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THE FEDERALIST SOCIETY

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FREE SPEECH AND ELECTION LAW

PRACTICE GROUP

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IS TRUTH IN THE EYE OF THE BEHOLDER?  
DOES THE FIRST AMENDMENT PROTECT FACT-BASED  
SPEECH THAT COULD BE MISLEADING?

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Thursday, January 15, 2004

1 PRESENT:

2           HOWARD   BEALES,    Director,    Federal    Trade  
3 Commission Bureau of Consumer Protection

4           JOHN   E.   CALFEE,   Resident   Scholar,   American  
5 Enterprise Institute

6           ROSEMARY   HAROLD,   Partner,   Wiley   Rein   &  
7 Fielding

8           ERIK   S.   JAFFE,   Law   Office   of   Erik   S.   Jaffe,  
9 P.C.

10           DAVID   C.   VLADECK,   Professor,   Georgetown  
11 University Law Center

12           HONORABLE   WALTER   E.   DELLINGER,   Partner,  
13 O'Melveny & Myers and former acting U.S. Solicitor  
14 General, *moderator*

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1           MR. REUTER: Walter Dellinger is our  
2 moderator. He is head of the appellate practice at  
3 O'Melveny & Myers. He's also a professor of law at  
4 Duke University, and was Acting Solicitor General for  
5 the 1996-1997 Supreme Court term. He served for  
6 three years as Assistant Attorney General and head of  
7 the Office of Legal Counsel. As such, he was the  
8 department's principle legal advisor to the Attorney  
9 General and to the President. He's written articles  
10 that many of you have read, I'm sure. They've  
11 appeared in the Harvard, Yale, and Duke law reviews,  
12 and elsewhere. His articles have appeared in *The New*  
13 *York Times*, *Washington Post*, *London Times*, *Newsweek*,  
14 and any other journal or periodical you can think of.  
15 He has testified approaching 30 times in front of the  
16 U.S. Congress. His J.D. is from Yale University. He  
17 was a law clerk to Hugo Black, Supreme Court Justice.  
18 This is one of his areas of specialty, so we're happy  
19 to have him here moderating today. Please welcome  
20 Walter Dellinger.

21           MR. DELLINGER: Thank you. Let me stand  
22 here just for a moment to introduce this excellent

1 panel on an engaging topic of when the government may  
2 regulate or when it should regulate truthful, but  
3 potentially misleading speech. We are well served by  
4 having Howard Beales, who is Director of the Bureau  
5 of Competition at the Federal Trade Commission.

6 We also have that great intellectual  
7 gadfly and provocateur, Erik Jaffe, who is the senior  
8 and named partner in the Erik Jaffe Law Firm and a  
9 great writer of excellent briefs.

10 We will then hear from John Calfee.  
11 Jack Calfee has been a resident scholar at AEI since  
12 1995. He's a Ph.D. economist, and he has been in the  
13 Bureau of Economics at the Federal Trade Commission  
14 and has written a great deal on the subject of  
15 consumer advertising.

16 Rosemary Harold is a partner at Wiley  
17 Rein & Fielding in their communications, Internet, e-  
18 commerce, and aviation practices. She is formerly a  
19 journalist with *The Miami Herald* who then came to law  
20 and has written and spoken frequently and represents  
21 media companies -- satellite providers and others --  
22 in the areas of regulation of broadband and similar

1 subjects.

2                   Last, we have David Vladeck, whom you  
3 all know for his long tenure -- over 25 years -- with  
4 the Public Citizen Litigation Group. He's now in a  
5 sense taken that in-house at Georgetown University  
6 Law Center, where he is a member of the faculty and  
7 directs a clinical program that addresses a broad  
8 array of issues of open government, First Amendment,  
9 and regulation.

10                   Let me introduce the panel just by  
11 saying that this is a topic that starts small and can  
12 loom large. When you talk about the regulation of  
13 true but potentially misleading speech, you ask  
14 questions of whether the government should be  
15 engaging in paternalistic protection of its citizens  
16 from true but misleading speech, whether they will  
17 become too dependent upon the notion that the  
18 government will take care of the speech, or whether  
19 there should be, as a matter of policy, a much  
20 greater free flowing dialogue.

21                   Increasingly, since the time I started  
22 being a law professor, the First Amendment, either

1 intrudes or happily makes this a subject of  
2 constitutional discourse as well as policy discourse.  
3 As you know, increasingly there are members of the  
4 Court that extend protection of speech to commercial  
5 activities or commercial speech. We see that in a  
6 number of examples.

7 I was co-counsel in the *Nike* case  
8 involving corporate and commercial speech. It  
9 certainly permeated the background of the debate over  
10 whether the FDA could regulate tobacco and restrict  
11 promotion of tobacco to children.

12 I'll try to ask some provocative  
13 questions of our panelists, but I think first we'll  
14 let them give you their basic orientation towards  
15 these issues in five or six minutes apiece. We will  
16 start with Howard.

17 MR. BEALES: Thanks very much. It's a  
18 pleasure to be here today. Today's subject of how to  
19 deal with truthful but misleading speech is an  
20 important one and one that we think about essentially  
21 every day at the FTC in the practical world of going  
22 about law enforcement.

1           Falsity is one of the primary tools of  
2 fraudsters. But many other fraudsters have very  
3 quickly learned the art of framing misleading  
4 messages using half truths and misleading  
5 implications. In one of our cases, for example, Amy  
6 Travel, the promotional claim was, "buy an airline  
7 ticket and get your lodging for free." Well, yes,  
8 but it was an airline ticket that would cost you  
9 substantially more than any other airline ticket you  
10 could buy and more than cover the cost of the room.  
11 But they didn't tell you. The implication was  
12 misleading.

13           Or in the companies that tried but got  
14 it wrong department, Haagen-Dazs advertised its line  
15 of frozen yogurt as being "94 percent fat free". But  
16 it was only one flavor in the line that met that  
17 standard. Nothing else did.

18           The FTC over a long period of time has  
19 very carefully nurtured the idea that speech could be  
20 literally truthful but nonetheless misleading. We  
21 think the ability to prosecute this kind of  
22 calculated deception is fundamental to effective

1 consumer protection.

2           As we talk about truthful but misleading  
3 speech, we also need to remember that challenging  
4 literal falsity can be problematic as well. It was  
5 in the name of preserving literal truth that an  
6 earlier FTC challenged "navy bean soup" as falsely  
7 representing that was made by the Navy. It  
8 challenged a desktop encyclopedia that said it  
9 contained "everything you wanted to know about every  
10 conceivable subject". Not true, said the Commission.  
11 We can think of some things that aren't in there.

12           So there are potential problems of over  
13 regulating truthful but misleading speech. But there  
14 are also potential problems of regulating the literal  
15 meaning of words, because in all cases the question  
16 ought to be, "How do consumers understand that  
17 message? What do they take away?" That's the  
18 message that ought to be truthful.

19           Although we've been active in  
20 challenging false or misleading commercial speech,  
21 we're strong believers in the First Amendment and in  
22 the Commercial Speech Doctrine. In fact, even



1 without the First Amendment, I think you'd likely  
2 find the FTC applying the criteria that the  
3 Commercial Speech Doctrine applies, because frankly  
4 it's good public policy.

5           The FTC has long understood that even  
6 well-intentioned efforts to prevent deception can end  
7 up curtailing the amount of truthful information  
8 that's available to consumers. Even before *Virginia*  
9 *Pharmacy*, you can find that concept being discussed,  
10 if not always adhered to, in FTC cases. In fact,  
11 when *Virginia Pharmacy* was decided, there was an FTC  
12 rule making pending to preempt state laws that  
13 prohibited price advertising of prescription drugs.

14           In short, we think the FTC's approach to  
15 regulating deception as it's been developed and  
16 refined over the years is really a First Amendment  
17 friendly one. In fact, we see it as a model of how  
18 commercial speech generally should be regulated. Let  
19 me tick off some of the reasons why. First, we  
20 think that standards really do matter. That's why in  
21 1984 the Commission adopted a deception standard that  
22 focused on reasonable consumers and the materiality

1 of claims as necessary predicates to challenge speech  
2 as deceptive.

3           Second, we understand that even the  
4 clearest claim may be misinterpreted by at least some  
5 consumers. Anybody who has been in front of a  
6 classroom knows no matter how clear you are to your  
7 students, some of them will get it wrong. And that's  
8 a problem that's inherent in any communication.  
9 That's why we've made it clear that it's important  
10 how reasonable consumers, not regulators, interpret  
11 particular claims.

12           And for the same reason, we recognize  
13 the importance of extrinsic evidence in interpreting  
14 murky claims. When there's doubt about what a claim  
15 says, we should focus on how consumers understand the  
16 claim. Our approach recognizes the importance of  
17 context and qualification in how consumers interpret  
18 claims.

19           We look at claims after the fact, after  
20 they've run, and we ask whether the claim as made was  
21 likely to deceive consumers. We're not talking about  
22 conceivable or even potential deception, but claims

1 made that were likely to have misled consumers. I  
2 think we've been very successful using our resources  
3 to move quickly against deception, to stop it, to  
4 obtain redress and other forms of relief for  
5 consumers who have been injured.

6           The Commission's deception enforcement  
7 is accompanied by an advocacy program which argues  
8 against unnecessary governmental restraints on  
9 commercial speech, as well as, in some cases, taking  
10 law enforcement actions against private restraints on  
11 commercial speech.

12           We think that our experience can be  
13 important and useful to other agencies who face  
14 similar problems. For example, we're working closely  
15 with the FDA staff to fashion a workable approach to  
16 allow qualified health claims for food products  
17 without misleading consumers about the strength of  
18 the scientific evidence. Such an approach would  
19 facilitate the flow of truthful information.

20           FTC economic studies have shown that  
21 truthful health claims can both help improve consumer  
22 diet and spur improvements in product formulations.

1 And it's particularly important and particularly true  
2 for less advantaged consumers. Other FTC studies  
3 have shown that labeling policies can directly affect  
4 the availability of health information in both food  
5 advertising and food labeling.

6           So we think there's a lot at stake in  
7 demonstrating that our post market deception-based  
8 enforcement can be both an efficient and an effective  
9 way of regulating speech. I think the view that the  
10 post market deception based approach is a more First  
11 Amendment friendly approach is widely shared by  
12 advertisers and marketers. Unless, of course,  
13 they're the ones that are the subject of an FTC  
14 investigation or an enforcement action.

15           At that point, there are often concerns  
16 about whether the advertiser was on notice that the  
17 conduct challenged was deceptive and about whether  
18 the enforcement action will chill its future speech.  
19 I think it's worth looking at the Solicitor General's  
20 brief in the *Nike* case that was filed before the  
21 Supreme Court. What the SG argued was that there is  
22 some protection against this chilling effect that is

1 inherent in the enforcement discretion exercised by  
2 government agencies; in the other forms of guidance  
3 that are available to advertisers about whether a  
4 particular claim can be permitted or not; and in the  
5 checks and balances of public enforcement.

6           But the brief also pointed out that the  
7 cumulative effect of the private enforcement system  
8 established by California didn't have any of those  
9 checks. It allowed for private attorney general  
10 suits by individuals who didn't need to allege any  
11 injury from the advertisement or other statements.  
12 It allowed potential recovery of substantial monetary  
13 relief.

14           The SG argued that regime could chill  
15 protected speech and urged remand of the case to the  
16 California courts to consider that problem. The  
17 Court didn't do that, but the two dissenting justices  
18 referred to the factors in the SG's brief arguing for  
19 deciding the case on its merits. The three  
20 concurring justices noted that the issue would  
21 benefit from further development on exactly that set  
22 of issues.

1           Whatever the constitutional status of  
2 these concerns, the public policy underlying them is  
3 important. We want a system that aggressively  
4 protects consumers from fraud and deception. But we  
5 also want to make sure that the system does not deter  
6 truthful speech. Finally, we want our deception  
7 based system of regulating speech to be so successful  
8 that it can be a model in the international arena  
9 where the tenets of the U.S. Constitution don't hold  
10 sway, and thus a speech friendly regulatory  
11 environment must be based on a demonstrated  
12 superiority to other approaches.

13           Thus the logic of the public policy  
14 that's embedded in First Amendment doctrine has to be  
15 explained and supported. I think it can be. It's  
16 one that we think is persuasive and instructive and  
17 that still allows aggressive regulation to ensure  
18 that the flow of information is truthful and not  
19 deceptive.

20           Thank you.

21           MR. JAFFE: I come from a slightly  
22 different perspective. Just to get it all out on the

1 table, I don't think commercial speech should be  
2 treated differently than political speech. I think  
3 the standard there is incoherent. It's based upon an  
4 internal inconsistency that simultaneously assumes  
5 that commercial speech is both more important than  
6 political speech and less important than political  
7 speech.

8           It's more important because the  
9 consequences, God forbid, are that you buy some  
10 product that could kill you, hurt you, or make you  
11 waste your money. And that's so terribly, terribly  
12 important, apparently. It's less important, of  
13 course, because it's not the big picture of political  
14 stuff. It's not government. So who really cares if  
15 we regulate it more?

16           Those two things seem to be in terrible  
17 tension with each other. If indeed the consequences  
18 of a bad decision predicated on speech are worse than  
19 the consequences of electing a bad person for your  
20 president or for Congress or for what have you, then  
21 we would want to have a more vigorous speech  
22 protective regime to make sure you didn't screw that

1 decision up. Of course, the framers thought big  
2 important decisions ought to get debated vigorously  
3 and freely and without government control as much as  
4 possible.

5           So that's just the baseline for what I  
6 will say next. I affirmatively question whether or  
7 not one should downgrade the protection given to  
8 commercial speech. Things that I think are important  
9 in analyzing any kinds of speech protection or  
10 restrictions, regardless, whether they're on  
11 political or commercial speech, are first respect for  
12 speech. There seems to be this assumption that  
13 speech is evil; speech can do bad. Indeed, certain  
14 speech can have bad consequences.

15           But the Constitution, the Framers, and  
16 the constitutional culture that we've developed over  
17 the years have assumed that speech in general has  
18 more power for good than evil and that such evil, as  
19 may come of it, will be rebutted by more speech. One  
20 needs to assume, I think as a constitutional matter,  
21 that speech is a good thing, not a bad thing, even if  
22 it can be misused.



1           The second thing I think is important is  
2 the notion of respect for listeners. So much of  
3 government regulation of commercial speech in  
4 particular presumes that listeners are idiots. It  
5 may be true; they may be idiots. It's really not  
6 relevant.

7           The Constitution presumes quite the  
8 opposite. It presumes that people listening to the  
9 arguments over time -- maybe not today, maybe not  
10 tomorrow -- but over time will on average come to a  
11 better answer. As a systemic policy, it's worth  
12 having some people getting it wrong, even having all  
13 people get it wrong for a period of time. It's worth  
14 keeping it open for that.

15           One needs to presume and have respect  
16 for the listeners and for their capacity, and also  
17 place a sense of responsibility upon the listeners  
18 that they need to listen and pay some attention. If  
19 they're going to abdicate their responsibility to  
20 make judgments themselves to the government, one  
21 wonders whether the Constitution should be  
22 particularly concerned about their poor decision

1 making.

2           The last thing, of course, is the notion  
3 of substituting judgment. No matter how dumb we  
4 think people are, consumers are, let's just say I  
5 think that government has far greater capacity to be  
6 dumb. I know government never thinks this of itself.  
7 They're the best and the brightest. That's why  
8 they're elected. But after all, they're elected by  
9 precisely the stupid people that they think can't  
10 even decide what brand of cigarette to buy.

11           So if they can't make a decision like  
12 that, why in the world are they electing good people?  
13 It's a bad choice. Hence, up-shifting the decision  
14 making to the cream of the crop of choices by bad  
15 people makes no sense. If you're assuming people  
16 have no decision-making capacity, why should we  
17 assume that their delegates have any greater  
18 capacity?

19           In fact, history tends to show that  
20 government, while it may be composed of bright people  
21 individually, collectively has the capacity to make  
22 far greater and far stupider mistakes than

1 individuals do, and far more damaging mistakes than  
2 individuals do. Why would we let them tell us fat is  
3 good; fat is bad; you can't have potentially  
4 misleading implications. I'll get to examples in a  
5 moment.

6           Some good examples of potentially  
7 misleading speech that people have tried to or have  
8 in fact regulated or sued about that I think should  
9 not be sued about: low tar cigarettes. There has  
10 just been a recent suit where they said, "You implied  
11 that they were actually safe. You implied that they  
12 were better for you than high tar cigarettes." They  
13 get hammered. They didn't say that, actually. They  
14 didn't say you won't get as much cancer. They just  
15 said this has half the tar than the last one had.

16           Why is that misleading? Well, it's  
17 misleading because everyone and their mother on the  
18 other side of the fight was screaming that tar kills  
19 you, that tar is bad. So of course, when they say  
20 there's less tar, the people listening, the smokers  
21 are thinking, "Well less tar. The anti-smokers say  
22 tar is bad. Must be okay." Holding the tobacco

1 companies responsible for the sky-is-falling claims  
2 of their opponents and to say that they're misleading  
3 is sort of odd.

4           The same thing is true with additives.  
5 All these bizarre additives in tobacco arsenic, this,  
6 that, ammonia. Well some tobacco company responding  
7 to that yanked them all out and said, "We don't have  
8 any of those additives." Why do people get the wrong  
9 idea that those things make the tobacco safer? It's  
10 because somebody on the other side told them tobacco  
11 is unsafe because it had these things.

12           Yet the only people we regulate in this  
13 fight are the folks who said "no additives" for the  
14 implication that that means that you have a better  
15 cigarette. We don't regulate the guys who ran the  
16 public service announcement that said this has  
17 additives but can't prove for a minute that those  
18 additives actually hurt you. They're just terrifying  
19 people arbitrarily, yet they're not commercial  
20 speakers, so they have much greater protection for  
21 that. It's a ridiculous imbalance between the  
22 critics of products and the defenders of products.

1           A similar example, smokeless tobacco  
2 versus cigarettes. Lower health risks. I think  
3 there's pretty good evidence of that. It doesn't  
4 mean it's safe. But no one wants the comparative  
5 health analysis because of the potential implication  
6 that this means it's okay to chew rather than smoke.  
7 Nobody said it's okay to chew. They just said it's  
8 better to chew than it is to smoke, which apparently  
9 is quite true and apparently has lots of data.

10           I've been talking about cigarettes a  
11 lot. People hate cigarettes though; it doesn't  
12 always sink in. Let's talk autos. The Miata had a  
13 crash test rating of 5.0 on so-and-so's crash test.  
14 That certainly implies that it's safe in the same way  
15 as saying this is less dangerous than that. It  
16 implies that it is, in fact, not dangerous.

17           The potential for misleading someone to  
18 think a Miata is safe is certainly there. But let's  
19 not kid ourselves, Miata versus a Mercedes, you're  
20 going to get crushed like a bug when you hit that  
21 SUV. No one imagines that driving a Miata is  
22 actually a safe thing to do. In fact, driving a car,

1 per se, is not a safe thing to do. It's just worth  
2 the risk. We all think it's worth the risk. Smokers  
3 happen to think the same things about cigarettes.  
4 Their call.

5           Food, one-third less fat than a regular  
6 hamburger implies that it's healthy to eat. We see  
7 these ads all the time. In fact, there is the  
8 precise same potential to mislead.

9           The last great example, which is not  
10 about products, is speech about candidates. Dean  
11 voted in favor of abortion rights. Does that mean he  
12 will support all abortion rights? Is there a false  
13 potential there? Or George Bush voted against them.  
14 Does that mean he'll wipe them out entirely?

15           You see these kinds of incomplete  
16 statements about candidates, either from their  
17 opponents or from third parties, all the time with  
18 the potential to mislead. What is misleading about  
19 it is that they haven't bothered hashing out their  
20 opponent's answer. Yet, that shouldn't be a  
21 speaker's obligation to say, "Here's X, though my  
22 opponent would say this is crap because..."

1           That's not a speaker's obligation.  
2           That's the opponent's obligation or the public's  
3           obligation to deal with. But the notion that you can  
4           be misleading for not giving the other side of the  
5           story seems to undermine the whole concept of free  
6           speech.

7           The last thing I will do is come back to  
8           where I started, which is commercial speech versus  
9           political speech. We have such open-ended freedom to  
10          criticize candidates, fairly or unfairly,  
11          misleadingly or otherwise. We let people hash that  
12          out and get responses. But the notion that that's  
13          okay because you have a lot of time to fight in the  
14          political arena is really no different than in the  
15          commercial arena. People buying cars take a while to  
16          figure out which car they want. People buying  
17          cigarettes, yes, they may buy a pack tomorrow, but  
18          that one pack ain't killing them. It's 10 years of  
19          smoking that's going to kill them. They have some  
20          time to think about it. In fact, a lot of the  
21          candidate ads that might be misleading show up the  
22          day before the election or two days before the

1 election. The notion that we can tolerate the  
2 potential that the public is misled in important  
3 decisions, like where our country will go, who will  
4 lead it, whether we will go to war, whether we will  
5 have higher taxes, and whether we will feed the poor,  
6 if those aren't more important than whether an  
7 individual smoke, or whether a million people smoke,  
8 then I just don't quite get what the government is  
9 thinking about.

10 If those are more important and we  
11 protect them, we should protect commercial speech as  
12 well.

13 MR. DELLINGER: Thank you, sir. People  
14 are being quite timely. Jack, you've been thinking  
15 about these issues at AEI. What is your take on  
16 this?

17 MR. CALFEE: There is a lot I could  
18 agree with in what Erik said. Actually there's quite  
19 a bit I could agree with in what Howard had to say as  
20 well. It sounds almost like they're coming from two  
21 different worlds. They really aren't.

22 I used to be very critical of the FTC,



1 because I thought they regulated advertising too  
2 closely. The more I looked at other agencies and how  
3 they regulated advertising, or even other countries,  
4 the better I felt about the FTC. I would reinforce  
5 the central notion of what Howard had to say, which  
6 is that even when the FTC is looking at speech that  
7 by some measure is truthful, their touchstone is  
8 still deception - i.e., the question of whether  
9 speech is misleading in some more or less concrete  
10 sense.

11 I think when we begin to regulate speech  
12 that is truthful but might be misleading, the danger  
13 is that we will expand beyond a narrow focus on what  
14 is misleading. Pretty soon we're trying to control  
15 speech by shaping what kind of truth should be spoken  
16 rather than policing clearly deceptive speech, which  
17 is pretty much the only kind of speech regulation in  
18 which government actions might actually make things  
19 better.

20 The real problem is that it's very hard  
21 to do what some people propose, which is to regulate  
22 truthful speech in order to eliminate the possibility

1 of it being misleading. There are two reasons why  
2 that is so difficult. One is that commercial speech  
3 in an ordinary, competitive environment tends to be  
4 quite robust in the sense that commercial speech, if  
5 it is at all effective, tends to trigger a series of  
6 activities. In some rough sense, the truthfulness of  
7 speech is a good deal more robust in terms of the  
8 dynamics of the marketplace than it is if you simply  
9 examine a single ad conclude it is potentially  
10 misleading because there are various things that it  
11 doesn't tell you, that it doesn't include, and so  
12 forth.

13           If you look at how advertising plays out  
14 over time, how different brands compete, how critics  
15 have their say, how advertising responds to  
16 competitors and critics, and so on, the picture is  
17 very, very different. In fact, I would point out  
18 that most advertising that is effective - and I'm  
19 talking about ads that gain their power from some  
20 sort of factual foundation rather than being image  
21 advertising - it gains it's power from it's ability  
22 to persuade the viewers that there is something to

1 what the sellers say, that there is some factual  
2 basis to what they claim. Almost never is that  
3 achieved by relying upon sources internal to the  
4 firm. Successful advertising usually makes explicit  
5 or implicit reference to outside information, often  
6 information that actually comes from critics of  
7 advertising and the products being advertised.

8           Hence, a lot of advertising is what some  
9 people might call "less bad advertising." It's a  
10 little bit like the safety advertising." It's a  
11 little bit like the safety advertising that Erik  
12 Jaffe was talking about, and a lot of cigarette  
13 advertising through the years, and a lot of  
14 advertising involving health, and on and on. Sellers  
15 are not saying that their food is perfectly healthy,  
16 that you can eat as much as you want to, or that  
17 their cigarettes are perfectly safe. They're saying  
18 that whatever your preconceptions are, it's not as  
19 bad as you might think.

20           When competing brands or vocal critics  
21 harp on the shortcomings of a particular product  
22 category, advertisers tend to talk about the specific

1 ways in which their brands might not be as bad as  
2 they could be. This kind of competition motivates a  
3 tremendous amount of innovation to improve products  
4 and thus permit them to make ever more compelling  
5 less-bad claims.

6           The greatest tar derby in the history of  
7 the cigarette market was in the early 1950s at a time  
8 when none of the manufacturers thought their products  
9 were dangerous at all. But the manufacturers were  
10 very much in tune with the public health critics who  
11 said there was too much tar in the cigarettes. So  
12 they started reducing tar very rapidly. And they  
13 advertised that fact until they were kept from doing  
14 so by inappropriate regulation at that time.

15           I think there are some pretty good  
16 arguments that however potentially misleading some  
17 ads appear to be at first glance - usually because  
18 the ads are incomplete - if you take into account the  
19 dynamics of advertising, those potentially misleading  
20 ads usually work out pretty well over time. On the  
21 whole, it is rather difficult to improve upon what  
22 emerges in the marketplace through relatively

1 unrelated competitive advertising.

2                   But all that assumes we have  
3 disinterested regulators of advertising. This brings  
4 me to the second basic problem with regulating  
5 truthful but potentially misleading advertising.  
6 Once you start that kind of regulation, pretty soon  
7 you have to worry about the incentives of the  
8 regulators themselves. They will often have a  
9 political stake in the product being advertised or in  
10 the context in which the advertising occurs.

11                   When regulatory critics like me, point  
12 to commercial speech regulation that is most  
13 objectionable, they usually talk about agencies that  
14 regulate more than just advertising. FDA regulation  
15 is full of examples of prohibiting or otherwise  
16 restricting information that is absolutely and  
17 completely truthful, that by almost any standard is  
18 not misleading. For example, if a drug manufacturer  
19 were to point out that the American Cancer Society  
20 strongly recommends prescribing its product for  
21 certain cancer patients, an ad saying that simple  
22 fact might easily run afoul of FDA regulations, even

1 though the ad is perfectly truthful even by the  
2 standards of the American Cancer Society and the  
3 oncology specialists targeted by the ad. The FDA  
4 gets away with that kind of regulation because it has  
5 so much control over the industry itself. It  
6 regulates, the manufacturing of the product, the  
7 approval of new products, and of new uses for old  
8 products, all the manufacturer-initiated information  
9 surrounding the product, and on and on. Good  
10 relationships with the FDA on those many crucial  
11 matters is too important to risk by fighting the FDA  
12 in court over its ad rules.

13           The FDA is not alone. If you look at  
14 other areas in which the regulation appears to go far  
15 beyond standards based upon deception, you find  
16 roughly the same situation. An example is the  
17 regulation of the advertising of stocks and  
18 securities by the Securities and Exchange Commission.  
19 Those advertisements are subject to all sorts of *per*  
20 *se* rules and restrictions that I don't think Howard  
21 Beales and the FTC would attempt to impose on any  
22 business. If a firm wants to sell a new stock issue,

1 it has to go through the approval of the SEC, not  
2 just for the advertising but for many details  
3 associated with the stock issue itself. Again, the  
4 result is that regulation of commercial speech is far  
5 more severe than it would otherwise be. Just like  
6 drug firms dealing with the FDA, firms going to the  
7 stock market are not going to jeopardize larger  
8 interests by fighting SEC advertising rules in court.

9           The bottom line here is that, number  
10 one, it's difficult to improve upon a competitive  
11 marketplace in terms of advertising and information;  
12 and second, once agencies get into the business of  
13 trying to improve the informational aspects of  
14 competitive markets, their incentives often become  
15 distorted or suspect, and they can end up going far  
16 beyond reasonable standards. If the agency that  
17 regulates advertising in a particular industry also  
18 regulates other crucial aspects of that industry,  
19 there is almost no effective check on the agency's  
20 reach over commercial speech. After literally  
21 decades of excessive FDA regulation of drug  
22 advertising, and often of food advertising, during

1 which the FDA staff operated with little constraint  
2 beyond regulations it wrote on its own, the FDA was  
3 finally challenged in court, but not by a drug  
4 manufacturer or even a food manufacturer. Instead,  
5 the *Washington Legal Foundation* and private attorney  
6 Jonathan Emord sued on First Amendment grounds on  
7 behalf of clients who were neither drug nor food  
8 manufacturers and were therefore no more than  
9 minimally subject to FDA regulation.

10           Now to this economist -- and I am no  
11 lawyer -- these ideas seem to lead straight to the  
12 heart of First Amendment law. To this legal amateur,  
13 one essential function of the First Amendment is to  
14 constrain the government from doing certain things  
15 precisely because the government cannot be trusted to  
16 make the best decision from the standpoint of the  
17 audience. I think that there is a great deal of  
18 truth to Erik Jaffe's basic argument that when it  
19 comes to commercial speech, you run into the same  
20 kinds of problems, the same kinds of mixed incentives  
21 that you run into in the regulation of political  
22 speech. That is the essential reason for thinking



1 that if the government is going to hold sway at all  
2 over truthful commercial speech it should do so in  
3 extremely reserved fashion.

4 Thank you.

5 MR. DELLINGER: Thanks. Rosemary, you  
6 regularly appear before the agencies of the federal  
7 government that regulate speech. What is your take  
8 on it from that perspective?

9 MS. HAROLD: I guess I should in the  
10 interest of full disclosure say that I am not a  
11 libertarian, but not necessarily at all sanguine  
12 about government regulation of speech, having been a  
13 journalist before I went to law school. I also have  
14 some real practical knowledge of how difficult it is  
15 to say something in a short amount of time or in a  
16 short amount of space and not be considered  
17 misleading in some way because you've left something  
18 out. That's been really difficult.

19 It's particularly difficult in the FDA  
20 context. Inadvertently, my introduction gave rise to  
21 another example of misleading but true information.  
22 I don't really do aviation law. I do a little

1 satellite law, and that for some reason is in our  
2 aviation practice. But that's the sort of thing  
3 that's a small example of misleading but true speech  
4 that might lead somebody down the garden path to ask  
5 me something about airplanes, which I know absolutely  
6 nothing about.

7           The FDA has been something that I have  
8 had a lot more interaction with over the last five  
9 years, helping some drug companies, helping WLF,  
10 helping some other folks try to educate the agency  
11 about the First Amendment, which has been in sharp  
12 contrast to some of the other agencies that I deal  
13 with -- most predominantly the FCC -- where the  
14 regulatees there who are First Amendment folks  
15 themselves don't tend to roll over for the government  
16 and do tend to fight back. I know that's the truth  
17 with the FTC as well.

18           It's not really been so much the case  
19 with the FDA, as Jack has explained. The FDA's whole  
20 context for why they've gotten into speech  
21 regulation, as Jack mentioned, is really that they're  
22 coming from a different perspective. They're also

1 coming from a hundred years ago. Their current  
2 existence and regulatory scheme really dates back to  
3 about 1906. What that's resulted in, of course, is a  
4 wildly complex regulatory scheme that has resulted in  
5 the real world in advertisers complying with those  
6 regulations, particularly making compelled  
7 disclosures, that perhaps are very misleading or  
8 confusing, at best, or not saying things in order to  
9 fit into yet another regulatory box that the FDA's  
10 created, and confusing people because they don't say  
11 plainly what the heck they're talking about.

12           For example, those rather humorous  
13 commercials for Levitra, the new entrant in the ED ad  
14 war. The spot, as I'm sure almost everybody knows,  
15 shows a handsome middle-aged guy trying repeatedly  
16 and failing repeatedly to lob a football through a  
17 tire swing. You do not need to be an English major  
18 to really grasp what is going on here.

19           However, then a few cryptic words are  
20 spoken and all of a sudden he's winging it right  
21 through the tire, and a woman is coming out and  
22 throwing her arms around him. Probably most people

1 get what that's about. On the other hand, if you pay  
2 attention to the ad, what is said, it doesn't really  
3 tell you.

4           Why doesn't it tell you? Because FDA  
5 has this funny category called reminder ads that  
6 allow regulatees to escape disclosure requirements as  
7 long as they don't tell you what the product is for  
8 in the first place. I suppose that perhaps there are  
9 a few people out there that might be confused that  
10 this really could help a quarterback who is having  
11 problems with his passing game. But that's a funny  
12 example.

13           On a more serious note, another FDA  
14 twist -- again for consumer-directed commercials --  
15 really does have to do with those ads you see all the  
16 time on TV where there is a brisk recitation of side  
17 effects, some of which are pretty scary. In a 30  
18 second spot, though, there's no time as a practical  
19 matter to explain or give context to those things.  
20 It's true, those are side effects that the FDA has  
21 determined are a risk of the drug and do need to be  
22 on the professional label that doctors use to

1 determine whether or not to use this drug with a  
2 particular patient. However, the percentage of times  
3 that this particular risk may actually be a serious  
4 danger to people often is very low. If it was really  
5 high, the drug wouldn't have been approved. So the  
6 list can actually scare some people. In fact, FDA  
7 now has evidence from some folks who've studied it,  
8 that it does scare people enough that some people  
9 don't even raise a question about the underlying  
10 condition or the drug to their doctor.

11           You and I have all been in doctors'  
12 offices probably within the last few years. You know  
13 that they don't do a full history with you every  
14 time. They don't ask you every relevant question.  
15 You've really got to bring questions up to them. But  
16 if you're scared about a side effect and so you don't  
17 ask about something that could actually help you with  
18 high cholesterol, that seems to me that it's truthful  
19 disclosures, but it's really misleading in its actual  
20 effect because of where it's led to: non-treatment  
21 of the person.

22           Finally, one of other things that I've

1 done recently -- I'm happy to see Jack has a copy of  
2 my submission, in fact, right on his pile of papers  
3 here -- has to do with some fallout cases that are  
4 coming up in the wake of the *Nike* case, which as you  
5 probably know, or at least a number of you know, grew  
6 out of the application of California's false  
7 advertising statute to Nike who at that point was  
8 making some, I think, political speech messages.

9           Unfortunately because of the way the  
10 case turned out, at least in California, *Nike* is good  
11 law with respect to being able to go in to court and  
12 sue as a private citizen, or in one case, a group of  
13 private citizens, against just about any speech that  
14 a commercial entity might make.

15           In the case that I'm thinking about,  
16 which we've won just recently, it involved  
17 manufacturer communications to professionals who  
18 prescribe drugs. The *Nike* precedent has been used to  
19 challenge, for example, the publication in  
20 independent, peer reviewed journals of scientific  
21 studies that were written up by drug company  
22 researchers on the use of existing drugs for purposes

1 that were not approved by FDA. We're not talking  
2 about ads in the traditional sense obviously. We're  
3 also not talking about explicit lies about the status  
4 of the drug at issue.

5           It is not, in fact, illegal for doctors  
6 to use drugs for what are called off-label purposes.  
7 It also presumably is not illegal for doctors to read  
8 about this sort of stuff, since that's how they get  
9 the information to decide if, in a particular case,  
10 it might be appropriate to use a drug for a  
11 particular patient in this manner.

12           But in this case, the article was  
13 written up and vetted by an independent journal,  
14 vetted by peer reviewers, and yet got challenged by a  
15 coalition of public interest folks as being false and  
16 misleading, because, they said, it left the  
17 impression that the drug had been approved for that  
18 use and that professional people couldn't understand  
19 that it wasn't. That, obviously, just goes too far.

20           I'm really happy that the California  
21 trial judge apparently decided that it went too far  
22 as well. Fortunately, the folks who lost at trial

1 have decided not to go on to appeal. But there are  
2 lots of other *Nike* based cases out there now. I'm  
3 very concerned about where that's going to lead.

4 MR. DELLINGER: Well, you always learn  
5 something. I'm so disappointed. I thought this drug  
6 was really going to enhance my ability to throw the  
7 football through the swinging tire. It hasn't gotten  
8 any better after several weeks, but I've been having  
9 a great time otherwise. I'm terribly disappointed.

10 Fortunately there are people like David  
11 Vladeck to save us from misleading advertising.  
12 David, I'll let you respond to -- I think you in a  
13 sense will need to respond to everybody that has  
14 spoken so far.

15 PROFESSOR VLADECK: Yes, I think I do.  
16 There is so much to disagree with and so little time.

17 Let me first thank very much the  
18 Federalist Society and Dean Reuter for inviting me  
19 here today. It's really a pleasure to come and  
20 debate in front of people with an open mind, and I  
21 appreciate that.

22 Let's start with some theory,



1 particularly since Erik has given you the Jaffe view  
2 of the commercial speech doctrine which has been  
3 accepted, so far, I think, by Erik and maybe his  
4 mother, but no one else ...

5 MR. JAFFE: My mother's with you.

6 PROFESSOR VLADECK: ... which is that the  
7 First Amendment, as construed by the Court, does not  
8 differentiate between commercial and political  
9 speech. The Court has never suggested that there is  
10 a single standard under the First Amendment. In  
11 fact, if you look at the First Amendment and the way  
12 it's been interpreted by the courts, there are many  
13 domains. One domain, which was established back in  
14 1976, I'm proud to say by my law firm Public Citizen  
15 Litigation Group, was that commercial speech is  
16 entitled to some measure of First Amendment  
17 protection.

18 But the Court has never suggested that  
19 commercial speech is on the same footing as political  
20 speech. In part that is because the First Amendment  
21 theory that underlies the commercial speech doctrine  
22 is different than the First Amendment theories that

1 support robust and full-bore protection for political  
2 speech.

3           By the way, it's quite significant, in  
4 my view, that *Pharmacy Board* was not brought by a  
5 commercial speaker. It was brought by listeners,  
6 people who wanted to receive information. The  
7 message that the Court conveyed in *Pharmacy Board* was  
8 that the First Amendment protects commercial speech  
9 because consumers have an interest in making better  
10 informed decisions.

11           The flow of commercial speech, which  
12 should flow "cleanly as well as freely," a phrase  
13 that appears in almost all of the early commercial  
14 speech cases, put an emphasis on truthful commercial  
15 speech. The Court has always made it clear that  
16 false or misleading commercial speech is subject to  
17 regulation without any further dispute because it  
18 doesn't serve the information purpose at the heart of  
19 the doctrine.

20           So the idea that commercial speech is  
21 inherently a good thing has never been adopted by  
22 this Court. In fact, if you look at the history of

1 commercial speech regulation, the courts have always  
2 been worried about commercial speakers. We've  
3 invented a whole jurisprudence on the theory that  
4 commercial speakers lie. We call it "puffery". But  
5 the courts have defined the permissible boundaries of  
6 lying for commercial speakers knowing full well that  
7 the incentive to sell a product, just as Erik points  
8 out, the incentive to sell a political candidate,  
9 often incites the speaker to stretch the truth.

10           Now having said that, you have to  
11 understand that if you look at the whole of the  
12 commercial speech jurisprudence, it is nonetheless  
13 very protective of commercial speech. Since *Pharmacy*  
14 *Board* was decided 28 years ago, the Court has had 24  
15 commercial speech cases. The speech restraint has  
16 been upheld only in five. My guess is that if three  
17 of these cases were to come back to Court, the  
18 government would lose those cases.

19           If you track the commercial speech  
20 jurisprudence, no restraint has been struck down by  
21 the Supreme Court in the last decade. The Court's  
22 language about what constitutes the appropriate

1 standard to review commercial speech restraints has  
2 gotten tougher and tougher and tougher - making it  
3 such harder for government to justify restrains on  
4 commercial speech.

5 I think there's a good argument that  
6 today there are really two separate branches of the  
7 doctrine. One is false speech, deceptive speech.  
8 The Court will not tolerate commercial speakers  
9 engaging in fraud. We saw that just a couple of  
10 terms ago in *Madigan*. The Court has emphasized that  
11 repeatedly that government has broad power to  
12 restrain speech that is false in deceptive.

13 Where there is now friction in the  
14 joints is the topic of today's discussion. What do  
15 you do about speech that may be literally true but is  
16 capable of misleading or is deliberately deceptive?  
17 In these cases, the Court, I think, has signaled that  
18 it's going to give more breathing room to those kinds  
19 of statements, it will nonetheless not give them the  
20 sort of full-bore constitutional protection that Erik  
21 thinks they deserve.

22 One reason is that Erik's description of

1 the political arena does not apply with equal force  
2 to the commercial field. Take the advertising of  
3 Ephedra. Ephedra was advertised for 15 years as a  
4 healthful product, even there was virtually no  
5 evidence that said so. It wasn't that there were  
6 public health groups and others who were equal  
7 participants in the debate about the health risks  
8 posed by Ephedra. The sellers of Ephedra had the  
9 field to themselves. Why? Because no one had an  
10 economic interest in doing battle with them over the  
11 safety of their product.

12           That pattern is repeated time and again  
13 in the commercial speech arena. One of the things  
14 about the *Nike* case that drove me nuts was that  
15 Nike's principle argument to Mr. Kasky and its other  
16 critics were, "You just you don't know what you're  
17 talking about," because Nike -- and I think there is  
18 some truth to this -- had far greater access to  
19 information and the facts than its critics did. This  
20 monopoly over access to the relevant facts and one-  
21 sided debates are foreign to political battles, but  
22 are common in the commercial arena.

1           *Nike* is one of those rare cases in which  
2 there really was a legitimate public debate on a  
3 matter of real importance, not just on political  
4 opinions, but on objective, verifiable statements of  
5 facts that Nike made that were subject to dispute in  
6 the public arena.

7           So let's get back to speech that may be  
8 literally true but is provably false. Let's take a  
9 couple of concrete examples: dietary supplements in  
10 foods are now permitted to be sold, making health  
11 claims with respect to disease prevention,  
12 mitigation, and cure. "Take SAM-E and it'll help  
13 your depression." "Take beta-carotene and it will  
14 reduce the risk of cancer." Even where the  
15 scientific evidence for those claims is unreliable.

16           Now Congress, when it passed the Food  
17 and Drug Act, the dietary supplement modification of  
18 it, and when it regulated foods said, "Look, way too  
19 often preliminary studies about health and safety are  
20 proven wrong. So we do not want these products to be  
21 marketed for disease prevention and cure purposes  
22 unless there's a high degree of scientific likelihood

1 that the claim is true.”

2           The D.C. Circuit, in a case called  
3 *Pearson v. Shalala* three years ago, struck down the  
4 FDA’s regulations on dietary supplements because the  
5 FDA’s theory was that these statements were capable  
6 of being misleading did not justify a ban on these  
7 statements. The court said the cure for potentially  
8 misleading speech is not suppression; it is more  
9 speech. What the D.C. Circuit directed the FDA to do  
10 was to come up with a system whereby disclaimers  
11 could be used to correct any misimpression that the  
12 consumer may have.

13           I’ve been a critic of *Pearson*, and I’ve  
14 been a critic of the new FDA policy to extend the  
15 logic of *Pearson* to foods, because it doesn’t solve  
16 the dilemma that the consumer has. The consumer is  
17 not really interested whether there are 19 or 20  
18 studies. The consumer wants to know whether the  
19 product works, particularly for products going to  
20 health and safety matters, like products that claim  
21 to be pharmaceuticals in the sense they have a  
22 therapeutic benefit. Telling the consumer that the

1 FDA is not sure of the seller's claim that this  
2 product is going to prevent prostate cancer or going  
3 to cure some other disease doesn't help consumers, it  
4 only makes their decision-making more difficult. The  
5 FDA says, "Well we just don't know whether that's  
6 right or wrong." That doesn't solve the consumer's  
7 dilemma. That doesn't provide reliable information  
8 to make these choices.

9           So at least in the health and safety  
10 arena, the notion that we should let unverifiable  
11 claims go forward without regulation strikes me as  
12 absurd. The low tar case that Erik invokes I think  
13 proves the other point. The argument in low tar  
14 cases was not that society in whole had concluded  
15 that low tar cigarettes were safer. That wasn't the  
16 evidence presented to the jury in Illinois. The jury  
17 in Illinois saw only the tobacco industry's own  
18 statements about low tar cigarettes. And they heard  
19 evidence that in order to make these products  
20 palatable to consumers, the companies actually added  
21 different additives that were far more lethal than  
22 the additives that they regularly imposed.



1           Liability was not imposed in those cases  
2 because consumers had somehow concluded, wrongly or  
3 from sources other than the tobacco industry, that  
4 these products were being sold as safer. The jury  
5 held the companies' feet to the fire because that was  
6 the claim the companies made. The companies re-  
7 engineered their products and invited people to  
8 switch to the low tar cigarettes with a promise of  
9 less risk. It doesn't strike me as being wrong that  
10 the companies are being held liable. It seems to me  
11 that that's the way our tort system ought to work.

12           The last thing I want to say, and I  
13 realize I've probably extended my time, I think the  
14 courts have moved away, particularly in the field of  
15 health and safety, from giving any deference at all  
16 to our expert agencies. I know there's been a lot of  
17 unhappiness with the FDA. I think some of it's  
18 justified.

19           I think Rosemary's point about direct to  
20 consumer advertising is a fair one. Those ads are  
21 confusing. They don't help the seller of the  
22 product, nor do they help consumers. But Congress

1 has made a judgment that certain products --  
2 prescription pharmaceuticals, securities -- pose  
3 grave danger to the public unless they're regulated.  
4 You cannot sell a security on the open market unless  
5 you receive the prior permission of the SEC. You may  
6 not sell any of those pharmaceuticals on the open  
7 market unless the FDA has approved them.

8           Where you're talking about products that  
9 the government has decided through the democratic  
10 process need to be strictly regulated because they  
11 pose special dangers, I think the courts owe some  
12 degree of deference to the agency when it comes to  
13 claims being made about the performance of those  
14 products. I am very troubled that unverified health  
15 claims for food additives, and dietary supplements  
16 will now go forward.

17           Just a couple of years ago beta-carotene  
18 was touted as a cancer preventative. There was lots  
19 of advertising touting beta-carotene. The Institute  
20 of Medicine has concluded that not only were those  
21 claims wrong, but for large numbers of consumers  
22 beta-carotene is actually toxic. Those claims were

1 allowed to go forward, but as often happens, further  
2 scientific evidence has shown that the preliminary  
3 claims were not accurate.

4 I think the public has a right not to be  
5 exposed to unverified claims that they cannot  
6 possibly evaluate on their own. I don't think that's  
7 paternalism to recognize that fact anymore than it's  
8 paternalistic to say that before a prescription drug  
9 can reach the market the FDA ought to approve it. We  
10 ought not go back to a regulatory regime that would  
11 let people sell Thalidomide with the disclaimer that  
12 we just don't know what it may do. I don't think  
13 that's an appropriate reaction.

14 Thank you.

15 MR. DELLINGER: Instead of posing a  
16 question to each panelist, I think I'll just list the  
17 set of questions that come to mind and let each of  
18 you have at those questions. Then we'll open it up  
19 to questions from the floor.

20 I was going to ask Howard and David  
21 questions along the following line. Howard,  
22 something you said I found mildly disturbing, which

1 is that the FTC's regulation of misleading speech is  
2 "a model of how speech should generally be  
3 regulated." I would think that, at best, we can  
4 tolerate regulation like what the SEC and the FTC do  
5 because it's an exception where we regulate the  
6 product to a great degree and necessarily regulate  
7 the speech. What makes that troublesome, and I think  
8 my fundamental disagreement with David, would be the  
9 notion that we really know what is truthful and what  
10 is not truthful. Some of what Erik said reflected  
11 that same skepticism.

12           It is the case that truthful speech can  
13 be misleading and thus be as bad as false speech.  
14 But it's also the case that false speech can be true.  
15 In the history of the regulation of speech, people  
16 were forced to take the hemlock poison not because  
17 what they said was thought to be true, but because  
18 what they said was thought to be false, that the  
19 earth was not the center of the universe, et cetera.  
20 So I'm much more skeptical that anybody knows what is  
21 truth.

22           Secondly, I guess I would ask Erik the

1 fundamental challenge is whether the First Amendment  
2 ought to have such a vast and extensive empire as  
3 Erik would give to it by having the First Amendment  
4 control so much of the world. Charles Fried has  
5 aptly referred to some of this as the *Lochnerization*  
6 of the First Amendment; that is, what once was seen  
7 as the regulation of economic activities is often  
8 given a First Amendment overlay now. So you're  
9 taking back a part of the ground given up by *Lochner*.  
10 You can label it with the First Amendment regulating  
11 whether accountants can solicit customers, for  
12 example. It's either wise or unwise and either  
13 should or should not be protected as part of the  
14 *Lochner* liberty interests, but to single out this  
15 piece for speech seems odd.

16           Secondly, to allow regulation but not  
17 allow the regulation of speech causes, to me, at  
18 least as a policy matter, a certain dysfunction.  
19 That is, it is generally conceded that you could  
20 regulate speech promoting a product if the product is  
21 made a crime. Criminally, you can't have billboards  
22 outside the high school saying, "Is your algebra

1 teacher getting you down? Call this number and some  
2 crack cocaine will make you feel much, much better,  
3 at least for a while." Even if that's true, you  
4 can't say it.

5           But the notion that we would allow the  
6 prohibition of speech, but only if we make something  
7 criminal, means the only way you can regulate  
8 something is to make it criminal. We ran into this  
9 with regard to whether, if the FDA could regulate  
10 tobacco, they could prohibit the promotion of tobacco  
11 to minors and whether that would run into the First  
12 Amendment.

13           Well, to say that you could regulate as  
14 long as you make it a crime takes us back to  
15 everything we've learned in the last half century  
16 about how bad the criminal law is. It's one of our  
17 worst methods of social control, compared to public  
18 health models and other models. It seems it would be  
19 nuts to use a criminal model. But the notion that  
20 you have to go to full fledged promotion, unbridled  
21 promotion unless you make it a crime, gives you two  
22 extreme choices that may not be best.

1           Finally, I guess I would ask all of the  
2 panelists if you want to address this. I think  
3 compromise is very bad in this area, because I think  
4 we get a bad muddled middle. But I have a new  
5 compromise. Why isn't the right answer to say that  
6 the government should just pony up enough money? It  
7 wouldn't be as much as getting a republican candidate  
8 to Mars or whatever the next or latest program is,  
9 but pony up the money to have more speech? Why not  
10 eliminate all of these restrictions and then have the  
11 Surgeon General and his counterpart in Consumers  
12 Affairs have plenty of money to put on ads saying  
13 that, "You're really not better off if you can throw  
14 the football through the tire," or "there may be  
15 fewer additives, but it's bad for you?" Is that  
16 better or worse, or does it avoid the First Amendment  
17 problem?

18           So with that I'll open it up, and sorry  
19 in case I was unfair to Howard about what you meant  
20 about the FTC's model being the model of how speech  
21 should be done.

22           MR. BEALES: Well, I think it is a much

1 better model than in the places where the products  
2 aren't closely regulated. What has happened in the  
3 places where the products are closely regulated is  
4 the speech is regulated *ex ante*. It's regulated with  
5 a set of standards that have to be specified in  
6 advance.

7           What ends up being the issue is not what  
8 did this person say in this communication, but what  
9 might someone say in a way that might be misleading.  
10 That's problematic, because it's completely  
11 hypothetical about how people will interpret it in  
12 context. Our approach is after the fact; somebody's  
13 done it. In essence what we're saying is you did it  
14 wrong. You did it in a way that actually conveyed a  
15 message to consumers that's deceptive.

16           Second, as to your question about do we  
17 really know truth. I think in a lot of circumstances  
18 we don't. The way most of our cases proceed is based  
19 on the notion that a claim has to be substantiated,  
20 that an advertiser has to have a reasonable basis for  
21 thinking that a claim is true. You don't have to  
22 prove it's true with certainty. You do have to have



1 enough evidence, given the type of claim, as well as  
2 the risk of mistakenly prohibiting truthful claims,  
3 and the risk of mistakenly allowing false claims.  
4 You have to have an amount of evidence that's  
5 appropriate given those factors.

6           So we don't know truth. We don't  
7 pretend we do. Sometimes we do. But we do ask that  
8 people have a basis for the claims they make. I  
9 think it is in essence a collective version of the  
10 long standing common law tort of misrepresentation.

11           MR. DELLINGER: Erik, I'll let you have  
12 another go at it, particularly with regard to the  
13 question of don't you think we'd be better off if we  
14 went back and had protection of political speech  
15 only? It would take care of obscenity and sex and  
16 nude dancing and all that. You don't, do you?

17           MR. JAFFE: As a policy matter, no, I  
18 think all those are perfectly fine. I think actually  
19 letting the government regulate is the only truly  
20 obscene act, particularly of speech.

21           So, no, as a policy matter, I don't  
22 think that. But my policy views really aren't at

1 issue here. We made a choice. And having made the  
2 choice, if we want to make a different one, we have a  
3 very clear path for that, which is amendments.

4           The question whether protecting  
5 commercial speech is starting to cover too much  
6 assumes that I'm saying more than I in fact am. I do  
7 not think that the statement, "I agree to pay you ten  
8 dollars for that car," is speech. It is a speech  
9 act. It is a contract, perfectly regulable. If you  
10 lied and gave him five bucks, you can be sued. Not a  
11 problem. I don't have a problem with those.

12           What I consider speech are merely  
13 statements of advocacy or statements of information,  
14 but not statements promising to act which take on a  
15 life of their own. So I wouldn't deregulate the  
16 solicitation act if it were in fact part and parcel  
17 of signing the contract. What I would deregulate is  
18 a statement that says, "Hi, I'm Joe Blow, I do this  
19 kind of law; call me if you need me," which I think  
20 is sufficiently removed from the engagement to make  
21 it different. So I don't think protecting commercial  
22 speech covers too much.

1           You asked whether it is better to  
2 regulate the product versus to regulate the speech.  
3 It makes a lot of sense. My answer at the end of the  
4 day is from a public policy perspective it may be  
5 inefficient. It may have some negatives to be forced  
6 to regulate the conduct. But from a constitutional  
7 perspective it is less intrusive to regulate the  
8 conduct, by definition. The way we know this is  
9 because one can regulate conduct on a rational basis,  
10 yet one can only regulate speech on some degree of  
11 heightened justification, which I think necessarily  
12 implies regulating speech is worse. Worse in the  
13 constitutional sense if not worse in the public  
14 policy efficiency sense.

15           Whether the public health model might  
16 work better is not the point. Persuasiveness, mind  
17 control works wonderfully to get people to stop doing  
18 things. It works wonderfully to get them to vote for  
19 the government in power. Yet, we don't let them do  
20 that regardless of its efficiencies and accomplishing  
21 certain goals.

22           Your last question was on money for more

1 speech, should we hand it over to the government? My  
2 answer, accepted by even fewer people than my first  
3 position on commercial speech, I think it's accepted  
4 by absolutely no one, is that that would violate the  
5 Constitution. Government advocacy apart from the  
6 government conduct of a particular program of  
7 behavior is unconstitutional. You can't hand the  
8 government a chunk of change and say, "Try to change  
9 people's minds, go at it," any more than you could  
10 hand the government a chunk of change and say, "Here,  
11 run ads that say vote Republican, vote Democrat."

12           Either one of those would be offensive  
13 coming from the government. I think the Surgeon  
14 General's very existence is offensive, because all he  
15 does is advocate the government's position. For all  
16 these studies that David pointed out that we know  
17 nothing but they routinely turn out to be wrong,  
18 thank the Surgeon General for making half the country  
19 believe that they were right when they first came  
20 out. Because he knows just as little as we do,  
21 frequently less. That's we, collectively.

22           So those are my answers to those. The

1 only thing I'd like to say to David is I actually  
2 don't think we're that far apart. Your recounting of  
3 the commercial speech doctrine suggests that it's  
4 pretty strong these days and pretty close to what I  
5 would want it to be, though there are the occasional  
6 statements that it's not. Anyone who watched McCain-  
7 Feingold, we now know the political speech doctrine  
8 is dead. So what's the difference. Now they are in  
9 fact regulated roughly similar.

10 MR. DELLINGER: Before I hear from  
11 Howard and Rosemary, and for your benefit, let me  
12 throw one other equation onto the table. It seems to  
13 me that -- when we get down to David, yours will be  
14 the most interesting answer to this, perhaps. Would  
15 it really be all that bad if we had a libertarian  
16 president. Roger is here. Are you eligible? Were  
17 you born in the United States?

18 ROGER PILON: I'm not eligible.

19 MR. DELLINGER: So we'll have to have  
20 someone else.

21 MR. JAFFE: Are you 35 yet?

22 MR. DELLINGER: In any event, maybe my

1 road to libertarianism will some day lead me to this  
2 position. A libertarian president to announce we are  
3 rescinding all these agencies. I'm doing it in my  
4 inaugural address. I want every American to  
5 understand that no more FDA, no more FTC, and we're  
6 going to have a big tax cut. Every American should  
7 buy a subscription to the consumer report of your  
8 choice. I believe that once we've eliminated these  
9 that it won't be one, but a multiplicity of choices  
10 of private organizations. The first thing a consumer  
11 will know when he or she gets their first credit card  
12 is what I need to purchase is a membership in an  
13 organization that evaluates products on the private  
14 market. That will be my first expenditure.

15 MR. CALFEE: That sounds like a pretty  
16 good market to me. I would point out, for example,  
17 that if you look at today's automobiles compared to  
18 those of 30 or 40 years ago, the modern automobile is  
19 vastly safer, but almost none of those safety  
20 improvements had anything to do with NHTSA.

21 If you look through all the components  
22 of your automobile, all the things that pertain to

1 safety, whether it's brakes, lights or dozens of  
2 other components, NHTSA has touched very few of them.  
3 And when NHTSA does regulate something, what it  
4 typically does is to take something the market  
5 developed spontaneously, and then say, "We think  
6 that's a great idea. But we think you should move a  
7 little bit faster or do it a little differently."

8           There's one particular point I wanted to  
9 emphasize that David was talking about, and that is  
10 the question of whether or not we should wait until  
11 we have compelling evidence before anyone is allowed  
12 to say that a certain product, such as food, has a  
13 certain health effect. I would point out first of  
14 all that if that were the general policy, then most  
15 of what the Surgeon General has ever said about food  
16 and health would never have been said.

17           There is essentially no compelling  
18 evidence, for example, that as a general rule, low  
19 fat foods are safer. In fact, there is considerable  
20 dissent on that particular point. We should bear in  
21 mind that if we were to adopt a policy in which you  
22 cannot say anything about the health aspects of

1 various products, including foods, until you have the  
2 kind of evidence that the FDA normally requires for  
3 drugs, then almost no statements could be made at all  
4 on many of the most important things in health and  
5 safety.

6           That would certainly be true regarding  
7 tobacco products, because we have precious little in  
8 the way of randomized control experiments that would  
9 tell us whether one product is safer than another.

10           I think that what we need is basically a  
11 safe harbor for advertising. One part of that safe  
12 harbor would be a doctrine under which, if an ad  
13 makes reference to statements from authoritative  
14 public sources, fully disclosing what those sources  
15 are, how to find out about them, and so on, the ad  
16 would be essentially immune from prosecution. If a  
17 food manufacturer wants to tell the world that the  
18 Harvard School of Public Health has taken a  
19 particular position on the healthiness of its food,  
20 it should be allowed to do that. That means, to cite  
21 one episode, that cigarette manufacturers in the  
22 1970s should have been perfectly free to point out



1 exactly what the Surgeon General's position was on  
2 the relative safety of different kinds of cigarettes.

3 MR. DELLINGER: Okay. Rosemary?

4 MS. HAROLD: Two points. I've certainly  
5 written in my time a fair number of originalist  
6 briefs about commercial speech and agree with Erik on  
7 one point, which is that I am untroubled by the  
8 intermediate scrutiny concept. However, if you want  
9 to take the originalist approach to commercial speech  
10 regulation, you have to deal with the fact that  
11 antifraud statutes predate the First Amendment. They  
12 go way back to England. They got imported in the  
13 colonies. They have always been with us. That's why  
14 we are here.

15 So I personally distinguish quite a bit  
16 between commercial speech regulation that tries to  
17 keep people from doing things that are bad for them,  
18 like let's try to suppress gambling advertising to  
19 keep people from gambling, versus things that fall  
20 into the nature of fraud, because there is a  
21 historical basis, for those of you who care about  
22 that, to show that society has cared about that for

1 hundreds of years, if not thousands.

2           Second, why isn't the right answer to  
3 say that government should just have the money to do  
4 its own counter speech beyond the fact that, although  
5 it's fun to debate, practicality does interfere here  
6 with what could actually happen. My experience with  
7 FDA is these people don't communicate well. They  
8 have a really hard time putting out a message that is  
9 important at times. Or they have a very big fear of  
10 the situation we talked about, which is what if you  
11 don't know yet? What if the science is evolving?  
12 What if the safety standards are evolving?

13           I personally, in the particular  
14 situation, would rather have the debate out there and  
15 have the government say we don't think that's right  
16 for the debate to be happening in private, behind  
17 closed doors. I really get annoyed. I can deal, as  
18 a consumer, I think most adults can deal with the  
19 notion that not everything is known. Here's what we  
20 know. Here's what this guy says; here's what that  
21 guy says. You do the best you can with the facts you  
22 have at hand.

1           I don't want the standard to be so high  
2 that that conversation doesn't happen in front of me.  
3 Let me take my opportunity to make my choice.

4           PROFESSOR VLADECK: I love having the  
5 last word. Let me try to first answer Walter's  
6 question about the notion that we really know the  
7 truth and who ought to distinguish between what is  
8 truthful and what is not truthful.

9           Here I think we as a society have given  
10 an answer, which is that for products that we have  
11 decided may not be sold until the federal government,  
12 which has yet to be demolished, gives a green light,  
13 the agency ought to be the arbiter, at least in the  
14 first instance, of truth or falsity. That is why I  
15 support FDA regulation of health claims about the  
16 products that it approves, particularly prescription  
17 pharmaceuticals.

18           I do not favor a regime, libertarian or  
19 not, where I and I alone am entrusted with the  
20 decision of trying to figure out which drugs are safe  
21 for my children. I don't think most people are.

22           But the health claims that are being

1 made are indistinguishable from the labeling and  
2 diagnostic claims that are made and approved by the  
3 FDA. At least with respect to products that we have  
4 decided require prior approval in the first instance  
5 it ought to be the agency, just as the SEC makes  
6 these determinations with respect to securities and  
7 other financial instruments.

8           With respect to other products, the  
9 common law has always decreed that the government,  
10 either through a judge or through an agency like  
11 Howard's, is the final decision maker. But the  
12 burden is on the government to show falsity. There  
13 is a significant amount of protection afforded simply  
14 by the historical understanding that unless the  
15 government can prove that the speech is deceptive or  
16 false, the speaker wins. I don't have a problem with  
17 that regime. That's the regime that's been in place  
18 in this country since its founding. I really don't  
19 understand a principled basis for attacking that.

20           Let me make two quick points. The  
21 question that Walter posed to assume away government  
22 ad place decision-ready responsibility in the hands

1 of non-governmental entities, you have to assume away  
2 tort reform as well. Because if we were relying on  
3 non-public sources to tell us what drugs to take and  
4 what dietary supplements treat diseases, we would  
5 want a liability system that holds those entities  
6 accountable when they were wrong. So I think we  
7 would want a robust tort system to ensure that these  
8 entities function well and function fairly.

9           The last point is about giving money to  
10 the government to engage in counter speech. I'm not  
11 quite with Erik, but I'm close. I don't think that  
12 government is the appropriate speaker in these  
13 situations. I would differentiate, unlike Jack,  
14 between the Surgeon General and other scientists  
15 debating scientific questions on one hand, and  
16 sellers making what appear to be factual  
17 representations about the characteristics of their  
18 products on the other hand.

19           I don't think that simply because the  
20 Surgeon General issues a report saying that a fatty  
21 diet may be bad for you, that's the same as a seller  
22 selling a product based on that claim. I don't think

1 our legal regime treats those two statements the  
2 same. I would be unhappy to see the legal standards  
3 for those kinds of statement collapse into one.

4 MR. DELLINGER: I think one of the  
5 things that I think we might all agree on is that  
6 it's not the speech, but the failure to deliver on  
7 the speech. I always conceded in the *Nike* case that  
8 if the athletic director of the University of North  
9 Carolina calls Nike and says, "We've got protests on  
10 our campus, we have to know, if you're our athletic  
11 equipment sponsor, that none of your factories with  
12 which you contract use abusive practices or underage  
13 labor." They say, "No it's all done in Switzerland  
14 by adult senior citizens that are amply rewarded."  
15 So you buy all your athletic equipment. You find out  
16 that that's absolutely not true. You clearly can sue  
17 to rescind the contract. The speech isn't a defense  
18 to the fact that you didn't get the product for which  
19 you contracted. The University can get damages and a  
20 rescission of the contract. We're not saying that  
21 you're fully insulated from that speech. So I think  
22 the contract acts as an exemption.

1           The second question was Rogers.

2           ROGER PILON: Thank you, Walter. If you  
3 run my campaign, Walter, to the White House and if  
4 I'm successful, you will get the post of more than  
5 acting Solicitor General.

6           My question is, of course, to Professor  
7 Vladeck and I want to first assure him that Erik has  
8 far more support, for example, over at the CATO  
9 Institute than just himself.

10           In any event, your brief for the  
11 regulatory state carves a massive hole in the First  
12 Amendment, and it's done so, if I understand your  
13 argument correctly, in the name of consumer  
14 interests, which the Court got wrong, as it often  
15 does, because the First Amendment has nothing to do  
16 with consumer interests.

17           There is no right of the people to know.  
18 The First Amendment deals with speakers. It doesn't  
19 deal with recipients of speech, properly understood.  
20 Therefore, it seems to me that you've essentially  
21 created a massive prior restraint regime. Whereas  
22 the common law of misrepresentation can serve the

1 function very nicely. Or, even better, as Walter  
2 said, secondary markets such as consumer reports as  
3 in the automobile field where Jack pointed out safety  
4 has resulted from secondary markets and other such  
5 reports, far more effective than some government  
6 bureaucrat, with all due respect, Mr. Beales, can do  
7 in sorting out truth from falsity.

8 MR. VLADECK: It all depends on what  
9 historical view of the First Amendment you accept.  
10 If you look at the legal history, your view of the  
11 First Amendment is just completely wrong.

12 AUDIENCE MEMBER: Since 1937 it is dead  
13 wrong. We all know that.

14 PROFESSOR VLADECK: This actually  
15 predates 1937, but prior to 1976 the law was quite  
16 clear. The First Amendment did not protect  
17 commercial expression, period.

18 So, if I thought there was more  
19 substance to your premise, which is that the First  
20 Amendment was created in part to protect the  
21 commercial speaker, then you'd have the better of the  
22 argument. But there is really no historical support



1 for that. The debates on the First Amendment don't  
2 really tell us very much about what the framers had  
3 in mind other than protecting political speech.

4           During the debates on the First  
5 Amendment, the focus of the discussion was not on  
6 advertising. It was not on selling Levitra on the  
7 TV. It was on protecting people's right to debate  
8 matters of political importance. Prior to that time,  
9 there had been all sorts of restraints in England on  
10 publications.

11           AUDIENCE MEMBERS: That's political  
12 speakers, right? It isn't recipients.

13           PROFESSOR VLADECK: If there were a  
14 right to know, there would be an obligation to speak.

15           AUDIENCE MEMBER: There's no obligation  
16 to speak, therefore there's no right to know.

17           PROFESSOR VLADECK: Your argument is  
18 very much the argument we made in the *Virginia*  
19 *Pharmacy Board* case. So I do not necessarily  
20 disagree with you as to result. We believe, and this  
21 is why we pushed the early commercial speech cases as  
22 hard as we did as listener - rights cases, though of

1 course we framed the argument differently than you're  
2 proposing, that the First Amendment ought to be  
3 interpreted as protecting commercial expression.

4 MR. DELLINGER: Let me intervene here by  
5 saying that Erik is so thrilled that someone agrees  
6 with him that he --

7 MR. JAFFE: It's not so much that. It's  
8 just one thing that I think several comments have  
9 been made -- first of all, Dan Troy from Wiley Rein  
10 and Fielding has done some superb historical work on  
11 the basis of First Amendment.

12 MS. HAROLD: Thank you for complimenting  
13 me sub silencio -- research and half of my writing.

14 MR. JAFFE: There you go -- frequently  
15 written in briefs and published in an article, if I  
16 recall correctly, that I think, David, provides some  
17 fairly persuasive evidence that commercial speech in  
18 some sense was meant to be effective. But more  
19 importantly, if we're going to have a historical  
20 perspective, we also need to go back to two things:  
21 one, what history thought commercial speech was,  
22 which was a much narrower range of speech than what

1 we call commercial speech now; and two, the extreme  
2 limitations on fraud actions historically that have  
3 been all but abandoned by statutes like California's  
4 statute.

5           Once upon a time, you could not say it  
6 was potentially misleading, therefore I should win.  
7 You'd get thrown out of court and laughed all the way  
8 back to your house. Fraud was a very narrow, very  
9 difficult thing to prove. I think perhaps all of us  
10 agree if you could prove fraud, you've satisfied the  
11 First Amendment, much like if you can prove actual  
12 malice and defamation, you've satisfied the First  
13 Amendment even if it's political speech.

14           No one says false speech is protected.  
15 It's the scope of protection and how much we're going  
16 to call false or not false that the First Amendment  
17 constrains. So if we're going to go back  
18 historically, we also had a sedition law with the  
19 first Congress. The fact that we've had fraud  
20 actions and misrepresentation actions historically  
21 does not mean that what we try to transmute them into  
22 today has that same historical support.

1                   MR. DELLINGER: That's a very high note.  
2 Let me close with the observation that there's a  
3 tension to me that is quite interesting, and the  
4 question of whether the First Amendment protects  
5 commercial speech or commercial speech is outside the  
6 First Amendment's core protection of speech about  
7 government. What's interesting, is that many aspects  
8 of the consumer movement are resistant to commercial  
9 speech protection for companies.

10                   PROFESSOR VLADECK: If it wasn't for us,  
11 it wouldn't be there.

12                   MR. DELLINGER: I'm accepting your work  
13 in public. I understand that.

14                   PROFESSOR VLADECK: It's interesting,  
15 but there was not a lot of "commercial speech"  
16 litigation before *Pharmacy Board*. Nor were  
17 commercial actors bringing these cases. If you look  
18 at the pre-history of *Pharmacy Board*, the litigation  
19 to the extent it was brought, was either raised as a  
20 defense in an enforcement proceeding, or it was  
21 brought by consumer groups.

22                   MR. DELLINGER: And, David, just a

1 slightly broader point to close with, which is that I  
2 think it is the consumer movement that made it  
3 impossible to continue to say that commercial speech  
4 is different.

5                   After Ralph Nader, you couldn't possibly  
6 argue that debates over consumer issues were no  
7 longer political. So that the idea of a boundary  
8 between commercial speech and non-commercial speech  
9 collapsed in some sense with the politicization of an  
10 effective political consumer movement.

11                   PROFESSOR VLADECK: You're ready to  
12 argue *Nike* all over again, I can see it.

13                   MR. DELLINGER: That's it. That's *Nike*  
14 all over. Thank you very much.