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SOME COMMENTS ON PROFESSOR NEUBORNE'S PAPER

Henry P. Monaghan*

INTRODUCTION

It is a pleasure to have the opportunity to comment upon Professor Neuborne's paper; it is a provoking effort to make sense out of important aspects of the first amendment. At the outset, I should say that there is much in the paper with which I agree. But for the purposes of this essay I will focus on points of disagreement.

Professor Neuborne's specific focus is an analysis of the Security and Exchange Commission's (SEC) regulation of speech. The final twenty-one pages of his paper are directly concerned with analysis and criticism of the existing case law on the subject. Quite properly, the first thirty-five pages are an effort to articulate a general first amendment theory that will adequately frame and support his more specific discussion of SEC law. Given the composition of this group of commentators, I think it perhaps most useful to confine my remarks to the general theory contained in the first thirty-five pages, leaving the SEC discussion entirely to others.

Professor Neuborne posits a central distinction between speaker-centered and hearer-centered theories of the first amendment. This distinction is advanced at two different levels, one historical and the other theoretical. I should like to examine each level.

I. THE HISTORICAL CLAIM

Professor Neuborne's historical claim is that traditional free speech theory has been speaker-centered and that this view has provided a generally satisfactory level of protection for speech about religion, politics, and art. Professor Neuborne claims that

these three areas — religion, politics, and art — involve "traditional speakers of conscience." By contrast, speech concerning consumer affairs, labor relations, and capital formation lack a speaker of conscience, and, therefore, such speech has been excluded entirely from the protection of the first amendment. When in 1976 the Supreme Court extended protection to commercial speech, this great "structural divide" collapsed, Professor Neuborne argues.

In considering the soundness of his claim from an historical view, it is important to draw attention to an important feature of Professor Neuborne's account of what he claims is the traditional speaker-centered theory of free speech. Professor Neuborne believes that speaker-centered theories are about a particular kind of speaker: the speaker of conscience — that is, a speaker, usually politically weak, who speaks from deep conviction. Professor Neuborne claims that this is the kind of speaker who was protected by Holmes and Brandeis in their famous opinions. My own understanding of the history of free speech is different. For me, except in the area of religious speech, the traditional theories of freedom of speech were heavily hearer-centered — that is, the right of the speaker was protected because of the benefits conferred on hearers, not because of some idea related to the "dignitary interest" of the speaker.

When free speech cases first came to the Supreme Court in 1919, they involved, at their bottom, the right of citizens to criticize governmental policy, a right that was restricted in various forms by civil and criminal libel laws, as well as by criminal anarchy and criminal syndicalism statutes. Over time, the Court recognized that, by and large, these restrictions were in large measure inconsistent with the core constitutional concept of representative democracy. Representative government presupposes the right to criticize governmental policy and to change it. This, in turn, meant the government could not foreclose its citizens from being able to hear various viewpoints by cutting off discussing of topics the government didn't like. Recognition of this set of ideas culminated in the famous decision in New York Times v. Sullivan, which restricted civil libel actions by public officials. I think it fair to say of this entire development that at no point was the Court's judicial philosophy concerned with Professor Neuborne's "speaker of conscience." Rather, when political speech was at issue, the Court was concerned that govern-
ment censorship not foreclose the right of the citizens to hear various and conflicting views.

To my mind, then, the traditional theories are in fact hearer-centered, as Professor Neuborne uses the term. Moreover, I think the description is true of both Holmes and Brandeis, whom he specially invokes. Holmes, you will recall, protected speech because, as he said in his famous dissent in *Abrams v. United States*, the "best test of truth is the power of thought to get itself accepted in the competition of the market." In that dissent, Holmes was expressly referring to political speech. The quoted statement indicates that Holmes protected speech because of his deep epistemological skepticism about the existence of truth. For Holmes, truth is not "out there," so to speak, but is only what people will buy. Quite plainly, this is a hearer-centered theory.

Brandeis did not share Holmes's skepticism. He had the progressive's abiding conviction in reason, rational self-government, and progress. His famous concurring opinion in *Whitney v. California* emphasized the social utility of protecting speech. Speech of all kinds must be tolerated if we are to avoid repression and secure the benefits of orderly change. This seems an even clearer illustration of a hearer-centered theory.

There are other difficulties with Professor Neuborne's account if it is viewed historically. In the 1930s, the Court extended protection to the media, as for example, in *Grosjean v. American Press Co.* Do members of the media qualify as "speakers of conscience," even though the media operates in corporate form? I would also note that artistic speech, which did involve Neuborne's "speaker of conscience," received quite restrictive protection, constantly being threatened by obscenity prosecutions. Not until 1947, in *Roth v. United States*, did aesthetic speech receive robust constitutional protection.

Finally, Professor Neuborne's effort to ground political speech in a speaker of conscience cannot explain what is perhaps the most litigated current first amendment problem: claims by the media that it is entitled to access to government information. These claims are always grounded in terms of the "public's — the hearers' — right to know."

All in all, then, I think that Professor Neuborne's general analysis is at least open to challenge, if viewed historically. But registering my own differences with Professor Neuborne on this
point is not the end of the matter. The distinction Professor Neuborne so heavily stresses should be considered also at the theoretical level.

II. The Theoretical Claim

Those who work in the first amendment area know that there is considerable disagreement about how to explain the special protection accorded to free speech by the Constitution. Some judges and writers advocate a theory that has one overarching value, for example, protecting speech enhances individual self-realization, that is, good psychological benefits flow to individuals when they are permitted to speak. Others draw on a different value, the enhancement of representative democracy. Still others despair of a theory of the first amendment that draws on a single value and, instead, offer more complex models. Once seen against this background, Neuborne's paper has special relevance. In his stress on the distinction between speaker- and hearer-centered theories, Professor Neuborne's paper can be understood as a claim about how we should now make sense of our present in order that we may go forward in an intelligent form. For me, this aspect is the most interesting part of his paper, and one to which I should like to give further thought.

I have some initial reservations. Some are drawn from my prior historical comments. I wish to call your attention to two such reservations. First, I do not think any distinction between speaker- and hearer-centered theories will be viable if the speaker-centered theory must assume that only “speakers of conscience” qualify as speakers. Indeed, in Professor Neuborne's exposition, I find his category of “speakers of conscience” puzzlingly narrow. Why, for example, aren’t commercial sellers speakers of conscience? Second, I do not think that his basic distinction is viable if it assumes that the protection for political and social speech is speaker- rather than hearer-centered.

I also have a wider and more pervasive reservation. For me, the emphasis on a distinction between speaker-centered theories and hearer-centered theories is useful in a way not mentioned by Mr. Neuborne: the distinction calls our attention to the fact that the interests of the speakers and hearers may not be congruent, at least in the short run. For example, an audience may not wish to hear what the speaker wants to say and it may enlist the government in an effort to avoid listening. The Skokie litigation is a
dramatic example. There are numerous other such illustrations not only in the political arena, but also with respect to such matters as pornography and junk mail. However, even if the interests of speakers and hearers are not perfectly congruent, traditional first amendment doctrine, which in virtually every area focuses on the speaker as the holder of the first amendment right, is perfectly capable of taking the fact of divergence into account. There are very few circumstances in which any "first amendment problem" cannot be worked out in terms of thinking about the rights of the speaker. Why? Because the right of the speaker will not be an unlimited one; what we denominate as the speaker's first amendment right will only be the end result of the judicial balance that has already taken into account a wide range of factors.

The supposed distinction between speaker-centered and hearer-centered theories is highly problematic if pressed very hard. The distinction does not strike me as in any sense "foundational," if I may borrow a term used by philosophers. To begin with, I find it unsatisfying to draw a sharp divide between speakers and hearers; this distinction blurs the important reciprocal relationship that exists between them. Any adequate theory of the first amendment will necessarily be a complex one. This means that it will take into account a wide range of factors, including the interests of the speaker, the interests of the audience, and the interests of third parties who are not the intended audience of the speech. Moreover, the theory will take into account the kind of speech involved, valuing some kinds of speech as more important than others. Finally, the theory will take into account the circumstances under which the speech occurs, including not only the content of the speech but the way in which it is delivered.

My own inclination is to think about free speech problems in the terms I have just described. In that respect, I wonder how far I really am from Professor Neuborne. The reader will notice, for example, that Neuborne frequently invokes the idea of distrust of the government's ability to make impartial judgments about speech as an important first amendment factor. This idea is well known in first amendment literature, but it is in no sense an idea that turns on the distinction between speaker-centered and hearer-centered theories of speech. In the end, therefore, the difference between Neuborne and me may be one of empha-
sis. Personally, I am inclined to downplay — not eliminate — the distinction between speaker-centered and hearer-centered theories as a way of making sense out of the first amendment.