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It's Time to End *Zauderer* as *Chevron* for the First Amendment

A decision upholding New York's algorithmic pricing law provides a recent example of how courts too often defer to supposedly "reasonable" judgments by state legislatures that restrict freedom of speech.

by Jeremy J. Broggi

When the Supreme Court ended *Chevron* deference in 2024, it emphasized that in our constitutional republic "judges have always been expected to apply their 'judgment' independent of the political branches when interpreting the laws those branches enact."[1] And though the downfall of that judicially created doctrine requiring deference to statutory interpretation by federal administrative agencies may help discipline what Chief Justice Roberts has called "the danger posed by the growing power of the administrative state,"[2] there is another area of law where a judicially created standard of review is harming individual liberty. Its name is *Zauderer*, and in practice it often creates an almost *Chevron*-like deference doctrine under the First Amendment.

The Usual First Amendment Standard

The Free Speech Clause of the First Amendment prohibits federal and state governments from abridging the freedom of speech. And because all speaking necessarily involves a choice both about what to say and what not to say, the Supreme Court has long recognized that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all. "If there is any fixed star in our constitutional constellation," the Supreme Court has declared, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[3]

The commitment to free speech was central to the framers' conception for our Nation. Accordingly, the Supreme Court usually reviews laws that require someone to say something under a legal test called "strict scrutiny." "Strict scrutiny," the Supreme Court recently explained, "is the most demanding test known to constitutional law."[4] It requires a governmental speech regulation "to be the least restrictive means of achieving a compelling governmental interest."[5] Because nearly all laws fail this legal test, lawyers often refer to it as strict in theory but "fatal in fact."[6]

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[1] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (capitalization altered).

[2] *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

[3] *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

[4] *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 484 (2025).

[5] *Id.*

[6] *Id.* at 485.

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How *Zauderer* Wrongly Became *Chevron* For The First Amendment

Strict scrutiny is obviously quite speech protective. But the Supreme Court has sometimes applied a lower, more deferential and government-friendly standard in the context of compulsions that involve so-called "commercial speech." Under that standard, the government must prove that its disclosure law advances a sufficiently important interest and is "purely factual," "uncontroversial," and "not unjustified or unduly burdensome."[7]

This standard takes its name from *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*. There, an attorney had misled his potential clients by advertising that if a case was unsuccessful, he would not charge them "legal fees" but failed to disclose that he would charge them "costs."[8] The Supreme Court upheld an Ohio disciplinary action that required the attorney to make that disclosure in his advertising going forward, explaining that the disclosure was "purely factual and uncontroversial information about the terms under which his services will be available" and, therefore, was "reasonably related to the State's interest in preventing deception of consumers."[9]

Much judicial ink has been spent attempting to characterize *Zauderer*. While most agree the result in *Zauderer* itself was justified, a too lax view of the test it sets forth can authorize abuses. In an opinion joined by then-Judge Sotomayor, for example, the Second Circuit described the *Zauderer* standard as akin to a "rational basis test."[10] At the other end of the spectrum, then-Judge Kavanaugh argued that the *Zauderer* standard is "far more stringent than mere rational basis review," explaining that the rational basis standard is "extremely deferential" and would "tolerate government mandates of moral or policy-laden messages" whereas *Zauderer* review would not.[11]

In some ways, these debates mirror those that attended *Chevron* before its demise. Judges and academics often discussed the amount of statutory ambiguity necessary before a court should defer to a "reasonable" agency interpretation. But regardless of these arguments, the results were unmistakable—in cases where *Chevron* was invoked, courts ruled for the agency 77% of the time, compared to only 38% of the time in cases where courts exercised their own judgment.[12]

Zauderer frequently has similar results. Although the Supreme Court has in recent years invoked *Zauderer* to strike down state laws that compel businesses to speak government messages,[13] lower courts appear to have missed this message. When the lower courts invoke *Zauderer*, its effect, too often, is to excuse judges from the difficult task of rigorously scrutinizing the burden on free speech, and to instead authorize a seeming deference to the political branches—not unlike *Chevron* at its height. In that sense, *Zauderer* has become a sort of *Chevron* for the First Amendment.

A Recent Example

A recent Southern District of New York decision is illustrative. There, a district court applied *Zauderer* to uphold a New York law that requires most businesses that use customer information

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[7] *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985).

[8] *Id.* at 652.

[9] *Id.*

[10] *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009). The Second Circuit has since clarified that Circuit law does "not determine whether scrutiny under *Zauderer* is tantamount to traditional or perhaps more rigorous rational basis review, or whether it is better characterized as a special and more relaxed application of intermediate scrutiny." *Volokh v. James*, 148 F.4th 71, 86 (2d Cir. 2025).

[11] *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 33–34 (D.C. Cir. 2014) (Kavanaugh, J. concurring in the judgment).

[12] Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6 (2017).

[13] *See, e.g., Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 776–79 (2018).

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to automatically adjust pricing to display the following disclaimer: "THIS PRICE WAS SET BY AN ALGORITHM USING YOUR PERSONAL DATA."[14]

The intent behind the mandate is clear. New York is skeptical about the merits of algorithmic pricing and wants to persuade consumers to share its views. Through its terse warning, the State forces businesses to convey its message that the offer of a personalized price may be unfair and is at least cause for concern.

Many businesses, unsurprisingly, disagree. In filings submitted with the district court, retailers challenging the New York law explain how pricing algorithms benefit consumers by lowering prices. One example is using customer data to prompt customers with a personalized, lower price after a customer abandons an item in an online shopping cart. But under the New York law, that offer must be paired with the government warning.

The First Amendment burden that New York's speech mandate imposes is obvious. And contrary to what the district court found, the disclosure is not "a run-of-the-mill commercial disclosure mandate."[15] It does not, for example, correct a marketplace failure, such as a law requiring "honest weights and measures" on product packaging.[16] Nor is it claimed to remedy some material misrepresentation, as did the disclosure about costs in *Zauderer* itself.[17] Rather, it requires businesses to assert a controverted policy judgment made by the State.

Because the law regulates speech, it should have faced searching review. But after the district court concluded that *Zauderer* applied, it looked only for "reasonableness." Reminiscent of some lower court applications of *Chevron* in its heyday, the court recited the government's purported justifications for its law, excused it from the burden of proving those justifications with "evidence or empirical data,"[18] and then concluded that the unsubstantiated explanation was enough to show a "reasonable relationship" "pass[ing] muster under *Zauderer*."[19] No rigorous review required.

Time for *Zauderer* to End

The Supreme Court's rationale for its *Zauderer* doctrine has always been thin. In *Zauderer* itself, the Court said only that "the interests at stake in this case are not of the same order" as its other free speech cases because these interests pertained "only" to "commercial advertising."[20] In other words, the Court there asserted a value judgment that economically motivated speech is simply less worthy than other speech.

There is reason to doubt that premise. The text of the First Amendment does not single out economically motivated speech for lesser protection than other types of speech and, as Justice Thomas has explained, there is no "philosophical or historical basis for asserting that 'commercial' speech is of lower value than 'noncommercial' speech."[21] To the contrary, founding-era authorities treat economically motivated speech as having at least equal value as other types of speech. That

[14] *National Retail Federation v. James*, __ F. Supp. 3d __, 2025 WL 2848212, at *1 (Oct. 8, 2025).

[15] *Id.* at *4.

[16] *See Armour & Co. v. State of N. Dakota*, 240 U.S. 510, 516 (1916).

[17] *See Zauderer*, 471 U.S. 626, 650–53.

[18] *See National Retail Federation*, 2025 WL 2848212, at *9.

[19] *Id.*; *see also id.* ("The challenged disclosure is reasonably related to the government's legitimate interest in ensuring that consumers are informed" (cleaned up)); *id.* at 10 ("the disclosure here reasonably bears on the final product" (cleaned up)).

[20] *Zauderer*, 471 U.S. at 651.

[21] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring).

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is unsurprising, as "the Framers' political philosophy equated liberty and property and did not distinguish between commercial and noncommercial messages."[22]

In addition to first principles, more recent Supreme Court precedents also highlight the intrinsic value of economically motivated speech. When it struck down a Vermont law restricting "speech in aid of pharmaceutical marketing," the Supreme Court explained that "a consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue."[23] And when it enjoined enforcement of a Colorado nondiscrimination law against a graphic design business that made wedding websites, the Supreme Court applied strict scrutiny, remarking that "the First Amendment extends to all persons engaged in expressive conduct, including those who seek profit."[24]

But the Supreme Court's growing solicitude for economically motivated speech has not always trickled down to the lower courts—as cases like the one involving New York's algorithmic pricing disclosure law shows. Consistent with the text and original meaning of the First Amendment, it is time for the Supreme Court to retire its judge-made *Zauderer* rule that some lower courts have read to authorize deferential review of commercial speech mandates. If that sort of deference is not appropriate for workaday statutory interpretations by federal administrative agencies, then it certainly is not appropriate when defining the scope of First Amendment rights. The Supreme Court should make clear that when freedom of speech is at stake, judges must enforce the Constitution independent of the views of the political branches.

[22] *Id.* (cleaned up).

[23] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557, 566 (2011) (cleaned up).

[24] *303 Creative LLC v. Elenis*, 600 U.S. 570, 600 (2023).

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