Health Promotion and the First Amendment: Government Control of the Informational Environment

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THE GOVERNMENT PLAYS A SIGNIFICANT ROLE IN protecting the public's health.¹ The state and federal governments enact laws to ensure the quality of the air we breathe, the water we drink, the food we eat, and the health care we receive. Many of the determinants of health and disease rest on human behaviors, which affect not only individuals but also the broader society. In addition, unhealthy behaviors are often predicated on a lack of information or on inaccurate information.

The government's efforts to alter health behavior therefore often include some degree of control over the content of information pertaining to health that the public receives. Three governmental means to do this are (1) proscribing claims that vendors may make when offering a product

¹ In 1889, the Supreme Court affirmed the states' inherent authority to protect the health, safety, and welfare of their citizenry. See *Dent v. West Virginia*, 127 U.S. 114 (1889); the state may impose licensing requirements on physicians. Federal government involvement in public health protection, albeit of more recent vintage, has come to play an equally profound role in public health protection. With the rise of the administrative state, Congress has delegated substantial authority to federal agencies to ensure the safety of, for example, our foods (e.g., Food and Drug Administration, Department of Agriculture), pharmaceuticals (Food and Drug Administration), and consumer products (Consumer Product Safety Commission). See, e.g., Gostin 2000.

for sale (commercial speech), (2) prescribing warning labels or other disclosures in conjunction with such products or services (compelled commercial speech), and (3) delivering health messages to the public, either directly or through grants to private organizations (government speech).

The government's authority to curtail or compel product- or service-related communications in the private sector that are deemed hazardous to the public's health is bounded by the First Amendment's guarantee of free expression. The U.S. Supreme Court has fashioned a fairly well defined algorithm for determining the extent of government control over commercial speech that is consistent with the First Amendment. This algorithm seeks to mediate between the government's interest in protecting the public from deception and the rights of commercial entities to communicate—and the public to receive—information that pertains to health.

When government itself is the speaker, however, there is no simple algorithm. Indeed, although the First Amendment protects private citizens from government interference in expression, it has no specific application when government is the speaker. Thus as a constitutional matter, the courts rarely constrain government speech even if such speech could be constrained were it made by commercial interests. Not surprisingly, then, while there is a significant body of jurisprudence and scholarship relating to the permissible boundaries of commercial speech regulation, there is very little relating to government speech and none specifically concerning government speech on matters of health.

Although largely shielded from constitutional scrutiny, government speech on matters of health raises difficult social and ethical questions and involves important societal trade-offs. Such information may reduce risk behavior and result in substantial public health benefits, but it may also stifle freedom of thought, expression, and association. Moreover, even though the government's influence on commercial speech can be fairly easily determined, since it is regulated by law, government speech is often disseminated without this same benefit of public scrutiny or participation.

This article examines the ways in which the government controls the informational environment related to health. We discuss the government's regulation of commercial speech, by both suppressing messages deemed harmful to the public and compelling the disclosure of information to avoid consumer deception or confusion. We explore some of the values that the U.S. Supreme Court has applied, explicitly or implicitly,

in determining when government is permitted to control commercial speech. The article also reviews the “strange” case of government speech, in which the government has significant discretion to disseminate information, but with only few safeguards on its method or content of communication. Finally, we suggest ethical and practical considerations to guide government communications on matters of public health.

The Basic Tenets of Freedom of Expression

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” The First Amendment also prevents the government from suppressing speech by private citizens even when the subject matter is incorrect or offensive.² While the government may, consistent with the First Amendment, control some of the speech’s physical and temporal attributes (e.g., zoning ordinances regarding the posting of billboards),³ it generally may not prohibit communications based on their content (e.g., an ordinance making it unlawful to display within 500 feet of a foreign embassy any sign that might bring a foreign government into “public odium” or “public disrepute”).⁴ This general prohibition on restricting speech based on its content applies equally to speech on matters of public health. Thus the government may not prohibit a citizen from posting signs stating, for example, that cigarettes do not cause lung cancer or that AIDS is not caused by the human immunodeficiency virus, but it may limit the placement of all signs, including those proclaiming such messages.

The First Amendment’s protection of speech is grounded in several fundamental values (Chemerinsky 1997). First, free expression is essential to autonomy, self-fulfillment, and personhood and therefore has intrinsic value because it provides a vehicle for individuals and groups to define and proclaim their identity (Baker 1978). Free expression also

² See, e.g., *Cohen v. California*, 403 U.S. 15 (1971).

³ These types of governmental controls on speech are termed “time, place, and manner” restrictions. See, e.g., *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). The Supreme Court has stated that time, place, and manner restrictions do not violate the First Amendment if they are justified without reference to the content of the regulated speech, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

⁴ *Boos v. Barry*, 485 U.S. 312, 315 (1988).

has instrumental value because it enhances democracy or self-governance by permitting the free exchange of ideas, which enables both the electorate and public officials to be adequately informed on important issues (Meiklejohn 1948, 1960, 1961). Finally, and perhaps most important to public health, freedom of expression is considered necessary for the discovery of truth. In his classic defense of free expression, John Stuart Mill believed that

if an idea is true, society is denied the truth; if it is false, society is denied the fuller understanding of truth which comes from its conflict with error; and when the received opinion is part truth and part error, society can know the whole truth only by allowing the airing of competing views. (quoted in Gunther and Sullivan 1997, p. 1025)

Oliver Wendell Holmes invoked the metaphor of the “marketplace of ideas” to capture the notion that truthful expressions will prevail in the competition of a free market.⁵

While they do not dispute the intrinsic and instrumental values of free expression, public health authorities are skeptical that truthful ideas about health will necessarily prevail in a free market of communication. Interventionist by nature, the public health enterprise takes as a given the necessity of behavioral change to enhance the well-being of the population (Bayer, Gostin, and McGraw 1995). The specific changes to be promoted or discouraged are ideally based on rigorous scientific investigation; thus science is the ultimate arbiter of truth. Public health authorities distrust the free market to inform the public accurately and objectively concerning risk behaviors and appropriate measures for healthy living. Their reason is that such a market is a cacophony of explicit and implicit messages about health, many of which are not based on science but on uninformed opinion.

Notwithstanding their interventionist stance and their inherent distrust of the marketplace, public health authorities generally must accept the First Amendment’s protection of speech. While they may deplore claims by anti-vaccination organizations that childhood vaccinations are ineffective and unsafe⁶ and assertions by gun advocates that “guns don’t

⁵ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁶ See, e.g., *Citizens for Healthcare Freedom*. <http://www.unc.edu/~aphillip/www/chf> (accessed April 11, 2001).

kill people,” their only constitutionally permissible response is counter-speech to combat these messages’ damaging effects.

When the speech occurs in the context of commerce, however, more potent measures are available. In commercial speech, the intuitions of public health authorities and the Supreme Court intersect to permit government to exert some control over not only the format elements of speech (time, place, and manner) but also—to some extent—its content.

Not All Speech Is the Same: Why Commercial Speech Is Treated Differently

The private sector has a strong economic incentive to influence consumer preferences. Manufacturers and retailers want to sell products; the advertising industry strives to design alluring campaigns; and the media compete for advertising revenue. Thus most of the information that citizens receive that may affect their health comes not from the government but from private entities whose motive is profit. This fact is what informs and limits the government’s efforts to change risk behaviors.

The government’s ability to restrain and shape the messages delivered by the private sector is an important, arguably essential, strategy to safeguard consumers’ health and safety. Advertising campaigns help increase the demand for hazardous products and services⁷ such as alcohol, tobacco, and firearms.⁸ Some campaigns target children and adolescents, even though some of these products (e.g., alcohol, tobacco) cannot legally be sold to them. Finally, advertising may overstate the benefits of products while minimizing their potential harms (e.g., firearms). These potential dangers have thus spurred the government to regulate both the content and the format of advertising for products with potential health consequences.

⁷ In several cases, the Supreme Court has acknowledged the connection between advertising and demand for products. See *Lorillard v. Reilly*, 121 S. Ct. 2404, 2423 (2001); *Rubin v. Coors Brewing*, 514 U.S. 476, 487 (1995); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 568–69 (1980).

⁸ For example, in promulgating regulations aimed at reducing youth smoking, the Food and Drug Administration found that the period before adulthood is when an overwhelming majority of Americans first decide to use tobacco products and that advertising plays a crucial role in that decision. See 61 Fed. Reg. 44396, 44398–99 (1996), cited in *Lorillard*, 121 S. Ct. at 2423.

Historically, commercial speech has not been considered to merit First Amendment protection, a position that the Supreme Court confirmed in 1942.⁹ Like other categories of unprotected speech (e.g., obscenity) that were not afforded First Amendment protection, commercial speech was considered to have little value in the marketplace of ideas. The reasoning was that the minimal utility of commercial speech was easily outweighed by its potential harms. Thus the Court stated that the degree to which speech of a commercial nature may be disseminated should be left up to legislative judgment.¹⁰

Beginning in the 1970s, however, the Supreme Court departed from this historical view. In *Bigelow v. Virginia* (1975), the Court struck down a state law prohibiting the advertising of abortion services: "The relationship of speech to the marketplace of products and services does not make it valueless in the marketplace of ideas."¹¹ The early commercial speech cases involved instances in which the message itself had public health value (e.g., abortion referral services,¹² contraceptive advertisements,¹³ pharmaceutical prices¹⁴), which probably contributed to the Court's rejection of the states' attempts to suppress such information. But this rationale cannot entirely explain the Court's commercial speech jurisprudence. Consider, for example, the string of cases in which the Court struck down state bar associations' bans on lawyers' advertising.¹⁵ Underlying the Court's decision to include commercial speech under the First Amendment umbrella was a strong distaste for government paternalism. As the Court expressed it:

⁹ See *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

¹⁰ In *Valentine*, the Court stated: "The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct." 316 U.S. 52.

¹¹ *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

¹² *Id.*, invalidating a state statute making it a crime to circulate or sell material encouraging or prompting the procurement of an abortion.

¹³ *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), invalidating New York's ban on advertising nonprescription contraceptives.

¹⁴ *Virginia State Bd. of Pharmacy v. Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976).

¹⁵ See, e.g., *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that the information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.¹⁶

This antipaternalistic sentiment has been reiterated and strengthened over the years as the Supreme Court has steadily widened the protection afforded commercial speech.

At the same time, the Court acknowledged from the outset the real substantive differences between commercial speech and other types of speech that justified less constitutional protection for commercial speech. Early commercial speech cases, in particular, focused on the “lower value” of commercial speech:

Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods and services. The First Amendment protects the advertisement because of the “information of potential interest and value” conveyed, rather than because of any direct contribution to the interchange of ideas.¹⁷

In addition to the “subordinate position [of commercial speech] in the scale of First Amendment values,”¹⁸ the Court was sensitive to its “greater potential for deception or confusion,”¹⁹ which warranted more extensive government intervention to protect consumers. Finally, the government’s regulation of commercial speech was justified by the greater hardness of such speech,²⁰ which minimized the likelihood that government regulation would inappropriately suppress the First Amendment interests of businesses.

In light of the dichotomy established by the Court, namely, that commercial speech receives First Amendment protection yet the government can often regulate such speech, the Court had to grapple with two salient questions: (1) what identified commercial speech, and (2) what criteria

¹⁶ *Virginia State Bd. of Pharmacy*, 425 U.S. at 770.

¹⁷ *Id.* at 780.

¹⁸ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

¹⁹ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983).

²⁰ *Virginia State Bd. of Pharmacy*, 425 U.S. at 772.

should be employed to determine, in particular cases, whether the government regulation of such speech would be permitted.

The Court has described commercial speech as an "expression related solely to the economic interests of the speaker and its audience" that "does no more than propose a commercial transaction."²¹ The three attributes of commercial speech are that it (1) identifies a specific product (i.e., offers a product for sale), (2) is a form of advertising (designed to attract public attention to, or patronage for, a product or service by means of paid announcements proclaiming its qualities or advantages), and (3) confers economic benefits (the speaker stands to profit financially).²² No one of these three factors provides a complete description of commercial speech, but the Supreme Court classifies an expression as commercial if it contains all of them. Thus in *Bolger v. Youngs Drug Products Corporation* (1983),²³ the Court found that "informational pamphlets" with titles such as "Plain Talk about Venereal Diseases" and "Condoms and Human Sexuality" were "commercial" because they were advertisements, referred to a specific product, and the publisher had an economic motivation.²⁴

While the Supreme Court's definition often permits the separation of commercial from noncommercial speech, determining a clear and generalizable distinction between commercial and political speech is more difficult (see, e.g., Post 2000; Redish 1997). Certainly in some instances, the distinctions may seem difficult to justify. For example, many companies pay for advertising space in newspapers in order to express an opinion about a matter of public policy. For example, in 1985, two tobacco

²¹ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980).

²² *Bad Frog Brewery, Inc. v. New York State Liquor Off.*, 134 F.3d 87 (2d Cir. 1998), finding that a beer label displaying a frog giving an insulting gesture was commercial speech, but not the more fully protected social commentary or political speech, Bad Frog labels met the three criteria for commercial speech, and the purported noncommercial message was not "inextricably intertwined" enough to merit full First Amendment protection.

²³ 463 U.S. 60.

²⁴ The fact that a speaker will profit from a message is not conclusive, however. Indeed, many speakers, including publishers, broadcasters, and film producers, stand to gain economically. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court expressly rejected the argument that the First Amendment did not apply to "paid" commercial advertisements. Corporate speech can amount to fully protected political speech, such as when a company advocates its business interests in a political referendum campaign. See also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), invalidating a state statute prohibiting corporations from advertising designed to influence votes submitted to the electorate other than one materially affecting the corporation's business.

companies paid for editorial-style advertisements that appeared in 25 publications, including the *New York Times*. These advertisements contained headlines such as “Can We Really Make the Underage Smoking Problem Smaller by Making the Federal Bureaucracy Bigger? . . . Together We Can Work it Out” and “‘Of Cigarettes and Science,’ Why a Federal Study Failed to Prove the Causal Relationship between Smoking and Heart Disease.” No specific product or brand was mentioned, yet the intent of these “advertorials” was clearly to influence public opinion in favor of tobacco products, in order to prevent both governmental restrictions and decline in tobacco use. The fact that the advertisements were paid for and the motive of the speakers was profit does not, by itself, make them commercial speech. Since no product was specifically identified, such ads must be treated as political speech. Even though we may find such attempts to influence policy disturbing, and the dubious scientific assertions morally reprehensible, the First Amendment protection for speech on matters of public opinion overrides these concerns.

Having defined commercial speech, the Court then needed to decide on a method for determining the circumstances under which government interference (both suppression and compelled disclosure) would be permissible. In *Central Hudson Gas v. Public Service Commission* (1980),²⁵ the Supreme Court offered a four-part test for the governmental regulation of commercial speech. First, to receive constitutional protection, the speech must concern a lawful activity and not be false, deceptive, or misleading. Second, the government’s interest asserted in regulating the speech must be substantial. Third, the regulation must directly advance this interest. Finally, the regulation must not be more extensive than necessary to achieve the government’s objectives.

The first step of the *Central Hudson* test is a threshold inquiry: is the speech under the umbrella of the First Amendment, or is it completely undeserving of constitutional protection? Speech that promotes unlawful activity or that is false, deceptive, or misleading is considered to lack value in the commercial or ideological marketplace, as it can lead consumers into error, risk, or a disadvantageous position. Such speech, therefore, is excluded from constitutional protection. Yet as we discuss in the next section, it is not always easy to decide whether a commercial expression fits one of these categories.

²⁵ 447 U.S. 557 (1980).

Assuming that the speech merits protection, the burden then shifts to the government to answer several interrelated questions. The second step under *Central Hudson* is whether the government's interest is substantial. This step examines the reasons why the government wants to regulate the speech. Governmental regulation of commercial speech for public health objectives almost always satisfies this step.²⁶ Through their police powers, the states have the inherent authority to protect the health, safety, and welfare of their citizens,²⁷ and the Court has recognized the importance of government regulation to prevent disease and promote health.²⁸

The third step under *Central Hudson* asks whether the regulation of commercial speech will directly advance the interest asserted by the government. This step examines the tightness of the link between the regulation of commercial speech and the avoidance of harm. A regulation that has only a tangential or remote impact on a problem will not satisfy this step.

The final step under *Central Hudson* requires the government to demonstrate that the regulation is no more extensive than necessary to serve the state's interests. This step examines the "fit" between the interest and means chosen to achieve it. The government must show not merely that its regulation directly advances a public health objective but also that the means used are not more extensive than necessary to achieve that goal.

While the *Central Hudson* criteria provide guidance for determining the constitutionality of government regulations, there necessarily is room for discretion in applying these criteria to specific instances. The Court's jurisprudence has evolved from one that was relatively deferential to legislative judgments about the need to regulate commercial speech and the means chosen to do so, to one in which such regulations are closely scrutinized. During this judicial evolution, the Court has ostensibly purported to apply the *Central Hudson* test.

For example, with regard to the requirement that regulations directly advance the government's interest, the Supreme Court in *Posadas de Puerto Rico v. Tourism Company of Puerto Rico* (1986)²⁹ upheld the constitutionality of a law prohibiting gambling casinos from advertising to residents of

²⁶ But see *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2d Cir. 1996): consumers' desire to know whether milk derived from rBST-treated cows is insufficient to require the disclosure of information in the absence of safety concerns.

²⁷ See *Dent v. West Virginia*, 129 U.S. 114 (1889).

²⁸ See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

²⁹ 478 U.S. 328 (1986).

Puerto Rico. Chief Justice William H. Rehnquist noted: “[Puerto Rico] obviously believed [that] advertising of casino gambling aimed at [its residents] would serve to increase the demand for the product advertised. We think the legislature’s belief is [reasonable].”³⁰

Beginning with *Rubin v. Coors Brewing Co.* (1995),³¹ however, the Court has closely examined the connection between the means used by the government and the ends it seeks to achieve, requiring both a consistent regulatory policy and evidence to support the belief that restricting speech will advance its public health objectives. In *Rubin*, the Court unanimously invalidated a federal statute that prohibited beer labels from displaying alcohol content. The government defended the act as necessary to prevent “strength wars” among brewers who would compete in the marketplace over the potency of their beer. Although the government’s interest was substantial, the act did not directly advance that interest, “given the overall irrationality of the Government’s regulatory scheme.”³²

In 44 *Liquormart, Inc. v. Rhode Island* (1996),³³ the Court became even more insistent that the government demonstrate a relationship between means and ends. Rhode Island prohibited advertising the price of alcoholic beverages “in any manner whatsoever” except inside liquor stores and asserted the goal of “temperance.” Justice John Paul Stevens’s plurality opinion declared,³⁴

The State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so “to a material degree.” . . . [T]he State has presented no evidence to suggest that its speech prohibition will significantly reduce market-wide consumption. . . . Thus, [any] connection between the ban and a significant change in alcohol consumption would be purely fortuitous. [Any] conclusion that elimination of the ban would significantly increase alcohol consumption would [rest on] “speculation or conjecture.”

³⁰ Id. at 341–42.

³¹ 514 U.S. 476 (1995).

³² Id. at 488–89: “Brewers remain free to disclose alcohol content in advertisements, but not on labels, in much of the country. The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the government’s true aim is to suppress strength wars. . . . [The] irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve [its asserted] end.”

³³ 517 U.S. 484 (1996).

³⁴ Id. at 505–7.

While none of the opinions in *44 Liquormart* formed a majority, a strongly united Court in *Greater New Orleans Broadcasting Association v. United States* (1999) made clear its intention to use a more rigorous First Amendment standard.³⁵ The Court returned to a theme introduced in *Coors Brewing* that public health policy lacking consistency and coherency would not survive its evolving commercial speech doctrine. Congress's policy on gambling (which proscribed private casino advertising but promoted gambling on certain Native American land and in state-run lotteries) was "so pierced by exemptions and inconsistency that the Government cannot hope to exonerate it."³⁶

In the aftermath of *Coors Brewing*, *44 Liquormart*, and *Greater New Orleans Broadcasting*, the government must demonstrate, presumably with credible evidence, that the regulation will, in fact, achieve the asserted public health goal³⁷ and not be an "ineffective" or "remote" method.³⁸

The Court's application of the last step of *Central Hudson* has also become more rigorous. The early cases readily accepted legislative judgments that commercial speech restrictions were no broader than necessary to pursue the public health goal.³⁹ In *Board of Trustees of the State University of New York v. Fox* (1989),⁴⁰ the Court held that the fourth *Central Hudson* criterion did not require the government to use the least restrictive alternative. "The ample scope of regulatory authority [in commercial speech cases] would be illusory if it were subject to a

³⁵ 527 U.S. 173 (1993): exemptions in government's gambling policy prevent it from directly and materially advancing the asserted interests in reducing the social costs of casino gambling and assisting states that prohibit it within their own borders.

³⁶ *Id.* at 174.

³⁷ After *44 Liquormart*, the level of proof required to demonstrate that a commercial speech regulation directly advances the state's interest has been unclear. No single standard has the support of the majority of the Court. Justice Stevens's plurality opinion in *44 Liquormart* requires an evidentiary showing that the advertising regulation would significantly reduce the demand for a hazardous product. However, Justice Sandra Day O'Connor, writing for four members of the Court, pointedly declined to adopt Justice Stevens's approach on the third prong of *Central Hudson*, 517 U.S. at 530. In *Greater New Orleans Broadcasting*, the Court said it was not necessary on the facts of the case to resolve the evidentiary dispute within the Court, because the flaw in the government's case was more fundamental.

³⁸ *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

³⁹ See, e.g., *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 751 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984); *Queensgate Invest. Co. v. Liquor Control Com.*, 433 N.E.2d 138 (S. Ct. Ohio 1982), *cert. denied*, 459 U.S. 807 (1982).

⁴⁰ 492 U.S. 469 (1989).

least-restrictive-means requirement, which imposes a heavy burden on the State”⁴¹:

[What] our decisions require is a “fit between the legislature’s ends and the means chosen to accomplish those ends,”—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 interest served”; that employs not necessarily the least restrictive means . . . but a means narrowly tailored to achieve the desired objective.⁴²

While not explicitly questioning the rationale offered in *Fox*, the Court in *Coors Brewing*, *44 Liquormart*, and *Greater New Orleans Broadcasting* conducted a more demanding inquiry. In these cases, the Court invalidated commercial regulations because less restrictive alternatives were available to achieve the desired ends.⁴³

Most recently, in *Lorillard v. Reilly* (2001),⁴⁴ a more divided Court struck down Massachusetts regulations that, among other restrictions, would have prohibited the advertising of cigarettes, cigars, or smokeless tobacco products within 1,000 feet of any school or playground. Six members of the Court were satisfied that the state’s interest was directly advanced by the restrictions on outdoor cigar and smokeless tobacco advertising,⁴⁵ thereby meeting the standard in the third step of *Central Hudson*. Five members of the Court, however, held that the 1,000-foot rule was more extensive than necessary to serve the state’s interests, thus failing to satisfy the fourth step of *Central Hudson*. Specifically, they found

⁴¹ Id. at 477, upholding a university regulation restricting the operation of commercial enterprises on campus.

⁴² Id. at 480 (citations omitted).

⁴³ In *Coors Brewing*, the Court noted that there were a number of alternative ways of preventing strength wars, so the government’s interest could be achieved “in a manner less intrusive to . . . First Amendment rights,” 514 U.S. at 491. In *44 Liquormart*, the plurality opinion concluded that “it is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State’s goal of promoting temperance,” 517 U.S. at 507. And in *Greater New Orleans Broadcasting*, the Court said, “There surely are practical and non-speech related forms of regulation . . . that could more directly and effectively alleviate some of the social costs of casino gambling,” 527 U.S. at 192.

⁴⁴ 121 S. Ct. 2404.

⁴⁵ Because the Court concluded that the restrictions on cigarette advertising were preempted by the Federal Cigarette Labeling and Advertising Act, it did not render an opinion regarding whether the restrictions on cigarette advertising violated the First Amendment. Id. at 2419.

that the attorney general did not “carefully calculate costs and benefits associated with the burden on speech imposed by the regulation.”⁴⁶ For example, they stated that the attorney general did not consider the impact of the restriction in metropolitan areas, which would be greater than in rural areas: “The uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring.”⁴⁷ In the Court’s opinion, while “a careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests,” nevertheless “a speech regulation cannot unduly impinge on the speaker’s ability to propose a commercial transaction and the adult listeners’ opportunity to obtain information about products.”⁴⁸

Just as the First Amendment protects the right to speak, it also protects the right not to speak. The Court has offered two complementary rationales for affording First Amendment protection to compelled speech. First, to compel a person to enunciate a view with which he does not agree violates the freedom of conscience or belief. This reasoning was used to invalidate state laws making saluting and pledging allegiance to the flag compulsory⁴⁹ or requiring automobile owners to display license plates carrying a state motto, such as “Live Free or Die.”⁵⁰ Second, government-compelled speech may prevent the speaker from expressing his or her own views. The Court struck down state laws prohibiting anonymous handbills⁵¹ or campaign literature⁵² because they discouraged people’s underlying right to publish and disseminate their own work.

The Supreme Court’s compelled-speech jurisprudence is concerned principally with political and social discourse, as opposed to product health and safety.⁵³ But in *United States v. United Foods Inc.* (2001),⁵⁴

⁴⁶ Id. at 2425 (internal quotation and citation omitted).

⁴⁷ Id. at 2526.

⁴⁸ Id. at 2527.

⁴⁹ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁵⁰ *Woolley v. Maynard*, 430 U.S. 705 (1977).

⁵¹ *Talley v. California*, 362 U.S. 60 (1960).

⁵² *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995).

⁵³ For example, in *Riley v. National Fed’n of the Blind of N.C.*, 487 U.S. 781, 796 (1988), the Court declined to utilize a commercial speech test in striking down a statute mandating professional fund-raisers to disclose the percentage of charitable contributions actually turned over to the charity. “Even assuming . . . that [the mandated] speech in the abstract is merely ‘commercial,’ we do not believe that the speech retains its commercial character when it is inextricably intertwined with the otherwise fully protected speech [involved in charitable solicitations].”

⁵⁴ 121 S. Ct. 2334 (2001).

the Court made clear that its compelled-speech doctrine applied to commercial speech as well. In that case, the Court held that a federal statute requiring mushroom producers and importers to pay for generic advertising promoting the mushroom industry was coerced speech: "First Amendment values are at serious risk if the government can compel . . . [citizens to subsidize speech] on the side that it favors."⁵⁵

In *International Dairy Foods Association v. Amestoy* (1996),⁵⁶ dairy manufacturers challenged a Vermont law requiring labels on products from cows treated with recombinant Bovine Somatotropin (rBST) (a synthetic growth hormone that increases milk production). The federal court of appeals analyzed the regulation under *Central Hudson*, concluding that the asserted government interest ("consumer curiosity") was insufficiently strong to justify the regulation. In light of the Court's statements and its current line of reasoning, it would be likely to support the application of *Central Hudson* to government regulations compelling commercial speech.

The Court has stressed that commercial speech is protected insofar as it is truthful and not deceptive. Therefore, the Court would likely support government labeling, warning, and other disclosure requirements to the extent that they are necessary to maintain the truthful, nondeceptive quality of commercial speech.

Valuations of Commercial Speech

Embedded in the Supreme Court's First Amendment jurisprudence are some deeply rooted convictions about the different valuations that should be accorded to different categories of speech. The Court has articulated some of these values but left others implicit in its opinions. This section examines the factors that the Court uses in reviewing the constitutionality of commercial speech regulations. We also suggest possible applications of these factors that the Court has not yet implemented.

⁵⁵ Id. at 2338. Four years earlier, in *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 437 (1997), the Court upheld similar federal marketing orders requiring California fruit producers to fund a generic advertising program, characterizing the orders as economic regulation that did not impinge on First Amendment rights. See Casarez 1998. In *United States v. United Foods Inc.*, the Court distinguished its prior ruling by reasoning that the exaction in *Glickman* was ancillary to a comprehensive regulatory program that included several competition-displacing features. In contrast, the federal statute in *United Foods* had no regulatory objective other than the generic advertising.

⁵⁶ 92 F.3d 67 (2d Cir. 1996).

The Lawfulness Factor. The Court draws a firm line between speech that promotes lawful activities and speech that promotes unlawful activities. The latter merits no constitutional protection, as such speech has no value in the marketplace of ideas and also may encourage consumers to commit unlawful acts. For example, the government certainly could prohibit advertisements promoting the sale of marijuana (for medical or other use), provided that the advertised use of the drug is unlawful.

Supreme Court jurisprudence does not, however, provide a nuanced analysis of what does and does not constitute a lawful activity, perhaps on the assumption that such a determination is obvious. In some instances, however, activities lawful for one population are not lawful for another, and so speech could arguably be regulated if its audience included the population for whom the product is not lawful. The clearest example is products unlawful for minors, such as tobacco and alcoholic beverages. The Supreme Court has repeatedly recognized an independent government interest in protecting young people from harmful products, recognizing that they may not be able to make responsible decisions about them.⁵⁷ Although it never has, the Court could hold that advertising that explicitly targets this population—or in the future might include a significant segment of this population—constitutes speech regarding an unlawful activity.

The Massachusetts restrictions on tobacco at issue in *Lorillard* might have provided the Court an opportunity to consider the lawfulness of cigarette advertising that targets youth, but the issue was not raised by the Massachusetts attorney general. Indeed, he conceded before the lower court that the speech concerned a lawful activity and therefore was not misleading. Therefore, the Court was not given an opportunity to consider whether advertising that targeted a population that might not lawfully purchase the product was itself unlawful.

The Fair-Bargaining Factor. Supreme Court jurisprudence has consistently recognized that commercial speech that truthfully represents the quality, price, and other essential information about a product or service

⁵⁷ See, e.g., *Ginsburg v. New York*, 390 U.S. 629, 636 (1968), rejecting the assertion that “the scope of the constitutional freedom of expression . . . cannot be made to depend on whether the citizen is an adult or a minor”; *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978), upholding the FCC finding that indecent speech “in an afternoon broadcast when children are in the audience was patently offensive”; *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 744–45 (1996), upholding cable television restrictions as a means of protecting children from indecent programming.

offers value to consumers because it helps ensure a fair bargaining process between buyer and seller. The Court is skeptical of government regimes that keep consumers in the dark and bristles at the implicit assumption that consumers lack the competence to evaluate for themselves the quality of an advertised product or service. Conversely, commercial speech that is false, deceptive, or misleading undermines the fair bargaining process by creating an unequal relationship between buyer and seller. These kinds of commercial speech impart no useful information to consumers and therefore have no value worth protecting.

Although the requirement that speech be truthful and not deceptive is an essential criterion for constitutional protection, the Supreme Court has never clearly defined what constitutes untruthful or deceptive speech. Most of the commercial speech cases decided by the Court have not turned on the deceptive quality of the speech but, rather, on whether the government's regulations were narrowly enough tailored to achieve its objectives. Thus, the Supreme Court arguably has not had an opportunity to explore the boundaries of this criterion.

The boundaries of untruthful and deceptive speech are of paramount importance in the area of health and safety. The role of advertising is to create a "persona" associated with the product with which consumers want to identify. Advertising does this by using alluring images, contexts, and associations. For example, cigarette advertisements portray smokers as rugged, athletic, and adventuresome; beer advertisements focus on the social bonding associated with drinking; liquor advertisements associate their products with sophistication, achievement, and wealth; and firearm advertisements stress the personal and family security that can be achieved by owning a handgun.

To the extent that such advertisements fail to disclose the real and serious health hazards associated with these products, it can reasonably be contended that they are deceptive and misleading and therefore not subject to First Amendment protection. For example, handgun advertisements often emphasize the protective benefits of handguns: one print advertisement by the Colt Manufacturing Company, which appeared in the *Ladies Home Journal*, depicts a mother tucking a child into bed, under which the caption reads, "Self-protection is more than your right . . . it's your responsibility." In fact, however, studies indicate that the risk of being killed by a handgun (through both homicide and suicide) is significantly greater for residents of homes containing guns than homes not containing guns (Vernick, Teret, and Webster 1997; see also

Wintemute 1995). Since the advertisement does not disclose the greater risks to handgun owners and instead creates the overall impression that a person is less likely to be harmed at home if he or she has a handgun, it arguably distorts the truth and creates a false impression. Furthermore, it can reasonably be contended that far from imparting objective information useful to consumers, ads like these are harmful to consumers because they may lead them to take actions detrimental to their health and safety. They therefore not only have no value in the marketplace of ideas, but they also have negative value because of their potential harms. A court thus could reasonably impose bans on such advertisements or at least require the disclosure of sufficient information to correct their deceptive impression.⁵⁸

Again, the *Lorillard* case could have provided an opportunity for further consideration of what constitutes deceptive speech. In his partial dissent, Justice David Souter noted that the attorney general for Massachusetts "remains free to proffer evidence that the advertising is in fact misleading."⁵⁹ Thus the door is left open for a future case to argue that images associating tobacco use with a vibrant, athletic lifestyle while failing to disclose their short- and long-term negative consequences on health are deceptive and misleading.

The Underlying Social Harms Factor. The Supreme Court has stated that legislatures do not have broader latitude to regulate speech that promotes socially harmful activities.⁶⁰ Nevertheless, the *Central Hudson* test implicitly includes in its calculus the social harms that the government is seeking to avoid. Step 2 of *Central Hudson* requires that the government's interest in suppressing speech be "substantial." Government efforts to avoid social harms, for example, those associated with gambling, drinking, or smoking, are invariably held to be substantial.⁶¹ The fact that the government may have legitimate concerns about the social harms of certain advertising does not end the Court's analysis. Even when commercial speech may cause social harms, the government must still satisfy the third and fourth *Central*

⁵⁸ Note that although the Federal Trade Commission has regulatory authority over deceptive or unfair advertising, including advertisements for firearms, it has not yet responded to a petition filed in 1996 to disallow such advertisements (Vernick and Teret 2000).

⁵⁹ *Lorillard*, 121 S. Ct at 2447.

⁶⁰ *Rubin v. Coors Brewing*, 514 U.S. 476, 482 (1995).

⁶¹ See, e.g., *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173, 174 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Hudson steps by demonstrating that restricting such speech will directly and materially reduce the social harms asserted, and it must do so in manner that does not restrict the speech more than necessary. It is on these latter steps that most government speech regulations typically fall.

The Paternalism Factor. Weighing against the previous three factors is the Court's suspicion of regulations seeking to "keep people in the dark for what the government perceives to be their own good."⁶² The Court has reiterated that it is the job of the "speaker and the audience, not the government, [to] assess the value" of the commercial information presented.⁶³ The Court has struck down regulations premised on the "offensive assumption that the public will respond 'irrationally' to the truth"⁶⁴ even when such regulations are objectively well intentioned (e.g., prohibiting the posting of for-sale signs to prevent white flight and maintain an integrated neighborhood).

Because of its strongly antipaternalistic bent, the Court is likely to find unconstitutional those regulations that constitute blanket prohibitions or that censor content. But regulations that leave open alternative channels of communications by restricting only the "time, place, and manner" of the commercial speech are more likely to survive constitutional scrutiny (e.g., restriction of billboard advertising for traffic safety and aesthetics).⁶⁵ Similarly, requirements that certain speech be disclosed to prevent deception are more likely to pass constitutional muster than are those that ban the speech altogether.

This distinction is not always observed. In *Posadas*, the Court upheld a regulation banning an entire category of speech (casino advertising). However, the Supreme Court's commercial speech jurisprudence has changed significantly since that decision, making it unlikely that it would reach the same decision if the case were brought today. The *Rubin*, 44 *Liquormart*, *Greater New Orleans* trilogy confirms the Court's dislike of categorical bans on commercial speech that objectively conveys information about the price and availability of products or services and of its suspicion of government rationales based on protecting consumers from themselves. The decision in *Lorillard* similarly makes clear that the Court is becoming increasingly intolerant of overly broad restrictions

⁶² 44 *Liquormart, Inc.*, 517 U.S. at 502.

⁶³ *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

⁶⁴ *Linmark Associates, Inc. v. Willingboro, Tp.*, 431 U.S. 85, 96 (1977).

⁶⁵ See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

that prevent consumers from learning accurate information about lawful products.

The Government as Speaker

Thus far, we have explored the government's ability to control the informational environment to prevent others from speaking or to require that certain communications be issued. Such an exploration by itself, however, would miss an equal, if not more important, influence on health behaviors, namely, speech that derives either directly or indirectly from the government. This section looks at the constitutional and ethical dimensions of government speech on matters of public health.

The Role of Government in Health Communication

As a health educator, the government has substantial resources to deliver health messages both directly, through government agencies (such as the Centers for Disease Control and Prevention and the National Institutes of Health), and indirectly, through grants to or contracts with private organizations.

Health communication campaigns constitute a major governmental public health strategy. In addition to the antidrug and antismoking campaigns cited earlier, the government has conducted health education campaigns on numerous topics. Consider, for example, some of the health education campaigns initiated by the National Institutes of Health: "Milk Matters" (strong bones for young girls), "Back to Sleep" (SIDS), "Sisters Together: Move More/Eat Better" (obesity control), Depression Awareness, and Cancer Survivorship.

Health education campaigns rely on the same techniques used in other advertising. But instead of encouraging consumers to purchase cars or soap or to vote for a particular candidate for public office, they promote safer, more healthful behaviors. The government has become highly sophisticated in its use of the media to disseminate its health messages and employs a number of mass-media technologies, including radio and television (paid and public service announcements), newspapers and magazines (press releases and briefings), telephone lines ("800" numbers and "broadcast" and "auto-response" faxes), and the Internet (web sites). To

increase the marketability of its messages, the government often hires the same ad agencies that promote commercial products and political candidates.

Much of the government's health education initiative is carried out in collaboration with private (usually nonprofit) organizations (Rice and Atkin 1990). In addition, the Bush administration intends to expand the government's collaboration with, and funding of, religious organizations in matters of health and social welfare (Milbank 2001).

Private organizations are often highly dependent on government financial support and collaboration to deliver health messages. Even those organizations that want to remain independent of the government may have trouble achieving their objectives without public support. For example, citing "drastic changes in the media industry [that] have led to an overall decline in media exposure of public service advertising," the Partnership for a Drug Free America, although not directly accepting funds, agreed to participate in the Office of National Drug Control Policy's National Youth Anti-Drug Media Campaign by donating its advertising and its services as a primary strategic consultant.⁶⁶

The government chooses the funding recipient and influences the messages that the organization will convey. The state can issue a grant or a contract on condition that the private organization express a point of view consistent with the government's health message. For example, when he assumed office, President George W. Bush reinstated a Reagan-era policy prohibiting foreign nongovernmental organizations from receiving U.S. population or health aid funds if they discuss abortion as a method of family planning, lobby on abortion issues, or provide information to the public about abortion (DeYoung 2001). As another example, government-sponsored HIV prevention grants authorize health messages about safer sex but forbid any encouragement of drug use or homosexuality.

Constitutional Considerations

As a constitutional matter, it is important to separate government speech from government conditions placed on the speech of private and religious organizations. Government speech raises few, if any, serious constitutional concerns. The First Amendment proscribes only the government's

⁶⁶ Partnership for a Drug Free America. <http://drugfreeamerica.org/pdf/a/aboutus.asp> (accessed April 12, 2001).

suppression of private speech; it does not prevent the government from adding its own voice to the "marketplace of ideas," provided that it does not drown out private communication (Yudof 1983). Given the prodigious quantity of health information generated in the private sector, government speech is unlikely to dominate the marketplace. For example, the First Amendment does not prevent the government from choosing to promote some health interventions over others, such as restricted access to drug injection equipment over needle exchange programs. Those who object to the government's positions on controversial issues cannot legally compel the government to accept their views, nor can they contest the government's expenditure of considerable resources to enunciate controversial opinions.

When the government provides funds to promote speech, through either an appropriation to a government agency or a grant to a private organization, constitutional rights may be implicated if the state ties the use of the funds to the requirement that the recipients deliver or refrain from delivering a particular message. The "unconstitutional conditions" doctrine prohibits the government from offering a discretionary benefit conditioned on the recipient's forgoing a constitutionally protected right, including the right to speak freely or to refrain from speaking (Sullivan 1989). Thus the government may not punish those who espouse disfavored ideas by denying them benefits.⁶⁷

The line between a coercive penalty for supporting a viewpoint that the government finds objectionable and a selective subsidy that is needed to achieve desirable policy aims is a thin one, and Supreme Court jurisprudence has not articulated a consistent rationale for distinguishing between these two paradigms (see, e.g., Mitchell 1999; Winters 1991). For example, in *Rust v. Sullivan* (1991),⁶⁸ the Supreme Court upheld a "gag rule" similar to the one recently imposed by President Bush prohibiting U.S. family-planning clinics that receive federal funding from providing information about abortion. Writing for the Court, Chief Justice Rehnquist stated,

The Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. . . . [This] is not a case of the Government "suppressing a dangerous

⁶⁷ *Speiser v. Randall*, 357 U.S. 513, 517 (1958): "To deny a [tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."

⁶⁸ 500 U.S. 173 (1991).

idea,” but of a prohibition on a project grantee or its employees from engaging in activities outside of the project’s scope.⁶⁹

Recently, the Court invoked the unconstitutional conditions doctrine to invalidate a federal statute prohibiting Legal Services Corporation (LSC) grantees from undertaking any legal efforts, including litigation, lobbying, or rulemaking, for the purpose of reforming a federal or state welfare system.⁷⁰ In *Legal Services Corp. v. Velasquez* (2001),⁷¹ the Court distinguished its holding from that for *Rust*: whereas the federally funded physicians were delivering a health message on behalf of the government, “the LSC program was designed to facilitate private speech, not to promote a governmental message.”⁷² Thus the legal aid attorney could not be viewed as a state actor. This distinction between the role of a physician and that of an attorney is not convincing. Nevertheless, the Court’s reaffirmation of *Rust* suggests that there are few constitutional restraints on government incentives or disincentives for health-related speech in the private sector.

The unconstitutional conditions doctrine notwithstanding, the government largely gets a constitutional “free pass” when conducting public health campaigns or funding others to do so. In many respects, this hands-off approach to government speech is justifiable, and even desirable. Unlike the other actors in the marketplace, government is not motivated by profit, and therefore its messages may be viewed as more credible. Indeed, the public often relies on government-sponsored scientific studies to confirm or debunk prevailing health beliefs promoted by private-sector interests (e.g., government funding of research on alternative therapies) (Greenberg 1998)⁷³ and to provide objective, scientifically based information about the dangers and benefits of particular health behaviors. Furthermore, in making available the health information, the government is not requiring that citizens make behavioral changes; rather, they are free to accept, reject, or ignore government-sponsored health messages.

⁶⁹ *Id.* at 193–94.

⁷⁰ Omnibus Consolidated Rescissions and Appropriations Act of 1996, § 504(a)(16), 110 Stat. 1321–53.

⁷¹ 121 S. Ct. 1043 (2001).

⁷² *Id.*

⁷³ See also the National Center for Complementary and Alternative Medicine, National Institutes of Health. <http://nccam.nih.gov> (accessed April 11, 2001).

Ethical Considerations

Although the government's funding of speech does not, in general, raise constitutional concerns, it does pose troubling social and ethical questions. Government health messages construct and reinforce particular social norms and express the government's beliefs about what is "good" or "right" for society. Thus government health education does more than simply convey health information; it also tries to change behavior.

One potentially troubling ethical question arises when the government tries to construct and reinforce social norms without disclosing that it is doing so. For example, in January 2000, as part of the Clinton administration's "war on drugs," General Barry McCaffrey, the government's "drug czar," offered television networks significant financial incentives to include antidrug messages in their shows. The networks submitted their scripts for review by the White House's Office of National Drug Policy before airing the shows. In exchange for offering approved versions of such popular shows as *E.R.*, *Chicago Hope*, and *Beverly Hills 90210*, the networks were relieved of \$22 million worth of antidrug public service messages. But television viewers were never informed that the scripts had been filtered in advance by federal officials or that the broadcasters had altered certain images and content. Similar financial incentives were offered to several popular print magazines, and McCaffrey announced his intention to work with Hollywood movie producers as well (Kettle and Campbell 2000). Even those who agree in principle with the government's health objectives objected to its methods here, particularly its secretiveness and use of financial incentives. As one editorial stated, "In allowing government to shape or even to be consulted on content in return for financial rewards, the networks are crossing a dangerous line they should not cross. On the far side of that line lies the possibility of censorship and state-sponsored propaganda" (*New York Times* 2000).

Putting aside the concerns about secrecy and undue financial incentives, another potentially negative consequence of such attempts to influence behavior is that in its zeal to construct particular social norms, the government may adopt methods that do not reduce risk behavior and may even discourage or preclude a more effective strategy. For example, the McCaffrey plan was premised on the belief that portraying on television drug-using adolescents as being unpopular would influence real-world teens to change their behavior. But this simplistic message

misunderstands the real pressures that teens face and therefore is unlikely to be persuasive.

Closely allied to concerns about undue incentives and secrecy are those about truth telling. Government health communications may be ethically troubling and ultimately ineffective if the government knowingly overstates the scientific evidence for its claims or fails to provide complete information. Consider a 1993 study by the U.S. Environmental Protection Agency (EPA) overstating the harm to nonsmokers from exposure to secondhand smoke. A federal district court invalidated the report after finding that the EPA "adjusted established procedure and scientific norms to validate the Agency's public conclusion, and aggressively utilized authority to disseminate findings to establish a de facto regulatory scheme intended to restrict [the tobacco industry's] products and to influence public opinion."⁷⁴ Such findings, if true, damage the government's credibility as a neutral and dispassionate health educator (Parker 1998).

In many cases, the public can judge for itself whether the government has acted fairly and objectively in presenting health information. But what if the state intentionally conceals its intentions, so that the public is not even aware that the government is engaging in a health communication campaign? This was certainly the situation in the McCaffrey case. Consider also the government's decision to issue a postal stamp featuring a popular image of Jackson Pollack. In the original image, the artist was smoking a cigarette, but in the picture on the stamp, the cigarette was removed. In these and other cases, the public may not even be aware that the state is trying to convey a health message.

Finally, the government's attempts at acculturation include portraying certain behaviors or lifestyles as aberrant. Effective health campaigns often discourage health behaviors by associating them with unattractive characteristics (e.g., people who smoke have bad breath and develop wrinkles; people who eat high-fat foods or live sedentary lifestyles are lazy and become obese). These messages can, intentionally or unintentionally, promote societal condemnation, discrimination, and loss of support, leading to psychological harm (e.g., low self-esteem) and tangible detriment (e.g., exclusion from hiring, social ostracism).

⁷⁴ *Flue-Cured Tobacco Coop. Stabilization Corp. v. United States EPA*, 4 F. Supp. 2d 435, 465–66 (1998).

Notwithstanding these concerns, to many people the critical variable is the effectiveness of the government's action. Provided the state can create social norms that encourage healthy behavior and discourage risk behavior—that is, it can achieve important health outcomes—the population stands to gain tangible benefits in the form of improved health and well-being. Accordingly, can we legitimately find ethical difficulties in government health campaigns that effectively discourage high-risk behaviors, such as a sedentary lifestyle or unsafe sexual practices, by making them socially unacceptable? More controversially, should we support the government's use of scientific data that are exaggerated or flawed if they lead to safer and more healthful behaviors?

Such a results-oriented approach will trouble those who see an independent value in government truth telling and citizen autonomy. But there are no externally imposed (e.g., constitutional) constraints on the government requiring it to influence health behaviors using only those methods that all people agree are ethically unobjectionable, not coercive, and without social stigma. In the absence of such constraints, what criteria should we apply in assessing such speech?

Locating Government Speech on the Map

In answering this question, it is useful to locate government speech within the geographical boundaries of constitutionally protected speech. Assessing the similarities of government speech to and differences from other types of speech can help determine whether and under what circumstances we should support limits on government speech.

Thus far we have considered two categories of speech: commercial speech and “political” speech (a label encompassing speech on all matters important to a vibrant democracy, including speech on political, social, religious, and other ideological issues). Government speech on matters of health certainly shares many characteristics with political speech. Governmental health communications inform and educate the public about maintaining good health and avoiding illness and harm. Such information is essential to individual autonomy and self-fulfillment, for without good health, it is difficult to express one's autonomy or to engage in self-fulfilling activities. Government health communications can therefore be a crucial part of effectuating the intrinsic values associated with the First Amendment. Government health communications also are

necessary for the instrumental First Amendment value of arriving at the truth in the marketplace of ideas.

Government health communications can advance truth by informing the public about new scientific and medical discoveries and by debunking widely held but incorrect assumptions about health and illness. When such communications advance these intrinsic and instrumental values, they have significant value in the marketplace of ideas. Under these circumstances, government should no more be censored or restrained in its health communication mission than should a private citizen undertaking the same activities. Just as a private citizen may stand on the street corner with a megaphone and dispense health information, so may the government, using its metaphorical megaphone.

At the same time, government speech shares some similarities with commercial speech and raises some of the same concerns we encountered in regard to commercial speech. Like commercial speech, government speech is fairly “hardy.” Because government has significant resources and a strong interest in communicating public health information, we need not worry that such speech will be stifled if it required to conform to some basic standards. Moreover, as in the case of commercial speech, we should be concerned about government speech that is false, deceptive, or misleading. While the motive of government speech—the desire to shape the behavior and beliefs of the populace—is not financial gain, as it is with commercial speech, it is equally powerful and potentially equally troubling. When the intention of speech is to control ideas and behaviors, we have special reason to worry when it distorts the truth to achieve its objectives.

Government Speech: A Strange Hybrid Requiring Special Consideration

In light of the similarities to both political and commercial speech, what standards can we reasonably impose on government health communications? In answering this question, it is useful to consider the values we discussed with regard to commercial speech jurisprudence.

The informational worth of commercial speech and the social harms it seeks to avoid are vital considerations in assessing its value. Likewise, the informational worth of government health communications and the harms they seek to avoid should be considered when determining their ethical and social appropriateness. Government health communications

often have significant informational worth when their aim is to improve health and well-being and avoid disease. Consider, for example, the importance of government health messages about tobacco, alcoholic beverages, and firearms. The value of such communications is significant when weighing the value of government speech. As public health practitioners well know, behavior does not change through polite cajoling; more jarring words and images often are necessary to stop people from engaging in harmful activities. When the unwitting and unavoidable by-product of government efforts to change behavior is perceived or actual stigma, this in itself should not be grounds for objecting to the government's message. When possible, however, additional steps should be taken to mitigate the stigmatizing effects of the government's communications.

The ability of consumers to bargain fairly in the marketplace is another important consideration in commercial speech doctrine. Because commercial speech that is false, deceptive, or misleading undermines fair bargaining, it has no value and therefore does not receive constitutional protection. The government surely should be held to the same (or a higher) standard of veracity than is applied to commercial marketers. Consequently, we should oppose government health communications that knowingly mislead the public through falsity or concealment. When the government lies to its citizens or fails to disclose essential information about the methods it has employed, it breaches a fundamental bargain between itself and its citizens. Untruthful or deceptive speech undermines deeply held beliefs about democracy and distorts the democratic process. Moreover, when the population is kept in the dark through deception, it cannot carry out those activities intrinsic to a vibrant democracy, thereby threatening its continued existence.

Practically speaking, falsity or deception by the government regarding matters of health is unlikely to be effective and may actually defeat the very objectives it wants to achieve. Precisely because we have a democracy with a free press and independent actors with incentives to uncover the truth, any attempts by the government to deceive the people are unlikely to be successful. And when discovered, they will cast doubt not only on the specific speech found to be deceptive but also on other government health communications. For government to be trusted as an impartial health adviser, it must be careful to provide accurate and truthful information.

At the same time, the government should be allowed to engage in the same kinds of reasonable promotional techniques and visual associations

that the Court permits for commercial marketers. The government's ability to put a positive spin on the health effects of a product or its association with an attractive or unattractive image is vital to a successful campaign. In our zeal to ensure an open and honest government, we should not prevent public health authorities from using the tools necessary for social marketing.

A final value articulated by the Court in its commercial speech regulation is the avoidance of governmental paternalism. The Court viewed paternalism in that context as the inappropriate suppression of information. Conversely, however, paternalism may be appropriate when the government disseminates information. In particular, government health communications are often based on the assumption that people do not "perceive their own best interests."⁷⁵ Government health communications aim to change behaviors that people are unlikely to change on their own but that the government believes should be changed. Government communications are predicated on the assumption that they can be used to improve people's health more than people are able to do themselves and that government should intervene for the overall improvement of society. Therefore such communications often do not just convey information dispassionately but convey it in a way that will effect the desired change in behavior. This interventionist stance is a basic assumption of the public health enterprise. Although government paternalism may not be justified in the context of commercial speech, it is a justifiable, and sometimes even desirable, value in the context of government health communications. Nonetheless, even though some paternalism may be justifiable, the means employed to effect positive behavior change should not be without limits.

Conclusion

The relationship of government to the health information environment is complex and involves significant interaction with First Amendment values. In the government's regulation of noncommercial speech by private actors, this relationship is quite mature and well defined. The government is largely constrained from restricting health communications

⁷⁵ *Virginia State Bd. of Pharmacy v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

even if they conflict with public health goals. A fairly well established set of guidelines has also been developed for mediating between commercial speech interests and government health protection goals, although the Supreme Court has been steadily expanding the First Amendment protection for this category of speech as well.

When the government is the speaker, however, its behavior has few constraints. We have argued that government health communications are clearly not like either political speech or commercial speech. Rather, such speech is an unusual hybrid that requires both recognizing the value of the communication and limiting it to prevent unethical behavior. Government speech involves important societal trade-offs: autonomy versus coercion, openness versus secrecy, full disclosure versus deception, paternalism versus free choice, and reinforcement of social norms versus tolerance of all behaviors. Some of these trade-offs, particularly those relating to paternalism and the reinforcement of social norms, are justifiable and even desirable in pursuit of a healthy population. But even in pursuit of these laudable goals, there still are some lines that the government should not cross. When the government intentionally misleads the public, through false statements, overstatements of scientific evidence, or concealment of relevant information or the source of such information, it is using means not justified by the ends. Such behavior can do significant damage not only to societal health (if government health communications lose credibility) but also, and perhaps even more damaging, to the relationship between the individual and the government itself.

References

- Baker, C.E. 1978. Scope of the First Amendment Freedom of Speech. *U.C.L.A. Law Review* 25:964–1040.
- Bayer, R., L.O. Gostin, and D.C. McGraw. 1995. Trades, AIDS, and the Public's Health: The Limits of Economic Analysis. *Georgetown Law Journal* 83:79–107.
- Casarez, N.B. 1998. Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment. *Missouri Law Review* 63:929–77.
- Chemerinsky, E. 1997. *Constitutional Law: Principles and Policies*. New York: Aspen Law and Business.
- DeYoung, K. 2001. Abortion Aid Ban's Global Impact Debated; As Bush Revives Rule, Some Groups Argue It Harms Health, Family Planning. *Washington Post* (January 26).

- Gostin, L.O. 2000. *Public Health Law: Power, Duty, Restraint*. Berkeley and New York: University of California Press and Milbank Memorial Fund.
- Greenberg, D.S. 1998. Another Kind of Medicine. *Washington Post* (November 10).
- Gunther, G., and K.M. Sullivan. 1997. *Constitutional Law*. Westbury, N.Y.: Foundation Press.
- Kettle, M., and D. Campbell. 2000. Hollywood, the New Front in Drugs War: White House Gives Movie Industry Lead Role in Fight against Teenage Abuse. *The Guardian* (London) (July 12).
- Meiklejohn, A. 1948. *Free Speech and Its Relation to Self-Government*. New York: Harper.
- Meiklejohn, A. 1960. *Political Freedom*. New York: Harper.
- Meiklejohn, A. 1961. The First Amendment Is an Absolute. *Supreme Court Review*, 245–66.
- Milbank, D. 2001. Bush Unveils “Faith-Based” Initiative; Effort Will Team Agencies, Nonprofits on Social Issues. *Washington Post* (January 30).
- Mitchell, A.D. 1999. Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions. *Kansas Law Review* 48:161–95.
- New York Times*. 2000. Television’s Risky Relationship (editorial). *New York Times* (January 18).
- Parker, K. 1998. Betrayal by Our Government Should Have Us “Smoking.” *Denver Post* (July 24).
- Post, R. 2000. The Constitutional Status of Commercial Speech. *U.C.L.A. Law Review* 48:1–57.
- Redish, M.H. 1997. First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy. *Northern Kentucky Law Review* 24:553–84.
- Rice, R.E., and C.K. Atkin. 1990. *Public Communication Campaigns*, 2d ed. Newbury Park, Calif.: Sage Publications.
- Sullivan, K. Unconstitutional Conditions. 1989. *Harvard Law Review* 102:1413–506.
- Vernick, J.S., and S.P. Teret. 2000. Point/Counterpoint: A Public Health Approach to Regulating Firearms as Consumer Products. *University of Pennsylvania Law Review* 148:1193–211.
- Vernick, J.S., S.P. Teret, and D.W. Webster. 1997. Regulating Firearm Advertisements That Promise Home Protection. *Journal of the American Medical Association* 277:1391–7.
- Wintemute, G.J. 1995. *Advertising Firearms as Protection*. Sacramento, Calif.: Violence Prevention Research Program.

- Winters, G.A. 1991. Unconstitutional Conditions as Nonsubsidies: When Is Deference Inappropriate? *Georgetown Law Journal* 80:131–61.
- Yudof, M.G. 1983. *When Government Speaks: Politics, Law, and Government Expression in America*. Berkeley and Los Angeles: University of California Press.

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