

Reclaiming the First Amendment

 See also Pomeranz, p. 412.

The First Amendment's speech protections have evolved over time. For more than 150 years following ratification of the Bill of Rights in 1791, courts routinely held that the First Amendment protected civic speech by individuals, advocacy groups, and the press.¹ During the mid to late 20th century, a shift in judicial interpretation expanded the First Amendment to encompass commercial speech, such as advertising and marketing.¹ Since that time courts have refined the “commercial speech doctrine,” which may be implicated when a law restricts commercial speech (e.g., contains advertising or marketing limitations) or compels commercial speech (e.g., mandates information disclosures or labeling requirements).

Over the past decade, courts have used the commercial speech doctrine to strike down a variety of laws, including Food and Drug Administration (FDA) regulations restricting off-label promotion of prescription drugs, FDA marketing and labeling requirements for tobacco products, and Vermont's law limiting data brokers and other entities from unauthorized use of prescriber-identifying information.² As detailed in this issue of *AJPH*, last summer in *NIFLA v. Becerra* the US Supreme Court invalidated a California law that required crisis pregnancy centers to post signs regarding the availability of reproductive health services through state-sponsored programs.³

Notwithstanding the setbacks, there remains an intelligible path for crafting disclosures that

further public health initiatives. The commercial speech doctrine does not usurp the government's authority to promote the public health, nor can the doctrine serve as a shield to permit false or misleading advertising. An analysis of court decisions reveals a judicial preference for laws that are data driven and appropriately tailored to address a specific public health concern. If policymakers are mindful of the nuances of First Amendment jurisprudence, they can use the commercial speech doctrine as a tool to safeguard sensible public health laws. The time is ripe for public health to reclaim the First Amendment.

COMMERCIAL SPEECH DOCTRINE AND PUBLIC HEALTH

Although First Amendment litigation spans a wide array of interests, public health has played an important role in the development of the commercial speech doctrine. Some of the first commercial speech cases overturned laws that hindered public health. In the 1975 case of *Bigelow v. Virginia*, the US Supreme Court repudiated a Virginia law that banned advertisements for abortion services, ruling that the advertisements “contained factual material of clear public interest” and that health clinics had a First Amendment right to advertise their services, particularly because their “First Amendment interests coincided with the constitutional interests of the general public.”⁴ The latter point was a reference to abortion

protections outlined in *Roe v. Wade*, which was decided in 1973.

One year after *Bigelow*, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the US Supreme Court struck down a Virginia law that prohibited pharmacies from advertising prescription drug prices. At the time, reports documented significant disparities in drug pricing, sometimes as high as 650%. The court highlighted that advertising restrictions disproportionately affected the poor, the sick, and the elderly, and that price differences affected access to medicines and health outcomes.⁵ The court underscored benefits that stem from the free flow of commercial information, but also recognized that lawmakers must be afforded discretion to regulate the time, place, and manner of commercial speech. *Virginia State Board of Pharmacy* was a landmark ruling when it was issued and still is considered the Supreme Court's foundational articulation of the commercial speech doctrine.

REFINING THE COMMERCIAL SPEECH DOCTRINE

Courts use various legal frameworks to analyze commercial speech cases. Under the *Zauderer* test (from the 1985 *Zauderer v. Office of Disciplinary*

Counsel of the Supreme Court of Ohio)—which applies when a law requires a factual disclosure by a commercial entity—courts inquire whether the compelled disclosure is purely factual, uncontroversial, not overly burdensome, and reasonably related to a governmental interest.⁶ Courts can employ a more rigid standard when compelled speech is “content based” (i.e., alters speech by requiring that individuals speak a certain message). Specifically, courts can apply “strict scrutiny,” whereby a law is justifiable only if it is narrowly tailored to serve a compelling state interest.³ When a court applies strict scrutiny, the law at issue is presumptively unconstitutional and almost always invalidated.

Nestled between *Zauderer* and strict scrutiny is the *Central Hudson* test (from the 1980 *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*). Under *Central Hudson*, to withstand a First Amendment objection, a law that restricts commercial speech must directly advance a substantial governmental interest and not be more extensive than necessary to serve that interest.⁷ Compared with *Zauderer*, the *Central Hudson* test is less deferential to legislative and regulatory decisions.

The more stringent the standard, the less likely a court will uphold the compelled disclosure. Because all disclosures require dissemination of certain content,

ABOUT THE AUTHOR

Efthimios Parasidis is with the Moritz College of Law and the College of Public Health, The Ohio State University, Columbus.

Correspondence should be sent to Efthimios Parasidis, Professor of Law and Public Health, The Ohio State University, 55 West 12th Avenue, Columbus, OH 43210 (e-mail: parasidis.1@osu.edu). Reprints can be ordered at <http://www.ajph.org> by clicking the “Reprints” link.

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an expansive application of strict scrutiny would have a devastating impact on the government's ability to promote the public health. To date, courts have been mindful of this predicament and have adopted a narrow definition of content based. In turn, the overwhelming majority of commercial speech cases have been analyzed under *Zauderer* or *Central Hudson*. *Becerra* has potentially upset this balance—the five justices in the majority opinion broadly defined content-based speech and indicated that the California law was content based, but then backtracked and did not apply strict scrutiny.³

COMPELLED DISCLOSURES AND PUBLIC HEALTH LAWS

Public health laws that have survived a legal challenge under the commercial speech doctrine—such as New York City's calorie-labeling law, the US Department of Agriculture's country of origin labeling requirements, and Maine's law that pharmacy benefit managers disclose drug pricing and conflicts of interest to health plans—carefully considered First Amendment

standards during the course of policymaking, meticulously drafted the disclosure, and provided robust data to justify the public benefits.²

In cases in which a compelled disclosure was found to violate the First Amendment—such as *Becerra* and the FDA's graphic warnings for tobacco products—courts characterized the disclosure as paternalistic, underscored nonfactual or controversial elements of the disclosure, and questioned the data underlying the government's contention that the disclosure furthered a state interest.² Courts also substituted their own judgment for that of legislators and regulators, discussing alternative disclosures that might satisfy the state interest while being less burdensome to commercial speakers.² The four dissenting justices in *Becerra* characterized such actions as judicial overreach reminiscent of *Lochner* era judicial activism—a period between 1897 and 1937 when courts relied on laissez-faire economic theory and a politically conservative judicial philosophy to routinely strike down health and safety regulations and consumer protection laws.³

THE FIRST AMENDMENT AS A PUBLIC HEALTH TOOL

Compelled disclosures present challenging First Amendment issues. Although the commercial speech doctrine has raised the bar for public health officials, it has not eliminated mandatory disclosures as a public health tool. Indeed, courts have consistently highlighted that First Amendment protections are essential because “in the fields of medicine and public health . . . information can save lives.”³

A properly drafted disclosure can further the public interest by leveling the informational playing field. To do so, disclosures should address market imperfections and information asymmetries—particularly in situations in which the market contains misleading or incomplete information. Justifications for the disclosure should be addressed in detail, alternatives should be exhaustively considered, and a thorough report should explain why the adopted disclosure is superior to all alternatives.

Policymakers would be wise to conduct a robust First Amendment analysis before the enactment of a compelled disclosure. Faculty who specialize

in public health law may be uniquely positioned to assist in these endeavors. With data-driven policies and a detailed understanding of the commercial speech doctrine, public health can reclaim the First Amendment. **AJPH**

*Efthimios Parasidis, JD,
M.Bioethics*

CONFLICTS OF INTEREST

The author has no conflicts of interest to report.

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