

Fall 1998

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### Recommended Citation

Nicole B. Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. (1998)

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# Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment

Nicole B. Cásarez\*

## I. INTRODUCTION

Advertising has always presented a conundrum in First Amendment analysis. As a business activity, advertising should be regulable by the state subject only to substantive due process review.<sup>1</sup> On the other hand, advertising is also a form of expression that raises important questions regarding freedom of speech.<sup>2</sup>

Sixty years ago, the Supreme Court considered advertising as nothing more than one aspect of commerce. Advertising restrictions were seen as economic regulations that did not involve First Amendment issues.<sup>3</sup> In the 1970s, however, the Court began referring to advertising as “commercial speech”<sup>4</sup> and recognized that it was not “wholly outside the protection of the First

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1. Since the Supreme Court's retreat from the laissez-faire economic philosophy epitomized by *Lochner v. New York*, 198 U.S. 45 (1905), economic regulation need only be reasonably related to a legitimate state objective and not arbitrary or discriminatory to fulfill the demands of substantive due process. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 396 (1937) (upholding state minimum wage law); *Nebbia v. New York*, 291 U.S. 502, 539 (1934) (sustaining statute that fixed a maximum price for milk).

2. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-65 (1976) (providing First Amendment protection to licensed pharmacists who advertised prescription drug prices); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964) (invalidating application of state libel law to civil rights organization's advertisement).

3. See, e.g., *Railway Express Agency v. New York*, 336 U.S. 106, 109 (1949) (sustaining city advertising prohibition pursuant to economic substantive due process review); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (upholding commercial handbill ordinance as proper government regulation of business).

4. The Supreme Court first used the phrase “commercial speech” in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 384 (1973). According to Judge Alex Kozinski and Stuart Banner, District of Columbia Circuit Judge Skelly Wright originated the expression in 1971. Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 756 (1993) [hereinafter Kozinski & Banner, *The Anti-History*]. See *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 658 n.38 (D.C. Cir. 1971), *rev'd sub nom.* *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

Amendment."<sup>5</sup> At least since the Court's landmark decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>6</sup> laws restricting or prohibiting advertising have been subject to an intermediate level of First Amendment scrutiny.<sup>7</sup> After the rulings in *City of Cincinnati v. Discovery Network*<sup>8</sup> and *44 Liquormart, Inc. v. Rhode Island*,<sup>9</sup> commentators agreed that the Court seemed to be expanding First Amendment protections for commercial speech.<sup>10</sup>

However, the Court's recent decision in *Glickman v. Wileman Bros. & Elliott, Inc.*<sup>11</sup> shows that the Court's economic approach to advertising still exists, at least in the context of compelled commercial speech. In that case, federal marketing orders required that California fruit producers pay an annual assessment to fund a generic advertising program.<sup>12</sup> The producers objected, claiming that the orders abridged their First Amendment right to be free from compelled speech.<sup>13</sup> By a five-to-four vote, the Court upheld the marketing orders, characterizing them as no more than economic regulations that neither implicated nor violated the First Amendment.<sup>14</sup>

The Court's failure to apply any First Amendment analysis in *Glickman* stands in stark contrast to its other compelled speech cases. So-called "negative free speech rights"<sup>15</sup> are well-established in the religious and political context.

5. *Virginia Pharmacy*, 425 U.S. at 761.

6. *Id.* at 748.

7. *See id.* at 771 n.24.

8. 507 U.S. 410 (1993).

9. 517 U.S. 484 (1996).

10. *See, e.g.,* William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1640 (1996) (stating that "like treatment of commercial and noncommercial speech is an idea whose time has evidently arrived," although questioning the wisdom of equal protection); Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 555 (1997) (opining that the Court in *Liquormart* "appeared to reject the 'step child' status of commercial speech in everything but name"); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 126 (stating that "[a]fter 44 *Liquormart*, it is unclear why 'commercial speech' should continue to be treated as a separate category of speech isolated from general First Amendment principles"); Sean P. Costello, Comment, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 CASE W. RES. L. REV. 681, 686 (1997) (noting that a majority of Supreme Court Justices appear ready to apply strict scrutiny review to some forms of commercial speech).

11. 117 S. Ct. 2130 (1997).

12. *Id.* at 2134.

13. *Id.* at 2139.

14. Writing for the Court, Justice Stevens characterized the orders as presenting a "question of business judgment" rather than a "constitutional issue." *Id.* at 2142.

15. *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 26 (1986)

A child cannot be forced to recite the pledge of allegiance,<sup>16</sup> a newspaper cannot be made to provide free reply space to political candidates,<sup>17</sup> and non-union employees cannot be required to pay for a union's ideological activities.<sup>18</sup> These examples are seen as abridging the First Amendment right of citizens to remain silent.

Granted, compelled commercial speech presents its own set of difficulties. Traditionally, the remedy for speech-related harms is said to be more speech, rather than enforced silence.<sup>19</sup> Disclosure requirements are seen as one of the less restrictive commercial speech regulations because they add to the flow of commercial information.<sup>20</sup> If compelled commercial speech is given the same First Amendment scrutiny as forced ideological speech, the fear is that the government will be unable to mandate disclosure requirements to prevent fraud, deception, or other commercial harms.<sup>21</sup>

The generic advertising campaign required in *Glickman* was not designed to remedy any of these threats to the marketplace. While some commentators have argued that the *Glickman* decision is unimportant because of its narrow facts,<sup>22</sup> the case evidences the Supreme Court's apparent confusion in resolving compelled commercial speech cases. If commercial speech is worthy of First Amendment protection—and recent Supreme Court cases have strengthened this notion—then regulations that compel or restrict commercial speech cannot be dismissed as mere economic regulation. Even those disclosure requirements that are meant to protect consumers from misleading advertising or overly aggressive sales practices involve speech, just as defamatory statements still qualify as expression. While libelous remarks may not always be protected by the Constitution, neither are libel cases decided without reference to the First Amendment.<sup>23</sup>

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(Rehnquist, C.J., dissenting).

16. See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

17. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

18. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977).

19. See, e.g., *Bates v. State Bar*, 433 U.S. 350, 355 (1977) (stating that the preferred remedy in lawyer advertising cases was "more disclosure, rather than less").

20. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985).

21. See Caren Schmulen Sweetland, Note, *The Demise of a Workable Commercial Speech Doctrine: Dangers of Extending First Amendment Protection to Commercial Disclosure Requirements*, 76 TEX. L. REV. 471, 477 (1997) (stating that subjecting commercial disclosure requirements to First Amendment scrutiny would endanger consumer protection laws). But see *Sullivan*, *supra* note 10, at 160 (concluding that granting commercial speech full First Amendment protection would not mean the end of consumer protection agencies).

22. See, e.g., Robert M. O'Neil, *Court's View of Wileman as Economic Issue May Help Commercial Speech in Long Run* (visited June 13, 1998) <<http://www.mediainst.org/digest/97fall/wileman.html>>.

23. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)

This Article argues that the *Glickman* Court erred in treating compelled commercial speech as a mere question of economic policy. Part II reviews the development of the commercial speech doctrine and identifies consumer protection as the underlying rationale for commercial speech regulation. Part III focuses on compelled speech, including disclosure requirements, and argues that commercial speech should be compelled or restricted only to prevent consumer deception and overreaching in the marketplace. Governmental attempts to compel commercial speech for any other purpose, such as the mandatory advertising scheme in *Glickman*, should be upheld only pursuant to strict scrutiny analysis. Part IV examines the *Glickman* decision, showing how the Court used contextual factors to ignore First Amendment principles, and in the process, returned to an economic view of commercial speech that it discredited more than thirty years ago. Finally, Part V of this Article takes the position that even when the state compels commercial disclosures in the name of consumer protection, it implicates speech interests. Therefore, those enactments should be subject to an intermediate level of First Amendment review.

## II. RIDING THE SEE SAW: THE PAST, PRESENT, AND FUTURE OF THE COMMERCIAL SPEECH DOCTRINE

Advertising's voyage from outside to inside the sphere of First Amendment coverage has not been an altogether smooth one. Along the way, the Supreme Court has struggled to formulate a coherent rationale for whether, why, and how commercial speech figures into our system of freedom of expression. The Court granted commercial speech a significant amount of First Amendment protection in the mid-1970s, only to reduce that coverage in later cases. More recently, the Court has been inching back to its earlier view that advertising should be more regulable than fully protected speech only as necessary to preserve fair-dealing in the marketplace.

### A. *From Father Knows Best to Anti-Paternalism: The Early Cases*

When the Supreme Court first addressed the state's ability to regulate advertising, it treated advertising as commerce rather than speech.<sup>24</sup> The Court's unanimous 1942 decision in *Valentine v. Chrestensen*<sup>25</sup> was regarded as the prevailing judicial precedent in this area for more than thirty years. In *Chrestensen*, the Court simply announced that advertising was not protected by

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(holding that First Amendment requires defamatory statements be made with knowledge of falsity or reckless disregard of the truth for public officials to recover for libel).

24. For a thorough account of how the business/speech dichotomy influenced the commercial speech doctrine's development, see Kozinski & Banner, *The Anti-History*, *supra* note 4.

25. 316 U.S. 52 (1942).

the First Amendment to uphold a New York ordinance forbidding street distribution of commercial handbills.<sup>26</sup> According to the Court, whether individuals should be allowed to promote their businesses through handbill advertising was merely a matter of "legislative judgment."<sup>27</sup>

In 1976, when the Court examined the nature and value of commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>28</sup> it overruled the *Chrestensen* approach as overly simplistic. In that case, the Court invalidated, on First Amendment grounds, a Virginia statute that forbade licensed pharmacists to advertise prescription drug prices.<sup>29</sup> The Court, in an opinion written by Justice Blackmun, rejected the notion that commercial speech was less deserving of First Amendment protection than other speech.<sup>30</sup> Defining commercial speech as speech that does "no more than propose a commercial transaction,"<sup>31</sup> the Court found that advertisers, consumers and society all benefit from the "free flow of commercial information."<sup>32</sup> Commercial speech is "indispensable" to ensure both that consumers make informed marketplace decisions, and that citizens make intelligent political choices regarding the operation of our free market system.<sup>33</sup>

In its defense, the State argued that the price ban protected consumers from placing too much importance on drug prices when choosing a pharmacist.<sup>34</sup> The Court discounted this justification as a "highly paternalistic"<sup>35</sup> example of the State trying to influence behavior by suppressing truthful information about lawful products. The Court stated that citizens must be allowed to make up their own minds and that the State must accept that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."<sup>36</sup>

Although the Court treated truthful commercial information about a lawful product as fully protected speech, it also stressed that the government must be able to ensure "that the stream of commercial information flow cleanly as well

26. *Id.* at 54. Without citing any authority, the Court said "[w]e are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising." *Id.*

27. *Id.*

28. 425 U.S. 748 (1976).

29. *Id.* at 773.

30. *Id.* at 770.

31. *Id.* at 762 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

32. *Id.* at 762-64.

33. *Id.* at 765.

34. *Id.* at 767-68.

35. *Id.* at 770.

36. *Id.*

as freely.”<sup>37</sup> According to the Court, “commonsense differences”<sup>38</sup> between commercial and other forms of speech justify a lesser degree of First Amendment coverage for the former to enable the government to regulate false and misleading advertising. First, the Court described commercial speech as more easily verifiable by the speaker than news or political speech, making it reasonable for the State to require truthful advertising.<sup>39</sup> Second, the Court said commercial speech was more durable than other kinds of speech,<sup>40</sup> and therefore less likely to be discouraged by “proper regulation.”<sup>41</sup> Taken together, these two characteristics not only allow the government to insist on accuracy in advertising, but also to demand “such additional information, warnings, and disclaimers, as are necessary to prevent [advertising from] being deceptive.”<sup>42</sup>

Of course, the drug prices at issue in *Virginia Pharmacy* were not in the least misleading and were, therefore, entitled to full First Amendment protection. Certainly, that is how Justice Rehnquist—the lone dissenter—read the Court’s opinion. “Unless the State can show that these advertisements are either actually untruthful or misleading, it presumably is not free to restrict in any way commercial efforts on the part of those who profit from the sale of prescription drugs to put them in the widest possible circulation.”<sup>43</sup> Disagreeing with this result, Justice Rehnquist took the Meiklejohnian perspective that the First Amendment was meant to protect speech regarding “political, social or other public issues, rather than the decision of a particular individual as to whether to

37. *Id.* at 772.

38. *Id.* at 771 n.24.

39. Because advertisers have both knowledge of and access to their own products, the Court assumed that advertisers can check the accuracy of their claims. *Id.* at 777 (Stewart, J., concurring).

40. The durability rationale rests on the assumption that sellers must advertise to market their products or services successfully. *Id.* at 771 n.24.

41. *Id.*

42. *Id.* Both of these differences between commercial and other types of speech have been severely criticized by commentators. See, e.g., Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?* 76 VA. L. REV. 627, 635-38 (1990) [hereinafter Kozinski & Banner, *Who's Afraid*] (arguing that the distinctions are “unsupported by good explanations”); Redish, *supra* note 10, at 567-68 (disputing that commercial claims are either more verifiable or more durable than political statements, and identifying both factors as “wholly irrelevant” in the case of a blanket ban); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1218 (1984) (describing the verifiability distinction as having “weak empirical foundations” and the durability rationale as “a logical mistake”). But see Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 469-72 (1992) (endorsing view that commercial speech is both more verifiable and durable than other speech).

43. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 788 (1976) (Rehnquist, J., dissenting).

purchase one or another kind of shampoo.”<sup>44</sup> To save the First Amendment from what he saw as its devaluation, Rehnquist preferred the old economic approach to commercial speech where the Court deferred to the state’s legislative judgment.<sup>45</sup> Ten years later, his view would again come to the forefront of the Court’s commercial speech analysis.

### *B. A Compromise Solution: Central Hudson Creates a Balancing Act*

For several years following the *Virginia Pharmacy* decision, the Court endeavored both to protect commercial speech based on an anti-paternalism rationale, and to limit advertising practices that it viewed as potentially overreaching. So, for example, the Court in *Bates v. State Bar of Arizona*<sup>46</sup> used anti-paternalism to establish that attorneys have a First Amendment right to advertise their services and prices.<sup>47</sup> Drawing a comparison to *Virginia Pharmacy*, the Court invalidated the state law on the grounds that it was designed “to inhibit the free flow of commercial information and to keep the public in ignorance.”<sup>48</sup>

Alternatively, in *Ohralik v. Ohio State Bar Ass’n*,<sup>49</sup> the Court upheld a bar association rule that prevented lawyers from promoting themselves through in-person solicitation. The Court characterized such conduct as a business transaction that raised only marginal First Amendment concerns.<sup>50</sup> While *Ohralik*’s facts presented a real risk of consumer deception based on undue influence,<sup>51</sup> the Court was not careful to limit its rhetoric to such situations.

44. *Id.* at 787. Professor Meiklejohn argued that only speech that promoted successful self-government should be fully protected by the First Amendment. See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960).

45. Justice Rehnquist objected that the Court’s reasoning:

[M]akes no allowance whatever for what appears to have been a considered legislative judgment in most States that while prescription drugs are a necessary and vital part of medical care and treatment, there are sufficient dangers attending their widespread use that they simply may not be promoted in the same manner as hair creams, deodorants, and toothpaste.

*Virginia Pharmacy*, 425 U.S. at 788 (Rehnquist, J., dissenting).

46. 433 U.S. 350 (1977).

47. *Id.* at 384.

48. *Id.* at 365.

49. 436 U.S. 447 (1978).

50. *Id.* at 457-58.

51. Mr. Ohralik aggressively pursued employment by two 18-year-old accident victims, one of whom he approached in her hospital room while she was in traction, in a manner Justice Marshall described as a “classic example[] of ‘ambulance chasing,’ fraught with obvious potential for misrepresentation and overreaching.” *Id.* at 469 (Marshall, J., concurring in part and in judgment).



Echoing Justice Rehnquist's concerns in *Virginia Pharmacy*<sup>52</sup> that constitutional protection for advertising would dilute First Amendment coverage for political speech,<sup>53</sup> the Court concluded that commercial speech received only a "limited measure of [First Amendment] protection, commensurate with its subordinate position in the scale of First Amendment values."<sup>54</sup> In its next major commercial speech case, *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,<sup>55</sup> the Court took these words out of the deceptive-practice context to justify limiting First Amendment protection for all—even truthful—commercial speech.

In *Central Hudson*, the Court tried to devise a compromise between the two opposing views of commercial speech represented by Justice Blackmun's majority opinion and Justice Rehnquist's dissenting opinion in *Virginia Pharmacy*.<sup>56</sup> Ironically, the resulting four-part test satisfied neither of them.<sup>57</sup>

*Central Hudson* involved one state's attempt to conserve electricity during the energy crisis of the mid-1970s. To reduce demand for power, the New York utility commission ordered utilities in that state to refrain from all promotional advertising.<sup>58</sup> Although the advertising at issue was accurate and not misleading, the Court did not invalidate the order based on *Virginia Pharmacy*'s aversion to paternalistic manipulations of consumer behavior. Instead, the Court cited *Ohralik* for the proposition that "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."<sup>59</sup>

After relegating all commercial speech to an inferior constitutional category, the Court outlined a four-part test for determining the constitutionality of advertising restrictions. First, the Court said the Constitution does not pose any obstacle to a state prohibition against false, misleading, or deceptive advertising, or advertising regarding an illegal activity.<sup>60</sup> Commercial speech,

52. See *supra* notes 43-45 and accompanying text.

53. *Ohralik*, 436 U.S. at 456.

54. *Id.*

55. 447 U.S. 557 (1980).

56. Justice Blackmun, in the *Virginia Pharmacy* majority opinion, stated that all truthful, nonmisleading commercial speech should receive full First Amendment protection, and Justice Rehnquist, in his dissent, argued that commercial speech deserved no First Amendment protection at all. See *supra* notes 43-45 and accompanying text.

57. Justice Blackmun concurred in the judgment, stating that the Court's four-part test "does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech." *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring). Justice Rehnquist dissented, arguing that the Court's decision "fails to give due deference to th[e] subordinate position of commercial speech." *Id.* at 589 (Rehnquist, J., dissenting).

58. *Id.* at 558-59.

59. *Id.* at 563.

60. *Id.* at 563-64.

which the Court defined as “expression related solely to the economic interests of the speaker,”<sup>61</sup> is not eligible for First Amendment protection unless it is truthful and concerns a lawful product or service.<sup>62</sup> Second, commercial expression that fulfills this threshold requirement may still be regulated if the State justifies the restriction pursuant to a substantial state interest.<sup>63</sup> Third, the restriction must directly advance that state interest; and finally, the restriction must be “designed carefully to achieve the State’s goal.”<sup>64</sup>

Pursuant to this four-part analysis, the Court overturned the utility commission’s order forbidding promotional advertising of electricity. The Court agreed that energy conservation constituted a substantial state interest.<sup>65</sup> The Court also assumed that the order would have a direct effect on power usage because “Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales.”<sup>66</sup> However, the order failed the test’s fourth prong because it was overbroad. According to the Court, the order applied to more speech than necessary because it would prevent the utility from advertising efficient uses of energy as well as wasteful ones.<sup>67</sup>

Based on this reasoning, the Court implied that an order prohibiting only advertisements that promoted inefficient (although certainly legal) uses of electricity would have been upheld. As Justice Blackmun noted in his concurrence, this implication turned the Court’s anti-paternalism rationale on its head.<sup>68</sup> Such a restriction would advance the state interest in energy conservation “not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice”<sup>69</sup>—exactly what *Virginia Pharmacy* had forbidden.

Although the four-part *Central Hudson* test effectively limited the amount of First Amendment protection originally given to nondeceptive commercial speech in *Virginia Pharmacy*, Justice Rehnquist still believed that even this reduced First Amendment coverage encroached on the State’s authority to regulate business transactions. In his *Central Hudson* dissenting opinion, Justice Rehnquist described the utility commission’s order as an economic regulation

61. *Id.* at 561.

62. *Id.* at 566.

63. *Id.*

64. *Id.* at 564.

65. *Id.* at 568. The Court also found that the state’s interest in fair and efficient rate-making qualified as substantial. *Id.* However, under the test’s third prong, the Court described the link between the advertising restriction and the utility’s rate structure as “at most, tenuous.” *Id.* at 569.

66. *Id.*

67. *Id.* at 570. The Court also noted that the state had not shown that its interests could not be advanced by more limited regulation of speech, such as by requiring advertisements to include efficiency information for various services. *Id.* at 570-71.

68. *Id.* at 579.

69. *Id.* at 575 (Blackmun, J., concurring).

to which the Court should show "virtually complete deference."<sup>70</sup> However, even Justice Rehnquist acceded to the *Central Hudson* formulation when the inherent flexibility of the test became apparent. Writing for the Court in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,<sup>71</sup> he applied *Central Hudson*'s prongs in such a way as to provide significant deference to state advertising restrictions.

*Posadas* has been described as the "low water mark" for commercial speech.<sup>72</sup> In that case, Justice Rehnquist used the *Central Hudson* test to uphold a ban on truthful casino advertising directed at Puerto Rican residents.<sup>73</sup> The State permitted casino advertising to be addressed only to tourists, even though Puerto Rico had legalized many forms of gambling for both citizens and tourists.<sup>74</sup> The State claimed the ban was necessary to discourage casino gambling among Puerto Ricans, thereby protecting them from gambling's "serious harmful effects."<sup>75</sup>

In his opinion, Justice Rehnquist deferred to Puerto Rico's legislative judgment to conclude that this obviously paternalistic goal qualified as a substantial state interest.<sup>76</sup> The Court said the legislature's belief that the advertising ban directly advanced the interest was "reasonable," despite the lack of any state substantiation.<sup>77</sup> The Court had no trouble finding that the prohibition satisfied *Central Hudson*'s final prong. Again, the Court left it to the legislature to decide if other remedies, such as counterspeech, would discourage gambling as effectively as the advertising ban.<sup>78</sup> Justice Rehnquist reasoned, most notoriously, that the government's power to forbid products or activities (such as gambling) gave it the lesser power to prohibit advertising of such products or activities.<sup>79</sup> Applied literally, this sweeping pronouncement could have justified virtually complete government regulation of commercial speech.<sup>80</sup>

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70. *Id.* at 591 (Rehnquist, J., dissenting).

71. 478 U.S. 328 (1986).

72. P. Cameron De Vore, *The Two Faces of Commercial Speech under the First Amendment*, 12 COMM. LAW. 1, 23 (1994).

73. *Posadas*, 478 U.S. at 340-44.

74. *Id.* at 332.

75. *Id.* at 341.

76. *Id.*

77. *Id.* at 342.

78. *Id.* at 344.

79. *Id.* at 346.

80. According to this rationale, only commercial speech pertaining to activities that are constitutionally protected, such as the purchase of contraceptives or abortion services, would be entitled to First Amendment protection. Because the range of independently constitutionally protected economic transactions is quite small, this would effectively eviscerate constitutional protection for commercial speech. See Philip B. Kurland, *Posadas de Puerto Rico v. Tourism Co.*: "Twas Strange, 'Twas Passing Strange, 'Twas Pitiful, 'Twas Wondrous Pitiful," 1986 SUP. CT. REV. 1, 12-13 (stating

Commentators roundly criticized the *Posadas* result and Justice Rehnquist's "greater-power-includes-the-lesser" dictum as inconsistent with both the Court's prior commercial speech decisions and First Amendment principles.<sup>81</sup> Although some scholars speculated that the decision might be nothing more than an aberration,<sup>82</sup> the case clearly demonstrated the subjectiveness of the *Central Hudson* test. That test was weakened even further three years later in *Board of Trustees of the State University of New York v. Fox*.<sup>83</sup> In that case, the Court ruled that restrictions on commercial speech are constitutional even if they do not meet the least restrictive means test.<sup>84</sup> Justice Scalia, writing for a six judge majority, stated that *Central Hudson*'s fourth prong required only that there be a "reasonable" fit between the legislative goals and the regulation enacted to achieve them.<sup>85</sup>

Following *Posadas* and *Fox*, the *Central Hudson* test had become so elastic as to give no meaningful guidance to commercial speakers regarding when or whether advertising would receive First Amendment protection. The Court's decisions wavered between invalidating advertising restrictions as paternalistic and upholding them in deference to state legislative goals. By embracing both anti-paternalism rhetoric in some commercial speech cases and pro-paternalism results in others, the Court provided itself with precedent to do anything it pleased with respect to advertising. These cases reflect the Court's lack of consensus on why commercial speech should be constitutionally protected. Furthermore, the *Central Hudson* formulation was too easily manipulated and too inconsistently applied to qualify as a real "test" for commercial speech.<sup>86</sup> In

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that if the "greater includes the lesser" rationale was applied, no advertising would be free from government censorship).

81. See, e.g., Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 386 n.76 (1995) (listing critical reviews of *Posadas* decision); Kurland, *supra* note 80, at 12 (concluding that *Posadas* decision did not comport with the Court's prior commercial speech decisions); Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909, 935 (1992) (criticizing *Posadas* as overly deferential to legislative judgments regarding advertising restrictions); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1182 (describing *Posadas* as irreconcilable with both *Virginia Pharmacy* and *Central Hudson*).

82. See, e.g., De Vore, *supra* note 72, at 23-24 (describing *Posadas* as a weak authority in part because of its "unusual facts").

83. 492 U.S. 469 (1989).

84. *Id.* at 478.

85. *Id.* at 470.

86. Many commentators have remarked on the failings of the *Central Hudson* test. See e.g., Christopher C. Faille, *Spinning the Roulette Wheel: Commercial Speech and Philosophical Cogency*, 41 FED. B. NEWS & J. 58, 60 (1994); Kozinski & Banner *Who's Afraid*, *supra* note 42, at 631; Lars Noah & Barbara A. Noah, *Liberating Commercial Speech: Product Labeling Controls and the First Amendment*, 47 FLA. L. REV. 63, 78 (1995).

a series of cases beginning with *City of Cincinnati v. Discovery Network, Inc.*,<sup>87</sup> the Court attempted to remedy *Central Hudson*'s inadequacies, both by fine-tuning individual prongs of the test and by reasserting the value of commercial speech. Most recently, in *44 Liquormart, Inc. v. Rhode Island*,<sup>88</sup> some of the Justices advocated scrapping the *Central Hudson* test with respect to accurate, nonmisleading commercial speech.<sup>89</sup>

### *C. Back to the Future: Liquormart and the Return of Commercial Speech*

Commercial speech's time in the First Amendment sun looked seriously limited after *Central Hudson*, *Posadas*, and *Fox*. However, in 1993, the clouds cleared when Justice Stevens delivered a ringing endorsement of commercial speech's value for a six judge majority in *City of Cincinnati v. Discovery Network, Inc.*<sup>90</sup> In that case, the Court invalidated Cincinnati's ban on commercial newsracks, saying that the City had not established a "reasonable fit," under the fourth prong of *Central Hudson*, with the City's goals of improving street and sidewalk safety and appearance.<sup>91</sup> The ordinance, which would have required the removal of sixty-two newsracks that dispensed free advertising publications while leaving more than 1,500 traditional newspaper racks on the streets, would have had a negligible effect on the City's goal.<sup>92</sup> Furthermore, the Court faulted the City for not first regulating the size, shape, appearance, and number of newsracks.<sup>93</sup> Although the Court emphasized it was not applying a "least-restrictive-means" test, it noted that "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."<sup>94</sup> In *Discovery Network*, the Court strengthened the fourth part of the *Central Hudson* test by refusing to accept the City's word that the restriction was sufficiently tailored.

In his opinion for the Court, Justice Stevens reached several other interesting conclusions. First, he noted the City based its ordinance on the premise that commercial speech was of lower constitutional value than other speech.<sup>95</sup> He rejected this supposition, stating that it "attaches more importance to the distinction between commercial and noncommercial speech than our cases

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87. 507 U.S. 410 (1993).

88. 517 U.S. 484 (1996).

89. See *infra* notes 114-43 and accompanying text.

90. 507 U.S. 410 (1993).

91. *Id.* at 417.

92. *Id.* at 417-18.

93. *Id.* at 417.

94. *Id.* at 417 n.13.

95. *Id.* at 418-19.

warrant and seriously underestimates the value of commercial speech.”<sup>96</sup> He also cast doubt on any categorical approach to commercial speech in general, pointing out that the distinction between a newspaper and a commercial publication is far from clear and nothing more than a matter of degree.<sup>97</sup>

Most importantly, Justice Stevens recognized that Cincinnati’s interest in esthetics had some validity,<sup>98</sup> but stated that the commercial/noncommercial distinction did not relate to that interest.<sup>99</sup> Noncommercial newsracks were as unattractive as commercial newsracks. Therefore, the ordinance did not address a specific problem linked to the commercial nature of the speech.<sup>100</sup> In other words, advertising cannot be restricted just because it is commercial. Instead, the state must assert an interest in deterring some risk that pertains directly to the commercial speech which is the subject of the regulation. The Court went one step further to identify the prevention of “commercial harms” as the usual state interest that could justify commercial speech regulation.<sup>101</sup> This follows, the Court said, because avoiding injuries that result from inaccurate or misleading advertising is “the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.”<sup>102</sup>

Although in cases such as *Discovery Network*, the Court devoted significant attention to the third and fourth prongs of *Central Hudson*,<sup>103</sup> the second part of the test—the requirement that the restriction advance a substantial state interest—was virtually ignored. For example, in *Rubin v. Coors Brewing Co.*,<sup>104</sup> the Court considered a federal law that prohibited brewers from including alcohol content on their labels, ostensibly to preclude them from competing based on the strength of their beers.<sup>105</sup> Coors wanted to list alcohol content on

96. *Id.* at 419.

97. *Id.* at 419-23.

98. *Id.* at 418.

99. *Id.* at 424.

100. *Id.* at 425-26.

101. *Id.* at 426.

102. *Id.*

103. The Court also strengthened the third prong of *Central Hudson* in *Edenfield v. Fane*, 507 U.S. 761, 771 (1993), by requiring the state to provide studies or anecdotal evidence that a solicitation ban directly advanced the state interest in consumer protection. However, *Edenfield*’s requirement that the state prove that a commercial speech restriction advance a state interest “in a direct and material way,” was also vulnerable to indiscriminate application. *Id.* at 767. For example, in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626-28 (1995), the Court held that a bar association study satisfied the state’s burden to show that its rule against direct-mail solicitations directly advanced its interest in protecting accident victims’ privacy. In his dissent, Justice Kennedy observed that the study included no actual survey results, no descriptions of methodology or statistical assumptions, and was “noteworthy for its incompetence.” *Id.* at 640 (Kennedy, J., dissenting).

104. 514 U.S. 476 (1995).

105. *Id.* at 483-84. Coors argued that the real purpose behind the regulation,

its labels to correct the consumer misperception that its beers were weaker than other brands.<sup>106</sup> In applying the *Central Hudson* test, the Court agreed that "strength wars" could lead to increased alcoholism "and its attendant social costs."<sup>107</sup> The Court concluded, therefore, that the labeling law served a substantial state interest in protecting citizens' health, safety, and welfare by "preventing consumers from choosing beers on the basis of alcohol content."<sup>108</sup> Although the Court overturned the labeling law for failing parts three and four of the *Central Hudson* test,<sup>109</sup> the substantial interest approved by the Court was just the sort of paternalistic social engineering that *Virginia Pharmacy* decried. Despite the truthfulness of the information about alcohol content, the state preferred that it be kept from consumers, for their own good.

Justice Stevens, concurring only in the judgment, chastised the Court for recognizing a substantial state interest in a law that restricted the availability of accurate information, calling such a purpose an "anathema to the First Amendment."<sup>110</sup> He found the commercial/noncommercial distinction to be irrelevant in a case involving truthful speech.<sup>111</sup> Coors' beer label was entitled to full First Amendment protection because it did not present a risk of consumer harm or deception—which Justice Stevens saw as the only supportable rationale

which was enacted in 1935, was to prevent brewers from making inaccurate claims about alcohol content at a time when brewers lacked the technology to ensure uniform alcohol levels in their beers. *Id.* at 484.

106. *Id.* at 487.

107. *Id.* at 485.

108. *Id.* at 487.

109. With respect to *Central Hudson*'s third prong, the Court concluded that the state had failed to show a direct link between labeling and the threat of strength wars. *Id.* at 489. Furthermore, the Court determined that the statute would be ineffective to prevent competition based on alcohol content because the same law required or permitted that alcohol content be listed on wine and distilled spirit labels. *Id.* at 488. By implying that the labeling law, like the advertising prohibition in *Central Hudson*, was unconstitutional only because it did not work, the Court reinforced its paternalistic conclusion that influencing consumer choice through suppression of information was acceptable under the First Amendment.

Concerning *Central Hudson*'s fourth prong, the Court held that alternatives existed by which the government could combat strength wars without interfering with free speech, including "directly limiting the alcohol content of beers." *Id.* at 490-91. In reaching that conclusion, the Court acknowledged that Congress' power to limit beer's alcohol content did not include the right to limit commercial speech with respect to alcohol content. *Id.* Although technically only dicta, this repudiated the "greater-includes-the-lessor" argument from *Posadas*.

110. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring). Justice Stevens described the labeling law as "nothing more than an attempt to blindfold the public." *Id.* at 498.

111. *Id.* at 494.

for regulating commercial speech in the first place.<sup>112</sup> Justice Stevens disavowed what he called *Central Hudson's* "misguided approach" with respect to situations involving restrictions on accurate, nonmisleading, informative commercial speech.<sup>113</sup>

A year later, Justice Stevens gathered support for his position when the Court's dissatisfaction with the *Central Hudson* test finally came to a head in *44 Liquormart, Inc. v. Rhode Island*.<sup>114</sup> In that case, Rhode Island prohibited off-premises advertising of liquor prices in an attempt to promote temperance by keeping liquor prices high.<sup>115</sup> As noted by Professor Sullivan, the case was no more than a reprise of *Virginia Pharmacy*, and therefore should have been a practically effortless exercise for the Court.<sup>116</sup> Indeed, the Justices in *Liquormart* unanimously struck down the law on First Amendment grounds, but not without a great deal of effort. Whereas in 1976, the Court could have merely cited *Virginia Pharmacy* to overturn the law, in 1996 it had to deal with *Central Hudson*.

As a result, four opinions were written by the Justices, none of which gathered more than four votes.<sup>117</sup> Justice Stevens wrote *Liquormart's* plurality opinion, in which he reiterated his position on commercial speech from earlier cases, without explicitly abandoning the *Central Hudson* test. He emphasized that the commercial speech doctrine had developed "to ensure that advertising provides consumers with accurate information about the availability of goods and services,"<sup>118</sup> and reasserted *Virginia Pharmacy's* anti-paternalism rationale.<sup>119</sup> He identified two categories of commercial speech regulation: advertising restrictions designed to protect consumers from inaccurate, incomplete, or misleading information; and advertising bans that prohibit truthful, nondeceptive commercial messages for reasons "unrelated to the preservation of a fair bargaining process."<sup>120</sup> According to Justice Stevens (joined only by Justices Kennedy and Ginsburg on this point), only the former are subject to the "less than strict review" of *Central Hudson*, while the latter deserve "the rigorous review that the First Amendment generally demands."<sup>121</sup> Pursuant to this two-tiered analysis, the only state interest that could trigger

112. *Id.* at 494-97.

113. *Id.* at 493.

114. 517 U.S. 484 (1996).

115. *Id.* at 489-92.

116. Sullivan, *supra* note 10, at 138-39.

117. Justice Stevens' plurality opinion was joined, for the most part, by Justices Kennedy, Souter, and Ginsburg; Justices Scalia and Thomas wrote separate concurring opinions; and Justice O'Connor wrote an opinion concurring in the judgment that was joined by Chief Justice Rehnquist, Justice Souter, and Justice Breyer.

118. *Liquormart*, 517 U.S. at 496 (Stevens, J., plurality opinion).

119. *Id.* at 497.

120. *Id.* at 501 (Stevens, Kennedy, & Ginsburg, J.J., plurality opinion).

121. *Id.*



*Central Hudson*-style intermediate scrutiny for commercial speech restrictions would be the prevention of consumer deception or overreaching.<sup>122</sup>

Justice Stevens (writing again for a plurality) concluded that "even under the less than strict standard" of *Central Hudson*, the advertising ban would fail.<sup>123</sup> As he applied the test, *Central Hudson*'s third prong would require the State to prove direct links among price advertising, liquor prices, and liquor consumption—something the State had not done beyond mere "speculation or conjecture."<sup>124</sup> Additionally, Justice Stevens said *Central Hudson*'s fourth prong was not met because Rhode Island could institute higher liquor prices and encourage temperance among its citizens in many ways that did not restrict speech.<sup>125</sup> These included direct price regulation, higher liquor taxation, and citizen education.<sup>126</sup> Finally, Justice Stevens (joined on this point by Justices Kennedy, Thomas, and Ginsburg) rejected both the "greater-includes-the-lesser" justification for regulating commercial speech<sup>127</sup> and the notion of a "vice" exemption for advertising related to unpopular or risky items.<sup>128</sup>

Although both Justice Scalia and Justice Thomas disapproved of the *Central Hudson* test in their respective concurring opinions,<sup>129</sup> Justice Scalia remained non-committal, while Justice Thomas bravely charted new territory. Although he disliked *Central Hudson*, Justice Scalia felt unsure about what should replace it. Therefore, he merely concurred in striking down the advertising ban without either "develop[ing] new law, or reinforc[ing] old, on this issue."<sup>130</sup> Justice Thomas, on the other hand, advocated a return to *Virginia Pharmacy*'s holding that "all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible."<sup>131</sup> Justice Thomas said that the commercial/noncommercial distinction is unjustified when the government

122. *Id.* at 502. Justice Stevens rejected the much maligned "commonsense differences" between commercial and noncommercial speech, and instead identified the state interest in preventing commercial harms as the real reason that commercial speech is sometimes subject to less than full First Amendment protection. *Id.* For a discussion of the "commonsense differences," see *supra* notes 38-42 and accompanying text.

123. 44 Liquormart, Inc. v Rhode Island, 517 U.S. 484, 507 (1996) (Stevens, J., plurality opinion).

124. *Id.* (citing *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

125. *Id.* at 507.

126. *Id.*

127. *Id.* at 510-13.

128. *Id.* at 513-14.

129. Justice Scalia stated that the *Central Hudson* test has "nothing more than policy intuition to support it." *Id.* at 517 (Scalia, J., concurring in part and in judgment); Justice Thomas described it as so "inherently nondeterminative" that it cannot be applied uniformly, but rather is controlled by individual judges' preferences and biases. *Id.* at 527 (Thomas, J., concurring in part and in judgment).

130. *Id.* at 518 (Scalia, J., concurring in part and in judgment).

131. *Id.* at 526 (Thomas, J., concurring in part and in judgment).

restricts speech in an attempt to manipulate behavior, and therefore, *Central Hudson*'s balancing approach is not only irrelevant, but nonsensical.<sup>132</sup>

Even the Justices who advocated retaining the *Central Hudson* test applied it in an unusually narrow way. In her concurrence, which was joined by Chief Justice Rehnquist, Justice Breyer and Justice Souter, Justice O'Connor found that the statute failed *Central Hudson*'s last prong because it unnecessarily burdened speech.<sup>133</sup> The State could impose higher liquor prices, and thereby deter liquor consumption in many other ways that were less oppressive to speech, such as establishing minimum prices, increasing sales taxes on liquor, or implementing an educational program to encourage moderation.<sup>134</sup> Additionally, Justice O'Connor disavowed the *Posadas* approach of treating state advertising restrictions with unquestioning deference.<sup>135</sup> Rather, courts must take "a closer look" to ensure that the speech restriction both advances a substantial state interest and is narrowly tailored.<sup>136</sup>

Where does *Liquormart* leave the commercial speech doctrine? For one thing, the case practically guarantees that restrictions on truthful, nonmisleading commercial information about lawful commodities are invalid, regardless of whether the *Central Hudson* test is used or not.<sup>137</sup> Whether the Court applies strict scrutiny in such situations (Justice Stevens' approach), invalidates the restriction based on anti-paternalism (Justice Thomas' choice) or applies a stricter version of *Central Hudson*'s third and fourth prongs (Justice O'Connor's preference), the result should be the same.<sup>138</sup> As Justice Thomas noted in his concurrence, direct regulation of a product and state-sponsored counterspeech

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132. *Id.* at 518, 523-24.

133. *Id.* at 530 (O'Connor, J., concurring in judgment).

134. *Id.*

135. *Id.* at 531-32.

136. *Id.* at 531.

137. Some courts have tried to distinguish *Liquormart* as involving a "total ban" on advertising. See, e.g., *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329 (4th Cir. 1996) (upholding ban on billboard advertising of alcoholic beverages in certain areas of city as time, place, and manner restriction rather than "blanket ban"), *cert. denied*, 117 S. Ct. 1569 (1997). However, the term "total ban" is a tautology: whatever is banned is always totally banned. For example, in *Liquormart*, off-premises advertising of liquor prices was totally banned, but liquor sellers could still display signs advertising prices within their stores.

138. At least, it should be the same as long as other nonspeech alternatives have not been implemented. For example, assume that Rhode Island restricted liquor price advertising as part of a comprehensive program to encourage temperance that included increased taxation of alcoholic beverages and an educational campaign to preach moderation. Now under Justice O'Connor's approach, the advertising ban might well be upheld as one step among many needed to achieve a substantial state interest. Under either Justice Stevens' or Justice Thomas' approach, however, the statute would remain unconstitutional.

are always available and will always be less burdensome on speech than restrictions on advertising.<sup>139</sup>

The case certainly marks an end to the deferential application of the *Central Hudson* test and presages a new approach to commercial speech. What is that approach likely to be? The Court's decision in *Discovery Network*, together with its decision in *Liquormart*, shows the Court's growing acceptance of "the preservation of a fair bargaining process"<sup>140</sup> as the rationale behind commercial speech regulation.<sup>141</sup> The reason for granting commercial speech less than full First Amendment protection is to protect consumers from commercial harms. This explains why false commercial speech can be regulated when inaccurate political speech remains fully protected.<sup>142</sup> Just as libel laws favor protecting individuals' reputations from false, defamatory statements over First Amendment absolutism, so consumer protection laws reflect a policy choice to shield purchasers from false and misleading advertising.<sup>143</sup> Clearly, neither *Liquormart*'s liquor sellers nor *Virginia Pharmacy*'s pharmacists would have been granted full First Amendment protection to advertise erroneous prices. However, because their commercial messages were truthful and thus presented

139. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 524-25 (1993) (Thomas, J., concurring in part and in judgment).

140. *Id.* at 501 (Stevens, Kennedy, & Ginsburg, JJ., plurality opinion).

141. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993) ("Cincinnati has not asserted an interest in preventing commercial harms by regulating the information distributed by respondent publishers' newsracks, which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech"); see also *R.A.V. v. St. Paul*, 505 U.S. 377, 388-89 (1992) (describing "risk of fraud" as "one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection").

142. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976) (noting that false and deceptive commercial speech may be regulated by the state because "[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely"); see also *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) (stating that First Amendment protection for commercial speech is designed to safeguard societal interests in "broad access to complete and accurate commercial information").

143. Some commentators have noted that consumer protection laws themselves are paternalistic because they assume purchasers cannot protect themselves from false information or deceptive practices. See, e.g., Daniel Hays Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1242 (1988).

However, even Justice Thomas, who took the strongest position against paternalism in *Liquormart*, described paternalism as "manipulating consumer choices or public opinion through the suppression of accurate 'commercial' information." 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 520 (1993) (Thomas, J., concurring in part and in judgment) (emphasis added). Apparently, restricting inaccurate or deceptive commercial information would not constitute objectionable paternalism even for Justice Thomas.

no danger of consumer fraud, these sellers should not have to rely on a *Central Hudson* analysis to claim First Amendment coverage.

In summary, commercial speech began this century as a mere outgrowth of business, with the result that advertising restrictions were subject only to the rational basis review given to other economic regulations. Since then, the evolution of the commercial speech doctrine has consisted of three major developments. First, the Court in *Virginia Pharmacy* granted First Amendment protection to truthful, nondeceptive commercial speech to ensure the free flow of reliable consumer information. This development benefitted purchasers and sellers alike. As an obvious corollary, the Court in *Virginia Pharmacy* also stated that commercial speech could be regulated to prevent inaccurate, misleading messages or overreaching sales practices. Second, the Court in *Central Hudson* reduced the First Amendment protection granted to truthful, nonmisleading commercial speech to an intermediate level. *Central Hudson* created a four-part balancing test that the Court applied strictly, to invalidate advertising prohibitions, and with great deference to state legislative judgments.

Finally, the ambiguity and uncertainty associated with the *Central Hudson* test appears to have led the Court back to its original thinking in *Virginia Pharmacy*. Cases such as *Discovery Network* and *Liquormart* have shown the Court's dissatisfaction with *Central Hudson*, along with a growing consensus that truthful, nondeceptive advertising should be entitled to full First Amendment protection. This would mean advertising should be subject to a reduced level of First Amendment scrutiny only when necessary to protect consumers from commercial harms. As shown in Part III of this Article, the First Amendment standard used to evaluate advertising restrictions should also be applied to assess the constitutionality of regulations compelling commercial speech.

### III. THE RIGHT TO BE SILENT: A COMPLEMENTARY COMPONENT TO FREE SPEECH

Thirty years before the Supreme Court granted constitutional protection to commercial speech, it recognized that free expression was a two-sided coin: it included not only the right to be free from government censorship, but also the right to refrain from speaking at all. The right to remain silent originated in cases involving political, religious, ideological, or other fully protected speech. In the commercial context, government-mandated disclosure requirements have been presumed to be within the state's purview, based on commercial speech's lower constitutional status. However, at least with respect to truthful, nonmisleading commercial speech, *Liquormart* has changed the rules regarding that status. This section of the Article describes the development of "negative free speech rights"<sup>144</sup> in ideological and commercial contexts. It concludes that

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144. *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 26 (1986) (Rehnquist, C.J., dissenting).

the only commercial disclosure requirements that should be subject to the less-than-strict scrutiny of *Central Hudson* are those that protect consumers from commercial harms.

### A. Our "Fixed Star": Ideological Speech Cannot be Compelled<sup>145</sup>

The fact that the First Amendment prohibits the state from compelling speech of a religious, political, or ideological nature has been determined beyond question. In *West Virginia State Board of Education v. Barnette*,<sup>146</sup> the Court held that religious objectors could not be forced to salute the flag.<sup>147</sup> The Court stated that the First Amendment does not allow "public authorities to compel [an individual] to utter what is not in his mind."<sup>148</sup> Similarly, in *Wooley v. Maynard*,<sup>149</sup> the Court concluded that a state cannot require its citizens to display the state motto "Live Free or Die" on their cars.<sup>150</sup> In his opinion for the Court, Chief Justice Burger reasoned that "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."<sup>151</sup>

The right to be free from compelled political speech has been upheld in various contexts. In *Miami Herald Publishing Co. v. Tornillo*,<sup>152</sup> the Court held that a newspaper could not be obliged to provide reply space to political candidates who had been criticized in print. Similarly, the Court has ruled that political pamphleteers cannot be forced to put their names on the work,<sup>153</sup> and that private parade organizers may not be required to include marchers who advocate incompatible views.<sup>154</sup> According to the Court, "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"<sup>155</sup>

In a related line of cases, the Court has also recognized that the state cannot compel individuals to pay for someone else's ideological speech. In the leading

145. "[I]f there is any fixed star in our constitutional constellation, 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." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

146. 319 U.S. 624 (1943).

147. *Id.* at 642.

148. *Id.* at 634.

149. 430 U.S. 705 (1977).

150. *Id.* at 713.

151. *Id.* at 714.

152. 418 U.S. 241 (1974).

153. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

154. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 580 (1995).

155. *Id.* at 573 (citing *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 16 (1986) (plurality opinion)).

case of *Abood v. Detroit Board of Education*,<sup>156</sup> the Court upheld an "agency shop" arrangement where a teacher's union charged non-union members "service fees" equal to union dues.<sup>157</sup> Non-union members objected that their funds were being used to finance the union's political activities.<sup>158</sup> The Court held that the service charge was permissible to the extent that those monies were used to further the union's collective bargaining activities, a use seen as "germane" to important state interests.<sup>159</sup> However, the Court ruled that the service fees violated non-union members' First Amendment rights to the extent those funds supported the union's political agenda.<sup>160</sup> The *Abood* rule was applied to a State's integrated bar association in *Keller v. State Bar of California*.<sup>161</sup> In *Keller* the Court held that compulsory membership dues could not be used to finance the bar association's ideological or political programs, but could be used for bar activities relevant to the State's interest in regulating and improving legal services.<sup>162</sup>

In *Riley v. National Federation of the Blind of North Carolina, Inc.*,<sup>163</sup> a case that presented an interesting blend of compelled political and commercial speech, the Court held that professional fund-raisers could not be forced to tell potential donors the percentage of funds raised in past campaigns that went to costs and fees, as opposed to charity.<sup>164</sup> Earlier cases held that charitable solicitations are fully protected under the First Amendment.<sup>165</sup> In defending the statute, the State argued that the law actually regulated commercial speech because it dealt only with the professional fund-raisers' ability to make a profit.<sup>166</sup> The Court stated that "[p]urely commercial speech is more susceptible to compelled disclosure requirements,"<sup>167</sup> but disagreed that the speech in this case was truly commercial. The Court held that the regulation was entitled to strict scrutiny because the fund-raisers' mandated disclosure was "inextricably intertwined with otherwise fully protected speech."<sup>168</sup>

According to the Court in *Riley*, when the speech involved is "fully protected," laws compelling speech are subject to the same constitutional test as laws restricting speech.<sup>169</sup> The Court said that whether the State tries to prohibit

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156. 431 U.S. 209 (1977).

157. *Id.* at 211.

158. *Id.* at 212-13.

159. *Id.* at 235-36.

160. *Id.* at 234-35.

161. 496 U.S. 1 (1990).

162. *Id.* at 14.

163. 487 U.S. 781 (1988).

164. *Id.* at 798.

165. *Id.* at 787-89.

166. *Id.* at 795.

167. *Id.* at 796 n.9.

168. *Id.* at 796.

169. *Id.* at 797.

or compel protected speech makes no constitutional difference because in either situation, the regulation would have to survive strict scrutiny analysis.<sup>170</sup> In 1988, when *Riley* was decided, the Court did not consider any commercial speech (truthful or not) to be fully protected; rather, it was seen as an inferior category of expression subject only to intermediate scrutiny.<sup>171</sup> To the extent that later cases such as *Discovery Network* and *Liquormart* have enlarged constitutional coverage for truthful, nondeceptive commercial speech,<sup>172</sup> *Riley* would indicate that commercial disclosure requirements are also entitled to more than perfunctory review. If commercial speech qualifies for less than full First Amendment scrutiny only to protect consumers from commercial harms,<sup>173</sup> then commercial disclosure requirements also should be subject to a lower First Amendment standard only as needed to preserve a fair bargaining process. In other words, the state should not be allowed to compel commercial speech based on governmental interests other than consumer protection if it is not allowed to restrict commercial speech for those same purposes. As will be seen below, the Court identified the prevention of consumer fraud as the justification for commercial disclosure requirements back in 1976 in its *Virginia Pharmacy* decision.

### *B. Commercial Speech: Susceptible to Compelled Disclosure to Protect Consumers*

When commercial speech first attained constitutional legitimacy in *Virginia Pharmacy*,<sup>174</sup> the Court, in a footnote, added that advertisers could be required to include disclaimers or additional information necessary to make commercial messages nondeceptive.<sup>175</sup> The Court said these disclosures were justified by the "commonsense differences" between commercial and noncommercial speech: the alleged greater verifiability and toughness that makes commercial speech harder to chill.<sup>176</sup> A year later, in *Bates v. State Bar of Arizona*,<sup>177</sup> the Court noted in dicta that the State could require lawyer advertisements to include "some limited supplementation, by way of warning or disclaimer. . . to assure that the consumer is not misled."<sup>178</sup> Therefore, consumer protection was the only interest identified that could justify compelling commercial advertisers to provide additional information about their products.

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170. *Id.* at 796-97.

171. *Id.* at 795.

172. *See supra* Part II.C of this Article.

173. *See supra* notes 140-43 and accompanying text.

174. 425 U.S. 748 (1976). *See also supra* notes 28-42 and accompanying text.

175. *Virginia Pharmacy*, 425 U.S. at 771 n.24.

176. *Id.* *See supra* notes 38-42 and accompanying text.

177. 433 U.S. 350 (1977).

178. *Id.* at 384.

The Court considered the constitutionality of such a disclosure requirement for the first time in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.<sup>179</sup> In that case, an Ohio disciplinary rule required lawyers who advertised contingent rates to state in those ads that clients would be responsible for litigation costs even if their claims were unsuccessful.<sup>180</sup> The Court said that when commercial advertising is concerned, "material differences" exist between disclosure requirements and speech restrictions.<sup>181</sup> The State's rule here did not compel attorneys to advance a particular ideological or political stance as in *Wooley* or *Barnette*,<sup>182</sup> nor did it limit the amount of information available to the public.<sup>183</sup> Instead, the State required attorneys to include "purely factual and uncontroversial information."<sup>184</sup> Without this, contingent-fee ads created what the Court saw as a "self-evident" likelihood of deception.<sup>185</sup> As long as they are not overly burdensome, disclosure requirements only need to be reasonably related to the state interest in consumer protection to pass constitutional muster.<sup>186</sup> Furthermore, the Court saw no need to inquire whether the state interest could be achieved by less restrictive means because disclosure requirements are always less restrictive than laws that suppress speech.<sup>187</sup>

Justice Brennan wrote separately to emphasize his view that commercial disclosure requirements could be justified only if they met the same standards applied to commercial speech restrictions—the *Central Hudson* test.<sup>188</sup> While preventing deceptive advertising clearly qualified as a substantial state interest, Justice Brennan said that the State must prove either that the advertising is inherently likely to deceive or that the advertising has actually deceived consumers.<sup>189</sup> Additionally, the State must show that the disclosure requirement effectively counteracts the deception and "may be no broader than reasonably necessary to prevent the deception."<sup>190</sup> Based on the public's unfamiliarity with the intricacies of contingent-fee arrangements, Justice Brennan concluded that the Ohio costs disclaimer could satisfy the *Central Hudson* standard as long as it was not overly extensive.<sup>191</sup>

Justice Brennan, however, found fault with two other disclosure requirements which Ohio applied to attorneys who advertised contingent-fee

179. 471 U.S. 626 (1985).

180. *Id.* at 633.

181. *Id.* at 650.

182. *Id.* at 651. See *supra* notes 146-51 and accompanying text.

183. *Zauderer*, 471 U.S. at 650.

184. *Id.* at 651.

185. *Id.* at 652-53.

186. *Id.* at 651.

187. *Id.* at 651 n.14.

188. *Id.* at 657-58 (Brennan, J., concurring in part and dissenting in part).

189. *Id.* at 658 n.2, 659.

190. *Id.* at 658 (citing *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

191. *Id.* at 660.



arrangements: first, that those ads specify the lawyers' rates; and second, that those ads set out in full the terms of the proposed fee relationship.<sup>192</sup> The Court wholly ignored the latter and barely mentioned the former requirement, saying only in a footnote that it did not seem either unreasonable or "unduly burdensome."<sup>193</sup> Justice Brennan took the Court to task for not examining whether consumers were actually being deceived by attorney ads that did not include rate information. He also believed the Court should have determined whether forcing lawyers to list fees in those ads could actually make them misleading, because global estimates could never take into account the unique legal circumstances of individual clients.<sup>194</sup> Finally, Justice Brennan pointed out that requiring lawyers to include detailed fee information in their advertisements was clearly unreasonable because it would "fill far more space than the advertisement itself, would chill the publication of protected commercial speech and would be entirely out of proportion to the State's legitimate interest in preventing potential deception."<sup>195</sup>

Although *Zauderer* did not hold that commercial disclosure requirements are outside the scope of First Amendment protection, the Court did evince an easy-going attitude with respect to their review. The opinion contains dicta that seem to derogate the First Amendment position of compelled commercial speech. For example, the Court stated that "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech."<sup>196</sup> The Court stated that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed . . . ."<sup>197</sup> In fact, one commentator has asserted that *Zauderer* supports subjecting commercial disclosure requirements to no more than substantive due process review, an inquiry that would not involve the First Amendment.<sup>198</sup> However, a closer look shows that the *Zauderer* Court was indeed employing a close cousin of the *Central Hudson* test, albeit not in as strict or precise a manner as Justice Brennan. According to the Court, consumer protection qualified as a substantial state interest,<sup>199</sup> the possibility of deception was "self-evident,"<sup>200</sup> and the remedy was no more extensive than necessary because it was not unduly burdensome.<sup>201</sup>

That compelled commercial speech is subject to more than substantive due process review also was apparent in *Ibanez v. Florida Department of Business*

192. *Id.* at 660-64.

193. *Id.* at 653 n.15.

194. *Id.* at 660-61, 661 n.5 (Brennan, J., concurring in part and dissenting in part).

195. *Id.* at 663-64.

196. *Id.* at 651.

197. *Id.* at 651 n.14.

198. See Sweetland, *supra* note 21, at 504.

199. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

200. *Id.* at 652.

201. *Id.* at 653 n.15.

*and Professional Regulation*.<sup>202</sup> In that case, Florida law prohibited accountants from listing any private certifications (such as “Certified Financial Planner”) in advertising or on promotional materials such as business cards unless accompanied by an exhaustive disclaimer.<sup>203</sup> Using the language of *Central Hudson*, the Court reserved the question of whether such a disclaimer could ever be “an appropriately tailored check against deception or confusion.”<sup>204</sup> In the instant case, the Court ruled that the disclaimer was not narrowly tailored because it required too much detail to be included on stationery, business cards, or in phone book listings.<sup>205</sup> The Court faulted the State for providing no evidence that either a disclaimer or a restriction on speech was needed to prevent any actual, as opposed to “purely hypothetical,” commercial harm.<sup>206</sup> “If the ‘protections afforded commercial speech are to retain their force,’”<sup>207</sup> the Court said, “we cannot allow rote invocation of the words ‘potentially misleading’ to supplant the Board’s burden to ‘demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’”<sup>208</sup> As in *Zauderer*, the Court acknowledged that commercial disclosure requirements could be justified only as a means to ensure commercial fair dealing.

In sum, although the state cannot require its citizens to engage in political, religious, or ideological speech (either directly or indirectly through payment of money) without satisfying the strict scrutiny test, commercial disclosure requirements have been subjected to less stringent First Amendment analysis. According to the Court in *Riley*, laws that restrict and compel speech are constitutional equivalents only when the speech at issue is fully protected by the First Amendment. More recently, the Court in *Discovery Network* and *Liquormart* has begun to recognize that consumer protection provides the underlying rationale for commercial speech regulation. The Court has also recognized that truthful, nonmisleading commercial speech deserves full First Amendment protection.<sup>209</sup> Disclosure requirements, therefore, should be subject to the “less than strict”<sup>210</sup> standard of *Central Hudson* only when they advance the state’s interest in preventing commercial harms. Prior to the Court’s decision in *Glickman v. Wileman Bros. & Elliott, Inc.*,<sup>211</sup> that was the result—if not

202. 512 U.S. 136 (1994).

203. *Id.* at 146.

204. *Id.*

205. *Id.* at 146-47.

206. *Id.* at 146.

207. *Id.* (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49 (1985)).

208. *Id.* (citing *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

209. See *supra* Part I.C of this Article.

210. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, Kennedy, & Ginsburg, JJ., plurality opinion). See *supra* notes 120-22 and accompanying text.

211. 117 S. Ct. 2130 (1997).

always the rhetoric—of the Court's compelled commercial speech cases. The Court has both said in dicta (*Virginia Pharmacy, Bates*) and held in its decisions (*Zauderer, Ibanez*) that sellers of products or services could be required to provide additional information about those commodities only to prevent deceptive sales practices. As will be seen in the next part of this Article, the Court radically changed this approach to compelled commercial speech in *Glickman*. In that case, the Court found that a state-mandated advertising program did not even implicate the First Amendment. This holding breathed new life into an economic view of commercial speech not seen since *Chrestensen's* demise.

#### IV. A SUBTLER ANALYSIS: *GLICKMAN* AND THE ASCENDANCY OF CONTEXT

Since at least the early 1980s, Justice Stevens has indicated his dissatisfaction with an approach to the First Amendment that is exclusively categorical<sup>212</sup> where differing levels of constitutional protection are allocated to various types of speech based on their content.<sup>213</sup> In the hate-speech case, *R.A.V. v. St. Paul*,<sup>214</sup> Justice Stevens outlined in his concurrence what he called "a more complex and subtle" First Amendment analysis; one that emphasized context-specific factors as opposed to hard-to-define categories.<sup>215</sup> With respect to the constitutionality of the ordinance in that case, Justice Stevens identified the content and character of the speech at issue, the context of the regulated speech, and the nature and scope of the restriction as the determinative considerations.<sup>216</sup> According to Justice Stevens, "it is wiser to argue and decide one case at a time . . . than it is to attempt to craft absolute propositions of law to answer a host of questions that have not yet been tested in adversary litigation."<sup>217</sup>

212. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 81 (1983) (Stevens, J., concurring) (warning against "unnecessary insistence on rigid classifications" with respect to commercial speech); *New York v. Ferber*, 458 U.S. 747, 778 (1982) (Stevens, J., concurring in judgment) (stating that both content and context of a specific communication must be considered in determining whether that communication receives constitutional protection).

213. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (stating that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has [sic] never been thought to raise any constitutional problem"). For a discussion of the history of the categorical approach to free expression, see O. Lee Reed, *Is Commercial Speech Really Less Valuable Than Political Speech? On Replacing Values and Categories in First Amendment Jurisprudence*, 34 AM. BUS. L. J. 1, 9-14 (1996).

214. 505 U.S. 377 (1992).

215. *Id.* at 428 (Stevens, J., concurring).

216. *Id.* at 429-31.

217. John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1311

Justice Stevens garnered four other votes for his contextual theory of the First Amendment in *Glickman v. Wileman Bros. & Elliott, Inc.*,<sup>218</sup> a case involving compelled commercial speech. In *Glickman*, Justice Stevens' opinion for the Court relied on a host of contextual factors to conclude that a state-mandated compulsory advertising scheme constituted nothing more than economic regulation that fell outside the First Amendment altogether.<sup>219</sup> The following section of this Article reviews the Court's treatment of compelled commercial speech in *Glickman*, taking issue with both its reasoning and result.

### *A. The Glickman Decision: Compelled Commercial Speech as Economic Regulation*

In *Glickman*, sixteen California fruit growers, handlers, and processors refused to pay for a generic advertising program mandated by the Federal Government, and challenged the underlying marketing orders as violative of their First Amendment rights.<sup>220</sup> The advertising campaign, which was approved and implemented pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA),<sup>221</sup> was designed to increase consumer demand for California peaches, plums, and nectarines.<sup>222</sup> The plaintiffs objected to the ads, claiming certain of them fostered the belief that all brands of California tree fruits were identical in quality, while others promoted fruit varieties grown only by the plaintiffs' competitors.<sup>223</sup> Although the marketing orders were upheld in an administrative proceeding and in federal district court,<sup>224</sup> the Ninth Circuit invalidated them as compelled commercial speech in violation of the handlers' First Amendment rights.<sup>225</sup> Applying the *Central Hudson* test,<sup>226</sup> the appellate court concluded that the generic advertising program neither directly advanced the state interest in promoting fruit sales, nor was narrowly tailored.<sup>227</sup>

In an opinion written by Justice Stevens, the Supreme Court overturned the Ninth Circuit's decision by a vote of five to four, and reached the startling conclusion that the plaintiffs' claim did not even present a First Amendment issue.<sup>228</sup> Prescient readers could glean the Court's conclusion from the second

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(1993).

218. 117 S. Ct. 2130 (1997).

219. *Id.* at 2138-42.

220. *Id.* at 2134.

221. 7 U.S.C. §§ 601-659 (1994).

222. *Glickman*, 117 S. Ct. at 2134-35.

223. *Id.* at 2137 & nn.10-11.

224. *Id.* at 2135.

225. *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367, 1380 (9th Cir. 1995), *rev'd sub nom. Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130 (1997).

226. *See supra* notes 60-64 and accompanying text.

227. *Wileman Bros.*, 58 F.3d at 1380.

228. *Id.* at 2141.

paragraph of the opinion, where Justice Stevens characterized the marketing orders as "a species of economic regulation"—a phrase redolent of *Chrestensen*<sup>229</sup> and Justice Rehnquist's dissenting opinion in *Virginia Pharmacy*.<sup>230</sup> Indeed, the Court took a *Chrestensen*-like approach to the case, upholding the marketing orders pursuant to the rational basis test, reasoning that they were entitled to "the same strong presumption of validity that we accord to other policy judgments made by Congress."<sup>231</sup>

Justice Stevens pointed to the marketing orders' statutory context to justify this conclusion.<sup>232</sup> Significantly, the California tree fruit business was highly regulated and collectivized in many ways pursuant to the AMAA other than with respect to promotion and marketing.<sup>233</sup> In accordance with the statute, the marketing orders had been approved by either two-thirds of the affected producers or by producers who sold at least two-thirds of the volume of the regulated fruits. This prompted the Court to view the advertising assessments as just another instance of legitimate majority rule.<sup>234</sup>

Justice Stevens listed three additional contextual features of the generic advertising program that he believed distinguished it from the Court's commercial and compelled speech precedents. First, he noted that the marketing orders did not prevent the fruit handlers from promulgating their own, individual advertisements,<sup>235</sup> a factor he said differentiated the case from *Central Hudson*, *Virginia Pharmacy*, and *Liquormart*.<sup>236</sup> Second, he stated that although the marketing orders required the plaintiffs to finance the advertising program, they did not "compel any person to engage in any actual or symbolic speech."<sup>237</sup> Justice Stevens said this distinguished the case from compelled speech decisions such as *Barnette* and *Wooley*.<sup>238</sup> Finally, Justice Stevens noted the orders did not force the fruit handlers to support, financially or otherwise, any political or ideological beliefs they found distasteful,<sup>239</sup> as opposed to the fact situations presented in cases such as *Abood* and *Keller*.<sup>240</sup> Dismissing the plaintiffs'

229. See *supra* notes 25-27 and accompanying text.

230. See *supra* notes 43-45 and accompanying text.

231. *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130, 2142 (1997).

232. *Id.* at 2138.

233. *Id.*

234. *Id.* at 2138.

235. *Id.*

236. *Id.* at 2138 n.12. For a discussion of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), see *supra* Part II of this Article.

237. *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130, 2138 (1997).

238. *Id.* at 2138 n.13. For a discussion of *Barnette* and *Wooley*, see *supra* notes 146-51 and accompanying text.

239. *Glickman*, 117 S. Ct. at 2138.

240. *Id.* at 2138 n.14. For a discussion of *Abood* and *Keller*, see *supra* notes 156-

objections to the mandated advertisements as “trivial,” the Court concluded that the fruit producers did in fact all agree with the advertising program’s messages.<sup>241</sup> In any event, the Court said, the producers had no reason to object because the ads were attributed to the industry as a whole, rather than to individual growers.<sup>242</sup>

To bolster its conclusion that the marketing orders did not create a First Amendment issue, the Court relied on the *Abood* line of cases<sup>243</sup> for the proposition that “assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group.”<sup>244</sup> According to the Court, *Abood* held that individuals may not be forced to contribute financially to an organization “whose expressive activities conflict with one’s ‘freedom of belief,’”<sup>245</sup> but only if those activities are not “germane” to a legitimate governmental purpose.<sup>246</sup> Justice Stevens reasoned that the *Glickman* plaintiffs failed both parts of this two-pronged test. First, the required assessments did not “engender any crisis of conscience” because they were used to finance commercial, rather than ideological, messages.<sup>247</sup> Second, the Court found the generic advertising program “unquestionably germane” to the regulatory purpose of the marketing orders—increasing market demand for California tree fruits.<sup>248</sup> The Court relied on rational basis review to uphold the compulsory advertising program, and chastised the Ninth Circuit for failing to show “[a]ppropriate respect for the power of Congress to regulate commerce among the States.”<sup>249</sup>

In his dissenting opinion, Justice Souter (joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, in part) disputed both the Court’s conclusion that coerced payment for commercial speech does not implicate the First Amendment, and the legitimacy of the contextual factors relied on by the Court to support that result.<sup>250</sup> First, the dissenters accused the Court of misinterpreting the *Abood* “germaneness” test as an either/or test: the government can force

62 and accompanying text.

241. *Glickman*, 117 S. Ct. at 2139.

242. *Id.*

243. *Id.* at 2139-40. Along with *Abood* and *Keller*, the Court also cited *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 519 (1991), where the Court held that in an agency-shop situation, non-union employees may be compelled to fund union activities that (1) are “germane” to collective-bargaining; (2) are justified by the government’s policy interest in labor peace and preventing “free riders;” and (3) do not significantly burden speech. *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130, 2140 (1997).

244. *Id.* at 2140.

245. *Id.* at 2139 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977)).

246. *Id.* at 2140 (citing *Keller v. State Bar*, 496 U.S. 1, 13 (1990)).

247. *Id.* at 2139.

248. *Id.* at 2140.

249. *Id.* at 2141.

250. *Id.* at 2142 (Souter, J., dissenting).

payment for speech as long as the speech is either related to valid economic regulation or is non-ideological in character.<sup>251</sup> Justice Souter said this interpretation cut too broadly and ignored significant speech interests.<sup>252</sup> Pursuant even to *Abood*'s germaneness formulation, compelled funding of expressive activities "must also be justified by vital policy interests of the government and not add significantly to the burdening of free speech inherent in achieving those interests."<sup>253</sup>

Second, the dissenters objected to the Court's inference that because the government neither forbade the plaintiffs from purchasing their own ads nor attributed any of the collective ads to an individual plaintiff, the government was free to compel payment for non-ideological speech.<sup>254</sup> While *Abood* and *Keller* involved political expression, those cases did not hold that the government can freely compel other types of speech, which Justice Souter noted would include art and entertainment as well as commercial messages.<sup>255</sup> The dissenters believed that regardless of the factual circumstances, being forced to pay for either political or commercial speech implicates the First Amendment just as surely as being forbidden to pay for such expression.<sup>256</sup>

Finally, Justice Souter opposed the Court's assumption that the plaintiffs did not really disagree with the content of the generic advertisements, calling it both "doubtful" and "beside the point even if true."<sup>257</sup> Citing the Court's compelled-speech precedents, Justice Souter rightly pointed out that objectors to forced speech had never been required to prove actual disagreement with the message to invoke the First Amendment.<sup>258</sup>

Unlike the Court's contextual analysis, Justice Souter began from the proposition that commercial speech is protected by the First Amendment, both for speakers as well as listeners.<sup>259</sup> As a result, laws that compel commercial speech are just as suspect as ones that restrict it, and are subject to the same level of constitutional scrutiny.<sup>260</sup>

Justice Souter's dissenting opinion (minus Justice Thomas as to this point) identified the *Central Hudson* test as appropriate for evaluating laws that either limit or compel commercial speech.<sup>261</sup> In applying the test to *Glickman*'s marketing orders, Justice Souter found the orders wanting with respect to all

251. *Id.* at 2145-47.

252. *Id.* at 2147.

253. *Id.* at 2146.

254. *Id.* at 2147.

255. *Id.* at 2147, 2147 n.5 (citing *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981)).

256. *Id.* at 2147.

257. *Id.*

258. *Id.* at 2148.

259. *Id.* at 2143.

260. *Id.* at 2144.

261. *Id.* at 2149.

three prongs.<sup>262</sup> First, Justice Souter disputed that the marketing orders served the government's otherwise valid interest in stabilizing markets and preserving prices because the AMAA authorized compelled advertising programs with respect to some commodities in certain states and not others.<sup>263</sup> To these dissenters, this random implementation of compelled advertising programs pursuant to the statute denied the substantiality of the government's asserted interest.<sup>264</sup> According to Justice Souter, "arbitrariness or underinclusiveness of the scheme chosen by the government may well suggest that the asserted interests either are not pressing or are not the real objects animating the restriction on speech."<sup>265</sup>

Second, Justice Souter faulted the Secretary of Agriculture for failing to show any evidence that the compelled advertising program actually achieved the government's interests any more than would a system of voluntary advertising.<sup>266</sup> Justice Souter concluded that the mandatory advertising scheme imposed by the marketing orders was not narrowly tailored.<sup>267</sup> He cited a credit system, where handlers' assessments were reduced according to any amount expended for "branded" advertising, as an alternative that would achieve the same statutory purposes without infringing so deeply on the plaintiffs' speech interests.<sup>268</sup>

Although agreeing with the other dissenters' First Amendment analysis, Justice Thomas filed a separate opinion objecting to Justice Souter's reliance on the *Central Hudson* test to invalidate the generic advertising scheme.<sup>269</sup> True to his position in *Liquormart*, Justice Thomas emphasized his disapproval of both the *Central Hudson* test and the "discounted weight given to commercial speech generally."<sup>270</sup> Accordingly, to uphold the compelled advertising program in *Glickman*, Justice Thomas would have required it to pass strict scrutiny review.

Based on the Court's expanding notions of protected commercial speech, and the Justices' recognition, either directly or indirectly, in *Liquormart* that prevention of commercial harms provides the true basis for commercial speech regulation,<sup>271</sup> Justice Thomas took the more reasoned approach. The marketing orders in *Glickman* were not designed to prevent marketplace overreaching or consumer confusion; rather, they furthered the regulatory purpose of stabilizing commodity markets.<sup>272</sup> Therefore, the generic advertising campaign should have been invalidated not because it failed to meet the *Central Hudson* test, but

262. *Id.*

263. *Id.* at 2150-51.

264. *Id.* at 2150-52.

265. *Id.* at 2150.

266. *Id.* at 2154.

267. *Id.*

268. *Id.* at 2155.

269. *Id.* (Thomas, J., dissenting).

270. *Id.*

271. See *supra* notes 137-43 and accompanying text.

272. *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130, 2140 (1997).



because it did not advance the only goal that justifies less-than-full First Amendment protection for commercial speech: consumer protection.

*B. More Flies in Glickman's Ointment: Should Free Speech Require a "Crisis of Conscience?"*

As the dissenting opinions show, *Glickman* constitutes a serious departure from traditional commercial speech and compelled speech analysis. The majority's contextual approach resulted in a house-of-cards opinion based on a faulty premise: that compelled commercial speech does not raise a First Amendment issue because its speakers do not suffer a "crisis of conscience."<sup>273</sup> This premise overlooks three settled First Amendment principles: first, that compelled speech is just as constitutionally suspect as restricted speech; second, that paying for speech is constitutionally equivalent to speaking; and third, that commercial speech falls within the scope of the First Amendment. It is obvious that the Court ignored these principles after examining the contextual factors the Court used to defend its decision.

First, the Court's argument that the marketing orders did not prevent the fruit producers from purchasing their own advertisements states the obvious: the statute compelled speech rather than prohibited it. If this point is to be given any significance, it can only mean the Court believes that whereas restricted commercial speech would be entitled to First Amendment protection, coerced commercial speech is not. Logically, however, speech that falls within the First Amendment should retain that protection in either context. As Justice Thomas noted, "it is incongruous to suggest that forcing fruit-growers to contribute to a collective advertising campaign does not even involve speech, while at the same time effectively conceding that forbidding a fruit-grower from making those same contributions voluntarily would violate the First Amendment."<sup>274</sup>

Furthermore, the Court's "now you have it, now you don't" approach to First Amendment coverage of commercial speech leaves all speech rights, commercial or political, vulnerable to infringement. For example, based on the Court's reasoning, New Hampshire's requirement in *Wooley v. Maynard*<sup>275</sup> that citizens' license plates display the state motto could easily have been upheld, as long as Mr. Maynard was not forbidden from exhibiting his own bumper sticker reading "New Hampshire's Motto is Idolatrous."<sup>276</sup> For many reasons, however, speakers may prefer not to trumpet their own views. Regardless, the First

273. *Id.* at 2139.

274. *Id.* at 2156 (Thomas, J., dissenting).

275. 430 U.S. 705 (1977). For a discussion of *Wooley*, see *supra* notes 149-51 and accompanying text.

276. As a member of the Jehovah's Witnesses, the plaintiff in that case objected to the state motto "Live Free or Die" on both religious and political grounds. *Wooley*, 430 U.S. at 707-08, 708 n.2.

Amendment means little if it takes away with one hand what it gives with the other. The right to speak cannot negate either the right to be silent or to be free from coerced expression.

Second, the "fact" that the marketing orders did not compel "any actual or symbolic speech" is in reality a legal conclusion that, again, can only be based on the commercial nature of the speech.<sup>277</sup> Cases such as *Buckley v. Valeo*<sup>278</sup> and *First National Bank of Boston v. Bellotti*<sup>279</sup> have established that in the political context, limiting advertising expenditures limits speech. Both logic and Supreme Court precedent indicate that the same result holds true in the commercial context. The electric utility in *Central Hudson*<sup>280</sup> could not engage in "actual" speech to promote the use of electricity; rather it paid money to purchase promotional advertising. Nevertheless, the Court in that case held the utility's expenditures for advertising constituted commercial speech protected by the First Amendment.<sup>281</sup> Therefore, the idea that paying for commercial advertising somehow fails to qualify as speech is insupportable and cannot be used to justify ignoring the Court's compelled speech precedents.

In a related vein, the Court also denied the applicability of its prior forced speech decisions, because, it said, the marketing orders did not compel political or ideological speech.<sup>282</sup> According to the Court, only compelled speech that interferes with an individual's "freedom of belief" violates the First Amendment.<sup>283</sup> Again, this reasoning throws into doubt the whole notion of First Amendment protection for commercial speech. Laws restricting commercial speech arguably do not result in ideological traumas, yet they are still viewed as affecting the advertiser's freedom of expression. Furthermore, the suggestion that speakers must truly disagree with a message to be free from compelled speech raises serious implications with respect to both commercial and political speech. What proof would suffice to show that a plaintiff actually disagreed with a message, if instituting a time-consuming and expensive legal challenge and pursuing it to the U.S. Supreme Court is not enough? Taken to its logical extension, this reasoning would allow the Court in *Wooley* to inquire into Mr. Maynard's religious practices to determine whether he qualified as a "real"

277. *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S.Ct. 2130, 2138 (1997).

278. 424 U.S. 1, 39 (1976) (stating that expenditure limits in federal campaign financing law created "direct and substantial restraints on the quantity of political speech").

279. 435 U.S. 765, 776 (1978) (describing corporate expenditures for advertising regarding referendum as "at the heart of the First Amendment's protection").

280. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). For a discussion of *Central Hudson*, see *supra* notes 56-66 and accompanying text.

281. *Central Hudson*, 447 U.S. at 570.

282. *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S.Ct. 2130, 2138 (1997).

283. *Id.* at 2139 (quoting *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 235 (1977)).

Jehovah's Witness,<sup>284</sup> before acknowledging his right to contest the compelled ideological speech. Conditioning constitutional rights on genuine opposition to the speech in question sets a precedent, which, in the past, the Court recognized as dangerous and refused to do.<sup>285</sup>

The democratic character of the marketing orders, which pursuant to the AMAA had been approved by either two-thirds of the individual handlers or by producers who sold at least two-thirds of the fruit by volume,<sup>286</sup> may have influenced the Court's thinking on this point. Perhaps the majority could not believe the fruit producers were being forced to pay for speech they found offensive, considering that the advertising campaign was approved by a vote of those affected. However, because the marketing orders theoretically could have been approved by one or two dominant producers who accounted for the requisite volume of production, the regulation may not have been as participatory as it appeared.<sup>287</sup> As Justice Souter noted in his dissent,<sup>288</sup> First Amendment rights cannot be subject to majority rule.<sup>289</sup>

All three of these contextual factors, therefore, boil down to only one: this case involved compelled *commercial* speech. According to the Court, compelled ideological speech and restricted commercial expression constitute "speech" in the constitutional sense. However, compelled commercial speech does not. The only reason given by the Court for this distinction is that commercial speech is not ideological. A more circular and unsatisfactory answer is hard to imagine.

The real, yet still troubling, explanation for the Court's decision may be found in its emphasis on the collectivization of California's fruit industry in general and the regulatory nature of the marketing orders in particular.<sup>290</sup> The

284. See *supra* note 275.

285. See, e.g., *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 635 (1943) (stating that the right not to be forced to salute the flag does not depend "on one's possession of particular religious views or the sincerity with which they are held").

286. 7 U.S.C. § 608c(9)(B)(i) (1994).

287. See, e.g., *Cal-Almond, Inc., v. United States Dep't of Agric.*, 14 F.3d 429, 438, 438 n.9 (9th Cir. 1993), *cert. denied*, 117 S. Ct. 72 (1996) (recognizing that where under similar marketing orders, one almond producer dominated the retail market with a 92 % market share of almonds sold in grocery stores).

288. *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130, 2152 n.11 (1997) (Souter, J., dissenting) (stating that "the mere vote of a majority is never enough to compel dissenters to pay for private or quasi-private speech whose message they do not wish to foster; otherwise, the First Amendment would place no limitation on this type of majoritarian action").

289. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (explaining that the First Amendment "protects the right of individuals to hold a point of view different from the majority"); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943) (stating that the First Amendment protects the "freedom to differ" and prevents "[c]ompulsory unification of opinion").

290. *Glickman*, 117 S. Ct. at 2138 (reasoning that the plaintiffs were assessed for advertising "as part of a broader collective enterprise in which their freedom to act

Court clearly equated the constitutionality of the generic advertising program with the validity of the entire statutory scheme, stating its fear that “[s]imilar criticisms might be directed at other features of the regulatory orders that impose restraints on competition that arguably disadvantage particular producers for the benefit of the entire market.”<sup>291</sup> Rather than separate those aspects of the statute that affected speech interests (such as the marketing orders) from those that regulated commercial activities, the Court treated both the former and the latter as economic regulation.

Significantly, Justice Stevens advocated treating compelled commercial speech as outside the First Amendment in a case decided eleven years before *Glickman*. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,<sup>292</sup> the Court held a private utility company could not be compelled to include messages from dissenting ratepayers in its billing envelopes, even though the “extra space” in the envelopes belonged collectively to all the ratepayers.<sup>293</sup> A plurality of the Court<sup>294</sup> invalidated the utility commission’s order granting compelled access on First Amendment grounds, stating that “the choice to speak includes within it the choice of what not to say.”<sup>295</sup> While the plurality analyzed the case as presenting an issue of political speech,<sup>296</sup> Justice Stevens in his dissent saw only a question of economic regulation. Analogizing to commission rules establishing utility-bill format, Justice Stevens argued that the order granting consumer access to those bills was just another example of the commission’s regulatory authority.<sup>297</sup> Justice Stevens concluded that as such, the order was entitled to a presumption of constitutionality.<sup>298</sup> “In my view,” he said, “this requirement differs little from regulations applied daily to a variety of commercial communications that have rarely been challenged—and to my knowledge never invalidated—on First Amendment grounds.”<sup>299</sup>

Both *Pacific Gas & Electric* and *Glickman* involved compelled speech as part of an otherwise valid, statutory scheme designed to regulate an underlying business. Like collectivized fruit growers, electric utilities are highly regulated and have exchanged much of their independence in return for a monopoly. The manufacture and sale of alcoholic beverages is also a heavily regulated industry.

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independently is already constrained by the regulatory scheme”).

291. *Id.* at 2140.

292. 475 U.S. 1 (1986).

293. *Id.* at 20.

294. Justice Blackmun did not participate in the case. *Id.* at 21.

295. *Id.* at 16.

296. The utility had used the billing envelope to distribute its own newsletter, which contained political editorials as well as billing information. *Id.* at 5. The Court described the newsletters’ contents as extending “well beyond speech that proposes a business transaction.” *Id.* at 9.

297. *Id.* at 36-39 (Stevens, J., dissenting).

298. *Id.* at 37.

299. *Id.* at 36.

However, the Court in *Rubin v. Coors Brewing Co.*<sup>300</sup> did not treat the federal labeling restriction at issue as economic regulation, but rather, as a limitation on protected speech.<sup>301</sup>

The notion that expression can be controlled without constitutional inquiry whenever the regulation is part of a valid economic program simply denies the special nature of speech that is guaranteed in our society by the First Amendment.<sup>302</sup> This view resurrects *Chrestensen*'s economic approach with respect to commercial speech that was supposedly left for dead more than twenty years ago.<sup>303</sup> Perhaps even more ominously, Justice Stevens' dissent in *Pacific Gas & Electric* illustrates how a contextual approach can strip constitutional protection from political as well as commercial speech by characterizing government attempts to compel expression as mere economic regulation.

To summarize, the Court in *Glickman* held that fruit producers had no First Amendment grounds to challenge federal marketing orders compelling them to finance a generic advertising campaign. The Court relied on several contextual factors in describing the marketing orders as valid, economic regulation entitled to no more than rational basis review.<sup>304</sup> Upon analysis, these factors do not justify its conclusion or the resulting distortion of First Amendment principles. Most disturbing is the Court's implication that commercial speech regulations fall outside of First Amendment prohibition whenever they are part of an overarching statutory framework to control underlying economic activities.<sup>305</sup> By failing to separate constitutionally protected speech interests from regulable business operations, the Court's analysis poses a potential danger to political as well as commercial expression. This Article argues, in accord with Justice Thomas' position,<sup>306</sup> that the marketing orders should have been granted full First Amendment review (as opposed to the less-than-strict *Central Hudson* scrutiny advocated by the other dissenters)<sup>307</sup> because the advertising campaign was not designed to prevent commercial harms. One question remains: should fraudulent or misleading commercial speech remain totally unprotected by the First Amendment?<sup>308</sup> If so, laws that regulate such speech need not be subject

300. 514 U.S. 476 (1995).

301. For a discussion of this case, see *supra* notes 105-13 and accompanying text.

302. See *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130, 2156 n.3 (1997) (Thomas, J., dissenting) (stating that while the "Government has a considerable range of authority in regulating the Nation's economic structure, part of the Constitution—the First Amendment—does enact a distinctly individualistic notion of 'the freedom of speech' and Congress may not simply collectivize that aspect of our society, regardless of what it may do elsewhere").

303. See *supra* notes 25-27 and accompanying text.

304. *Glickman*, 117 S. Ct. at 2132.

305. *Id.* at 2138.

306. *Id.* at 2155 (Thomas, J., dissenting).

307. *Id.* at 2149 (Souter, J., dissenting).

308. According to the Court in *Central Hudson*, inaccurate or misleading

to any First Amendment review. Part V of this Article takes the position that laws restricting or compelling commercial speech in the name of consumer protection should be entitled to an intermediate level of First Amendment scrutiny.

## V. TAKING THE NEXT STEP: ANOTHER CHANCE FOR *CENTRAL HUDSON*

The most recent development in the commercial speech saga involves the Court's return to the *Virginia Pharmacy* point of view that truthful, nondeceptive commercial speech about legal products or services is entitled to full First Amendment protection.<sup>309</sup> Some of the Justices (including Justice Stevens) have been willing to announce this principle outright.<sup>310</sup> Others, however, would achieve this same end based on a newly tightened interpretation of the *Central Hudson* test.<sup>311</sup> Regardless of the approach, regulations that restrict accurate, nonmisleading commercial speech will be subject to what, in essence, constitutes strict scrutiny review.

The important question, becomes why truthful, nonmisleading commercial speech regarding lawful commodities is entitled to full First Amendment protection when inaccurate, misleading commercial speech has not been so embraced by the Court.<sup>312</sup> The answer is that accurate, nondeceptive commercial

commercial speech falls outside the scope of First Amendment coverage. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564-65 (1980).

309. See *supra* notes 137-39 and accompanying text.

310. See 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1507 (1996) (Stevens, Kennedy & Ginsburg, JJ., plurality opinion); *id.* at 1516 (Thomas, J., concurring in part and concurring in judgment). For a discussion of *Liquormart*, see *supra* notes 114-36 and accompanying text.

311. *Id.* at 1521-22 (O'Connor, Breyer & Souter, JJ. & Rehnquist, C.J., concurring in judgment). See *supra* notes 133-36 and accompanying text.

312. Some commentators have argued that all commercial speech, misleading or not, should receive full First Amendment protection. See, e.g., Kozinski & Banner *Who's Afraid*, *supra* note 42, at 628 (stating that the "commercial/noncommercial distinction makes no sense"); Redish, *supra* note 10, at 583 (concluding that no basis exists to distinguish commercial from noncommercial speech for constitutional purposes). But see R. George Wright, *Freedom and Culture: Why We Should Not Buy Commercial Speech*, 72 DENV. U. L. REV. 137, 137 (1994) (arguing that constitutional protection of commercial speech should be excluded entirely from First Amendment protection "to promote freedom and well-being in the long term").

However, none of the Justices have suggested enlarging constitutional protection for commercial speech quite so far. Even Justice Thomas in his *Liquormart* concurrence stated only that the *Central Hudson* test should not be applied where "the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace." *Liquormart*, 517 U.S. at 518 (Thomas, J., concurring in part and concurring in judgment). He reserved the question of whether a

speech does not pose a danger to consumers. More precisely, it cannot defraud, deceive, or otherwise expose them to marketplace harms.

Based on this reasoning, the "preservation of a fair bargaining process"<sup>313</sup> must be acknowledged as the sole valid justification for government regulation of commercial speech.<sup>314</sup> The Court's words in *Virginia Pharmacy* bear repeating: "The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."<sup>315</sup> This section of the Article argues, however, that even government attempts to restrict or compel commercial speech in the name of consumer protection infringe on free expression and therefore should be subject to First Amendment review. To determine the constitutionality of regulations that compel speech for the purpose of preventing commercial harms, this Article concludes that a modified *Central Hudson* test is the proper approach.

### *A. The More Principled Approach: Restrict or Compel Commercial Speech Only to Prevent Commercial Harms*

Once protecting consumers from fraud in the marketplace is identified as the foundation for commercial speech regulation, it then becomes clear that laws which attempt to limit commercial speech for some other purpose—for example, to beautify city streets by removing commercial newsracks<sup>316</sup> or to discourage consumers from using electricity when the state wants to conserve energy<sup>317</sup>—can be valid only if they withstand full First Amendment scrutiny. Furthermore, the risk that any state interest can be phrased in terms of consumer protection is reduced by automatically granting truthful commercial information full First Amendment protection. For example, a law forbidding brewers from listing alcohol content on their beer labels<sup>318</sup> could not be justified as a way to protect consumers from the folly of choosing beer based on its alcoholic strength. The fact that the statute prohibited the dissemination of accurate, nonmisleading commercial information would show that the state had attempted to protect consumers in an unacceptably paternalistic way. The Court in *Rubin*

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*Central Hudson*-type balancing test might be appropriate "when the asserted state interest is of a different kind." *Id.* at 523 n.5.

313. *Id.* at 501 (Stevens, Kennedy, & Ginsburg, JJ., plurality opinion).

314. See *supra* notes 140-43 and accompanying text.

315. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976).

316. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), discussed *supra* notes 90-102 and accompanying text.

317. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), discussed *supra* notes 55-70 and accompanying text.

318. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), discussed *supra* notes 101-10 and accompanying text.

*v. Coors Brewing Co.*,<sup>319</sup> also invalidated such a labeling restriction on much less satisfying grounds, and only after approving the same manipulative state interest pursuant to the *Central Hudson* test.<sup>320</sup>

Surprisingly, given his treatment of compelled commercial speech in *Glickman*, Justice Stevens in his *Rubin* concurrence recognized consumer protection as providing the only acceptable rationale for the State to regulate commercial speech.<sup>321</sup> Justice Stevens said the beer labeling law in that case was entitled to full First Amendment scrutiny because it “neither prevents misleading speech nor protects consumers from the dangers of incomplete information.”<sup>322</sup> Justice Stevens emphasized that “any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech’s potential to mislead.”<sup>323</sup> Contrary to his position in *Glickman*, Justice Stevens indicated that this analysis should be used to evaluate government attempts to compel and restrict commercial speech. Justice Stevens contended that a law requiring brewers to disclose alcohol content on their beer labels would be subject to less-than-strict First Amendment scrutiny because such a law “could be justified as a means to ensure that consumers are not led, by incomplete or inaccurate information, to purchase products they would not purchase if they knew the truth about them.”<sup>324</sup> Similarly, it follows that a law requiring brewers to list net profits on their labels would be subject to strict scrutiny review because such a law would not protect consumers from marketplace harms any more than did *Glickman*’s compelled advertising program. Justice Stevens and the Court ducked this analysis in *Glickman* by reaching the insupportable conclusion that the generic advertising campaign did not rise to the level of speech at all.<sup>325</sup>

Justice Stevens’ reasoning in *Rubin* discredits not only the result in *Glickman*, but also his own analogy in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*.<sup>326</sup> In that case, Justice Stevens’ dissent analogized a utility commission’s order forcing a utility to include missives from disgruntled ratepayers in its billing envelopes to commission rules prescribing “required warnings and the type size of various provisos and disclaimers.”<sup>327</sup>

319. 514 U.S. 476 (1995).

320. See *supra* notes 104-13 and accompanying text.

321. *Rubin*, 514 U.S. at 493 (Stevens, J., concurring in judgment).

322. *Id.* at 492.

323. *Id.* at 494.

324. *Id.* at 493.

325. See *supra* notes 221-52 and accompanying text.

326. 475 U.S. 1 (1986).

327. *Id.* at 37-38 (Stevens, J., dissenting). Justice Stevens also compared the utility commission’s order to the Securities and Exchange Commission requirement that incumbent boards of directors include dissident shareholder proposals with their proxy materials. *Id.* at 39. As the plurality opinion noted, however, this SEC requirement is



According to Justice Stevens, both examples constituted a valid exercise of the commission's power to regulate the commercial aspects of the utility's operations.<sup>328</sup> If the Court invalidated the former example, Justice Stevens argued, it should also disapprove of the latter.<sup>329</sup>

Even assuming, as did Justice Stevens, that the bill insert order did not involve political speech, a clear constitutional distinction exists between these two types of regulation. Rules that fix utility bill format, it can safely be assumed, advance the state interest in making sure that consumers can read their bills.<sup>330</sup> Similarly, regulations establishing various warnings and provisos on utility bills also provide consumers with necessary information to prevent commercial harms. However, while the order that the utility provide a forum for discontented ratepayers may have indirectly promoted more effective utility regulation by advancing diverse viewpoints,<sup>331</sup> it clearly was not designed to protect consumers. Therefore, whether the utility's newsletter constituted commercial or political speech—a distinction that can be hard to draw<sup>332</sup>—was irrelevant. The order in *Pacific Gas & Electric* was entitled to strict scrutiny

distinguishable as a rule of internal corporate governance. *Id.* at 14 n.10.

328. *Id.* at 36 (Stevens, J., dissenting).

329. *Id.* at 38-39.

330. For example, in certain Texas counties, portions of utility bills must be printed in both English and Spanish. See 16 TEX. ADMIN. CODE ANN § 23.6 (West 1997).

331. *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 20 (1986). The plurality noted, however, that more effectual rate-making proceedings could be achieved in ways that would not infringe on the utility's speech, and that the First Amendment does not allow the state to "advance some points of view by burdening the expression of others." *Id.*

332. The Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), recognized that commercial speech has political overtones, saying that although commercial speech furthers "the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Id.* at 765. The Court also indicated how these political overtones make commercial and political speech practically indistinguishable:

[W]e may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express, themselves on the merits of the dispute in order to influence its outcome.

Since the fate of . . . a "single factory" could as well turn on its ability to advertise its product as on the resolution of its labor difficulties, we see no satisfactory distinction between the two kinds of speech.

*Id.* at 763-63 (citations omitted).

Commentators have also noted how today's political advertising is really closer in content to product packaging. See, e.g., Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 344 (1995).

review because, unlike commercial disclosure requirements that prescribe utility bill format, it did not advance the state's interest in consumer protection.

*B. Searching for a Constitutional Test: Are Laws That Regulate Deceptive Speech Subject to First Amendment Review?*

Given that consumer protection provides the basis for treating commercial speech—whether restricted or compelled—with less than full First Amendment protection, it should not be assumed that laws affecting commercial speech in the name of consumer protection are automatically constitutional. Of course, the *Central Hudson* test literally does make that assumption. According to that test, inaccurate or misleading commercial speech falls outside the First Amendment,<sup>333</sup> creating what has been described as “a mini-species of unprotected speech.”<sup>334</sup> It has been argued that if laws regulating deceptive speech are made subject to constitutional scrutiny beyond the requirements of due process, it will mean the death knell for state and federal consumer protection regulation.<sup>335</sup> Others contend that these fears are unfounded, and that the government would retain the ability to fight fraud even if full First Amendment protection were awarded to commercial speech.<sup>336</sup>

Laws that regulate or compel commercial speech for consumer protection purposes should be reviewed pursuant to an intermediate level of First Amendment scrutiny. These regulations still infringe on speech interests and, as such, should be presumed to raise First Amendment concerns. Justices Stevens, Kennedy, and Ginsburg seemed to say as much in *Liquormart*, where they endorsed a “less than strict” *Central Hudson* analysis to determine the constitutionality of laws regulating “misleading, deceptive, or aggressive sales practices” or requiring “the disclosure of beneficial consumer information.”<sup>337</sup> An analogy can be drawn to libel law, where the First Amendment provides

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333. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564-65 (1980). Under this test, ads for illegal products or activities are also not entitled to First Amendment protection. *Id.* Although the issue is beyond the scope of this Article, see Sullivan, *supra* note 10, at 149-52, for a discussion regarding the implications of including ads for illegal transactions within the First Amendment's purview.

334. Sullivan, *supra* note 10, at 152.

335. See, e.g., Schauer, *supra* note 81, at 1194-96 (contending that almost all of our laws against product misrepresentation would be unconstitutional if full First Amendment scrutiny was awarded to commercial speech); Sullivan, *supra* note 10, at 155 (stating that applying even limited First Amendment review to regulations prohibiting potentially misleading speech would make consumer protection laws harder to defend).

336. See, e.g., Kozinski & Banner, *Who's Afraid*, *supra* note 42, at 651-52.

337. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, Kennedy, Ginsburg, JJ., plurality opinion). See Sullivan, *supra* note 10, at 146.

certain safeguards for defendants charged with publishing defamatory statements, despite the false nature of their speech.<sup>338</sup> Like misleading commercial speech, defamation is untrue, yet libel law recognizes it as expression that implicates the First Amendment. So should the commercial speech doctrine recognize that laws restricting or compelling speech in the name of consumer protection interfere with protected speech, and therefore, should be subject to some measure of First Amendment review. The intermediate scrutiny provided by a *Central Hudson*-type test would recognize both the importance of preserving a fair bargaining process and protecting speech. Similarly, libel law represents a compromise between reputational interests and freedom of expression.

The Court has in fact treated laws designed to regulate deceptive advertising with an intermediate scrutiny similar to the *Central Hudson* test, at least with respect to potentially misleading, as opposed to actually misleading, commercial speech. While the Court has held that speech need not be actually fraudulent to be regulable,<sup>339</sup> it has also said that "states may not place an absolute prohibition on certain types of potentially misleading information."<sup>340</sup> Several times, the Court has emphasized that the state cannot be allowed to run roughshod over commercial speech just by announcing that it is eliminating fraud. For example, in *Edenfield v. Fane*,<sup>341</sup> the Court invalidated a state rule forbidding certified public accountants from personally soliciting clients. Although the State argued that the rule was justified to protect consumers from deceptive or overreaching practices,<sup>342</sup> the Court looked skeptically at the government's claim. While agreeing that the State had averred a substantial interest, the Court faulted the State for failing to provide empirical evidence to support that interest.<sup>343</sup> Similarly, in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*,<sup>344</sup> the Court invalidated a state rule forbidding attorneys to list trial certifications on their letterheads.<sup>345</sup> Again, the State argued that the rule was justified by the potentially misleading nature of the speech.<sup>346</sup> Although the plurality did not say it was applying the *Central Hudson* test, it found that the

338. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that the First Amendment does not allow public officials to recover for libel without proving that the defendant acted with knowledge of falsity or reckless disregard of the truth).

339. See *Friedman v. Rogers*, 440 U.S. 1, 13 (1979) (holding that the government can regulate commercial speech that has a "significant possibility" of misleading the public).

340. *In re R.M.J.*, 455 U.S. 191, 203 (1982).

341. 507 U.S. 761 (1993).

342. *Id.* at 768.

343. *Id.* at 770-71.

344. 496 U.S. 91 (1990).

345. *Id.* at 111.

346. *Id.* at 106.

State had not met its "heavy burden" to justify the prohibition,<sup>347</sup> and suggested that the State should have considered less restrictive alternatives.<sup>348</sup> Furthermore, even when it upheld a disclosure requirement based on the need to prevent consumer deception, the Court in *Zauderer v. Office of Disciplinary Counsel*<sup>349</sup> noted such disclosures could not be unduly burdensome.<sup>350</sup> These examples show the Court giving more scrutiny to consumer protection laws than would be required under a deferential, rational basis approach.<sup>351</sup>

Lower courts, have also applied a *Central Hudson* analysis even when the restriction on commercial speech is said to protect consumers. In *Ficker v. Curran*,<sup>352</sup> the Fourth Circuit invalidated a state requirement that attorneys refrain from sending direct-mail solicitations for thirty days to persons charged with traffic or criminal offenses.<sup>353</sup> Although the court acknowledged the State's interest in "shielding recipients from undue influence or confusion,"<sup>354</sup> it held that the thirty-day ban did not materially advance that interest,<sup>355</sup> nor was it narrowly drawn,<sup>356</sup> thereby failing *Central Hudson*'s third and fourth prongs. However, if laws meant to prevent commercial overreaching need not be subject to more than rational basis review, the court's application of the *Central Hudson* test was a meaningless exercise, and its holding subject to question. To avoid this confusion, the Court should acknowledge that laws affecting commercial speech in the name of consumer protection will be reviewed pursuant to a *Central Hudson*-type approach.

### *C. Focusing on Compelled Commercial Speech: How Will the Test Work?*

A theory is only as good as its application. With respect to commercial disclosure requirements in particular, how would a *Central Hudson* framework apply? As discussed above, the only "substantial interest"<sup>357</sup> that would justify

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347. *Id.* at 109.

348. *Id.* at 110.

349. 471 U.S. 626 (1985).

350. *Id.* at 651.

351. A notable exception to this conclusion is the now-discredited *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341-42 (1986), where the Court upheld a restriction on casino advertising to protect citizens from the harmful effects of gambling on little more than rational basis review. See *supra* notes 71-80 and accompanying text.

352. 119 F.3d 1150 (4th Cir. 1997)

353. *Id.* at 1151.

354. *Id.* at 1153.

355. *Id.* at 1153-54.

356. *Id.* at 1155.

357. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

state efforts to either limit or compel commercial speech is that of protecting consumers from fraudulent or misleading<sup>358</sup> marketplace practices. Modified this way and because, by definition, it would not apply to truthful, nondeceptive speech, the remainder of the *Central Hudson* test becomes less susceptible to judicial manipulation of the type epitomized by the Court's decision in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.<sup>359</sup> Disclosure requirements add information to the marketplace and so would often appear to advance the state's interest in consumer protection. Even so, to be subject to less than full First Amendment review, the state should be required to show that the compelled commercial disclosures alleviate a real danger of deception, and that a nexus exists between the proposed disclosure requirement and that danger. Finally, disclosure requirements may often be less restrictive than speech prohibitions or restrictions: they must not be "more extensive than necessary"<sup>360</sup> to achieve the state interest in preventing marketplace overreaching.

In *Tillman v. Miller*,<sup>361</sup> a recent case involving attorney advertising, the Eleventh Circuit applied such an analysis to properly overturn an unjustified and overly burdensome disclosure requirement. In that case, a state law provided that attorneys who advertised their workers' compensation services on television must include in those advertisements a video notice.<sup>362</sup> The notice was to remain on the screen for at least five seconds, and read as follows: "Willfully making a false or misleading statement or representation to obtain or deny workers' compensation benefits is a crime carrying a penalty of imprisonment and/or a fine of up to \$10,000.00."<sup>363</sup>

Although the court said it would review the disclosure requirement pursuant to the less stringent standards announced in *Zauderer*,<sup>364</sup> the court's reasoning was in fact quite comparable to the *Central Hudson* test.<sup>365</sup> First, the court held that the State had not justified its interest in assuring that solicitations regarding workers' compensation claims contained "truthful and adequate disclosure of all material and relevant information"<sup>366</sup> because the plaintiff's ad was truthful as it stood.<sup>367</sup> Second, the court found that the State had failed to show that its requirement directly advanced that state interest, because the State had produced no evidence either (1) that lawyers' ads encouraged citizens to file false workers' compensation claims, or (2) that the video notice would reduce the number of

358. See *infra* notes 389-90 and accompanying text.

359. *Posadas de Puerto Rico*, 478 U.S. at 328. See *supra* notes 71-80 and accompanying text.

360. *Central Hudson*, 447 U.S. at 566.

361. 133 F.3d 1402 (11th Cir. 1998) (per curiam).

362. *Id.* at 1403.

363. *Id.* at 1403 n.1 (citing GA. CODE ANN. § 34-9-31 (1995)).

364. 471 U.S. 626 (1985). See *supra* notes 196-201 and accompanying text.

365. *Tillman*, 133 F.3d at 1403.

366. *Id.* at 1403 n.2 (citing GA. CODE ANN. § 34-9-30(b) (1995)).

367. *Id.* at 1403.

fraudulent claims filed.<sup>368</sup> This meant that no nexus existed between the plaintiff's advertisement and the evil addressed by the disclosure. As the court said, "[t]he message . . . is not tied to an inherent quality of the thing [the plaintiff] is trying to sell—his legal services."<sup>369</sup> Finally, the court determined that the disclosure requirement was overly burdensome because it unfairly placed the cost of informing the public about the State's criminal law on television advertisers.<sup>370</sup> The court noted that five seconds out of a thirty-second commercial was far from "trifling."<sup>371</sup> Accordingly, the disclosure requirement infringed on First Amendment rights by unjustifiably compelling commercial speech.<sup>372</sup>

Under a *Central Hudson* approach, could a state ever compel a disclosure in a commercial advertisement if that ad was not inaccurate or deceptive on its face? Inherent in the notion of "misleading" advertising is the notion that consumers should have adequate information about a product.<sup>373</sup> For example, a box of cereal would not be deceptive if it did not disclose how many grams of sugar were inside. However, as a mother, I believe that information is essential in choosing food for my family. Similarly, even though a recent study has shown that restricting one's salt intake may actually cause health problems,<sup>374</sup> I still would prefer to know that if I buy certain canned soups, I am paying for little more than salty water. While not every instance of consumer curiosity would justify a disclosure requirement, laws requiring manufacturers to reveal product information that is both relevant and material to a purchasing decision should satisfy the state interest in preventing commercial harms.

For example, in *International Dairy Foods Ass'n v. Amestoy*,<sup>375</sup> the Second Circuit invalidated a commercial disclosure law by mischaracterizing the State's interest in consumer protection as "mere consumer concern."<sup>376</sup> In that case, a Vermont law required dairy manufacturers to identify products that came from cows treated with the synthetic growth hormone recombinant Bovine Somatotropin ("rBST").<sup>377</sup> Using the *Central Hudson* standard to evaluate the

368. *Id.*

369. *Id.*

370. *Id.* at 1403-04.

371. *Id.* at 1404 n.4.

372. *Id.* at 1403.

373. To repeat Justice Stevens' explanation, disclosure requirements can "be justified as a means to ensure that consumers are not led, by incomplete or inaccurate information, to purchase products they would not purchase if they knew the truth about them." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring in judgment).

374. *Salt Restriction Could Be Harmful, New Study Finds*, HOUSTON CHRON., June 3, 1998, at F2.

375. 92 F.3d 67 (2d Cir. 1996).

376. *Id.* at 73.

377. *Id.* at 69.

law, the court concluded that the statute failed to advance a substantial state interest because tests conducted by the Food and Drug Administration showed no safety or health considerations associated with foods derived from rBST-treated cows.<sup>378</sup> Based on the government studies, the court concluded that the information regarding rBST should not be material to consumers.<sup>379</sup> According to the court, "[w]ere consumer interest alone sufficient [to compel disclosure], there is no end to the information that states could require manufacturers to disclose about their production methods."<sup>380</sup>

The Second Circuit erred, however, in *Amestoy* by applying an overly paternalistic understanding of what information is material to a reasonable consumer. In effect, the court said that because the government says rBST is safe, consumers do not need to know about it. However, as Judge Leval noted in his dissenting opinion many consumer products once believed to be safe—including tobacco—were later found to be dangerous.<sup>381</sup> As shown by the recent fen-phen debacle,<sup>382</sup> even FDA approval cannot guarantee ultimate safety of a product. In *Amestoy*, evidence produced by the State demonstrated that consumers were wary of foodstuffs produced by genetic biotechnological manipulation.<sup>383</sup> As a result, the trial court found that a majority of the State's citizens "do not want to purchase milk products derived from rBST-treated cows."<sup>384</sup>

Accordingly, the disclosure requirement clearly advanced a substantial state interest in providing accurate information about a product that reasonable consumers considered relevant to their purchasing decisions.<sup>385</sup> Although the Second Circuit was correct that the government should not be allowed to make manufacturers disclose anything consumers might want to know, the labeling law in *Amestoy* was not based on irrational concerns. Furthermore, unlike the disclosure requirement in *Tillman* discussed above,<sup>386</sup> the labeling law did not appear to be onerous or unduly burdensome.<sup>387</sup>

378. *Id.* at 73.

379. *Id.*

380. *Id.* at 74.

381. *Id.* at 77 (Leval, J., dissenting).

382. The FDA-approved diet drug fen-phen was withdrawn from the market after some users suffered heart damage. See John Schwartz, *Two Diet Drugs Are Pulled Off Market*, WASH. POST, Sept. 16, 1997, at A1.

383. *International Dairy Farmers Ass'n v. Amestoy*, 92 F.3d 67, 75-76 (2d Cir. 1996) (Leval, J., dissenting).

384. *International Dairy Farmers Ass'n v. Amestoy*, 898 F. Supp. 246, 250 (D. Vt. 1995), *rev'd*, 92 F.3d 67 (2d Cir. 1996).

385. For a thorough discussion of the rBST controversy and various state labeling provisions, see Terence J. Centner & Kyle W. Lathrop, *Labeling rBST-Derived Milk Products: State Responses to Federal Law*, 45 U. KAN. L. REV. 511 (1997).

386. See *supra* notes 364-74 and accompanying text.

387. The law required that milk obtained from rBST-treated cows be identified as

It is inevitable, however, that what constitutes "misleading" speech under this analysis will be debatable. With respect to cigarette advertisements, to give a current example, some commentators have argued that tobacco ads are inherently misleading because they ignore the substantial dangers of smoking and instead rely on inaccurate depictions of glamorous lifestyles.<sup>388</sup> Others have countered that cigarette ads cannot be considered misleading because they carry specific warning labels,<sup>389</sup> or because they convey opinion statements regarding the pleasures of smoking that are undoubtedly true for some smokers.<sup>390</sup> As foraying into the law of deceptive advertising is beyond the scope of this Article, suffice it to say that this will continue to be an area for administrative and judicial interpretation. If one thing is clear, however, it is that such interpretation must take First Amendment interests into account.

## VI. CONCLUSION

In recent years, the commercial speech doctrine's development has largely been charted through Supreme Court decisions written by Justice Stevens. Writing for the Court in *Discovery Network*<sup>391</sup> and the plurality in *Liquormart*,<sup>392</sup> he questioned the constitutional distinction between commercial and noncommercial speech,<sup>393</sup> and advocated treating truthful, nonmisleading commercial speech as fully protected by the First Amendment.<sup>394</sup> Furthermore, Justice Stevens correctly identified protecting consumers from commercial

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such on the package or by a store shelf label. The statute also required retailers to post a sign with the following text:

The United States Food and Drug Administration has determined that there is no significant difference between milk from treated and untreated cows. It is the law of Vermont that products made from the milk of rBST-treated cows be labeled to help consumers make informed shopping decisions.

*Amestoy*, 92 F.3d at 70 (citing VT. STAT. ANN. tit. 6, § 2754 (Supp. 1996)).

For a very different analysis of *Amestoy*, see Sweetland, *supra* note 21, at 479-83 (concluding that disclosure requirements in general should not be accorded First Amendment protection).

388. See Vincent Blasi & Henry P. Monaghan, *The First Amendment and Cigarette Advertising*, 250 J. A.M.A. 502, 506 (1986); Lowenstein, *supra* note 143, at 1222-24; Kenneth L. Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 113-14 (1988).

389. See Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 609 (1996).

390. See Jef I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U. L. REV. 1147, 1207-09 (1996).

391. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

392. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

393. *Discovery Network*, 507 U.S. at 419-23.

394. *Liquormart*, 517 U.S. at 501 (Stevens, Kennedy, & Ginsburg, JJ., plurality opinion).



harms as the underlying rationale behind state regulation of commercial speech.<sup>395</sup> By so doing, he provided the Court with a badly needed theoretical basis for why commercial speech may be regulated in the first place. All in all, Justice Stevens may be described as a great champion of commercial speech when it comes to state attempts to restrict advertising messages.

It is ironic, then, that Justice Stevens also drafted the Court's troubling decision in *Glickman*,<sup>396</sup> in which compelled commercial speech was treated as wholly outside the First Amendment.<sup>397</sup> While underlying facts will always be important in deciding legal controversies, the Court's contextual approach in *Glickman* makes the unpredictable *Central Hudson*<sup>398</sup> ad hoc balancing test look like a model of conscientious decision-making. More importantly, the Court in *Glickman* failed to separate aspects of the statutory scheme that affected speech from those that affected commerce. Instead, the Court treated both as mere economic regulation entitled only to substantive due process review. Reading the First Amendment out of a law that compels speech because that law is part of a larger, regulatory framework is unprincipled at best and dangerous at worst.

The government can regulate expression in two ways: it can restrict speech and it can compel speech. Either way, First Amendment interests are at stake. Speech that is valuable enough to be protected should retain that protection regardless of the form of regulation employed by the government. If commercial speech can be restricted only in the name of preserving a fair bargaining process—a stance that this Article wholeheartedly supports—then, conversely, commercial speech can be compelled only for the same purpose. As the mandatory advertising program in *Glickman* was not intended to protect consumers from commercial harms, it should have been invalidated pursuant to strict scrutiny review. While strengthening and stabilizing commodities markets may be a laudable goal, the state should not be allowed to achieve it by forcing farmers to pay for advertisements against their will.

Commercial disclosure requirements are often essential to ensure that consumers have access to sufficient accurate information to make informed marketplace decisions. The immense state and federal administrative machinery dedicated to eradicating deceptive trade practices evidences our policy choice to favor consumer protection. Yet even here, the First Amendment cannot allow the state free rein to compel speech whenever it asserts the public could potentially be misled. In a modified form,<sup>399</sup> *Central Hudson* can have a useful second life as the appropriate test for determining the constitutionality of laws that restrict or compel commercial speech in the name of consumer protection.

395. *Liquormart*, 517 U.S. at 496 (Stevens, J., plurality opinion); *Discovery Network*, 507 U.S. at 426.

396. *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130 (1997).

397. *Id.* at 2142.

398. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). See *supra* notes 60-64 and accompanying text.

399. See *supra* notes 359-63 and accompanying text.

According to his opinion in *Liquormart*, as to this point, even Justice Stevens would agree.<sup>400</sup>

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400. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, Kennedy, & Ginsburg, JJ., concurring). See *supra* notes 120-22 and accompanying text.

