FREE SPEECH: THE BATTLE CONTINUES

By Sandy Shaw
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The First Amendment "guarantee" of free speech and press ("Congress shall make no law ... abridging the freedom of speech, or of the press ...") has been under attack by government almost since day one. Remember the Alien and Sedition Act that passed Congress with the blessing of President John Adams?

We received a great gift from the U.S. Supreme Court in the January 21, 2010 decision in *Citizens United v. Federal Election Commission*. The upholding of broad freedom of speech rights on political issues on the basis of the First Amendment for corporations and labor unions by the Court was a gift because the questions asked of the Court by Citizens United were very narrow ones (as explained below), which the Court could have answered in a narrow ruling, passing entirely on a badly needed constitutional review of *McConnell v. Federal Election Commission* and *Austin v. Michigan Chamber of Commerce*. Indeed, that narrow ruling is what the four liberal Justices (Stevens, Breyer, Ginsburg, and Sotomayer) wanted and complained about not getting in their dissent.

The only part of the ruling that I disagreed with was section IV in which the Court upheld the requirement that disclosures be made in political ads of who paid for the ad. Whatever happened to anonymous and pseudonymous pamphleteers? In fact, Justice Clarence Thomas filed a dissent as to this part of the decision. The part of the decision related to the requirement of disclosures was the only part of the decision supported by the four liberal Justices!

Citizens United Had a Weak Case, Asking the Wrong Questions

Citizens United asked only that the rules prohibiting corporate political speech ("express advocacy") during the period of 30 days from an election be ruled to not apply to their film "Hillary: The Movie" on the basis that the film could somehow be interpreted other than as express advocacy, that the video-on-demand system of delivery has a lower risk of distorting the political process than do television ads, and that there should be an exception for nonprofit corporate speech funded overwhelmingly by individuals. As stated in the decision (delivered for the majority by Justice Kennedy): "Because the question whether [the regulation] applies to Hillary cannot be resolved on other, narrower grounds without chilling political speech, this Court must consider the continuing effect of the speech suppression in Austin." We got lucky. This wimpy suit could easily have gotten us nothing. Compare this to the powerful arguments of the FDA First Amendment suits written by our constitutional attorney Jonathan Emord. *See Pearson v. Shalala* at *www.emord.com*.

Commercial Speech

The government unconstitutionally regulates speech by dividing speech into different categories, which it then claims are protected by differing degrees, if at all, by the First Amendment. One of the most disfavored types of speech (liberals are biased against it because it is associated with markets) is called "commercial speech." Commercial speech is that speech communicated on the labels or in advertisements for products regulated in interstate commerce. By violating the First Amendment in its censorship of commercial speech accompanying the sale of foods and dietary supplements, the U.S. Food and Drug Administration is able to prevent the dissemination of important health information, thus maintaining a powerful barrier to competition by foods and dietary supplements with FDA-approved drugs for the treatment of disease.

The ruling in *Citizens United v. FEC* was a very important one, but it does not correct for the destruction of free speech and press rights carried out by the U.S. Food and Drug Administration. While the amount of information on the health effects of foods and food constituents and other natural products such as spices and herbs (as included in dietary supplements) is increasing at a dramatic rate, the amount of information that the FDA permits on labels and in ads for food and dietary supplement products is very severely restricted. The U.S. Supreme Court and lower courts began supporting restrictions on speech accompanying the sale of products by ruling from the early 1940s that so-called "commercial speech" is worthy of less protection by the First Amendment than political speech. (Indeed, one had to wonder what was left of the First Amendment after *McConnell v. FEC* shredded political speech, the form of speech that supposedly "deserved" the most First Amendment protection).

As a direct result of the FDA's prohibition on communication of most truthful information on the potential benefits of foods and dietary supplements by

companies making and selling them, hundreds of thousands, if not millions, of Americans die prematurely every year. For example, during the period of 1994 to 2001, when we sued the FDA (Pearson & Shaw, joined later by others, versus Shalala) for not allowing the truthful claim (among others) that Omega-3 fatty acids may reduce the risk of cardiovascular disease (particularly of sudden death heart attacks), about 2,000,000 Americans died of sudden death heart attacks. Based upon the published peer-reviewed scientific data, half or more of those people would not have died had they been taking adequate amounts of Omega-3 fatty acid fish oil supplements (or eating more meals of fatty fish). Yes, we won a landmark decision against the FDA in 1999 (*Pearson v. Shalala*, U.S. Court of Appeals for the DC Circuit, 164 F.3d 650 (D.C. Cir. 1999), *rehearing denied*, 172 F.3d 72 (D.C. Cir. 1999) (en banc). If it were not for *Pearson v. Shalala*, there would be no such thing as qualified health claims, health claims the FDA has had to allow because there is scientific evidence to support them even though the evidence is not conclusive, not reaching the FDA's "significant scientific agreement" standard (which has never been defined).

Nevertheless, the FDA continues to disallow most truthful information on labels and in ads for foods and dietary supplements by simply disregarding *Pearson v. Shalala* and other supporting Court decisions. We and others recently sued the FDA yet again to defeat their continuing unconstitutional censorship of truthful health claims on the protective effects of selenium against various forms of cancer and of the protective effects of Vitamins C and E against various types of cancer. You can read the briefs for these suits at *www.emord.com*.

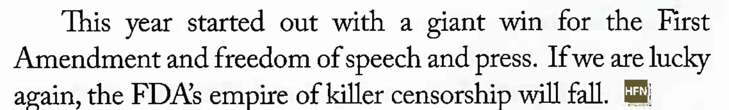
Is Political Speech Also Commercial Speech?

The supposed distinction between commercial speech and political speech is, moreover, a false one. See, for example, Jonathan W. Emord, "Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence," *Cato Institute Policy Analysis* 161 (Sept. 23, 1991). If you argue in an advertisement for a Vitamin-C product that the FDA's policy of censorship of the truthful information that Vitamin C has antiviral properties is a violation of the First Amendment, is that commercial speech or political speech? Obviously, it is both. A supposed primary distinction of commercial speech is that it promotes economic activity. Yet, nearly all political speech also concerns economic activity. Indeed, it was the commercial implications of corporate political speech that ultimately resulted in the McCain-Feingold campaign-finance reform law and the U.S. Supreme Court's horribly mistaken unconstitutional upholding of it in *McConnell v. Federal Election Commission*.

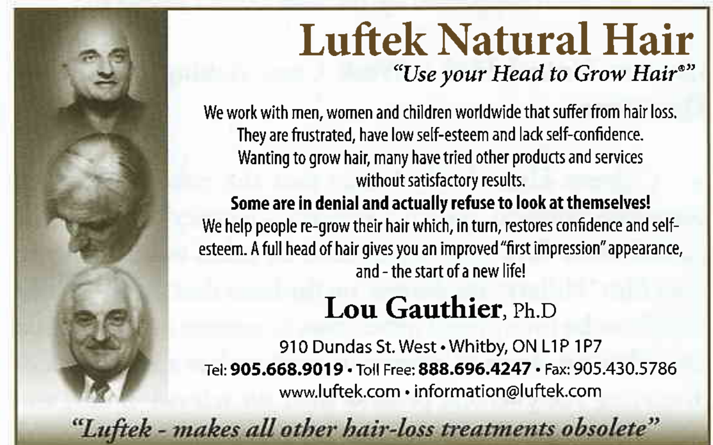
Parallel Medical Systems

Many people do not realize that in America we have, in effect, two medical systems in parallel. One is the FDA's approved nearly-all xenobiotic drugs (substances not found naturally in the human body) for the treatment of disease and the other is natural products (whole foods, constituents of foods, or other natural products such as spices and herbs) that have been found to be useful in the treatment of disease. Both systems of medicine are based upon the discovery of mechanisms, that is, the effect of the drugs or the foods or food constituents upon biochemical pathways that affect the course of human diseases, with data that are published in reputable peer-reviewed scientific journals. The FDA, by seeking to prevent competition by natural products with the products of its favored prescription-drug clients (generally by censoring truthful information that can be communicated on labels and in ads about natural products in interstate commerce), is killing a lot of people. I am not one of those who believe that there are not valuable uses for many prescription drugs or that drugs have not in many cases saved lives, but people should not be prevented by the FDA from learning of other effective treatments (generally less-risky than xenobiotic drugs) available to them simply because the FDA continues to violate the First Amendment.

This year started out with a giant win for the First Amendment and freedom of speech and press. If we are lucky again, the FDA's empire of killer censorship will fall.



Sandy Shaw, biomedical scientist and co-author of the Number 1 bestseller Life Extension, A Practical Scientific Approach *(Warner Books, 1982), is one of the lead plaintiffs in the landmark First Amendment court decision* Pearson v. Shalala, *Circuit Court of Appeals for the D.C. Circuit, 1999.*



It may not always be easy, convenient, or politically correct to stand for truth and right, but it is the right thing to do. Always.

— *M. Russell Ballard*