Corporate Speech and the Constitution: The Deregulation of Tobacco Advertising

In a series of recent cases, the Supreme Court has given businesses powerful new First Amendment rights to advertise hazardous products. Most recently, in *Lorillard Tobacco Co v Reilly* (121 SCt 2404 [2001]), the court invalidated Massachusetts regulations intended to reduce underage smoking. The future prospects for commercial speech regulation appear dim, but the reasoning in commercial speech cases is supported by only a plurality of the court. A different First Amendment theory should recognize the importance of population health and the low value of corporate speech. In particular, a future court should consider the low informational value of tobacco advertising, the availability of alternative channels of communication, the unlawful practice of targeting minors, and the magnitude of the social harms.

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DOES A CORPORATION HAVE the same free speech rights under the First Amendment to purchase advertising as people have to air political, social, and artistic views? For most of the nation's history, the Supreme Court has said that commercial speech (offering a product for sale) does not deserve the same protection as political speech. But in a series of recent cases, the Rehnquist Court is giving businesses powerful new First Amendment rights to advertise hazardous products.

THE CONSTITUTIONALIZATION OF COMMERCIAL SPEECH

The assertion of free expression for corporations is surprising in light of traditional understandings of the First Amendment (box, p 353). In 1942, the Supreme Court declared that the Constitution imposes "no such restraint on government as respects purely commercial advertising."[1] It was not until 1975 that the court first found that advertising merited constitutional protection: "The relationship of speech to the marketplace of products or services does not make it valueless in the marketplace of ideas."[2] The court, however, emphasized that commercial speech operated as a category of "lower value" expression, deserving of less constitutional protection than social or political discourse.[3] Indeed, the early commercial speech cases involved instances where the advertising message itself had public health value: abortion referral services,[4] advertisements for contraceptives,[5] or the price of pharmaceuticals.[6]

By 1980, in *Central Hudson Gas v Public Service Commission*,[7] the Supreme Court had articulated a 4-part test for commercial speech, emphasizing its lower level of constitutional scrutiny: (1) advertisements deserve constitutional protection only if they promote a lawful activity and are not false, deceptive, or misleading; (2) the government's interest in regulating commercial speech must be substantial; (3) the regulation must directly advance the government's interest; and (4) the regulation must be no more extensive than necessary to serve that interest. Chief Justice Rehnquist himself exhibited extreme deference to public health regulation as recently as 1986. In upholding a ban by Puerto Rico on gambling advertisements, he asserted that the greater power to ban a product necessarily includes the lesser power to regulate advertising of that product.[8] By that reasoning, states should be permitted to regulate the advertising of cigarettes, alcoholic beverages, gambling, and firearms.

REGULATION OF HAZARDOUS PRODUCT ADVERTISING

Departing from historical precedent, the Rehnquist Court has begun to sharply curtail regulation of commercial speech. In 1995, the court invalidated a federal ban on placing the alcoholic content of beer on labels; the government had sought to prevent a "strength war" among brewers. In 1996, the court found unconstitutional Rhode Island's law restricting liquor-price advertisements outside retail establishments. Similarly, the court held in 1999 that the Federal Communications Commission could not ban broadcast advertisements by private gambling casinos. The lower courts have been quick to follow the Supreme Court's lead. For example, the District of Columbia Circuit Court of Appeals invalidated a Food and Drug Administration (FDA) regulation of diet supplements, stating that the agency's requirement of "significant scientific agreement" on label content was "almost frivolous."[9]

The court's defense of businesses' First Amendment rights appears just as steadfast as its defense of people's freedom to engage in political, social, and artistic discourse.[10] Put another way, the court sees the spending of

advertising dollars as deserving rigorous constitutional protection. The First Amendment was designed to protect personal freedoms to express ideas, opinions, and arguments against government suppression. The constitution's framers did not envision that this freedom would be used as a shield by corporations to spend any amount of money necessary to sell products and services deemed harmful to the population.

1942	*Valentine*	Commercial speech deserves no First Amendment protection: "[N]o restraint on government [for suppressing] purely commercial advertising."
1950		For over three decades, there remained no constitutional protection of commercial speech.
1960		
1970		
1975	*Bigelow*	Commercial speech is afforded First Amendment protection for the first time in a case involving advertising abortion referrals. Commercial speech is "not valueless in the marketplace of ideas."
1976	*Virginia Pharmacy*	Commercial speech is protected: advertising the price of pharmaceuticals
1977	*Carey*	Commercial speech is protected: advertising contraception.
1980	*Central Hudson*	Supreme Court announces criteria for evaluating commercial speech
1986	*Posadas*	Supreme Court takes a permissive approach to government regulation of commercial speech (gambling advertisements). "The power to ban a product includes the lesser power to regulate advertising."
1989	*Fox*	Supreme Court continues the permissive approach to government regulation of commercial speech (conducting product demonstrations in dormitory rooms).
1990		
1995	*Coors Brewing Co.*	Supreme Court adopts more careful scrutiny of commercial speech (analyzing "irrationality" of restriction on alcohol advertisements).
1996	*44 Liquormart*	Supreme Court continues closer scrutiny of commercial speech (advertising of the price of liquor): rigorous protection of truthful, non-misleading speech.
1999	*New Orleans Broadcasting*	Supreme Court continues closer scrutiny of commercial speech (advertising of private casino gambling).
2001	*Lorillard*	Supreme Court finds Massachusetts regulation of tobacco advertising to be unconstitutional: State requirements are over-broad.

Source. L. O. Gostin, *Public Health Law: Power, Duty, Restraint.*[14]

Commercial speech and the First Amendment: a time line.

LORILLARD TOBACCO CO V REILLY

The Supreme Court continued its march toward rigorous protection of commercial speech in *Lorillard Tobacco Co v Reilly.*[11] Manufacturers and sellers of cigarettes, smokeless tobacco, and cigars challenged Massachusetts regulations prohibiting outdoor advertising within 1000 feet of a school or playground and point-of-sale advertising lower than 5 feet from the ground. The court held that Massachusetts's outdoor and point-of-sale regulations relating to smokeless tobacco and cigars violate the First Amendment. (The court also held that the Federal Cigarette Labeling and Advertising Act[12] preempted the same regulations relating to cigarettes.)

A closely divided court found that the regulation of outdoor advertisements failed to satisfy *Central Hudson*'s fourth step requiring a reasonable fit between the legislature's objectives and the means chosen to accomplish those objectives. Recognizing that preventing underage smoking is a compelling public health interest, the court nonetheless insisted that adults have the right to obtain information about lawful products. The regulations in metropolitan areas would "constitute nearly a complete ban on the communication of truthful information."[11(p2425)]

In a dissenting opinion, Justice Stevens noted that, while Massachusetts regulations do sweep broadly, if the state's intention is to limit consumption by minors, it is appropriate (even necessary) to tailor advertising restrictions to the areas where minors congregate (near schools and playgrounds).[11(p2446)] Joined by Ginsburg, Breyer, and Souter, Stevens argued that the issue of outdoor advertising restrictions should have been remanded to the lower court to determine whether tobacco advertisers had alternative means to convey their message. He observed that "the ubiquity of print advertisements [and direct mail] hawking particular brands

of cigars might suffice to inform adult consumers."[11(p2447)]

The court similarly found that the regulation of indoor, point-of-sale advertisements failed to satisfy *Central Hudson*'s third step requiring that the regulation directly advance the government's interest. The court noted that not all children are less than 5 feet tall and those who are can look up and take in their surroundings.

While the limit on the height of advertising surely is not fully effective, it is within the range of reasonable state regulation. This is particularly true because a height restriction for signs has negligible effects on freedom of expression. As Justice Stevens (joined by Ginsburg and Breyer) observed, the provision is "unobjectionable" because states "can properly legislate the placement of products and the nature of displays in its convenience stores."[11(p2448)] In other words, the 5-foot rule was more akin to regulation of a sales practice than to suppression of an expression deserving of strong First Amendment protection.

COMMERCIAL SPEECH THEORY

It is important to recall that the Massachusetts regulations were modeled on proposed FDA regulations that the Supreme Court earlier invalidated.[13] If the court can strike down regulations thought necessary by federal and state health agencies to reduce the single most preventable cause of illness and premature death, the future prospects for commercial speech regulation appear dim. Nevertheless, the more extreme reasoning in commercial speech cases is often supported by only a plurality of the court. A different theory of the First Amendment should recognize the importance of population health and the low value of corporate speech. In particular, a future court should consider the low informational value of tobacco advertising, the availability of alternative channels of communication, the unlawful practice of targeting minors, and the magnitude of the social harms.[14]

Informational Worth

The Supreme Court insists that truthful, nondeceptive speech should be rigorously protected. Indeed, several justices, including Scalia and Thomas, would abandon *Central Hudson* and institute strict scrutiny for commercial speech. Tobacco advertisers may not be telling outright lies, but their messages are distinctly misleading. Advertisements that associate hazardous products with healthy, adventuresome, or glamorous lifestyles have little informational value. Alluring images and associations do not impart any objective information, but they may induce consumers to act against their self-interest in maintaining health and vitality. Imagery can deceive consumers into believing that cigarette health warnings are exaggerated and that smoking is consistent with a robust and active existence.

Alternative Channels of Communication

Since the court does not desire to have consumers kept in the dark about relevant market information, it is particularly mistrustful of blanket prohibitions or content censorship. Nevertheless, tobacco manufacturers have many alternative channels of communication, such as newspapers, magazines, direct mail, and the Internet. Indeed, government could require "tombstone" advertising that demands black and white text only, with no use of human or animal images or cartoon characters. Such regulation would allow businesses to advertise consumer information such as price and ingredients without enticing people to endanger their health.

Distinguishing Children From Adults

Tobacco company documents reveal comprehensive strategies to capture the youth market.[15,16] Advertising targets a youthful audience despite the fact that the promotion and sale of tobacco to people under 18 years of age is unlawful in every state. Moreover, minors are not yet fully able to assess and analyze independently the value of the message presented. By the time they are capable of making a mature judgment, their health may be harmed irrevocably and their decisional capacity impaired by the product's addictive qualities.

Taking Public Health Interests Seriously

First Amendment theorists understandably urge that harmful messages, even those that are most unpopular, deserve protection in a vibrant democracy. However, justifications for commercial speech regulation must inevitably take account of the serious underlying harms of the products being sold. The public harms attributable to cigarette smoking are unprecedented and provide a strong regulatory justification. Tobacco use is associated with more than 430 000 premature deaths each year.[17] Moreover, since some 50 million Americans smoke, even relatively small changes in behavior would benefit the public's health. Reduction in tobacco-related ill-

nesses would also reduce the economic burden on society—an estimated $50 billion per year.[18] Sterile estimates of lives and economic costs, however, do not begin to measure the value to individuals, families, and society if tobacco-related disease were diminished. The decrease in personal pain and suffering, enjoyment of more energetic lifestyles, and healthier parents and children are among the profound social benefits.

THE FUTURE OF PUBLIC HEALTH REGULATION

The profound detrimental effects of tobacco on population health and well-being require an effective regulatory response. Yet there exists a virtual regulatory vacuum in relation to this product. The Federal Cigarette Labeling and Advertising Act preempts states from curtailing the advertising and promotion of tobacco and limits manufacturers' tort liability.[19] This legislation could easily have been more narrowly construed by the court to permit a broader exercise of the states' traditional police powers to control land uses and protect the population's health and welfare, particularly those of minors. At the same time, the court has held that the FDA lacks jurisdiction to regulate cigarettes. The court observed that Congress, despite having many opportunities, has repeatedly refused to permit agency regulation of the product.[13] Thus, Congress has systematically declined to regulate tobacco but has also preempted state regulation. Moreover, the Supreme Court's recent assertion of free speech rights for corporations prevents both Congress and the states from meaningfully regulating advertising. To the extent that commercial speech becomes assimilated into traditional political and social speech, it could become a potent engine for government deregulation. And, perhaps, that is the agenda of the court's conservative plurality. ■

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References

1. *Valentine v Chrestensen*, 316 US 52, 54 (1942).
2. *Bigelow v Virginia*, 421 US 809, 826 (1975).
3. *Ohralik v Ohio State Bar Assn*, 436 US 447, 455–56 (1978).
4. *Bigelow v Virginia*, 421 US 809, 826 (1975).
5. *Carey v Population Services Int'l*, 431 US 678 (1977).
6. *Virginia State Bd of Pharmacy v Virginia Citizens Consumer Council Inc*, 425 US 748 (1976).
7. *Central Hudson Gas v Public Service Commission*, 447 US 557 (1980).
8. *Posadas de Puerto Rico Associates v Tourism Company of Puerto Rico*, 478 US 328, 346 (1986).
9. *Pearson v Shalala*, 164 F3d 650 (DC Cir), *denying petition for rehearing en banc*, 172 F3d 72 (DC Cir 1999).
10. *44 Liquormart Inc v Rhode Island*, 517 US 484 (1996).
11. 121 SCt 2404 (2001).
12. 15 USC 1331 et seq.
13. *Food and Drug Administration v Brown & Williamson Tobacco Corp*, 120 SCt 1291 (2000).
14. Gostin LO. *Public Health Law: Power, Duty, Restraint.* Berkeley: University of California Press; 2000.
15. Redmond WH. Effects of sales promotion on smoking among US ninth graders. *Prev Med.* 1999;28:243–247.
16. Altman DG. Tobacco promotion and susceptibility to tobacco use among adolescents aged 12 through 17 years in a nationally representative sample. *Am J Public Health.* 1996;86:1590–1594.
17. Centers for Disease Control and Prevention. Cigarette smoking among adults—United States, 1990. *MMWR Morb Mortal Wkly Rep.* 1993;42:645–649.
18. Centers for Disease Control and Prevention. Achievements in public health 1900–1999: Tobacco use—United States, 1900–1999. *MMWR Morb Mortal Wkly Rep.* 1999;48:986–990.
19. *Cipollone v Liggett Group Inc*, 505 US 504 (1992).