Spring 1989

Introduction: Third Abraham L. Pomerantz Lecture: The First Amendment and Government Regulation of Economic Markets

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THE THIRD ABRAHAM L. POMERANTZ LECTURE

The First Amendment and Government Regulation of Economic Markets

INTRODUCTION

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To a securities lawyer, the idea that all, or significant portions, of the federal securities laws violate the first amendment and, therefore, are unconstitutional seems preposterous. Yet, it also seems preposterous that pornography is protected by the first amendment and sales literature for securities products is not. This distinction between artistic and commercial speech may be explainable historically, but it is difficult to justify intellectually. Moreover, the line between politics and economics is a fine one. A free society depends on economic freedom as well as political freedom. The free movement of capital is an essential component of democracy.

Securities regulation is essentially the regulation of speech. Further, because of the mechanics of the statutory construction of the federal securities laws, a fair amount of prior restraint is imposed on speech by the Securities and Exchange Commission (SEC). For example, the SEC can prevent the sale of securities products and, therefore, capital-raising activities by business en-

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terprise through the registration provisions of the Securities Act of 1933.[1] Similarly, the SEC can censor statements concerning tender offers[2] and proxy solicitations.[3] Another obvious first amendment question involves the regulation of financial newsletters.[4]

The following Articles discuss the interplay between the first amendment and government regulation of information in the securities market. They were delivered at a symposium sponsored by Brooklyn Law School on November 15, 1988.

Professor Burt Neuborne, who delivered the third Abraham L. Pomerantz Lecture at the symposium, posits the controversial thesis that commercial speech, such as information about securities products, is hearer-centered whereas political speech is speaker-centered. Accordingly, although commercial speech is protected, it does not prevent the government from forcing disclosure necessary to permit hearers to make informed and autonomous choices. Using this standard, Professor Neuborne contends that SEC regulation that promotes such an objective is valid, but other regulation may well be unconstitutional. However, Professor Neuborne believes that persons subject to SEC regulation are well served by such regulation and unlikely to challenge it.

The commentators on Professor Neuborne's paper disagree with Neuborne on various grounds. Benjamin M. Vandegrift articulates the viewpoint of the securities practitioner on these matters. He points out that commercial firms have on occasion successfully challenged SEC regulations on free speech grounds. Professor Arthur R. Pinto argues that the government should be permitted to regulate the capital markets because of the special nature of those markets and the role of information in adding value to securities. Further, since in his view the issue is one of policy rather than constitutionality, he believes that economic policy decisions should be left to Congress and the SEC rather than the courts.

Judge Ralph K. Winter questions Professor Neuborne's dis-

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[1] *See* Securities Act of 1933, § 5, 15 U.S.C. § 77e (1982 & Supp. IV 1986).

[2] Securities Exchange Act of 1934, §§ 13(d) & 14(e), 15 U.S.C. §§ 78m(d) & n(e).

[3] *See* 17 C.F.R. § 240.14a-9 (1988) (Rule 14a-9) and 17 C.F.R. § 240.14a-11 (1988) (Rule 14a-11). *See also* Long Island Lighting Co. v. Barbash, 779 F.2d 793 (2d Cir. 1985).

[4] *See* Lowe v. SEC, 472 U.S. 181 (1985).

tinction between hearer-centered and speaker-centered free speech protection and points out that securities legislation transcends ordinary discourse between a speaker and an audience. Professor Henry Monaghan also questions the distinction between hearer-centered and speaker-centered speech as a methodology for explaining the principles for limiting commercial speech. In addition, he questions the distinction between commercial and other protected speech.

The debate reflected in this Symposium is significant not only because of the legal issues discussed, but also because capital formation is a crucial economic function. Although it seems safe to assume that the SEC will not be dismantled by first amendment litigation, it is nevertheless probable that first amendment concerns will propel changes in various aspects of securities regulation. What rationale the courts will use in balancing the public interest in preventing and suppressing fraud in the capital markets against the first amendment protection of speech is an interesting question which is differently addressed by each of the authors.