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The Government as Ventriloquist

The National Law Journal
March 19, 2012

So-called "disclosure" regimes implemented by federal, state and local governments are a familiar part of everyday life. Notices of the minimum wage can be seen in break rooms around the country, and warnings about known toxins are found on household products stored under most sinks in America. Although these regimes involve government-compelled speech by private entities, there have historically been few First Amendment challenges because the burdens imposed were minimal and the policy behind the notices was relatively uncontroversial.

The status quo is changing. Some government officials are concluding that "warning" or "disclosure" regimes represent an easy substitute for regulatory action or the government's own speech on issues ranging from diet to union rights.

A number of these "disclosure" obligations are based on "risks" that are not proven, or those yet to be discovered. Others invoke the bromide "public health" in the service of far more controversial messages. Still others rely on an undefined consumer "right to know." In each, the "disclosure" seeks to shape behavior, rather than provide incontrovertible and important facts (e.g., "mercury is poison"). More disquisition than disclosure, these regimes represent governmental attempts to make private parties their message boards – forced to communicate controversial ideas with which the speaker may disagree and in a manner of the government's choosing. As "warnings" or "advisories" proliferate, regulators are directing private parties to use color graphics and large text on packaging or signs, or to disseminate "fact sheets" laden with government advice.

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This compelled speech raises serious First Amendment concerns, and business interests are fighting back. Business associations have challenged an aggressive National Labor Relations Board poster obligation about union rights. The wireless industry won an important victory when the U.S. Court of Appeals for the 9th Circuit enjoined San Francisco's so-called "Cell Phone Right-to-Know Ordinance." That enactment would have required detailed warnings about radio-frequency emissions from cellphones in the face of no evidence that cellphones emissions have ever caused any human harm. *CTIA – The Wireless Association v. City and County of San Francisco*, No. 11-17707 (9th Cir. Nov. 28, 2011) (order granting injunction pending appeal).

It is an exercise of the "precautionary principle," i.e., that in a world of less than perfect information, the government can force warnings against possible, but as yet undiscovered, risk. Other examples loom on the horizon, including proposed legislation in Connecticut and a potential referendum in California to mandate labeling of products containing genetically modified ingredients. Requirements were proposed in New York City to promote information about salt content of food. And activists have called for more information to be required about labor standards in product manufacturing, and the ethical sourcing of minerals.

Proponents are transforming the First Amendment from a limitation on government power into an affirmative grant of authority. They invoke the First Amendment interest in the free flow of information, but this is usually cited to strike down government restrictions on truthful commercial information. It counsels against paternalistic efforts to control information. "The First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech." *International Soc. for Krishna Consciousness Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in judgment). "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pacific Gas & Electric Co. v. Pub. Utils. Comm'n of California*, 475 U.S. 1, 11, 16 (1986).

Absent an interest in correcting misleading speech or alerting consumers to substantial dangers, the government cannot commandeer private speakers to steer debate in a preferred direction. As the U.S. Supreme Court recently explained in *Sorrell v. IMS Health*, 131 S. Ct. 2653 (2011), the government cannot blithely put its thumb on the scales in the marketplace of ideas.

Fortunately, the courts have not capitulated to such government-compelled speech. Asserted interests in a "right to know" are inadequate. In the "absence of a real concern," government "cannot 'justify requiring a product's manufacturer to publish the functional equivalent of a warning.' Otherwise, 'there is no end to the information that states could require manufacturers to disclose.' " *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996) (citations omitted). Similarly, government-contrived graphics designed to shock and repel cannot be forced upon the vendor of a lawful product. *See R.J. Reynolds Tobacco Co. v. U.S. Food and Drug Admin.*, No. 11-148 slip op. (D.D.C. Feb. 29, 2012) ("mandatory graphic images violate the First Amendment by unconstitutionally compelling speech").

Regimes that are not based on or tailored to address valid interests cannot survive the traditional scrutiny that applies to compelled speech or content-based regimes. Some propose to shoehorn them into the narrow exception for "purely factual and uncontroversial" statements intended to prevent consumer fraud and deception. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1986). But this would expand that

exception beyond anything the Supreme Court has sanctioned and subject a variety of intrusions to only minimal First Amendment review.

Conscripting private parties to serve as government mouthpieces has other pernicious effects. Information with a government imprimatur carries a potentially misleading air of authority about what are often highly debatable propositions. It also risks overwarning the public and numbing it to needed warnings. And by requiring private parties to display a poster, modify a package or hand out a leaflet in service of the state's message, regulators transfer the financial burden of their priorities, and relieve themselves of the costs associated with direct regulation. Taking regulation off the government's balance sheet only encourages its proliferation.

Businesses, associations and industries should be aware of this trend toward compelled speech, and guard their First Amendment right to be free from serving as the government's unwilling spokesperson.