Manufacturers' Center for Legal Action

MCLA Constitutional Law Series

WHEN THE FIRST AMENDMENT MEETS CHEVRON DEFERENCE: FREE SPEECH AND THE ADMINISTRATIVE STATE

This white paper explains how regulatory actions can impinge on core First Amendment rights and identifies fundamental principles that should inform agency action and judicial review of such action to ensure that agencies properly recognize the First Amendment as a limitation on government power.

Government agencies wield vast power in the modern economy. They regulate nearly all aspects of commercial activity, from financial transactions to land use to chemical labeling to the functioning of the internet. Agencies often prescribe detailed regulations to govern everyday transactions and they can bring enforcement actions to protect consumers and the marketplace.

Although the First Amendment "protects commercial speech from unwarranted governmental regulation,"[1] federal agencies too often fail to adequately cabin their regulatory actions in a manner that is fully consistent with the First Amendment. Judicial deference to agency action—particularly agency factfinding—exacerbates this problem by leading courts to engage in less exacting review of First Amendment restrictions imposed by regulatory actions.

By recognizing this phenomenon and taking steps to better safeguard First Amendment rights implicated by regulatory actions, both courts and regulators can more effectively safeguard core Constitutional rights.

Government Agencies Are Bound by the First Amendment

The First Amendment Restrains Government Power to Burden Commercial Speech.

At its core, "[t]he First Amendment is a limitation on government"[2] because the constitutional guarantee of free speech reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[3] As the Supreme Court recently reiterated, the government is not entitled to use its regulatory power to "burden the speech of others in order to tilt public debate in a preferred direction."[4]

When it is properly functioning, the First Amendment places on the government the burden to justify its restrictions, for example, by demonstrating that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'"[5] It is important to remember that in the First Amendment context, "'speculation or conjuncture' will not suffice."[6]

The First Amendment protects commercial entities' right to determine the nature, content, and timing of their speech, free from unjustified government control. The protection of economically

motivated communication is essential to our "predominantly free enterprise economy."[7] And this right includes not only the right to speak, but the right to be free from being compelled to speak.

Agency Actions Can Have Serious Impacts on Commercial First Amendment Rights.

As Chief Justice John Roberts has observed, "[t]he Framers could hardly have envisioned . . . the authority administrative agencies now hold over our economic, social, and political activities."[8] Over the past several decades, the expansion of agencies' reach has been breathtaking. In 1970, there were approximately 20,000 pages of regulatory activity published in the Federal Register. In 2016, there was almost 100,000.[9] In the same period, the Code of Federal Regulation grew from approximately 55,000 pages to almost 190,000.[10]

State and local governments take similar actions. For example, municipal rules have attempted to mandate point of sale warnings that contain government opinion on controversial scientific matters like cell phone safety.

See CTIA v. City and County of San Francisco

Not surprisingly, the broad reach of regulation often intersects with commercial speech and seeks to require or limit speech according to the policies the government seeks to promote. Examples of such agency actions include:

- **Product labels and warnings,** such as U.S. Department of Agriculture rules requiring country-of-origin labeling for meat.[11]
- **Securities and Exchange Commission (SEC) disclosures,** such as the "conflict minerals rule" requiring issuers of publicly traded securities to disclose to the SEC and the public whether their products contain minerals sourced from certain mines in the Democratic Republic of the Congo and to state whether their products were "conflict free."[12]
- **Regulation of Marketing Language,** such as the FDA's prohibition of off-label marketing of pharmaceutical products. [13]

Thus, regardless of whether intended, regulations can often implicate the First Amendment rights of the regulated.

When Regulations Burden First Amendment Rights, Courts Should Subject Agency Actions to Searching First Amendment Scrutiny

Agencies Are Typically Afforded Substantial Deference by Courts.

Since the Supreme Court's seminal decision in *Chevron, U.S.A. v. National Resources Defense Council, Inc.*, courts have afforded great deference to administrative action.[14] Under *Chevron*, judges reviewing agency action must defer to the agency's interpretation where the law is ambiguous and the agency's interpretation is reasonable. The "arbitrary and capricious" standard applicable to agency decisions "is narrow and the court should not substitute its judgment for that of the agency."[15] This deference arose in part because agency decision making can be complex—often spanning years and involving highly technical issues.

Courts are particularly deferential to agency factfinding. "In making the factual inquiry whether an agency decision was 'arbitrary or capricious' the reviewing court must consider whether the decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment. This inquiry must be searching and careful, but the ultimate standard of review is a

narrow one."[16] Under *Chevron*, Courts may not substitute their judgment on factual or policy matters for that of an agency. "We will accept the findings of fact made by the agency, and the reasonable inferences drawn from those findings of fact, as long as they are supported by substantial evidence in the record as a whole."[17] As a result, *Chevron* deference empowers agencies and can insulate much of their work from searching review.

> Rather than accept common sense as a substitute for facts and evidence, the Tenth Circuit made clear that it would not be "satisfied by mere **speculation or conjecture**" by an agency.
>
> *U.S. West v. FCC*

Chevron Deference Promotes Relaxed Judicial Review That Can Lead to Insufficient Scrutiny of Restrictions on First Amendment Rights.

In the First Amendment context, deference can lead to insufficient scrutiny of administrative actions that regulate speech. Factual determinations can dictate the First Amendment analysis that a court will apply to agency actions regulating commercial speech, whether it is the relaxed standard of *Zauderer v. Office of Disciplinary Counsel*[18] or the heightened scrutiny required under the *Central Hudson* test. Deference to agency fact-finding can lead courts to weaken their oversight of agencies' justifications for their actions under the First Amendment.

Spirit Airlines, Inc. v. U.S. Department of Transportation,[19] illustrates the point. Spirit Airlines challenged a Department of Transportation ("DOT") rule as both arbitrary and capricious and a violation of the First Amendment. The regulation required that the most prominent figure displayed on print and web advertisements for airplane ticket prices be the total price, including taxes.[20] Petitioners argued that the rule violated their First Amendment rights by requiring them to conform their website communications to the government's preferred content and format without adequate justification.

> Instead of engaging seriously with the evidentiary record (or lack thereof) the D.C. Circuit allowed the agency to rely on decades-old comments and an online chat room to support "the **intuitive** conclusion that customers are likely to be deceived" by alternative displays. *Spirit Airlines v. DOT*

Before considering the First Amendment issues, the court addressed the administrative law challenge, and under *Chevron* analysis, afforded the DOT "substantial deference."[21]

This deference undermined the court's subsequent consideration of the constitutional question by justifying the application of a relaxed standard of First Amendment review, as urged by the government. In considering what level of scrutiny to apply, the court reasoned that "the government . . . had no need to produce additional evidence that the advertisements [at issue] are misleading because the likelihood of deception is hardly speculative." This stemmed from the court's deference to the agency's "common sense and over three decades of experience and complaints." As a result, the court went on to apply the more relaxed *Zauderer* standard of First Amendment review to the agency's rule, reasoning that no meaningful evidence was required to justify the rule and effectively ensuring that the regulation would be upheld. In other words, deference to the agency's expertise and common sense served as a substitute for searching scrutiny of the facts undergirding an agency action that implicated free speech.

The relationship between judicial deference and First Amendment review also came into play in *U.S. West, Inc. v. FCC*. There, the Tenth Circuit analyzed the First Amendment implications of a challenged regulation *before* determining whether the agency deserved deference. The challenged regulation restricted the ability of telecommunication service providers to use, disclose, or share certain customer data for marketing. The court refused to view the issue as "just another case of reviewing agency action," emphasizing that the questions were "harbinger[s] of difficulties encountered in this age of exploding information, when rights bestowed by the United States Constitution must be guarded as vigilantly as in the days of handbills on public sidewalks."[22]

While "an agency's interpretation of a statute it administers" demands application of the "approach announced in *Chevron*," the court explained that "an unconstitutional interpretation is not entitled to *Chevron* deference." Moreover, "deference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions." So, before addressing whether the regulation was reasonable, the court considered the First Amendment issue.

Prioritizing the constitutional question led to a markedly different analysis than the D.C. Circuit's *Spirit Airlines* approach. Rather than accept common sense as a substitute for facts and evidence, the court in *U.S. West* relied on Supreme Court precedent to find that it could not be "satisfied by mere speculation or conjecture."[23] Because the government proffered "no evidence showing the harm" alleged, and instead resorted to "speculation," the speech restrictions were not justified under the First Amendment.[24]

The contrast between *Spirit Airlines* and *U.S. West* illustrates that proper application of judicial deference can either lead agencies to fall short in protecting First Amendment principles or serve as an important backstop to ensure that agencies do not trample First Amendment rights. Agencies should not be able to skip actual factfinding and invoke their expertise or "common sense" to insulate their actions from meaningful First Amendment review. Where inadequate evidence exists to show the effectiveness of a government speech regulation, the government should lose—as it did when the D.C. Circuit found inadequate proof that the SEC's conflict minerals disclosure rule would make a difference in alleviating violence. Because "the government may not rest on [] speculation or conjecture" and "the SEC had the burden of demonstrating that the measure it adopted would 'in fact alleviate' the harms it recited 'to a material degree'" it could not pass First Amendment scrutiny on a mixed record.[25] Indeed, the D.C. Circuit properly exercised its Constitutional duty when its administrative law analysis credited Congress's conclusion "that transparency and disclosure would benefit the Congo" but its First Amendment analysis began from first principles and demanded actual evidence.[26]

> Courts should be skeptical of agency requests for relaxed scrutiny and assertions about consumer deception and the efficacy of government action.

Constitutionally Significant Agency Action Deserves Searching Review.

Agency action that impacts the First Amendment should be scrutinized closely. Standard judicial deference of agency action is at odds with the requirement that in First Amendment cases, courts must undertake a searching review of evidence.

In *Bose Corp. v. Consumers Union of United States, Inc.* the Supreme Court made this clear. In the First Amendment context, a reviewing court must "make an independent examination of the whole record, so as to assure ourselves that the judgment does not constitute a forbidden intrusion

on the field of free expression."[27] As a result, the Supreme Court found that the "clearly erroneous" standard in the federal rules should not constrain appellate review of constitutionally significant facts found by a district court.

Bose is consistent with other Supreme Court holdings about the importance of close review in First Amendment cases. The Supreme Court has "stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'"[28] That is, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."[29]

The logic of *Bose* and similar cases should apply with equal force to agency action: "as expositors of the Constitution, [courts] must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold."[30] This is because "the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."[31]

This logic requires courts to follow the approach taken by *U.S. West* rather than *Spirit Airlines* when considering agency action that implicates First Amendment rights. That is, judicial deference to agency action must be secondary to the First Amendment. Without an independent review of constitutionally relevant administrative fact finding, there will be minimal limits on administrative authority over the expressive activities of corporations.

Agencies Should Emphasize the Importance of Regulated Entities' First Amendment Rights.

While searching judicial review of agency actions is critical, agencies can do much on their own to protect the First Amendment. Before undertaking any activity, agencies should consider whether contemplated action impacts expressive activity either by making expression costlier, tilting the marketplace of ideas in a preferred direction, or by compelling or restricting speech. Put differently, regulators should discipline themselves by subjecting their own actions to heightened scrutiny in order to assure that their regulations are amply justified under the First

Regulators Should Ask Themselves…

- Am I favoring a viewpoint or idea, or disfavoring a truthful message?
- Am I trying to adjust consumer behavior by affecting public discussion?
- Can I achieve my goal by speaking as the government, using government resources?
- If I am acting based on concern about deception, what evidence do I have that consumers actually will be misled if I do not act? Am I relying on common sense, or is there evidence?
- If I am considering a mandatory disclosure, is it purely factual and uncontroversial?

Amendment. And to that end, agencies at all levels of government should gather evidence and carefully consider their proposed solutions so that they can demonstrate to the public and reviewing courts that their actions will alleviate real harms to a material degree.

To ensure that agencies give proper attention to these considerations, the Executive Branch should consider formalizing them in regulations, guidance, and internal procedures.

- **The Office of Management and Budget (OMB) could provide guidance about the importance of respecting First Amendment rights in all agency actions**. OMB guidance could (1) provide examples of agency actions that implicate the First Amendment, to clarify the ways in which agency decision making may infringe on free expression; (2) develop practices that require agencies to provide a workable mechanism for the individuals and businesses whose rights may be impacted by a proposed rule to offer alternative proposals more narrowly tailored to advancing the government's goal without violating First Amendment rights; (3) require agencies to develop a thorough factual record to support action that may intrude on the First Amendment, which would enable courts to meaningfully review the government's evidence.

- **The Administrative Conference of the United States (ACUS) could examine agencies' handling of First Amendment issues and issue guidelines.** ACUS is an independent federal agency tasked with recommending improvements to administrative procedure. Decades ago, ACUS recognized the impact that adverse publicity generated by regulatory agencies can have on regulated actors, and it issued guidelines to govern agencies' use of adverse publicity.[32] ACUS could assist agencies in developing guidance to promote and regularize meaningful First Amendment review.

- **Agencies can develop their own guidance on the importance of the First Amendment.** Agencies could develop internal guidance to (1) identify when a regulation is likely to implicate the First Amendment; and (2) encourage regulations to be drawn as narrowly as possible to effectuate governmental interests without infringing on constitutional rights.

CONCLUSION

For decades, courts tasked with reviewing agency regulations have deferred to agency factfinding. This judicial deference recognizes agency expertise and experience. But allowing judicial deference to supplant searching judicial scrutiny when First Amendment interests are at stake erodes bedrock constitutional principles at the foundation of our society. Courts can fulfill their role as constitutional guardians by prioritizing their analysis of First Amendment issues over their review of the scope of agency authority when a regulation is challenged on First Amendment grounds. The Executive Branch can play a part, too, by developing clear guidance to govern how to address—and respect—the First Amendment.

NOTES

[1] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 562 (1980).
[2] *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in judgment).
[3] *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).
[4] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011).
[5] *Ibanez v. Florida Dep't of Business & Professional Regulation*, 512 U.S. 136, 146 (1994) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).
[6] *Id.* at 143 (quoting *Edenfield*, 507 U.S. at 770).
[7] *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).
[8] *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013).
[9] https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/Pages%20in%20the%20Federal%20Register.JPG
[10] https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/TotalPagesCodeFedReg.JPG
[11] *American Meat Institute v. USDA*, 760 F.3d 18 (D.C. Cir. 2014).
[12] *National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015).
[13] 21 C.F.R. §202.1.
[14] 467 U.S. 837 (1984),
[15] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[16] *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (internal quotations omitted).
[17] *Trans Allied Audit Co. v. ICC*, 33 F.3d 1024, 1032 (8th Cir. 1994).
[18] 471 U.S. 626, 651 (1985).
[19] 687 F.3d 403 (D.C. Cir. 2012)
[20] *Id.* 408.
[21] *Id.* at 410.
[22] 182 F.3d 1224, 1228 (10th Cir. 1999).
[23] *Id.* at 1237 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).
[24] *Id.* at 1238.
[25] *National Association of Manufacturers v. SEC*, 800 F.3 518, 527 (D.C. Cir. 2015) (opinion on panel rehearing) (quoting *Edenfield v. Fane*, 507 U.S. at 770).
[26] *Id.* at 553.
[27] 466 U.S. 485, 508 (1984).
[28] *Turner Broadcasting Sys. Inc.*, 512 U.S. 662, 666 (1994).
[29] *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).
[30] *Bose*, 466 U.S. at 511.
[31] *Id*. at 503-04.
[32] Administrative Conference of the United States, Recommendation 73-1, Adverse Agency Publicity, 38 Fed. Reg. 16839 (June 27, 1973) available at https://www.acus.gov/sites/default/files/documents/73-1.pdf.