United States: Protecting Commercial Speech under the First Amendment

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Abstract: The First Amendment to the US Constitution protects commercial speech from government interference. Commercial speech has been defined by the US Supreme Court as speech that proposes a commercial transaction, such as marketing and labeling. Companies that produce products associated with public health harms, such as alcohol, tobacco, and food, thus have a constitutional right to market these products to consumers. This article will examine the evolution of US law related to the protection of commercial speech, often at the expense of public health. It will then identify outstanding questions related to the commercial speech doctrine and the few remaining avenues available in the United States to regulate commercial speech including the use of government speech and addressing deceptive and misleading commercial speech.

Introduction

The United States is an outlier internationally because US law unquestionably protects commercial speech at the expense of public health. Unlike constitutions of other countries, the US Constitution does not protect social rights, such as the right to health, housing, or food, so there is no legally recognized right to health enforceable against the government. Moreover, the United States rarely ratifies international treaties that set forth human rights protections so international law does not provide an alternative avenue to enforce human rights in the country.[1] Yet, US law recognizes corporations as entities akin to individuals in terms of the "negative rights"[2] the Constitution does protect, such as the freedom of speech and to practice religion without government interference. Over the last two decades, the US Supreme Court has expanded the breadth of protections for both, corporations as akin to individuals and corporations' right to free speech.[3] As a result, under the US Constitution, industries that produce harmful products have a constitutional right

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to market these products that far surpasses any right US citizens have to attain health.

In terms of speech in particular, the US Supreme Court has now interpreted the First Amendment to the US Constitution to protect commercial entities' right to engage in both political speech and commercial speech the First Amendment to the US Constitution to protect commercial entities' right to engage in both political speech and commercial speech. A major shift occurred in 2010 based on the decision in *Citizens United v. FEC*, under which the Supreme Court essentially held that corporations have equal political speech rights as individuals.[4] This decision is concerning from a public health perspective because multinational corporations have the financial ability to engage in speech to influence election outcomes and financially support candidates who support corporate objectives over public health. Under the First Amendment, commercial speech is protected to a lesser degree than political speech. However, because the freedom of expression is broadly guaranteed for corporate entities in the United States, it has become nearly impossible to restrict commercial speech, including the marketing of products associated with noncommunicable disease.

An interesting example of the US framework is the fact that the United States is one of very few countries in the world that has not signed on the International Code of Marketing of Breast-Milk Substitutes; nor has it specifically implemented the Code's provisions into law.[5] As a result, within the United States, the breastmilk substitute industry engages in advertising, labeling, and other marketing practices that violate the Code (and would violate the laws of most countries with respect to infant formula marketing).[6] Because of the Supreme Court's interpretation of the First Amendment, however, it would be constitutionally difficult to restrict most marketing and labeling practices covered by the Code. Thus, even though the US Surgeon General called on companies to abide by the Code within the United States, there is no threat of US enforcement to encourage manufacturers to do so.

This article will examine the evolution of US law related to commercial speech for products associated with public health harms such as alcohol, tobacco, and food. It will then identify the few remaining avenues available in the United States to regulate commercial speech for products associated with noncommunicable disease.

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Framework for Analyzing Government Regulation of Speech

The US Constitution established the structure and framework for the US government. The Bill of Rights is the first ten amendments to the Constitution and defines citizens' rights and liberties in relationship to the government. The US Supreme Court established three levels of scrutiny along with corresponding tests to determine if government regulations that impinge on these rights are consistent with the Constitution.

The most difficult test to pass is strict scrutiny and applies to what the Court has deemed to be most strongly held constitutional values (e.g., classifications based on race, the right to travel across the states). This test is applied to restrictions and compulsions of fully protected expression, such as political and religious speech. The mid-level test is generally called intermediate scrutiny and applies to constitutional values that receive a mid-level of protection (e.g., classifications based on sex). This test is relevant to commercial speech. The easiest test for the government to pass is generally called the rational basis test — under which the government needs only a rational basis for the regulation. Most public health regulations that do not implicate constitutionally protect rights receive rational basis review (e.g., vaccine requirements). This test is relevant to disclosure requirements in the commercial context.

The First Amendment to the US Constitution states that, "Congress shall make no law … abridging the freedom of speech." This protects against the federal government's interference with the freedom of speech; the same prohibition applies to the states (and localities) through the Fourteenth Amendment.

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The original rationale behind this clause was to protect the free exchange of ideas to enable participation in a representative democracy. This type of "political speech" is considered fully protected speech and both government restrictions and compulsions of political speech are subject to strict scrutiny and, as a result, are almost always found to be unconstitutional. Within the context of fully protect speech, regulation based on the time, place or manner of speech are permitted if they are content-neutral, meaning they are justified without reference to the content of the speech. For example, a community can require parade organizers to obtain a permit and require the parade to take place on certain days, during specific times, and in specific locations.

Commercial speech is subject to different constitutional considerations. As such, the next section will trace the origins of the commercial speech doctrine including the different constitutional framework established for restrictions on commercial speech as opposed to disclosure requirements in the commercial context. The sections following will describe how these tests evolved to ultimately render a variety of speech regulations not legally feasible in the United States.

Origin of the Commercial Speech Doctrine

Restrictions on Commercial Speech

It was not until the 1970s that the Supreme Court decided that the First Amendment protects commercial speech. The first two cases were considered positive from a public health perspective. In *Bigelow v. Commonwealth of Virginia*, a newspaper editor had been convicted of violating a Virginia law that made it a misdemeanor to publish an advertisement for abortion services (even though the advertisement in question was for services available in New York State). The Supreme Court overturned the conviction. In doing so, the Court for the first time moved away from its earlier statement that, "the Constitution imposes no such restraint on government as respects purely commercial advertising."[7] In *Bigelow*, the Court found that the fact that newspaper advertisements had commercial aspects or reflected advertisers' commercial interests, "did not negate all First Amendment guarantees."[8]

One year later, in *VA State Pharmacy v. VA Citizens Consumer Council*, the Supreme Court confirmed that commercial speech, which it described as speech that "does no more than propose a commercial transaction," was protected under the First Amendment.[9] In that case, a licensed pharmacist had been found guilty of unprofessional conduct in Virginia for advertising prescription drug prices. The Court established the beginning of the commercial speech doctrine and held that the Virginia law violated the First Amendment. In doing so, it explained that, a "consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[10] The Court determined that false commercial speech would not be protected (unlike false political speech which is protected) and that the government can still regulate deceptive or misleading commercial speech to ensure "that the stream of commercial information flow cleanly as well as freely."[11]

Over the years, the Court has explained that commercial speech includes all forms of marketing, such as advertising,[12] labeling,[13] and price information.[14] In the 1980 case, *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court established the *Central Hudson* test that at the time was considered an intermediate level test to determine if government restrictions on commercial speech are constitutional.[15] Under this test, courts first determine (1) whether the expression is protected by the First Amendment, meaning that it must relate to a lawful activity and not be false, deceptive, or misleading. If it is found to be protected, the court must ask whether (2) the government asserted a substantial interest to be achieved by restricting commercial speech; (3) the regulation directly advances this interest; and (4) the restriction is not more extensive than necessary to serve this interest.[16]

Compulsions of Speech in the Commercial Context

In the context of most consumer products, government frequently requires the disclosure of factual information on product labels (and sometimes on advertisements). Such disclosures can take the form of purely factual data to provide consumers with clear information about the products for sale (e.g., the information panel on food packaging which includes the Nutrition Facts label, ingredient list, and common food allergens). A second type of disclosure includes warnings about products, for example, warnings on tobacco and alcohol labels about potential health and safety concerns associated with consumption. As opposed to restrictions on commercial speech, the Supreme Court found that compulsions of factual information in the commercial context were subject to a different test and level of scrutiny.

In 1985, the Court established the test to determine whether government requirements to disclose factual information in the commercial context were constitutional. In *Zauderer v. Office of Disciplinary Counsel*, the Court held that disclosure requirements, including

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warnings and disclaimers, are constitutional if they are "reasonably related" to the "government's interest in preventing deception of consumers," they are "purely factual and uncontroversial," and not "unjustified or unduly burdensome."[17] This is called the *Zauderer* test and was considered akin to a rational basis test. In *Zauderer* itself, the Court did not provide any type of explanation of the requirements of the test.

The Supreme Court expounded on the last clause of the *Zauderer* test in a subsequent 1994 case, *Ibanez v. Florida Dept. of Business & Professional Regulation*. In this case, the government had tried to require a professional's business cards to include a long disclaimer that would essentially make using a business card prohibitive. First, the Court stated that to justify a disclosure requirement, the government needed evidence to show that the harm it seeks to address "is potentially real," and "not purely hypothetical."[18] The Court found that the disclosure requirement at issue was "unduly burdensome" because it was so long and detailed that it effectively drowned or ruled out the commercial communication in the first place.[19] Despite this case, courts still struggled to determine what constituted a burdensome requirement, often focusing on font size.[20] The burdensome requirement therefore developed into somewhat of a subjective test.

Lower court seeking to apply *Zauderer* generally expect the government to amass evidence to support its requirement.[21] But a lack of clarity remained about the rest of the test. Courts generally concluded that the "uncontroversial" language in *Zauderer* referred to uncontroversial facts (e.g., a product either contains mercury or it does not[22]). And that the government's interest in "preventing deception of consumers" was a description of the government's interest in the *Zauderer* case itself, rather than the sole governmental interest that could be used to justify disclosure and warning requirements. For decades courts determined that that government could require factual disclosures and warnings based on government interests beyond preventing deception of consumers, including health, safety, and the environment.[23] (But they did find that an interest in satisfying consumer curiosity was not enough.[24]) Thus, lower courts generally upheld disclosure requirements passed to protect public health.

Summary

Thus, the Supreme Court initially seemed to establish three levels of scrutiny for speech regulations. Strict scrutiny has always applied to restrictions and compulsions of fully protected expression such as political speech, protests, religious speech, and artistic expression. The *Central Hudson* test, which evaluates restrictions on truthful commercial speech was deemed an intermediate test. And for factual disclosure requirements in the commercial context (including both warnings and factual information), the Court initially established the "reasonable basis" test, which was deemed to be akin to rational basis in other constitutional contexts.

However, both the *Central Hudson* and *Zauderer* tests have been interpreted with increasingly "stricter" scrutiny and thus, more difficult for the government to pass than perhaps was originally envisioned.[25] No commercial speech restriction has passed the *Central Hudson* test in decades, and it is now unclear whether a restriction on non-deceptive commercial speech can ever pass this test. Further, a recent case that was not necessarily a commercial speech case altered courts' interpretation of the *Zauderer* test.

Evolution of the Commercial Speech Doctrine

Commercial Speech Restrictions

Several cases decided under *Central Hudson* that directly relate to products associated with public health harm reveal that no matter how strong the government interest, how much evidence it amassed that the product harms health or that restricting speech is a method to address potential health harms, the government cannot restrict non-deceptive commercial speech about products legally for sale in the marketplace. In the context of alcohol, in *Rubin v. Coors Brewing Company*, the Supreme Court struck down a federal law that prohibited beer labels from displaying alcohol content to prevent "strength wars" among manufacturers competing on the basis of high potent alcoholic beverages.[26] Although the Court agreed the government's interest was "substantial," it held that the law unconstitutionally restricted truthful speech and thus failed the *Central Hudson* test. This holding is not entirely surprising because it is contrary to First Amendment values for the government to prohibit the disclosure of factual data about a product for sale. But the opinion is important for how it helped usher in the ultimate trajectory of First Amendment analysis under the Central Hudson test.

Writing for the majority, Justice Thomas explained that to pass the "last two steps of the *Central Hudson*," there must be a "'fit' between the legislature's ends and the means chosen to accomplish those ends."[27] This statement was originally part of a broader statement in a previous case that had a liberal meaning: "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interests served.'"[28] Nonetheless, the second part of this statement has now become something repeated by dis-

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senting opinions when the majority finds the fit to be improper. The "fit" requirement means that the government must show that its interest is proportionate to the burden placed on speech;[29] however, given the increased protection for commercial speech, the governments is not able to meet this burden. Thus, the question over fit has ultimately become a signal that a speech restriction cannot meet both parts three and four of *Central Hudson* simultaneously.

The majority in *Rubin v. Coors Brewing* also questioned whether the ban on alcohol content would directly advance the government's interest (and noted that the rest of the regulatory scheme was irrational because it also applied to wine and spirits and had exceptions for state laws). Importantly, the Court then pointed to alternatives to meet federal goals without burdening speech, including directly limiting the alcohol content of beers. This signaled that regulated entities may need to only come up with alternative methods to address the government's concern without implicating speech, and this would show the speech restriction was not proportionate to the government's interest.

One year later in 1996, the Court struck down a state law banning the advertisement of alcohol prices. The Court explained that "bans against truthful, nonmisleading commercial speech ... usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth."[30] It also confirmed there is no "vice" exception to the commercial speech doctrine for products that pose a threat to public health.[31]

In 2001, the Court went a step beyond previous decisions to strike down Massachusetts' regulations that aimed to protect children — who cannot legally purchase tobacco products — from seeing tobacco advertisements.[32] In *Lorillard v. Reilly*, the Court first found that the state had amassed adequate evidence to further its "substantial" and perhaps "even compelling" interest in preventing tobacco use by minors.[33] Nonetheless, the Court found the regulation prohibiting tobacco advertising within a 1,000-foot radius of a school or playground violated the fourth part of *Central Hudson*. It explained that in some areas in Massachusetts, this restriction would constitute "nearly a complete ban on the communication of truthful information" about tobacco products to adult consumers. This, the Court found, would violate the First Amendment interests of "tobacco retailers and manufacturers [who] have an interest in conveying truthful information about their products to adults," and adults who "have a corresponding interest in receiving truthful information about tobacco products."[34]

In *Lorillard v. Reilly*, the Supreme Court characterized the *Central Hudson* test as "a framework for analyzing regulations of commercial speech that is 'substantially similar' to the test for time, place, and manner restrictions." Nonetheless, it did not flesh out this conceptual overlap.[35]

The Court also started to take more seriously industry arguments to apply strict scrutiny to commercial speech restrictions.[36] Justice Thomas wrote a concurring opinion, in which he reiterated his argument in the *Rubin v. Coors Brewing Company*, that the government should consider alternatives to limiting speech:

> [T]he State should have examined ways of advancing its interest that do not require limiting speech at all. ... Massachusetts already prohibits the sale of tobacco to minors, but it could take steps to enforce that prohibition more vigorously. It also could enact laws prohibiting the purchase, possession, or use of tobacco by minors. And, if its concern is that tobacco advertising communicates a message with which it disagrees, it could seek to counteract that message with 'more speech'[37]

These specific suggestions are especially intriguing because they are not evidence-based and in fact are contrary to the public health evidence on punishing minors for tobacco use. This underscores the reality in the US court system that social science evidence is given little weight in First Amendment cases.

In his concurring opinion, Justice Thomas also explicitly stated that he would subject advertising restrictions to strict scrutiny and weaved into his argument the idea of "content-based" restrictions which was historically only discussed in the context of fully protected speech.[38] He questioned whether it was even possible to draw a "coherent distinction between commercial and noncommercial speech." Justice Thomas argued that since the regulations sought to suppress speech about tobacco because the state objected to the "content of that speech," they were content-based regulations of speech which should be subject to strict scrutiny.[39] This perspective is concerning because all commercial speech restrictions are "content-based." Nonetheless, less than two decades later, the Supreme Court seems to have embraced Justice Thomas' views on commercial speech.

In 2011[40] and 2020,[41] the Court analyzed two regulations under the First Amendment that the government argued were economic regulations that happen to have a speech component, but where the majority found the regulation imposed "content-based" burdens on speech and struck them down. In *Sorrell v. IMS Health Inc.*, a Vermont law restricted the sale, disclosure, and use of pharmacy records that revealed

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prescriber-identifying information.[42] The Court found the law imposed content-based and speaker-based burdens on protected expression, finding that "heightened judicial scrutiny" was warranted.[43] It relied on cases in the commercial speech context *and* in the context of fully protected speech and did not explain exactly what "heightened" scrutiny meant. The Court stated that under either test (intermediate or strict scrutiny) the regulation violated the First Amendment.[44]

Importantly, the dissent considered the Vermont law to be an economic regulation that should have been subjected to, and pass, rational basis review. The dissent explained the significance of this case and highlighted a changing tide for First Amendment jurisprudence:

> [N]either of these categories — 'content-based' nor 'speaker-based' — has ever before justified greater scrutiny when regulatory activity affects commercial speech… Regulatory programs necessarily draw distinctions on the basis of content… Nor, in the context of a regulatory program, is it unusual for particular rules to be "speaker-based."[45]

In 2020, the Court issued a similar decision on the topic of cell phone-based robocalls, again with the majority finding the regulation was content-based and subject to strict scrutiny, under which it failed.[46] The dissent again argued that applying the strictest level of scrutiny to an "ordinary commercial regulation" was "divorced from First Amendment values" as it had "next to nothing" to do with the marketplace of ideas.[47] At this point, although the Supreme Court had not expressly stated it, the majority opinions have evidenced a departure from the origins of the commercial speech doctrine.

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Commercial Disclosure Requirements

While the Supreme Court has pioneered First Amendment jurisprudence with respect to commercial speech restrictions (and thus analysis of the *Central Hudson* test), federal appellate courts have generally interpreted *Zauderer* without Supreme Court guidance for decades. This changed with a 2018 Supreme Court decision, discussed below. Before this decision, lower courts upheld commercial disclosure requirements in the context of environmental regulations (e.g., to require the disclosure of mercury in products to aid with proper disposal[48]), tobacco (e.g., textual health warnings for tobacco products[49]), nutrition (e.g., calorie[50] and sodium[51] warning labels on restaurant menus), and radio-frequency radiation exposure notices at the point of sale.[52]

Lower courts did strike down disclosure requirements that were not based on evidence (i.e., "unjustified") or that were non-factual (e.g., finding there was no factual definition of "conflict- free" minerals[53]). Perhaps the most important case from an international perspective was the case where a federal appellate court struck down graphic warning requirements for tobacco products, a labeling strategy widely accepted in countries world-wide.[54] In 2012, the DC Circuit found the FDA's proposed graphic tobacco warning labels were unconstitutional, stating:

> [M]any of the images do not convey any warning information at all, much less make an 'accurate statement' about cigarettes. For example, the images of a woman crying, a small child, and the man wearing a T-shirt emblazoned with the words 'I QUIT' do not offer any information about the health effects of smoking.[55]

Moreover, the court questioned the government's ability to make "every single pack of cigarettes in the country a mini billboard for the government's anti-smoking message."[56] The FDA has since created new graphic warning labels and has been sued by two tobacco manufacturers. The cases are pending in federal court as of the time of this writing.

The Supreme Court took on *Zauderer* in the 2018 case, *Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra*.[57] Rather than clarify the test, the case created upheaval in how to interpret the government's ability to require disclosures or warnings in the commercial context. This case stemmed from California's

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disclosure requirements for clinics that serve pregnant women. It is unclear to some extent whether this case should be interpreted as a speech case about abortion, a case about fully protected speech, or a case about commercial speech.[58] In *NIFLA*, the Court examined two notice disclosure requirements which it characterized as "content-based" and "speaker-based." It struck down the two requirements as violating the First Amendment and seemed to clarify parts of the *Zauderer* test in the opposite direction than lower courts had taken it. It is important to note that Justice Thomas authored the *NIFLA* opinion; he had previously stated that he is "skeptical of the premise on which *Zauderer* rests — that, in the commercial-speech context, 'the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.'"[59]

First, the Supreme Court explained that *Zauderer* only applies to disclosure requirements that are purely factual and uncontroversial. In interpreting the term "uncontroversial," the majority found that the disclosure requirement at issue was not subject to *Zauderer* because it mentioned abortion which is "anything but an 'uncontroversial' topic."[60] However, abortion is a politically controversial topic; the existence of the medical procedure of abortion is not. This is contrary to how lower courts have analyzed the "uncontroversial" requirement. Moreover, since companies have equal political speech rights as individuals,[61] a finding that a disclosure requirement related to abortion is controversial for First Amendment purposes is a deeply concerning interpretation of the First Amendment. Most public health regulations are controversial because they evoke competing values of community health versus individual or business interests. Further, companies that produce harmful products have the First Amendment right to create political controversy over any topic at any time.

Second, the Court disapproved of the fact that the disclosure at issue was "government-scripted." (This is reminiscent one of Justice Thomas's previous opinions where he stated: "even under *Zauderer*, we 'have not presumptively endorsed' laws requiring the use of 'government-scripted disclaimers' in commercial advertising."[62]) Yet, essentially all warning requirements are government scripted (e.g., "WARNING: Cigarettes cause cancer"). Ostensibly understanding the difficulty that government will have drafting, and courts will have evaluating disclosure requirements based on this decision, the majority added: "we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."[63] However, it did not flesh out which disclosures and warnings fall under this category.

The Court did not decide whether other interests besides "preventing deception of consumers" can support disclosures or warnings; and only stated that the notice requirement was "wholly disconnected from California's informational interest."[64] The Court also found that the state did not amass evidence that pregnant women did not already know the information sought to be disclosed, and therefore the notice requirement was "unjustified." This was a confusing finding because all health and safety warnings provide information about which certain consumers may already be familiar. In fact, Congress requires a health and safety warning on alcoholic beverage labels for the exact purpose of providing "a clear, nonconfusing reminder of such hazards" to the American public. Lastly, the Court found that the requirement to disclose the notice in up to 13 languages — which California envisioned would be tailored to the particular community — was unduly burdensome. Although it is clear that requiring a disclosure in 13 languages at once is burdensome under *Ibanez* given the amount of space it would require, it is unclear how many languages at once would not be burdensome.

In *NIFLA*, the majority used similar language as in the *IMS Health*, stating that one notice requirement imposed a "speaker-based disclosure requirement,"[65] while the second notice was a "content-based regulation of speech" that compelled the regulated entity "to speak a particular message."[66] This latter statement captures every single disclosure and warning requirement currently in place in the US commercial marketplace. Moreover, writing for the majority, Justice Thomas made clear that California should have found an alternative to regulating speech; the opinion suggested that California "could inform the women itself with a public-information campaign" or by using public property to convey its message.[67]

Reminiscent of the dissent in *Sorrell v. IMS Health*, the dissent in *NIFLA* similarly warned about the repercussions of striking down disclosure requirements aimed at supporting informed consumer decision-making:

> Because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation. Virtually every disclosure law could be considered 'content based,' for virtually every disclosure law requires individuals 'to speak

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> a particular message.' Thus, the majority's view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.[68]

A subsequent Ninth Circuit case highlights judges' difficulty in evaluating warning or disclosure requirements post-*NIFLA*. In 2019, the Ninth Circuit analyzed San Francisco's requirement that outdoor advertising for sugary beverages must include a warning on 20% of the advertisement that stated: "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco."[69] The Ninth Circuit struck down the law under *Zauderer*.[70] The majority found the 20% size requirement to be unduly burdensome because the state did not show that it would not "drown out" the advertiser's message, which would "effectively rule out the possibility" of advertisements in the first place.[71] The court acknowledged that the Sixth Circuit previously upheld a similar requirement in the context of tobacco advertisements, but pointed to a study in the context of sugary beverages found that warnings that were half the size would be similarly effective.[72] The court went on to say that it was not holding that a warning that was 10% of the size of the advertisement would be constitutional, further confirming the lack of an objective requirement for this part of the *Zauderer* test.

The concurring opinions revealed much conflict over how to interpret *NIFLA*. One concurring opinion stated that only "health and safety warnings [that] date back to [the year] 1791" would qualify as "long considered permissible" under the *NIFLA* standard.[73] This is an untenable position given that all current warnings have been created since 1791 and the government could not address newly invented threats (e.g., toddler milks, electronic cigarettes) or products for which the science has evolved (e.g., sugar-sweetened beverages).[74] Another concurring opinion argued that the proposed warning language was factually inaccurate because the FDA previously declared added sugars as "generally recognized as safe," and stated that they "can be a part of a healthy dietary pattern" when not consumed in excess.[75] Another concurring opinion questioned the application of *Zauderer* at all, stating they "disagreed with applying *Zauderer* outside the context of false and misleading speech."[76]

Directions for the Future

As the US Supreme Court has moved toward granting increased protections to corporations, including their right to communicate through political and commercial expression, one can only expect it to continue in this direction given the make-up of the Court in 2022. It would take a constitutional amendment to pull back on the speech rights of corporations; however, this is not politically likely.

Although of unclear efficacy, as noted in previous cases, government can use its own speech — government speech — to communicate with the public. Although the government cannot afford to fund counter-marketing campaigns that match even one company's marketing campaign, it can engage in public service campaigns to dissuade consumption of harmful products. At present, outside of tobacco control, this is generally rare in the United States. Another avenue available to government is for it to proscribe speech in its own buildings (e.g., office buildings, schools) and public transportation.[77] As long as it uses viewpoint neutral guidelines (i.e., does not choose among similar types of expression based on the viewpoint expressed), it can restrict commercial speech across government venues. These efforts, of course, will have a limited reach but are legally feasible.

So, what is left for marketing of products that cause public health harm? Despite the progression of increased protection for commercial speech and decreased ability for government to regulate it under both *Central Hudson* and *Zauderer,* false, deceptive, and misleading speech in the commercial context remains subject to government regulation. The ability to address false and deceptive commercial speech underlies much of the consumer protection authority of the Federal Trade Commission (FTC) and state attorneys general. Moreover, in the case law, evidence of deception is more compelling than social science evidence for speech regulations.[78] The outcome of First Amendment cases in the context of both commercial and fully protected speech has never been contingent on the amount or strength of social science evidence presented even when the government amasses an enormous amount of evidence of the public health repercussion of speech.[79] However, evidence of deception does influence the outcome of First Amendment cases.[82]

In both *Central Hudson*[83] and *Zauderer*[84], the Court indicated that deceptive speech is subject to regulation. At this point, the Court has not overruled this area of First Amendment jurisprudence. The dissent in *IMS Health* noted the same, stating that, "the Court normally exempts the regulation of 'misleading' and 'deceptive' information even from the rigors of its 'intermediate' commercial speech scrutiny."[83] Nonetheless, the Court has not analyzed a case directly on this point in decades. In fact, *NIFLA* could have been a case about deceptive speech by clinics that serve pregnant

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women but the State did not present it this way.[84] The state could have argued that the unlicensed clinic disclosure requirement was necessary to prevent deception because the state legislature explicitly had found that these clinics engaged in "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully informed, time-sensitive decisions about critical health care."[85] The majority in *NIFLA* went so far as to cut off phrases from *Zauderer* to avoid discussing deceptive speech.[86] Had they done so, they would have had to highlight a potential avenue for government to require such disclosures: curing deception.[87]

Decades-old case law indicates that there are three types of misleading commercial speech: potentially, inherently, and actually misleading commercial speech.The Supreme Court previously held that potentially misleading commercial speech (i.e., speech that is capable of being presented in a way that is not deceptive) is protected by the First Amendment. However, inherently and actually misleading speech are amenable to regulation.

This case law is not well fleshed out as there are very few cases in this area. The few cases that do exist indicate that inherently misleading speech is speech that is "incapable of being presented in a way that is not deceptive."[88] This has been found when advertising terms have no inherent meaning (e.g., the use of a trade name for optometrists;[89] the term "invoice" in car ads[90]). Nonetheless, courts have only rarely found speech to be inherently misleading. Actually misleading speech is speech for which there is "evidence of deception" which the Court only explained as evidence that consumers are misled.[91] Decades ago, the Court stated that the government "may impose appropriate restrictions" on inherently and actually misleading commercial speech.[92] However, it is not clear this is actually feasible in terms of direct regulation. In *Zauderer* itself (and a subsequent case almost identical to it, *Milavetz*) the Court upheld a disclosure requirement to cure inherently misleading speech.[93] In the context of deceptive advertising, the FTC and state attorneys general bring cases against ad campaigns deemed deceptive; the settlements include agreements by advertisers to cease using such deceptive claims in future advertising.[94] Expanding these types of cases is a viable option to address deceptive marketing practices and an area ripe for FTC and state attorney general action.[95]

As governments consider policy going forward, it should gather evidence of deception. FTC cases sometimes include review of actual evidence of deception in the form of consumer surveys.[96] Moreover, courts would look for evidence of deception to support commercial speech restrictions or disclosures. Social scientists have a role to play to reveal and amass evidence on how modern marketing practices for products that harm health, deceive consumers.[97]

Conclusion

Many outstanding questions remain about the commercial speech doctrine. It is now not fully known the extent a commercial speech restriction can ever survive First Amendment scrutiny under *Central Hudson* or if the Court will apply strict scrutiny to commercial speech restrictions in the future. It is also unknown the extent the government should consider and apply time, place, and manner restrictions on commercial speech. Future cases are needed to determine how courts will continue to flesh out *Zauderer* in light of *NIFLA*. Cases currently pending in federal court will provide additional insight on whether graphic warning labels can ever survive First Amendment scrutiny.

The Supreme Court's interpretation of the freedom of speech over the last two decades has fundamentally changed First Amendment jurisprudence, protecting corporate expression in all meaningful ways and at the expense of other values, including health. It is thus not surprising that little regulation of commercial speech has taken place in the United States. At a minimum, US law serves as a cautionary tale to other countries, but it also functions to support corporations in a global marketplace with digital expression that transverses country lines. Absent constitutional amendments, Americans may expect an expansion of the commercial speech doctrine, few rights related to attaining health, and an escalation of noncommunicable disease as a result of this market-driven framework.

Note

The author has no conflicts to disclose.

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rately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it."
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