# Returning to the True Spirit of the First Amendment

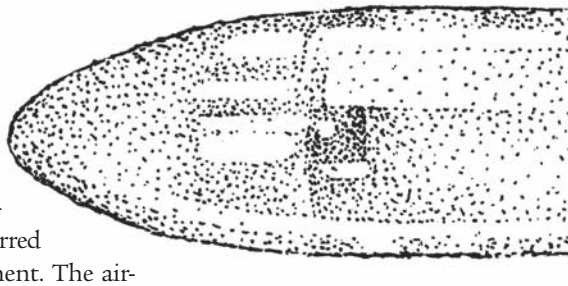
## The Supreme Court can provide consistent and principled protection to the right to speak.

BY TIMOTHY SANDEFUR

The First Amendment guarantees freedom of speech. It doesn't differentiate between categories of speech, giving preference to some types over others. But for decades, the U.S. Supreme Court has employed the doctrine of "commercial speech" to allow legislatures and regulatory agencies to limit the expressive rights of business owners in ways that would never be tolerated with regard to political or religious expression. A petition recently filed with the Supreme Court provides a stark example of the problems created by the inconsistent and confusing body of "commercial speech" law.

In 2011, the Federal Aviation Administration issued a new regulation governing how airlines may advertise their fares. Under this "Total Price Rule," airlines must state only the total out-of-pocket expense for an airline ticket, instead of listing the cost of the ticket and the taxes and fees separately. Although airlines may inform customers of the amount of the tax in a separate statement, the rule forbids them from making the amount of the tax "prominent"—meaning, among other things, that the airlines must print the amount of the tax in a font smaller than the ticket's total price.

Spirit Airlines, joined by Southwest and Allegiant, sued the FAA over this rule, arguing that it violates their First Amendment rights. These airlines often try to draw customers' attention to the levies imposed by government, and they argued that the rule stifles their attempt to express information critical of the government. Yet in a 2–1 decision issued last June, the U.S. Court of Appeals for the D.C. Circuit upheld the rule, concluding that it was only a "disclosure requirement" and thus not barred by the First Amendment. The airlines have petitioned the Supreme Court, which will decide this spring whether to hear the case.



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### What is "Commercial Speech?"

The commercial speech doctrine is notoriously confusing. After decades of conflicting precedent, the Supreme Court has still not settled on a clear definition of commercial speech. Although the justices have appealed to "commonsense differences between speech that does no more than propose a commercial transaction, and other varieties," common sense never seems to quite do the job. Advertisements that on a common-sense level seem quintessentially commercial typically do a lot more than propose a transaction, and many propose no transaction at all. For example, the British newspaper *The Guardian* placed a television ad, which was later named the best commercial of 2012 by *AdWeek*, that cleverly portrays the "three little pigs" story as a realistic police raid, dramatizing how *The Guardian*'s news coverage spurs public debate over the raid and the subsequent trial of the Big Bad Wolf. The ad is amusing and dramatic, but it never instructs viewers to subscribe to the newspaper or proposes any other transaction. The ad is, in

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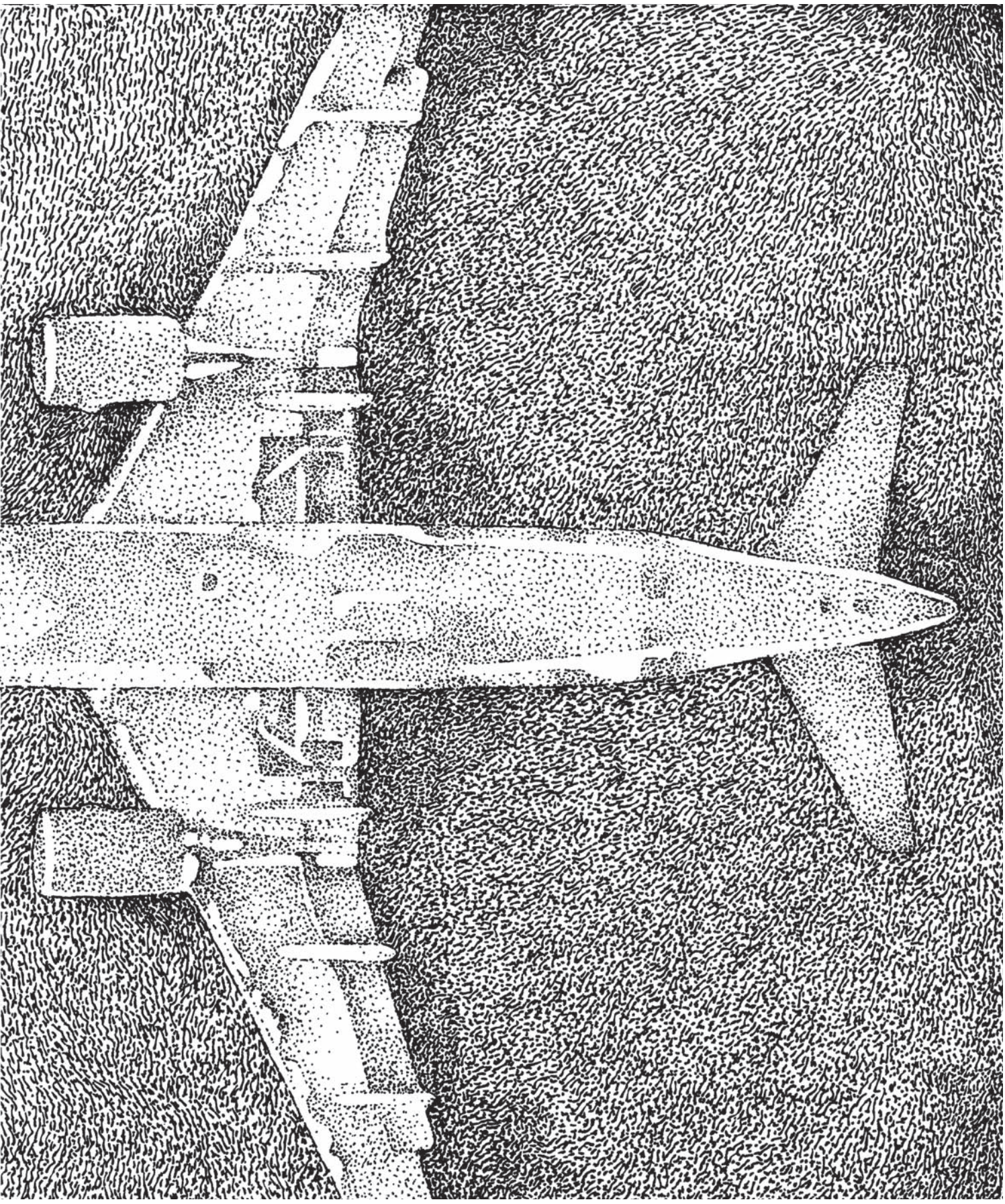

*AdWeek*'s words, a "mix of craft and storytelling" that "vividly demonstrat[es] the paper's collaborative concept of 'open journalism.'" Or, as Judge Alex Kozinski and UCLA law professor Stuart Banner put it in a classic 1990 article on the subject, the ad is a two-minute "mini-drama": a brief tribute—fittingly enough—to freedom of expression, which defies easy categorization as "commercial speech."

Over the years, the Supreme Court has fashioned at least three different tests for determining whether speech is "commercial" or not. Lower courts have been no less prolific. Some have declared that speech is commercial only if it proposes a transaction between the speaker and the audience. Thus in May 2012, the Ninth Circuit ruled that the Yellow Pages section of a phone book is not commercial speech, but is fully protected "pure" speech. To rule otherwise, the court noted, would mean that newspapers and books containing advertising material would receive less than full protection, an unacceptable conclusion. But other courts have taken a more general approach. That same year, the Fourth Circuit ruled that a mural depicting cartoon dogs and the logo of a dog-sitting business were "commercial speech" even though they did not propose any transaction. That ruling contradicted a 1995 decision from South Carolina that found that a mural on the side of a business was not commercial speech even though it was meant to attract customers. Yet the Fifth Circuit followed the Fourth Circuit when, in October 2012, it suggested (without actually holding) that the URL of a website, *texasworkerscomplaw.com*, was commercial speech even though it did not invite any commercial transaction and despite the fact that the website itself contained much truthful, non-commercial information about worker's compensation law.

## Abridging Commercial Speech

This confusion is dangerous because government can restrict speech categorized as commercial, forbidding the use of certain terms or limiting the format in which businesses express themselves. Worse, judges have devised different rules about what kinds of restrictions can be applied once speech is classified as commercial. In the 1990 decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court held that commercial speech is protected if it is true, non-misleading, and relates to a lawful activity—but if the government has a "substantial interest" in restricting such speech, it may, so long as the restriction directly serves that interest and is no more extensive than necessary.

By weighing these various factors differently, the justices have reached inconsistent decisions about the protections for commercial speech. The Court upheld a Puerto Rico restriction on casino advertising in 1986, concluding that courts should defer to the decisions of the Puerto Rico legislature. But seven years later, it ruled that deference to legislatures was unjustified and struck down a Federal Communications Commission rule banning casino ads because such ads "convey information ... about an activity that is the subject of intense public debate." As Justice Clarence Thomas has written, the several overlapping tests for determining what qualifies as commercial speech and what sorts of restrictions government can impose has rendered First Amendment law "inherently nondeterminative," so that "individual judicial preferences" are often the only governing principle. A legal regime that features so many different standards that it becomes a cover for ad hoc decisionmaking undermines the rule of law itself.

**Compelled speech** | Bad as the commercial speech precedents are, there is a third category that presents an even greater threat to businesses' expressive rights. Under a 1985 case called *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* government may force businesses to disclose "purely factual and uncontroversial information" to consumers. Such requirements are subject to a "reasonableness" requirement that is far more deferential to the government than either the "strict scrutiny" given to pure speech or the "intermediate" scrutiny that *Central Hudson* gives to commercial speech.

Disclosure requirements may sound benign, but it's rare for information to be "purely factual and uncontroversial," and bureaucrats have pushed to exploit this vagueness so as to restrict the expressive rights of businesses. In 1987, for example, the Seventh Circuit struck down an Illinois law that forced public utility companies to distribute messages that they disagreed with. The government relied on the *Zauderer* case, arguing that this requirement was simply a disclosure rule. The court rejected that approach, applying the more protective commercial speech rule instead: "[W]hile *Zauderer* holds that sellers can be forced to declare information about themselves needed to avoid deception, it does not suggest that companies can be made into involuntary solicitors for their idealogical [sic] opponents." More recently, the D.C. Circuit invalidated the Food and Drug Administration's effort to force cigarette companies to print on their packages disturbing images that are meant to convey the consequences of smoking. The agency again tried to use *Zauderer* as justification, claiming that the photos were the most effective means of forcing the companies to disclose tobacco's effects. The court rejected that argument, holding that "a disclosure requirement is only appropriate if the government shows that, absent a warning, there is a self-evident—or at least 'potentially real'—danger that an advertisement will mislead consumers," and the photographic warnings were not necessary to prevent deception.

## The Spirit Airlines Case

When Spirit Airlines challenged the Total Price Rule, the D.C. Circuit applied the *Zauderer* "reasonableness" standard on the grounds that the rule prevents potentially misleading speech and does not completely bar airlines from informing consumers about the taxes imposed on airline tickets. In doing so, the court ignored a contrary 2008 decision from the Sixth Circuit that struck down a state law that, like the Total Price Rule, barred utilities from separating out the amount of a tax on bills sent to customers. That ban, wrote Judge Jeffrey Sutton, seemed designed to insulate the government from "political account-

ability for the tax" and could not satisfy the First Amendment's requirements. By contrast, the D.C. Circuit applied the more deferential *Zauderer* standard to the Total Price Rule, holding that it "does not prohibit airlines from saying anything; it just requires them to disclose the total, final price and to make it the most prominent figure in their advertisements. Though limiting the manner in which airlines may advertise information, this neither prohibits nor significantly burdens airlines' ability to provide that information."

Yet the rule does more than merely require disclosure: it also forbids the airlines from making the tax "prominent" in their advertisements. This restriction means companies are not free to draw a customer's attention to the government's exactions at precisely the point where such information would have the greatest impact: at the moment of purchase. And it is difficult to avoid the conclusion that this restriction is meant, as Judge A. Raymond Randolph wrote in his dissenting opinion, "to control and to muffle speakers who are critical of the government."

*Zauderer* is problematic because it allows the government essentially to co-opt private industry for the propagation of its own messages. As Cumberland School of Law professor Dayna Royal observes, the case "fails to address those situations in which ... there is disagreement over whether the regulation simply mandates factual disclosures or compels commercial speech." And although the Supreme Court has often recognized that individuals have a First Amendment right not only to speak but to refrain from speaking, it has rarely protected businesses against compelled commercial speech. In 2001 it invalidated a law that required mushroom producers to contribute to a generic advertising campaign against their will. But in 2005 it upheld a similar law requiring beef producers to contribute to a generic advertising campaign for beef. First Amendment law should be a realm of clear guidelines and principles; instead, these cases show that business owners' right not to be forced to subsidize speech with which they disagree can often turn on a murky collection of trivial details.

Underlying all of this confusing and contradictory precedent is a conception of free speech that finds its roots in the Progressive-era ideology that gained ascendancy on the Court during the New Deal. The authors of the Constitution viewed freedom of expression as one of the natural rights with which all individuals are endowed and which government exists to preserve. But as historian Louis Menand writes, early 20th century intellectuals came to see rights as "privileges" that are "created not for the good of individuals, but for the good of society." They accordingly refocused the First Amendment's protections away from individuals and toward the collective. The clearest expression of this shift came in Justice Oliver Wendell Holmes' dissenting opinion in *Abrams v. United States* (1919), most famous for the metaphor of the "marketplace of ideas." Holmes began with the shocking statement that "[p]ersecution for the expression of opinions seems to me perfectly logical." But, he argued, society as a whole can benefit from an exchange of opinions, and that is why society gives people the privilege of free expression. It follows that this privilege exists only so long as expression is deemed socially useful. This shift in the understanding of free expression continues to dominate First Amendment jurisprudence.

If the First Amendment is part of an overall protection of individual autonomy, then the right not to speak—or to subsidize speaking by others—deserves at least equal solicitude.

Fortunately, on a practical level this "marketplace of ideas" model of free speech usually differs little from the individual rights model that the Founding Fathers intended. But one crucial difference is in the right to *refuse* to speak. If protections for free speech exist solely to ensure a robust social exchange of ideas, then there is little reason to safeguard a person's choice not to take part in that debate. But if, as the Framers believed, the First Amendment is part of an overall protection of individual autonomy, then the right not to speak—or to subsidize speaking by others—deserves at least equal solicitude. And if the Constitution safeguards speech only insofar as political leaders deem that speech socially useful, then there is little to prevent those leaders from subdividing speech into different categories based on their perceived usefulness, and to protect some expression while abandoning other types to government censorship. Such attempts to divvy up speech would have made little sense to the Framers, who saw freedom of expression as just one aspect of the individual liberty they hoped to safeguard.

The Supreme Court has occasionally confessed that efforts to bifurcate speech and parcel out different levels of legal protection to different types of speech have failed. The Court's inconsistent protection for the right of businesses not to speak has also proven a failure, resulting in similar disarray. With the *Spirit Airlines* case, the justices have an opportunity to cure these problems and provide a consistent and principled protection for everyone's right to speak—or to remain silent. R

READINGS


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