2d 1512 (9th Cir.) (en banc) (Kozinski, J., dissenting), *cert. denied*, 508 U.S. 951 (1993); cf. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (satire of religious figure); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (unauthorized broadcast of "human cannonball" stunt). For a strong response to the Kozinski dissent in *White*, see J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture—The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 137-38 (1995).

vail.<sup>15</sup> One way or the other, however, it comes to the same thing in the end. The choice must be made, that is, either to “level up” commercial speech to the high plateau of core political speech or to “level down” political speech to the low plateau of commercial speech, or perhaps to have them meet somewhere in between. If the one sort of speech is to be acknowledged as “*as much within*” or “*as well within*” the First Amendment as the other, these are the evident choices to be made—to unify the standards, *and so have them generally treated indistinguishably*. And that is a most disconcerting, if also a most provocative, thought.

## PART II

Disconcerting or not, the idea of constitutionally mandating *like* treatment of commercial and noncommercial speech is an idea whose time has evidently arrived, at least in part. For in one of the most provocative recent Supreme Court commercial speech cases, Justice Stevens declared for a majority of the Court that there *are* circumstances—perhaps a very large number—when “commercial” and “noncommercial” speech may *not* be treated differently by the state.<sup>16</sup> Indeed, this would be true, Justice Stevens suggested, in any case where the character of the interest thought sufficient to justify some kind of restriction on the one kind of speech is *indistinguishably present* in the manifestation of the other kind as well. However the state chooses to treat them, whenever this is so, he suggested, the state must treat them the same—whether for better or (and here’s the possible downside) for worse.

If, for example, the proliferation of news racks at street corners in a municipality’s central city has reached a nuisance level city council members regard as worthy of their attention, in Justice Steven’s view the municipality is not at all helpless to take strong regulatory measures. Indeed, there are any number of measures it may pursue. But, insofar as it takes any such measures, the new suggestion holds, such measures must fall on the

---

15. Justice Powell expressly noted this possibility in *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (“To require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech.”). See also *Florida Bar v. Went for It, Inc.*, 115 S. Ct. 2371, 2375 (1995) (reiterating Justice Powell’s dictum); *Board of Trustees v. Fox*, 492 U.S. 469, 481 (1989) (same); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 591 (1980) (“The test adopted by the Court . . . elevates the protection accorded commercial speech . . . to a level that is virtually indistinguishable from that of non-commercial speech. I think the Court in so doing has effectively accomplished the ‘devitalization’ of the First Amendment that it counseled against in *Ohralik*.” (Rehnquist, J., dissenting)).

16. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

“commercial” and “noncommercial” news racks alike—at least in all cases where the nuisance characteristics are shared equally.

What might this mean? According to this view, banning news racks as a mode of distributing “commercial” material (e.g., *The Cincinnati Real Estate Advertiser*<sup>17</sup>), while leaving untouched the more numerous news racks of other publications (e.g., *The Cincinnati Inquirer*, *The New York Times*, *The Wall Street Journal*, *The Gay-Lesbian News*<sup>18</sup>), becomes “an impermissible means of responding to the city’s admittedly legitimate interests,”<sup>19</sup> when there is nothing to distinguish the one kind of news rack from the other kind of news rack. If it is perfectly plain that each news rack, considered without reference to the material it contains, is “equally at fault” in contributing to the problem of street corner congestion, then they must be regulated equally.<sup>20</sup>

According to this view, any differential regulation of “commercial” from “noncommercial” material must find its rationale in something about the “commercial” material not equivalently present in the noncommercial material, for otherwise the difference in treatment invites invalidation as an impermissible kind of “content discrimination.”<sup>21</sup> So Justice Stevens declared expressly in the *Discovery Network* case, offering the following clinching critique:

In sum, the city’s newsrack policy is [not] *content-neutral* . . . . Thus, regardless of whether or not it leaves open ample alternative channels of [commercial advertising], it cannot be justified as a legitimate time, place, or manner restriction on protected speech.<sup>22</sup>

---

17. A “newspaper” containing only ordinary advertisements for real estate sales and no other features, stories, or opinion. See *Discovery Network*, 507 U.S. at 424 (“[F]or the purpose of deciding this case, we assume that all of the speech barred from [being distributed by means of stationary boxes put out on] Cincinnati’s sidewalks is what we have labeled ‘core’ commercial speech . . .”).

18. In other words, newspapers containing features other than mere real estate ads.

19. *Discovery Network*, 507 U.S. at 424 (emphasis added).

20. *Id.* at 426 (emphasis added).

21. Cf. Justice Douglas in *Railway Express Agency, Inc. v New York*, 336 U.S. 106, 110 (1949): “It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.” This sentence is given meaning and emphasis by the sentence preceding it in the Douglas opinion, namely: “[T]he fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category . . . is immaterial.” *Id.* Despite Justice Douglas’s view, although it may not be a requirement of equal protection “that all evils of the same genus be eradicated or none at all,” the majority opinion in *Discovery Network* suggests it may well become a requirement of the First Amendment instead.

22. *Discovery Network*, 507 U.S. at 430 (emphasis added). Ordinarily, however, commercial speech is presumed to be sufficiently “hardy” that entrepreneurs will seek out any existing reasonably cost-efficient alternative means of conveying ordinary sales promotional messages. Entrepreneurs, it is assumed, have a profit-seeking (and profit-catching) interest in pursuing these

And so, if presence of news racks on its streets creates a problem thought worthy of some kind of "news rack policy," yet news racks containing stacks of merely commercial advertising papers contribute to that problem no more (or, indeed, in total number, in the actual case far less) than those containing other kinds of papers, the city cannot require that they be removed. This is so Stevens says, "even if we assume, *arguendo*, that the city might entirely prohibit the use of news racks on public property"<sup>23</sup> (which, if reduced to this choice, the city may well decide to do<sup>24</sup>). Moreover, whatever the rationing device used by the city in its newsrack policy, it allegedly may not "discriminate" against commercial vis-à-vis ordinary

---

alternative media, such that they do not need the kind of subsidy that the First Amendment furnishes to others using leaflets (and other "public forum" devices) to signal attention to social grievance or causes they seek to have redressed. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976) ("[C]ommercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.").

23. *Discovery Network*, 507 U.S. at 427-28. And note the point well. The threat is not an empty one. Justice Stevens had already indicated his own view that freedom of the press and of speech offer no protection from a city eliminating *all* news racks from public locations. See *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 780-81 (1988) (White, J., dissenting, joined by Stevens and O'Connor, JJ.). Justices Rehnquist and Thomas agree with that view as well. See *Discovery Network*, 507 U.S. at 438 (Rehnquist, C.J., dissenting, joined by White and Thomas, JJ.). More generally, one may note in passing (albeit with regret) that Justice Stevens has been less than acutely supportive of a strong version of the First Amendment against impositions of time, place, and manner restrictions by the state, even on "fully protected" speech. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (voting to sustain censorship of high school newspaper); *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (voting to sustain total ban on any public property postings, see *infra* note 44); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (voting to sustain FCC daytime ban on "indecent" broadcasting applied to radio broadcast of George Carlin's parody, "Filthy Words"); see also *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994) (voting to sustain congressionally-imposed demands that cable television companies subsidize local over-the-air companies by providing free transmission on no fewer than one-third of their channels, whether or not this displaces more distant program originators whose program content may not otherwise be available at all); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (dicta approving subject-specific "hate speech" ordinances); *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989) (voting to sustain criminal conviction in flag-burning political demonstration).

24. Thus the city is itself pressed by the Court's new doctrine toward the harsh option of "leveling down" highly protected speech (that of the bona fide press, independent journals and publications, and underground and idiosyncratic newspapers that may depend more crucially on distribution from boxes located on convenient street corners). The dissent in *Discovery Network* makes the point forcefully. See 507 U.S. at 445 ("Today's decision . . . places the city in the position of having to decide between restricting more speech—fully protected speech—and allowing the proliferation of newsracks on its street corners to continue unabated. It scarcely seems logical that the First Amendment compels such a result."). It not only "scarcely seems logical," but scarcely seems credible (i.e., plausible).

newspapers, at least when, as here, the common mode for distributing the former contributes no more to the common problem than the latter (and indeed may contribute far less).<sup>25</sup>

### PART III

If we combine Justice Blackmun's views since 1976<sup>26</sup> with those of Justice Stevens as recently reflected in *Discovery Network*, we seem to arrive at a rather strange place.<sup>27</sup> For if this reasoning is right, even one who wants to distribute handbills calling attention to some rally or some speech the public is invited to attend,<sup>28</sup> whether by Colin Powell or Jesse Jackson (or Jesse Helms), may have *just as much right* to do so as another who wants to distribute handbills calling attention to a sale the public is invited to avail itself of at Macy's, but no *more* of a right than the latter. And indeed, to the extent that the distribution of handbills is allowed in the first instance, and the distribution of handbills for a Macy's sale would be no *more* of a nuisance (perhaps even *far less* of nuisance<sup>29</sup>), then even if neither need be allowed, if the former is permitted, the latter must appar-

---

25. For a contrast, see the dissent in *Breard v. Alexandria*, 341 U.S. 622, 649 (1951). The majority in *Breard* had voted to sustain a city ordinance prohibiting uninvited solicitors from calling on residents, as applied to magazine sales personnel just as much as to "Fuller Brush" salesmen or salesmen of other goods. It also had distinguished *Martin v. City of Struthers*, 319 U.S. 141 (1943) (holding such an ordinance invalid as applied to Jehovah's Witnesses). Justices Black and Douglas dissented in *Breard*, concluding that even door-to-door solicitations for magazine subscriptions were sufficiently central to the First Amendment that the restriction, otherwise valid, could not be applied to them. That it would be valid as applied to ordinary commercial sales, on the other hand, they had no doubt at all. See 341 U.S. at 650 n.\* (Black, J., dissenting) ("Of course I believe that the present ordinance could constitutionally be applied to a 'merchant' who goes from door to door 'selling pots.'").

26. See *Edenfield v. Fane*, 507 U.S. 761 (1993) (insisting on equal First Amendment treatment of commercial and noncommercial speech, where considerations of fraud, duress, or illegal advocacy are not involved); *Discovery Network*, 507 U.S. at 431 (Blackmun, J., concurring).

27. Unless there is something wrong with our reasoning, which I hope shortly to show there is. Melville Nimmer would assuredly be very quick to agree. See *infra* note 31.

28. Whether only on payment of an admission fee, or for free, we will not now stop to say. Cf. *Schneider v. New Jersey*, 308 U.S. 147, 154, 155 n.3 (1939) (handbills calling attention to "a meeting to be held under the auspices of 'Friends Lincoln Brigade' at which speakers would discuss the war in Spain," with notice of \$.25 and \$.50 "admission").

29. If, as Justice Blackmun suggests, consumers may frequently value information about a sale at Macy's more than they may value information as to when and where Jesse Jackson will be speaking, they may be far more inclined to keep the leaflet on the Macy's sale, even while dropping the leaflet about the Jackson speech into the street (so the problem of litter from leaflets is more substantially a problem of political leaflets than of commercial leaflets).

ently be permitted as well.<sup>30</sup> Moreover, whatever the measure taken to bring the felt nuisance under more manageable control, it must not draw distinctions on allegedly facile suppositions that information of sales at Macy's is of any "lower value" to the public than information on when and where Colin Powell, Jesse Jackson, or Jesse Helms may be heard. Why? Evidently, again, it is just because such allegedly facile assumptions (of "lower value") are not to be deemed to be consistent with the First Amendment.<sup>31</sup>

Adhering to this new test, a federal district court recently held unconstitutional an act of Congress barring the use of automatic-dialing-and-announcing devices (ADADs<sup>32</sup>) by telemarketers.<sup>33</sup> It did so on the ground that there was no evidence that the intrusion into one's privacy by

30. See *People v. Remeny*, 355 N.E.2d 375, 377 (N.Y. 1976) (holding that the anticommercial handbill New York City ordinance originally applied and upheld in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), was invalid even as applied to purely commercial handbills). Three judges concurred in this view, one concurred only in the judgment, three dissented. *Id.*; see *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (opinion of Justice Douglas); *supra* note 21; cf. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1236 (1996) (footnote omitted):

Like the maxims of equity, basic First Amendment doctrines tend to run in contradictory pairs. [One basic doctrine], for example, requires that speech restrictions be narrowly tailored to avoid the vice of "overbreadth." At the same time, another . . . insists that speech regulation be content neutral, which often forces a government to regulate speech in larger swaths than it would otherwise prefer.

31. Compare the following language from *Discovery Network*:

In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the "low value" of commercial speech is a sufficient justification for its selective . . . ban on newsracks dispensing "commercial handbills." . . .

. . . .

. . . [R]egardless of whether or not it leaves open ample alternative channels of communication [i.e., ample alternative channels of communication by means of which merchants can still reach consumers, and reach them in a reasonably cost-efficient way].

*City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-30 (1993). Absent this assertive position by the Court, however, one might have supposed that the distinction drawn by the city may be "relevant" to an interest asserted by the city: Not the interest in aesthetics or congestion, rather, its interest in not wanting to remove news racks providing a variety of newspapers, such that it means to forego affecting any such newsracks, even if that does mean that such gain it can make (solely by ordering the removal of mere advertising newspapers) is less—even substantially less—than it might otherwise accomplish but for its concern to make no move trammeling the free press. See also discussion *supra* note 24.

32. These are devices which employ a prerecorded message that automatically plays once the number that has been dialed "answers," the automatic dialing mechanism mechanically working its way through whatever series of telephone numbers it has been programmed to dial.

33. *Moser v. FCC*, 826 F. Supp. 360 (D. Or. 1993), *rev'd on other grounds*, 46 F.3d 970 (9th Cir.), *cert. denied*, 115 S. Ct. 2615 (1995).

the use of these devices by a mass sales telemarketer is different in kind than when the same equipment is used by a candidate for public office, a grass-roots political group, or a nonprofit organization, whose use of the equipment was not banned. Far from this difference in treatment being a virtue of the law (as one might surely have supposed), however, it was seen by the district court as a weakness, indeed, as a flaw sufficient to bring the act down on constitutional grounds. The court tracked the logic of the *Discovery Network* case and it sedulously recited the similarities of commercial and noncommercial ADAD use: Both kinds of ADAD use "trigger the same ring . . . and both risk interrupting the recipient's privacy equally."<sup>34</sup> Concluding from *Discovery Network* that the test that differential treatment of commercial and noncommercial speech is impermissible where the offending characteristics<sup>35</sup> thought to make one suitable for regulation are equally shared by the other which the law nonetheless fails to treat in the same way, the court struck down the law as a form of impermissible content discrimination.<sup>36</sup>

Conversely, yet applying just the same logic, a federal court of appeals has upheld a state law which "neutrally" barred virtually any<sup>37</sup> use of ADADs, including use of such a device by a person seeking election to public office who sought to use it merely in a manner he deemed helpful to advance his candidacy (namely, as he said, as "an inexpensive way to reach potential voters" and solely to "provide information" about himself and his campaign).<sup>38</sup> The use of this calling device saved considerable expense over what would be required to use a "live" voice call, of course, which is why the plaintiff proceeded in this way, as he quite straightforwardly

---

34. *Id.* at 366 (emphasis added).

35. In this instance, the "offending characteristics" are (1) the uninvited ring of one's telephone, and (2) the immediate "unanswerable" nature of the prerecorded message that is launched onto the recipient the moment the dialed connection is made. These characteristics are the same regardless of the message content, whether to alert one to a sale at Macy's or to ask that one vote for, or against, Proposition X.

36. See also *Moser v. Frohnmayer*, 845 P.2d 1284 (Or. 1993). In reversing the district court in *Moser v. FCC*, the Ninth Circuit did not disapprove of its rationale but instead noted that "the statute does not distinguish between commercial and noncommercial calls." 46 F.3d at 973. Rather, it merely permitted, but did not require, the FCC to do so. Finding that "the regulations" the FCC made were "outside the jurisdiction of the district court," it then described the "challenge to the statute's constitutionality" as a "narrow challenge," one that challenged the statute on its face. *Id.* Therefore, "[b]ecause the statute does not require that the FCC distinguish between commercial and noncommercial calls, the appropriate inquiry is [merely] whether a ban on automated telemarketing calls is narrowly tailored to the residential privacy interest." The Ninth Circuit then determined that the ban was narrowly tailored to this end. *Id.* at 974.

37. A few trivial exceptions were provided, e.g., for calls by schools needing to notify teachers that, due to weather conditions, classes were canceled.

38. *Van Bergen v. Minnesota*, 59 F.3d 1541, 1546 (8th Cir. 1995).

explained. Though the evidence the legislature had at the time this indiscriminate ban was enacted in Minnesota consisted almost solely of objections from the high volume of ADAD use by commercial telemarketers, and though the court conceded that this was a relatively "new technology,"<sup>39</sup> the court found nothing amiss in requiring candidates for public office to be relegated to the same means of reaching possible voters as a commercial corporation would have to use to flog its goods and services. In respect to the banning of ADADs, in brief, the court held it was constitutional to have "leveled down" political speech to the same treatment as applied to commercial speech.<sup>40</sup>

These flattening-out developments are far more worthy of Procrustes<sup>41</sup> than James Madison. They have appeared during the same period in which, even more generally, the Supreme Court has effectively demoted opportunities for political speech as communicated in leaflets, posters, face-to-face solicitation in public places, and other traditional, inexpensive grass roots ways of reaching wide audiences. Cases with doctrines similar to that found in *Discovery Network* appear to be but a part of a larger, increasingly intolerant, public forum "leveling down" trend. And they are all the more discouraging on that account, once put in this larger perspective as they need to be.

As the case law stood no more than twenty years ago, I believe it would have been virtually a foregone conclusion, evident to even casual First Amendment students, that a city could not simply outlaw the election-enlivening common practice of tacking political posters to city utility poles for a few days just before a municipal election, as a traditional, cheap, and yet effective way of advancing one's preferred candidate for some state or local office.<sup>42</sup> Local politics have thrived on this hardy American tradition, subject only to a fair minimum of regulation and restraint.<sup>43</sup> More recently, however, when the city council of Los Angeles

---

39. *Id.* at 1556.

40. Quoting from *Discovery Network*, the court treated the indiscriminate breadth of the ban (i.e., its indifference to the nature of the ADAD use, whether by mere commercial telemarketers or by others) as a "content neutral" virtue rather than as a First Amendment vice (the vice of overbreadth). *Id.* at 1550.

41. "[A] fabulous Greek giant who stretched or shortened captives to fit one of his iron beds." *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1044 (William Morris ed., 1971).

42. Though there would also be little doubt that forbidding the posting of ordinary commercial sales flyers on such public property would raise no substantial First Amendment question at all.

43. For instance, that care is taken to post such signs in ways posing no significant safety hazard and that one will also see to their prompt removal once the election is past.

flatly forbade all such postings (i.e. of any material at any time on city property), the Court, again in an opinion by Justice Stevens, sustained the ordinance even as applied in this manner to local candidate posters, despite the federal court of appeals view that as applied it was irreconcilable with the more ample protection of free political speech as previously declared by the Supreme Court. It was enough for the Supreme Court, however, that these uses of such signs on public property (e.g., utility poles along the public streets) were now thought to contribute to "the substantive evil" of "visual blight" such that the city could now ban them on that account not just for commercial uses (postings advertising ordinary consumer goods), but for these traditional, local, core *political* uses as well.<sup>44</sup>

Likewise, the Court has recently upheld federal postal regulations forbidding any soliciting on the perimeter sidewalk of United States Post Offices. The Court rejected a forceful argument that such a broad restriction unfairly trammels the opportunity of small advocacy groups who lack means to seek support for their various causes by more expensive forms of appeal to use these sidewalk locations to reach those willing to pause to hear them out, if they choose.<sup>45</sup> In upholding the regulation, the Court reversed the Fourth Circuit Court of Appeals, which had concluded that such a ban, not limited in any way merely to ordinary commercial solicitations, could *not* be sustained consistent with the Supreme Court's previous statements and emphasis on the special requirements of openness for political speech.<sup>46</sup> But the Supreme Court held otherwise—as though in anticipation of its new attitude ("one rule fits all") in the *Discovery Network* case.<sup>47</sup>

---

44. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); see also *Burson v. Freeman*, 504 U.S. 191 (1992) (likewise sustaining a 100-foot "campaign-free zone" at polls to forbid any distribution of election materials within that radius, cutting off a traditional low-cost means to reach voters with simple handbills seeking support for some local candidate or slate of candidates). For a contrast with *Vincent* and *Burson*, see *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (holding that posting political signs on one's property cannot be banned).

45. See *United States v. Kokinda*, 497 U.S. 720 (1990) (5-4 decision); see also *United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114 (1981) (sustaining a flat ban on placing anything in anyone's mailbox other than material that the postal service itself delivers, whether or not the box owner would have no objection and would willingly receive such material).

46. See the compelling opinion by Judge Harvie Wilkinson for the court of appeals in *Kokinda*, 866 F.2d at 699.

47. See also *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 506 U.S. 805 (1992) (5-4 decision) (holding entire interiors of Kennedy, La Guardia, and Newark International airports "nonpublic" forums to which the least demanding First Amendment time, place, and manner test will apply, and thus holding that political or religious soliciting may be as readily forbidden as commercial soliciting). Relatedly, see *Hudgens v. NLRB*, 424 U.S. 507 (1976) (withdrawing the availability of any part of even the largest corporately held shopping malls, including parking areas and public walkway areas, from First Amendment reach, and explaining that *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), implicitly overruled *Amalgamated Food Employees Union v. Logan*

In "leveling up" commercial speech in the new *Discovery Network* sense,<sup>48</sup> the Court has done less leveling up than leveling down.<sup>49</sup> For an increasing number of limitations that may make reasonable sense in restraining commercial vendors now tend to be sustained even if (and sometimes, according to *Discovery Network*, only if) applied "equally" to political and social advocacy uses as well.

#### PART IV: REMEMBERING MELVILLE NIMMER

The field of copyright law, Melville Nimmer's field, may seem far removed from what we have been considering here, but in fact, it is not. For the field of copyright law is in large measure itself merely a highly specialized segment of "commercial speech." The use of one's copyright power often involves the mere selling of one's speech, and often a very crass selling it can be. Even so, pursuant to an explicit, enumerated power,<sup>50</sup> Congress vests in an "author" a monopoly control over other people's use of something the "author" may have fixed in some form—such

---

Valley Plaza, 391 U.S. 308 (1968)). See generally Keith Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335 (1986).

48. I.e., that where the characteristics producing negative externalities are common to commercial and noncommercial matter indistinguishably, the former may not be restricted in ways from which the latter are exempt when the former contributes no more substantially to the same problem and, indeed, may contribute to that problem even less.

49. A different kind of additional example of "leveling down" may be furnished by *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). The Court originally granted certiorari in *Forsyth County* to resolve the question of the extent to which government could impose fee charges for those assembling or parading in public places. *Id.* at 129. The court of appeals had held that no more than a "nominal" charge could be required, at least in respect to traditional political assemblies and demonstrative, social-advocacy assemblies or parades. *Id.* at 128-29. In the Supreme Court, the case technically washed out, since the majority found the ordinance defective in committing a standardless discretion to the administrator to charge less than full direct cost up to \$1,000 per day. *Id.* at 132-33. Nevertheless, as four dissenting Justices noted, the case left the implication that the government's insistence on coverage of such costs, objectively determined and neutrally required of every party, would be sustained. *Id.* at 140-41 (Rehnquist, C.J., dissenting). Already the case has been understood in this way. See, e.g., *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 17 Cal. Rptr. 2d 861 (1993). Under this view, whether it were a commercial, promotional parade sponsored by local merchants, or that of an ad hoc minority political protest group, those unable to defray all direct city costs associated with the event may simply be out of luck. If this is to be so, however, note how the conflation of commercial and noncommercial uses of the public parks and streets thus tends to become even more rigid and complete. See Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411 (1995); Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257 (1985).

50. U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

"speech" (in a loose sense) as originated with him. The author is thereby empowered to exploit that monopoly as he pleases, to forbid anyone to reproduce the copyrighted material other than as he wishes, on terms satisfactory to himself. In brief, the Copyright Act carves a wide swath of "delegated censorship power" the State (in this instance, Congress, pursuant to the copyright clause) entrusts to "authors,"<sup>51</sup> thus to limit freedom of speech.

Mel Nimmer was, first of all, a great copyright lawyer, even before he became a valued member of the UCLA law faculty in 1962. And as a copyright lawyer, he frequently represented parties to enforce their copyright claims, assisting them to suppress unlicensed, unauthorized excerpting, quoting, borrowed renderings, and even remote "derivative"<sup>52</sup> byproducts without such payment as his clients demanded (if at all). It was, in short, from an objective point of view, a substantial part of Nimmer's practice to serve business interests ("commercial" interests of large companies), to put to their service his expertise in copyright—to "interfere," if you will, with the freedom of others to repeat what his clients did not want repeated, did not want played, performed, or merely "copied," save on such terms as the law vested in his clients an exclusive right to command.<sup>53</sup>

---

51. The power thus wielded need not actually be an author's power—it is enough to be the copyright holder (e.g., a corporate assignee). For critical reflection on the divorce of copyright from original authors to corporate assignees, see the observations made fifty years ago of Zechariah Chafee, Jr., *Reflections on the Law of Copyright* (pt. 1), 45 COLUM. L. REV. 503, 719 (1945).

52. 17 U.S.C. § 106 (1994) ("[T]he owner of copyright . . . has the exclusive rights to . . . prepare derivative works based upon the copyrighted work . . .").

53. It is worth noting that currently the monopoly control of a copyright-holder extends through the entire life of the original author (in the case of jointly authored works, the life of the longest-surviving author), plus a half-century beyond that. 17 U.S.C. § 302(a)–(b) (1994). This government-granted authority to control exclusive publication rights may therefore easily last through an entire century. See, e.g., *id.* § 302(e) (stating the presumption that the copyright has expired "one hundred years" from date the work was created, when date of author's death is unknown). This protection may well endure even longer, however. For example, in the case of an author who writes something at age 18 and lives to 93, the copyright will run for 125 years (75 years from the date the work was "fixed" in a tangible medium plus another half-century). Query, however, whether such an extended period can be fairly rationalized merely in order that creativity be furnished appropriate incentive. How long is such a power to control other people's access and use appropriate, after all? Is it pertinent to that question to note that prior to the current Act (1976), the maximum period for such censorship control over other people's uses of the work was *less than half* the century-and-quarter time possible today (56 years under the 1909 Act, and only then if care were taken to renew the original 28-year registration)? Is it useful to realize that under the *original* Copyright Act of 1790, moreover, the period was far shorter still—14 years, once renewable (so, a total of not more than 28 years)? See Act of May 31, 1790, 1 Stat. 124, reprinted in 5 DAVID NIMMER & MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS*, app. at 7-41 to -44 (1995).

Given that background, one might suppose that Mel Nimmer would rejoice in the development of ever enlarging the entitlements of "commercial speech" doctrines of the sort we have been reviewing, extending their reach and securing their claims across a widening frontier. But in fact that is not the way things were. Rather, it was the case that Nimmer's deep experience in the trenches of copyright law<sup>54</sup> put him in a better position than others—including a large number of First Amendment experts—to see how all speech cannot, ought not, by *any* means, be treated as constitutionally the same.

Even the purpose of the Copyright Clause and of copyright itself, he understood, was not to promote "commerce" as such but to serve First Amendment interests in a certain way. To do so, as conveyed on the face of the Copyright Clause, by granting a limited power to Congress to "promote the Progress of Science and useful Arts," by furnishing a fair assurance that creativity, transformative expression, original images—different ways of seeing old things as well as new expressions of new things—would be encouraged, albeit encouraged by a nominal First Amendment ("anti-free speech") paradox of vesting in the author—the one who would do any of

The original Copyright Act was adopted the year following Congress's approval of the First Amendment (1789), so one may suppose that the original 28-year period would raise no First Amendment complaint. May the same still be said, however, though the period is now more than a century? To be sure, in an early case, *Pennock & Sellers v. Dialogue*, 27 U.S. (2 Pet.) 1, 16-17 (1829), Justice Story thought the determination of the length of the "limited period" for copyright and patent protection a matter "subject to the discretion of Congress." But Story went on to say:

While one great object was, by holding out a reasonable reward to inventors . . . to stimulate the efforts of genius; the main object was "to promote the progress of science and useful arts;" and this could be done best, by giving the public at large a right to make, construct, use, and vend the thing invented, at as early a period as possible . . .

*Id.* at 19 (emphasis added); see also Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 284, 350 (1970) (examining the proposal then before Congress to extend copyright duration from the maximum of 56 years to the life of the author plus 50 years, and concluding that the then current period was itself already "too long" and that no adequate case for the proposed longer period of protection had been made); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996). And consider Thomas Macauley, *Speech Delivered in the House of Commons* (Feb. 5, 1841), in 8 THE WORKS OF LORD MACAULEY 201 (London, Logmas, Green & Co. 1879) ("The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures . . .").

54. Coincidentally (or, rather, probably not coincidentally), one of the great seminal academic contributors to First Amendment theory prior to Mel Nimmer, Professor Zechariah Chafee was likewise an expert on copyright law. See, e.g., ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1942); Chafee, *supra* note 51, at 719.

these original, creative things—a limited power to disallow others to broadcast it to the public without his consent.<sup>55</sup>

But copyright itself also drew lines, specifically distinguishing by “content,” the most basic of these lines requiring that the expression seeking copyright protection must be original and nontrivially *creative* to qualify, i.e., not so obvious that creativity would play a *de minimis* role. Even if effort is involved, if creativity is not, then the special protection of the Copyright Act simply does not apply.<sup>56</sup> Additionally, the Copyright Act,

---

55. See the observations by Justice Story *supra* note 53; see also THE FEDERALIST NO. 43, at 271–72 (James Madison) (Clinton Rossiter ed., 1961). To be sure, it may be a nice question whether copyright protection or its lack would make the world better informed and richer—if, for example, the instant a new play were published, an untrammelled freedom of everyone at once to copy and make whatever use of that copy each might like to do, albeit without consent of the author, were the law. The Constitution resolved that question in favor of copyright theory (to encourage authors, and so by their encouragement, secure creative works for the public good), but even so, only up to point—by vesting a *qualified* copyright power in Congress and nothing more. Consider also the strikingly similar question recently presented in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). In *Cowles Media*, the Court acknowledged that the threatened enforcement of a reporter’s promise of source confidentiality to one providing information and seeking to keep his name from being used may operate to keep the public ignorant of highly salient facts the newspaper’s senior editors subsequently decide are themselves an important part of the story the newspaper ought to report. *Id.* at 671–72. The public is thus deprived of information the editors themselves concluded was information the public deserved to know. Yet, though that is true, it is also true that insofar as such promises are binding (and therefore must be kept to avoid suits for damages), the assurance that such promises are binding may well encourage knowledgeable persons to be more forthcoming when they would not otherwise be willing so to do. Thus the public interest in the information they have, and would not otherwise part with, will be advanced. It thus was equally a very nice question in *Cowles Media* which rule (enforceability or nonenforceability of reporters’ promises of source confidentiality) would be the more “speech enhancing” rule helpful to the public-informing value of a free press. A majority concluded that a state could decide on either course. *Id.* at 672. For a thoughtful review of the problem, see Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609 (1991). And for a useful comment following the Court’s decision, see *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 277–79 (1991).

56. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). As David Nimmer usefully describes the case:

[In *Feist*] the Supreme Court . . . construed the limitation in the Copyright Clause that Congress could only protect the “Writings” of “Authors.” The Court concluded unanimously that only something creative, evincing intellectual effort, qualifies as the “Writings” of “Authors” under the Constitution. On that basis, the decision ruled that telephone book white pages stand outside constitutional protection.

David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1413 (1995) (footnotes omitted); see also *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (the “creativity” elements are enormously strained in *Geis*); cf. *Trade-Mark Cases*, 100 U.S. 82, 93–94 (1879) (holding that an act of Congress providing for registration of trademarks and criminal penalties for infringers is not within Congress’s power under the “authors and inventors” clause and that a trademark need involve neither originality nor creativity, but merely “priority of appropriation” and “a considerable period of use.”). The Court added: “[W]e are unable to see any such power

as Mel Nimmer understood acutely, has its own built-in consciousness of the First Amendment, most prominently in the exempting provisions for "fair use."<sup>57</sup> The fair use exemption, itself, makes distinctions that are not at all "content neutral." For example, if one quotes at length without the copyright holder's permission, and indeed without having offered to pay for the use at all—but embeds the passage inside a *review* (even one so devastating as to destroy the market for the work being reviewed), the use falls within the exemption. This is so because the unlicensed use in question lets the reader see just what it is, concretely, the critic is commending or criticizing; it is a protected free use; it is a so-called "fair" use. And this is so, of course, although the same passage reproduced in a commercial work of "Memorable Excerpts," a work containing merely the very same excerpts, with others of equivalent length from still other authors would not qualify as "fair use" under the law.<sup>58</sup> Even far more than the "limited times" restriction<sup>59</sup> and the creative originality<sup>60</sup> requirement of the Copyright Clause, the fair use provisions of the Copyright Act report a keen balance of First Amendment concerns.<sup>61</sup>

---

in the constitutional provision concerning authors and inventors, and their writings and discoveries." *Id.*

Regrettably, this significant limitation on the copyright power has been eviscerated. What Congress lacks power to do pursuant to the Copyright Clause, it has been permitted nonetheless to do pursuant to the Commerce Clause (despite the original decision to the contrary in the *Trade-Mark Cases*) and pursuant to the Necessary and Proper Clause to carry into domestic law obligations negotiated by the President in making treaties with other nation-states. See Nimmer, *supra*, at 1408-20.

57. See 17 U.S.C. § 107 (1994):

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use . . . is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

58. Did the content of the unauthorized copied passages fit within the imperatives of a critical review, or was it taken merely to appear within a commercialized collection of "Memorable Excerpts," would be the question to be answered in court. See *supra* note 57 (setting out the various fair use factors).

59. See description and critical discussion *supra* note 53.

60. See *supra* text accompanying note 52.

61. For a recent and highly compelling example, see *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994) (Souter, J., for a unanimous Court) (holding that even substantial borrowing of readily recognizable portions of copyrighted song (Roy Orbison's *Pretty Woman*) in a strong, rap social parody version, may constitute a fair use). The opinion in *Acuff-Rose* resonates with

For Mel, moreover, as of the time he was most actively practicing copyright law, it was by no means clear that the fair use exemption in the Copyright Act would extend as far as it *should* in order to provide adequate allowance for certain unauthorized uses critical to the informing function of a free press. So much worse for the Act—for Mel had no doubt that the First Amendment might itself be used as a suitable shield in an appropriate case to block any successful infringement claim under the Act.<sup>62</sup>

---

First Amendment, social satire, social parody, and anti-establishment freedom of speech concerns. See, for example, the following language:

2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true [the theme of the Roy Orbison original], with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words [in the 2 Live Crew version] can be taken as a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. . . .

. . . .  
 . . . [W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.

114 S. Ct. at 1173, 1178. What has happened, incidental to the *Acuff-Rose* case, is that the “fair use” factors of the Copyright Act have been interpreted to co-opt First Amendment arguments. In other words, the case strongly suggests that whatever the First Amendment might itself require to be deemed exempt from the reach of a copyright infringement action will be deemed protected within the Act as an exempted fair use. Cf. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (Rehnquist, C.J., for a unanimous Court) (holding that a parody ad, rife with political caricature, is protected by the First Amendment from state tort claims for misappropriation, libel, or intentional infliction of emotional distress).

And note also the postscript litigation to *Hustler Magazine*. After *Hustler* published its scurrilous ad parody maligning Falwell with crude gusto, Falwell sought to appeal to his own supporters by reproducing more than 750,000 copies of the *Hustler* parody advertisement to show how he had been treated, as part of a solicitation drive. *Hustler Magazine* promptly filed suit for copyright infringement (namely, the mass copying and mass distribution, for fund-raising purposes, of *Hustler*’s original ad copy, without its consent). But there was a nice justice done—*Hustler*’s infringement action was dismissed on a motion for summary judgment. The court of appeals affirmed, concluding that the use made by Falwell, given the circumstances (to answer the attack on his integrity as a public figure by *Flynt* and *Hustler*), was a “fair use” within the Copyright Act. See *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986). One may well say that First Amendment interests were well served, all around. Both *Acuff-Rose* and *Hustler Magazine* make liberal reference to the Nimmer treatise, attesting to its continuing stature, a stature well-maintained by David Nimmer.

62. In his entry on copyright in 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 504–05 (Leonard W. Levy et al. eds., 1986), Nimmer went out of his way to remind the general reader that the power vested in Congress pursuant to the Copyright Clause was as much subject to the First Amendment as any other power vested in Congress in Article I. He observed that “[i]n recent years the courts have begun to question whether, and to what extent, the copyright laws are subject to . . . the First Amendment.” *Id.* at 505. He emphatically agreed that they were fully subject to the First Amendment, reminding the reader of the following:

Nothing in the First Amendment limits the freedom protected thereunder to speech that is original with the speaker. Nor does the fact that the Constitution also grants to Congress the power to enact copyright laws render the First Amendment inapplicable [to laws Congress adopts pursuant to that clause]. The First Amendment and the remainder

Generally, Mel had noted, the factors involving fair use as permitted by the Copyright Act<sup>63</sup> were restricted to uses that do not "materially impair the marketability of the work that is copied."<sup>64</sup> Even if there were such a material impairment, however, he had no doubt that "[t]he First Amendment privilege, when appropriate, may be invoked, despite the fact that the marketability of the copied work is thereby impaired."<sup>65</sup> And he maintained that view, very strongly, through the end of his distinguished career.<sup>66</sup>

But Nimmer's mastery of copyright also gave him one other advantage well worth noting here, as we seek to draw these notes to some useful close.

of the Bill of Rights limit only those powers that have otherwise been confided to the federal government. If it did not modify such powers, it would have no meaning at all.

*Id.*

63. See *supra* note 57 (listing the fair use factors).

64. 1 NIMMER & NIMMER, *supra* note 53, § 1.10[D], at 1-92 (footnote omitted).

65. *Id.* As a concrete example of when it would be "appropriate" to fall back onto the First Amendment, rather than to rely on the fair use provision, he offered the district court opinion in *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968). First, he faulted the court in *Geis* insofar as it had held that the copying for commercial use by *Life* magazine of the Zapruder film (the footage showing the shooting of President Kennedy in Dallas) without the copyright holder's consent was a "fair" use within the terms of the act. 1 NIMMER & NIMMER, *supra* note 53, § 1.10[D], at 1-93. Rather, Mel believed, where, as in *Geis*, the entirety of the copyrighted picture was appropriated without permission for use by a commercial publication, the case could not fairly be reasoned *within* the statute (i.e., it strained the terms of the statute too much). *Id.* Nevertheless, in his view, the decision was defensible—but it should have been based on First Amendment grounds. *Id.* In dicta, a federal district court subsequently expressed agreement with Mel's First Amendment review of *Geis*. *Pacific & S. Co. v. Duncan*, 572 F. Supp. 1186, 1193 n.5 (N.D. Ga. 1983), *aff'd in part and rev'd in part*, 744 F.2d 1490 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985) ("*In Time*"] *Inc. v. Bernard Geis Associates*, the court found the unauthorized use of the Zapruder film to be fair use. Professor Nimmer believes the case more soundly rests on a First Amendment rationale. This Court agrees." (citations omitted)); see also Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Lyman R. Patterson, *Private Copyright and Public Communication: Free Speech Endangered*, 28 VAND. L. REV. 1161 (1975). *Compare Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (holding that a commercial airing of Zacchini's human cannonball act over his objection was actionable pursuant to state common law claim for commercial misappropriation) *with Geis*, 293 F. Supp. at 130 (involving no similar events of public interest).

66. See, for example, his amicus brief in *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (defending Nation's unauthorized use of 300 words of Gerald Ford's discussion of why he pardoned President Nixon, upstaging the planned publication of the same material by *Time* magazine under exclusive first serial publication rights from Harper & Row). The Court, divided six-to-three, however, upheld the infringement claim. *Id.* at 569. The case and Nimmer's participation in it, his last professional submission before his death, are elaborately reviewed in 1 NIMMER & NIMMER, *supra* note 53, § 1.10, at 1-71, 1-82 to -83; 3 *id.* § 13.05, at 13-194 to -205. See also RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 12.05, at 12-113 to -118 (1994).

Copyright makes a fundamental distinction between an idea as such and different expressions of an idea. The basic notion is that an idea is never subject to copyright;<sup>67</sup> rather, copyright attaches to one's personalized representation of the idea, the concatenation of words, the way this or that author has differently captured it and turned it loose again. It is thus quite natural for a copyright lawyer to insist, as Nimmer insisted, that "[i]n the exposition of ideas[,] form and substance are inextricably merged."<sup>68</sup> It is, after all, just this "inextricability" of the new (the form) reformulating the old (the subsisting idea) that offers itself as a competing perspective, so to tutor others to see something they did not see as well until *this* iteration appeared.

What distinguished Mel Nimmer was not that he understood this staple, or mere commonplace, of copyright. What distinguished him, rather, was that he readily saw its connection to "democratic dialogue"<sup>69</sup> in a far more spacious, generous, and libertarian sense. His wider grasp of First Amendment principles enabled him to carry the connection between form and substance into a larger, wholehearted defense of freedom of speech at large in American life. He knew how and why protecting the right to express oneself differently mattered *beyond* copyright. And he put his understanding to its most effective use before the Supreme Court in 1971, in *Cohen v. California*,<sup>70</sup> producing one of the strongest defenses to have come from the Court on the protection of political freedom of speech.<sup>71</sup>

*Cohen v. California* was not a copyright case nor in any sense a case about commercial speech. A mere local misdemeanor case, it arose from the arrest of a young man (Paul Cohen) for disturbing the peace by displaying "Fuck the Draft" on his jacket in the heavily trafficked public corridors of the Los Angeles County Courthouse where, as the trial court had noted, "women and children were present."<sup>72</sup> Relying on a three-decade-old case in which the Court had broadly implied that the use of mere four-letter

---

67. The Act is quite clear that no *idea*, as such, is subject to copyright. See 17 U.S.C. § 102(b) (1994) ("In no case does copyright protection . . . extend to any idea . . .").

68. Brief for Appellant at 34, *Cohen v. California*, 403 U.S. 15 (1971) (No. 299).

69. *Id.*

70. 403 U.S. 15 (1971).

71. The Justices currently inclined to collapse the public forum might profit themselves by re-reading this case and by taking its essential points more to heart than seems to be reflected in some of the principal cases we have reviewed.

72. *Cohen*, 403 U.S. at 16.

expletives in public places need not be tolerated by public authority,<sup>73</sup> three Justices were strongly inclined to dismiss Cohen's First Amendment claim. As they saw it, Cohen's behavior was little more than an "absurd and immature antic . . . mainly conduct and little speech."<sup>74</sup> For them, his case, therefore, provided no suitable occasion for "agonizing over First Amendment values"<sup>75</sup> at all. For the majority, however, in perhaps his most compelling opinion during his sixteen years on the Supreme Court, Justice Harlan saw the matter quite differently. And behind that opinion rested Nimmer's strong brief and oral argument. Professor Nimmer's brief in the Supreme Court and his compelling oral argument moved Cohen's case from the margins to the center of First Amendment concern.

In his brief, Nimmer argued strongly against the Court's earlier, tentative dismissal of certain "well known classes of utterances" as generally beneath First Amendment notice. There were no such classes, he suggested, nor could there be, without damaging the First Amendment itself. In this very case, for example, granted that Cohen's use of a four letter expletive was crude, what substitution might one make under the circumstances, without compromising meaning and message alike? Blunt language informs in ways conventional expression masquerades and frequently fails to capture at all. "The emotive content of language," Nimmer suggested, "can be fully as important as its intellectual content." Nor, he added, may the state "require that dissenting views be expressed in a manner that the authorities regard as polite."<sup>76</sup> Nearing the close of his oral argument, Nimmer returned to his point, "[W]e respectfully submit," he suggested, that "offensiveness of form, no less than the offensiveness of substance, must be preserved by the First Amendment, if the First Amendment is to be meaningful."<sup>77</sup> And scarcely four months later, picking up from Nimmer's own phrasing, Justice Harlan proceeded toward the Court's own

---

73. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (footnotes omitted)).

74. *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting, joined by Black, J., & Burger, C.J.).

75. *Id.*

76. Brief for Appellant at 33, 34, *Cohen* (No. 299).

77. Oral argument of Melville B. Nimmer on Behalf of Appellate, reprinted in 70 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 838 (Philip B. Kurland & Gerhard Casper eds., 1975). The point has generally been accepted by the Court since *Cohen*. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992) (White, J., concurring) ("[T]hat expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." (citing *Cohen*, 403 U.S. at 20)).

compelling conclusion embracing the point virtually without reservation in the following manner:

[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.<sup>78</sup>

Harlan explained:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion . . . .

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.<sup>79</sup>

By any measure, *Cohen* was a distinctly "American" freedom of speech case—strong, uncompromised, committed to a risk-taking (rather than a risk-averse) First Amendment, confident in the end as against the more collapsed and constrained regimes in countries with weaker first amendments than ours. The opinion exhibits a confidence in central principles of free speech and of a free press Mel Nimmer cherished and nourished through his own example and his distinguished career. We may wish that the Court should do as well as he in seeing where those central principles are strongly implicated in the cases that come before it, as well as when they are not.

---

78. *Cohen*, 403 U.S. at 26.

79. *Id.* at 24–25.

