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Persistent Threats to Commercial Speech

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PERSISTENT THREATS TO COMMERCIAL SPEECH

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The current Supreme Court is very protective of speech, including commercial speech. Threats to commercial speech persist nonetheless. This article briefly examines two: the use of commercial speech restrictions as a form of rent-seeking, and compelled commercial speech. Regulation of commercial speech is sometimes used to protect established corporate interests from competitors who are less able to bear the costs of regulation, with consequences that extend beyond the economic marketplace. In the case of commercial speech, courts have also been unduly deferential to claims of a consumer "right to know" as a basis for mandated labeling and disclosure. Greater and more consistent protection of commercial speech would be necessary to guard against these threats.

INTRODUCTION

Free speech may be under fire in America today,[1] but not at One First Street. Under Chief Justice Roberts, the Supreme Court has

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[1] *See, e.g.*, James Coll, Opinion, *Free Speech under Siege*, ALB. TIMES UNION (Mar. 23, 2016), http://www.timesunion.com/opinion/article/Free-speech-under-siege-6923876.php (noting threats to political speech and protest); Donal Brown, *Free Speech under Siege at Some U.S. Universities*, FIRST AMEND. COALITION (Feb. 18, 2016), https://firstamendmentcoalition.org/2016/02/free-speech-under-siege-at-some-u-s-universities/ (noting threats to free speech on college campues); George Leef, *Free Speech under Siege in America*, FORBES (Dec. 11, 2015), http://www.forbes.com/sites/georgeleef/2015/12/11/free-

been quite protective of speech.[2] From offensive protests[3] and lies about military service,[4] to violent video games[5] and campaign-related expenditures,[6] the Supreme Court has continued to expand

speech-under-siege-in-america/ (noting contemporary threats to free speech); Taylor Maycan, *Study: Nearly Half of Millennials Not on Board with Free Speech*, USA TODAY (Nov. 25, 2015), http://college.usatoday.com/2015/11/25/millennials-free-speech-pew-survey/ (noting declining support for broad speech protections among younger generations). *See generally* GREG LUKAINOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2012) (featuring several accounts of censorship on college campuses and suggesting broader threats to open discourse).

[2] *See, e.g.*, Joel Gora, *In the Business of Free Speech: The Roberts Court and* Citizens United, *in* BUSINESS AND THE ROBERTS COURT 255 (Jonathan H. Adler ed., 2016) (noting the Roberts Court has generally "left constitutional speech rights much stronger than they were found"); BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 11 (2015) (describing the Roberts Court as the "strongest First Amendment Supreme Court in our history").

[3] *See generally* Snyder v. Phelps, 562 U.S. 433 (2011) (discussing that the First Amendment protects peaceful protesters on a matter of public concern near the funeral of a military service member from tort liability).

[4] *See generally* United States v. Alvarez, 132 S. Ct. 2537 (2012) (invalidating federal law criminalizing false claims about military decorations).

[5] *See generally* Brown v. Entm't Merchs. Ass'n, 546 U.S. 786 (2011) (invalidating state law prohibiting the sale of violent video games to minors).

[6] *See generally* Citizens United v. Fed. Election Comm'n, 588 U.S. 310 (2010) (invalidating prohibition on corporate and union expenditures supporting or opposing candidates for political office).

the range of expression protected by the First Amendment.[7] Commercial speech is no exception.[8]

Over the past two decades, the Supreme Court has consistently protected commercial speech under the First Amendment.[9] Existing commercial speech jurisprudence recognizes the consumer and citizen interests that justify safeguarding the free flow of information about products and services.[10] If anything, the degree of protection most commercial speech retains is on the rise.[11]

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[7] *See* United States v. Stevens, 559 U.S. 460, 482 (2010) (holding the First Amendment protects depictions of animal cruelty). Those cases in which the Court has rejected claims of First Amendment protection for expressive activity are rather limited. *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (rejecting First Amendment claim against federal law criminalizing the provision of non-violent material support to a terrorist organization); Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding public employee statements pursuant to their official duties are not protected by the First Amendment and may be subject to employer discipline). While *Holder* upheld the prohibition as applied to the provision of legal services, the Court held that independent advocacy in support of such organizations remains protected. *Holder*, 561 U.S. at 24.

[8] *See*, *e.g.*, Sorrell v. IMS Health Care, 564 U.S. 552 (2011) (invalidating law restricting the sale, disclosure, and use of pharmacy records that reveal prescribing practices of individual doctors).

[9] *See, e.g.*, *id.*; Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002) (invalidating prohibitions on pharmacy advertising for drug compounding); 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996) (invalidating prohibition on price advertising for alcoholic beverages). Not all commentators see this as a positive development. *See, e.g.*, John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, Implications*, 30 CONST. COMMENTARY 223, 239 (2015) (lamenting "corporate takeover of the First Amendment"); Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENTARY 361, 378–79 (2015) [hereinafter Piety, *Why Personhood Matters*] (criticizing the doctrine of corporate personhood in relation to protection of commercial speech).

[10] *See, e.g.*, *Sorrell*, 564 U.S. at 579 (2011) ("The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.") (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)); United States v. United Foods, Inc., 533 U.S. 405, 411 (2011) ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.").

[11] *See* Rodney A. Smolla, *Afterword: Free the Fortune 500! The Debate over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1292

While commercial speech enjoys a substantial degree of protection, there are threats on the horizon.[12] In this brief essay, I

(2004) ("Examination of the actual case decisions demonstrates that the trajectory of modern commercial speech law has been an accelerating rise of protection for advertising.").

[12] Among the threats to commercial speech is the low regard with which constitutional protection of commercial speech is held by most legal academics who write in this area. *See, e.g.*, TAMARA PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2013) (arguing First Amendment protection of commercial speech limits the government's ability to act in the public interest); C. Edwin Baker, *The First Amendment and Commercial Speech,* 84 IND. L.J. 981, 981 (2009) (arguing that commercial speech should not have the protection of the First Amendment); Coates IV, *supra* note 9, at 223 (asserting that constitutional protection of commercial speech has resulted in the displacement of individual First Amendment Rights, reflecting "wasteful rent seeking"); Amanda Shanor & Robert Post, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 166 (2015) (criticizing judicial deregulation of speech in the marketplace); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV 1, 4–5 (2000) (arguing that the test for commercial speech should be revisited); Ellen Goodman, *Dangerous Corporate First Amendment Overreach: Three Information Trends and a Data Application*, PUB. KNOWLEDGE (May 25, 2016), https://www.publicknowledge.org/news-blog/blogs/dangerous-corporate-first-amendment-overreach-three-information-trends-and-a-data-application (examining the consequences of protected commercial speech); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 3, 2013), https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation (detailing the transformation of the First Amendment protections for corporations). There are exceptions to the prevailing view, however. *See, e.g.*, MARTIN REDISH, THE ADVERSARY FIRST AMENDMENT 75–121 (2013) (arguing for expansive First Amendment protection of commercial speech]); Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. (forthcoming 2017) (manuscript at 5) (on file with authors) (arguing in favor of the expansive protection of commercial speech by adopting a libertarian model of free speech); *see also* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 652 (1990) ("[I]n a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic, or religious nature."); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 472–73 (1971) (arguing that commercial speech serves an important interest and that "there may be a legitimate place for the commercial element within the boundaries of the first amendment."); Rodney Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993)

will focus on two. The first threat comes from speech regulation that is driven by rent-seeking.[13] Economic interests regularly seek to restrict commercial speech as a way of suppressing competition, often by prohibiting or limiting the disclosure of factually true information about products or services.[14] Regulation of advertising and other communication about products and services is an effective way to control the underlying market and pursue competitive advantage.

The second threat comes from compelled commercial speech. Governments at all levels routinely impose speech requirements, such as mandatory labels or other disclosures,[15] for a variety of reasons. Examples of such requirements range from mandatory nutrition labels[16] and mandatory energy efficiency disclosures for motor vehicles and appliances,[17] to disclosure requirements on imported meat,[18] debt-relief advisors,[19] and attorney advertising.[20]

("Commercial speech, as speech should presumptively enter the debate with full First Amendment protection. The theoretical question should not be what qualifies commercial speech for First Amendment coverage, but what, if anything *disqualifies* it.").

[13] *See infra* note 55 (defining rent-seeking).

[14] *See infra* notes 56–59, 88 and accompanying text.

[15] *See* Brian E. Roe et al., *The Economics of Voluntary Versus Mandatory Labels*, 6 ANN. REV. RESOURCE ECON. 407, 408–09 (2014) ("[P]roduct labeling is an increasingly popular tool of regulators.").

[16] *See* 21 C.F.R. § 101.9(a) (2016) ("Nutrition information relating to food shall be provided for all products intended for human consumption and offered for sale.").

[17] *See, e.g.*, 16 C.F.R. § 259.2 (1995) (requiring automobile advertisers to disclose fuel economy based on certain standards to avoid consumer confusion); 16 C.F.R. §§ 305.1, 305.3, 305.5, 305.11 (2015) (requiring all consumer appliances to carry a label describing water use, energy consumption, energy efficiency, energy cost—determined based on standards established for appliances from refrigerators to lamps).

[18] *See* Am. Meat Inst. v. U.S. Dep't of Agric., 746 F.3d 1065 (D.C. Cir. 2014), *aff'd en banc* 760 F.3d. 18, 27 (D.C. Cir. 2014).

[19] *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010).

[20] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

At present, such requirements are often subject to minimal scrutiny in federal court.[21] This makes compelled commercial speech an attractive means for suppressing competition or otherwise utilizing government regulation to enhance corporate power or advance other interests. The relative ease with which disclosure and labeling requirements are imposed threatens core First Amendment values and undermines the robust protection of commercial speech more generally.

This article proceeds in four parts. Part I briefly summarizes the Supreme Court's approach to commercial speech. Part II discusses how commercial speech often implicates the same values and concerns that underlie constitutional protection of noncommercial speech. Part III discusses the threat to commercial speech posed by rent-seeking and special interest efforts to gain a competitive advantage by limiting speech that may inform or educate consumers. Part IV discusses the threat posed by compelled commercial speech, particularly in light of widespread arguments that such speech should be subject to minimal constitutional scrutiny.

I. PROTECTING COMMERCIAL SPEECH

The Supreme Court first extended constitutional protection to commercial speech in the 1970s.[22] Since then, the Court has consistently held that "[t]he fact that the speech is in aid of a commercial purpose does not deprive [the speaker] of all First Amendment protection."[23] Indeed, the Court has noted repeatedly

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[21] *See, e.g.*, *Am. Meat Inst.*, 746 F.3d at 1068 (upholding mandatory country-of-origin labels for meat products as against First Amendment Challenge); Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015) (upholding mandatory GMO content labels against First Amendment Challenge); CTIA-The Wireless Ass'n v. City of Berkeley, 139 F. Supp. 3d 1048, 1075 (2015) (holding that local ordinances requiring disclosure of alleged radio frequency risks posed by cellular telephones did not violate First Amendment); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 116 (2d Cir. 2001) (upholding mercury labeling law for light bulbs where requirement was part of a broader regulatory scheme). *Cf.* Nat'l Ass'n of Mfrs. v. Sec. & Exch. Comm'n, 748 F.3d 359, 373 (D.C. Cir. 2014) (holding mandatory "conflict mineral" disclosure violates First Amendment rights of regulated firms), *aff'd on reh'g*, 800 F.3d 518, 556 (D.C. Cir. 2015).

[22] *See* Bigelow v. Virginia, 421 U.S. 809, 818 (1975).

[23] United States v. United Foods, 533 U.S. 405, 410 (2001).

that a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue."[24]

In its first decisions protecting commercial speech, the Court emphasized the value of information about goods and services to consumers.[25] As the Court explained in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[26]

On this basis, the Court concluded that commercial speech should be protected by the First Amendment, but not to quite the same degree as core protected speech, such as political speech.[27] Less explicit in the Court's decisions was the recognition that commercial speech can also serve to advance the broader interests of democratic self-governance.[28] Yet as the Court noted in *Virginia*

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[24] *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011) (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977)).

[25] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); *Bigelow*, 421 U.S. at 818. The Court had noted the value of commercial speech in earlier cases. *See, e.g.*, Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973) (noting that "the exchange of information is as important in the commercial realm as in any other").

[26] *Va. State Bd.*, 425 U.S. at 765. The opinion also noted that commercial speech "is indispensable to 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.

[27] *Id.* at 770 ("In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible.").

[28] *See* Bambauer & Bambauer, *supra* note 12, at 4 (noting protection of commercial speech "harmonizes with the democratic self-governance and personal autonomy theories that most legal scholars embrace"); *see also* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2372 (2000) (recognizing relationship between commercial information and democratic self-governance); Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 YALE J. ON REG. 85 (1999) (challenging the notion that

State Board, much commercial speech is also "indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered," and thus helps to "enlighten public decision-making in a democracy."[29]

In the 1980 case, *Central Hudson Gas and Electric v. Public Service Commission*,[30] the Court outlined a form of intermediate scrutiny for analyzing government restrictions on commercial speech:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[31]

Since then, the degree of protection afforded to commercial expression has, if anything, increased. Several Justices have suggested *Central Hudson* should be revisited.[32] Perhaps more

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commercial information or advertising is less valuable than other forms of speech); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 81 (2007) ("[S]peech concerning commercial products and services can facilitate private self-government in much the same way that political speech fosters collective self-government."). Courts and commentators have also often neglected the political and cultural content of many otherwise "commercial" messages. *See, e.g.*, Jonathan H. Adler, *Robert Bork & Commercial Speech*, 10 J.L. ECON. & POL'Y 615 (2014) [hereinafter Adler, *Robert Bork & Commercial Speech*].

[29] *Va. State Bd.*, 425 U.S. at 765.

[30] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

[31] *Id.* at 566.

[32] *See, e.g.*, 44 Liquormart v. Rhode Island, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in judgment) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment) ("I share Justice Thomas's discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it."); *see also* Thompson v. W. States Med. Ctr., 535 U.S. 357, 367–68 (2002) (dismissing other justices' apprehensions as to applicability of *Central Hudson*); United States v. United Foods, Inc., 533 U.S. 405, 409–10 (2001) (noting "criticism" of *Central Hudson* test by multiple justices); Robert

significantly, on more than one occasion, the Court's decisions have seemed to apply greater protections to commercial speech regulations than *Central Hudson*'s stated test requires.[33] For these reasons, commercial speech has seemed fairly secure in the Supreme Court.

II. COMMERCIAL SPEECH AND NONCOMMERCIAL VALUES

Even if one agrees that commercial speech should be protected and that the Supreme Court has been correct to apply First Amendment protections to such speech, there is ample space to question the coherence and consistency of the Court's commercial speech jurisprudence.[34] One deficiency in the Court's reasoning (matched in much of the relevant academic literature) is the failure to give adequate regard to the extent to which otherwise "commercial" messages and communications permeate broader political and cultural discourse. Much commercial speech is imbued, if not saturated, with normative and political content.[35]

Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Associations in* United Foods*,* Zauderer*, and* Abood, 40 VAL. U. L. REV. 555, 558 n. 15 (2006) [hereinafter Post, *Transparent and Efficient*] ("More than a majority of the justices have at one time or another indicated their dissatisfaction with the test."); David C. Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1052 (2004) ("Since *44 Liquormart*, the Court has made it clear that it would be willing to revisit the doctrine should the appropriate case come along.").

[33] *See*, *e.g.*, Sorrell v. IMS Health Inc., 546 U.S. 552, 571 (2011) (suggesting that a higher level of scrutiny is appropriate where a state imposes "content-and speaker-based restrictions on protected expression"). *Cf.* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015) (classifying a law that is "content based on its face" being subject to strict scrutiny).

[34] *See, e.g.*, Elizabeth Blanks Hindman, *The Chickens Have Come Home to Roost: Individualism, Collectivism and Conflict in Commercial Speech Doctrine*, 9 COMM. L. & POL'Y 237, 238 (2004) (The Supreme Court trying to "carve a path" between collectivism or individualism has only "created dissention, confusion and nearly continual calls for clarity among the justices"); Thomas C. Goldstein, Nike v. Kasky *and the Definition of "Commercial Speech,"* 2002-2003 CATO SUP. CT. REV. 63, 71 (noting "the ambiguities and conflicting signals" in the Court's commercial speech jurisprudence).

[35] *See* Jonathan H. Adler, *Compelled Commercial Speech and the Consumer Right-to-Know*, 58 ARIZ. L. REV. 421, 429–31 (2016) (discussing examples of

Commercial advertising and product labeling routinely appeal to potential customers' normative preferences and cultural values.[36] Corporations expend substantial resources seeking to create cultural and other affinities with particular consumer groups and cultural constituencies.[37] After the Supreme Court's decision in *Obergefell v. Hodges*,[38] for example, numerous Fortune 500 companies covered their logos with the rainbow that has come to symbolize gay rights, celebrating the Court's decision in the context of brand messaging.[39] This was commercial speech, but it also contained a powerful political and cultural message.

Individual purchasing decisions and commercial activities are often imbued with political and normative content as well.[40]

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commercial speech with normative and political content) [hereinafter Adler, *Compelled Commercial Speech*]; *see* Troy, supra note 28, at 85.

[36] *See, e.g.*, Douglas B. Holt et al., *How Global Brands Compete*, HARV. BUS. REV., Sept. 2004, at 68, 69–72 (noting that consumers look to brand identification to determine product quality, social responsibility of the manufacturer, and the cultural ideals associated with the product).

[37] *See, e.g.*, EDUC. FUNDING PARTNERS, CAUSE MARKETING: THE CASE FOR CORPORATE MARKETING INVESTMENTS IN PUBLIC EDUCATION TO GROW MINDS AND MINDSHARE (2012), http://www.edufundingpartners.com/wp-content/uploads/2013/12/EFP-White-Paper-Cause-Marketing-in-Education-9-12-Final.pdf ("[A]merican companies spent $1.1 billion in 2005 on cause marketing programs. In 2009, that investment increased by 43 percent to $1.57 billion, demonstrating an increased commitment by companies to link their marketing efforts to social causes despite the economic downturn.").

[38] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[39] *See* Susana Kim & Alexa Valiente, *Same-Sex Marriage: How Companies Responded to Supreme Court's Decision*, ABC NEWS (June 26, 2015), abcnews.go.com/Business/sex-marriage-companies-responded-supreme-courts-decision/story?id=32053240; Alison Griswold*, Brands Are Draping Their Logos in Rainbows to Celebrate Marriage Equality*, SLATE (June 26, 2015, 12:11PM), http://www.slate.com/blogs/moneybox/2015/06/26/brands_celebrate_marriage_equality_with_rainbows_and_supportive_tweets.html.

[40] *See, e.g.*, Lauren Copeland, *Value Change and Political Action: Postmaterialism, Political Consumerism, and Political Participation*, 42 AM. POL. RES. 257 (2014) (discussing the rise of "political consumerism" as a form of political participation); Michael Schudson, *Citizens, Consumers, and the Good Society*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 236, 239 (2007) (noting consumer choices may be "political in even the most elevated understandings of the term"); Dhavan V. Shah et al., *Political Consumerism: How Communication and Consumption Orientations Drive 'Lifestyle Politics,'* 611 ANNALS AM. ACAD.

Consider the person who drives a Toyota Prius hybrid, wears Toms on his feet, and carries a hemp sack emblazoned with a "fair trade" sticker when going to Whole Foods or Trader Joe's to shop for humanely raised, free-range chicken or a carbon-neutral, vegan, meat substitute. This individual is acting as more than a mere economic consumer. His purchasing decisions are simultaneously consumptive and communicative.[41] For some, the inherent symbolism of these choices is significantly more important than matters of quality or price.

Producers and consumers exchange money for goods and services.[42] They are also engaged in a dialogue about a wider range of concerns—cultural, normative, and political.[43] Efforts to obtain

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POL. & SOC. SCI. 217, 217 (2007) (discussing "consumer behaviors that are shaped by a desire to express and support political and ethical perspectives"); Craig J. Thompson et al., *Emotional Branding and the Strategic Value of the Doppelgänger Brand Image*, 70 J. MKTG. 50, 63 (2006) (noting research indicating "consumers' most valued brands are those whose symbolic meanings play an important role in their self-conceptions"); Deitlind Stolle et al., *Politics in the Supermarket: Political Consumerism as a Form of Political Participation*, 26 INT'L POL. SCI. REV. 245, 246 (2005) (noting consumer choices as political).

[41] *Cf.* Cohen v. California, 403 U.S. 15, 25–26 (1971) (noting that most speech performs a "dual communicative function").

[42] *See, e.g.*, *Buffy the Vampire Slayer: Triangle* (The WB television broadcast Jan. 9, 2001) (depicting Willow, impersonating Anya: "I like money better than people. People can so rarely be exchanged for goods and/or services").

[43] *See, e.g.*, Craig J. Thompson, *Understanding Consumption as Political and Moral Practice*, 11 J. CONSUMER CULTURE 139, 139 (2011) ("More explicitly values-based, politicized consumption practices, such as buying Fair Trade™ or eco-friendly goods, are often coupled with a neo-liberal belief that the marketplace is the most efficient and effective arbiter of social values. From this standpoint, individual consumers can most directly affect social change by voting with their proverbial pocket books."); Raluca Dragusanu et al., *The Economics of Fair Trade*, 28 J. ECON. PERSP. 217, 222 (2014) (exploring how the Free Trade initiative provides important information to the consumer); Corrine Gendron et al., *The Institutionalization of Fair Trade: More than Just a Degraded Form of Social Action*, 86 J. BUS. ETHICS 63 (2009) (describing how the emergence of the fair trade market is a form of social movement); Jens Hainmueller et al., *Consumer Demand for the Fair Trade Label: Evidence from a Multi-Store Field Experiment*, 97 REV. ECON. & STAT. 242, 243 (2015) (noting that the Fair Trade program "can be seen as a way to remove market inefficiency that exists due to incomplete information on the part of consumer about the manner in which goods are produced"); Geoff Moore, *The Fair Trade Movement: Parameters, Issues and*

greater market share are not confined to traditional marketing or product improvement; quality and price are but two of the product and service characteristics contemporary consumers care about. Companies seeking to increase their market share often attempt to align themselves with the values of desired consumer demographic groups. Producers achieve this by engaging in value-laden communications, inserting cultural messages into commercial advertising and brand messaging.[44] To gain a competitive advantage, they endeavor to discover what consumers care about now, or may care about in the future (even if only after a company communicates about it).[45] Consider, for example, the proliferation of products that are advertised as "fair trade" or "GMO free."[46] Companies also adopt political positions—and perhaps even take litigation

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Future Research, 53 J. BUS. ETHICS 73, 74–75 (2004) (attempting to estimate the market size of the fair trade industry).

[44] *See, e.g.*, Oliver Balch, *Social Marketing: Show the World What Your Brand's Values Are*, GUARDIAN (Sept. 25, 2014), https://www.theguardian.com/media-network/media-network-blog/2014/sep/25/social-marketing-brand-values-mcdonalds-burgers-cans ("[S]ocial marketing, like any marketing, is commercial. Brands might not be pushing us to buy stuff directly . . . but they benefit in other ways: an enhanced reputation, brand equity, customer loyalty, and in some cases, lower costs or reduced business risk.").

[45] *See* Walter Isaacson, *The Real Leadership Lessons of Steve Jobs*, HARV. BUS. REV., Apr. 2012, at 92, 94, 97 ("When Jobs took his original Macintosh team on its first retreat, one member asked whether they should do some market research to see what customers wanted. 'No,' Jobs replied, 'because customers don't know what they want until we've shown them.'").

[46] *See, e.g.*, Andrew Adam Newman, *This Wake-Up Cup is Fair-Trade Certified*, N.Y. TIMES (Sept. 27, 2012), http://www.nytimes.com/2012/09/28/business/media/green-mountain-coffee-begins-fair-trade-campaign-advertising.html?_r=0 (describing Green Mountain Coffee's advertising campaign focusing on their fair-trade coffee); *Food With Integrity*, CHIPOTLE MEXICAN GRILLE, http://chipotle.com/food-with-integrity (last visited Nov. 28, 2016) (displaying Chipotle's marketing campaign claiming that "with every burrito we roll or bowl we fill, we're working to cultivate a better world"). Perhaps ironically, it appears that Chipotle spent more time burnishing its progressive image than actually ensuring that its food was safe to eat. *See* Susan Berfeld, *Inside Chipotle's Contamination Crisis*, BLOOMBERG BUSINESSWEEK (Dec. 22, 2015), http://www.bloomberg.com/features/2015-chipotle-food-safety-crisis/ (discussing food poisoning outbreaks at Chipotle).

positions—as part of their effort to encourage consumer loyalty.[47] Those producers that do this successfully are rewarded in the marketplace.

The intertwined nature of commercial and cultural content complicates the effort to consign commercial speech to a lesser degree of constitutional protection. This contemporary reality[48] may be one reason why the Court, while leaving *Central Hudson* in place, has seemed to apply a higher level of scrutiny in recent commercial speech cases.[49] If so, the Court has not said so—at least not yet. One consequence of the Court's reticence to consider the broader cultural and political context in which much commercial speech occurs is that lower courts continue to apply *Central Hudson* with relatively little consideration for the broader implications of widespread government regulation of speech with commercial content.[50] This may make judicial protection of commercial speech more precarious than the Court's holdings in recent commercial speech cases would otherwise suggest.

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[47] To take one recent, high-profile example, when Apple refused to provide a mechanism to unlock an iPhone used by the terrorist responsible for the attack in San Bernadino, it defended this position to consumers and was accused by the government of posturing for marketing purposes. *See* Dustin Volz & Julia Edwards, *U.S., Apple Ratchet Up Rhetoric in Fight Over Encryption*, REUTERS (Feb. 22, 2016), http://www.reuters.com/article/us-apple-encryption-doj-idUSKCN0VS2FT; *see also* In the Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203, No. 15-0451m (C.D. Cal. filed Feb. 16, 2016) Government's Memorandum of Points and Authorities (alleging Apple refuses to comply with Governments request to decrypt iPhone belonging to suspect in 2016 San Bernardino shootings). For its part, Apple also argued that its cooperation with federal law enforcement would have constituted compelled speech in violation of the First Amendment. *See* Matthew Panzarino, *Apple Files Motion to Vacate the Court Order To Force it to Unlock iPhone, Citing Constitutional Free Speech Rights*, TECHCRUNCH (Feb. 25, 2016), https://techcrunch.com/2016/02/25/apple-files-motion-to-dismiss-the-court-order-to-force-it-to-unlock-iphone-citing-free-speech-rights/.

[48] For an argument that this may not, in fact, be a new development, see Troy, *supra* note 28, at 123–42.

[49] *See* cases cited *supra* note 33.

[50] *See* cases cited *supra* note 21.

III. SPEECH REGULATION AS RENT-SEEKING

Commercial speech is an important means for producers and sellers to communicate information about the products and services that they offer. Such communications extend well beyond the price and availability of products, however. Advertising and other commercial speech sends explicit and implicit messages about product quality[51] and desirability.[52] Such speech is used to appeal to existing consumer preferences as well as to shape such preferences over time. As discussed above,[53] advertising and other commercial speech also incorporate cultural and normative messages that both help develop brand identity and create or support affinity groups, which may or may not be centered around specific products or brands.

Just as commercial speech is an effective means for producers and sellers to communicate with consumers, restrictions on commercial speech are a powerful means of restraining competition and privileging the interests of some producers and sellers over others. For this reason, it should not be surprising at all that corporate interests have often sought to regulate commercial speech as a means of obtaining a competitive advantage.[54] In this regard, support for commercial speech regulation can be a form of "rent-seeking."[55] If a new product has a feature or characteristic that

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[51] *See* Paul Milgrom & John Roberts, *Price and Advertising Signals of Product Quality*, 94 J. POL. ECON. 796 (1986).

[52] *See* Scott Magids et al., *What Separates the Best Customers from the Merely Satisfied*, HARV. BUS. REV. (Dec. 3, 2015), https://hbr.org/2015/12/what-separates-the-best-customers-from-the-merely-satisfied ("Customers connect emotionally with brands when the brand resonates with their deepest emotional drives-things like a desire to feel secure, to stand out from the crowd, or to be the person they want to be.").

[53] *See supra* notes 51–52 and accompanying text.

[54] *See* Bambauer & Bambauer, *supra* note 12, at 5 ("Speech regulations seethe with public choice and collective action problems.").

[55] *See* Robert D. Tollison, *Rent Seeking*, *in* PERSPECTIVES ON PUBLIC CHOICE 506, 506 (Dennis C. Mueller ed., 1997) ("Rent seeking is the socially costly pursuit of wealth transfers."). As Nobel laureate economist James Buchanan observed, "[r]ent-seeking activity is directly related to the scope and range of governmental activity in the economy, to the relative size of the public sector." *See* James M. Buchanan, *Rent Seeking and Profit Seeking*, *in* TOWARD A THEORY OF A RENT-SEEKING SOCIETY (James M. Buchanan et al. eds., 1980).

differentiates it from those of existing products, incumbent producers may seek to restrict or alter communication about those characteristics, perhaps by placing limits on how products may be described or characterized.[56] Such use of speech regulation has a long and sordid history.[57]

Commercial speech is essential for producers to differentiate their products from competitors in the minds of consumers and citizens. This is particularly true of new entrants to the market that lack the brand identification, distribution networks, and brand loyalty of more established brands. To protect themselves (and their existing market share), incumbents are often eager to limit the communication of their competitors, through traditional and untraditional channels alike.[58] Incumbent firms may also benefit from across-the-board restrictions on advertising, as this may reduce the ability of new entrants to attract market share.[59]

Consider recent controversies over labeling within the dairy industry, where some dairy farmers, with the aid of biotechnology companies, have sought to restrict commercial speech regarding the hormones used to increase milk production.[60] Bovine somatotropin

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[56] *See* Bambauer & Bambauer, *supra* note 12, at 6 ("[S]peech regulation can be exploited to dispose of information that challenges entrenched interests.").

[57] For discussion of one prominent historical example, see Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83, 108–10 (1989) (describing how the dairy industry lobbied state legislatures for mandatory oleomargarine labeling laws in order to thwart competition with butter).

[58] *See, e.g.*, Bruce Yandle et al., *Bootleggers, Baptists, & Televangelists: Regulating Tobacco by Litigation*, 2008 U. ILL. L. REV. 1225, 1253–54 (describing how limits on tobacco advertising benefitted incumbent tobacco companies and "denied competitors an effective means to establish a brand").

[59] For example, major tobacco companies benefitted from advertising restrictions that harmed smaller firms. *See* Jonathan H. Adler et al., *Baptists, Bootleggers, & Electronic Cigarettes*, 33 YALE J. ON REG. 313 (2016) (discussing how limits on television ads benefitted larger incumbent cigarette producers); *see also* Yandle et al., *supra* note 58, at 1248; John E. Calfee, *The Ghost of Cigarette Advertising Past*, 10 REG. 35, 41 (1986) (noting that an FTC prohibition on comparative health claims in cigarette advertising "removed the most potent weapon small firms had for harassing big ones").

[60] *See* David Barboza, *Monsanto Sues Dairy in Maine Over Label's Remarks on Hormones*, N.Y. TIMES (July 12, 2003),

("BST") is a naturally occurring growth hormone that affects the amount of milk a dairy cow will produce.[61] In an effort to increase milk production, scientists learned how to synthesize BST through modern genetic engineering techniques.[62] The result is recombinant bovine somatotropin ("rBST"), which increases milk production in treated cows. This can increase the efficiency of dairy production, particularly in larger firms.[63]

Although the use of rBST is controversial, the U.S. Food and Drug Administration ("FDA") maintains that milk produced from cows treated with rBST is not appreciably different from milk from untreated cows, and certainly no less safe.[64] Indeed, the FDA declared that any suggestion that there is a meaningful difference in milk from treated and untreated cows would be "false and misleading."[65] Despite these assurances, some consumers and producers were unconvinced.[66] In response to such concerns, the state of Vermont sought to require labeling of milk and other dairy products from cows treated with rBST, but these regulations were struck down in federal court.[67]

Some dairy farms oppose the use of rBST, either because they believe such treatments are "unnatural," are inhumane, or perhaps

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http://www.nytimes.com/2003/07/12/business/monsanto-sues-dairy-in-maine-over-label-s-reamarks-on-hormones.html .

[61] *See* U.S. Food & Drug Admin., Interim Guidance on the Voluntary Labeling of Milk and Milk Products from Cows That Have Not Been Treated With Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279-04, 6279–80 (Feb. 10, 1994) [hereinafter FDA Guidance], https://www.gpo.gov/fdsys/pkg/FR-1994-02-10/html/94-3214.htm.

[62] *See* Christopher L. Culp, *Sacred Cows: The Bovine Somatotropin Controversy*, *in* ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 47, 48 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992) (noting that rBST was first synthesized in 1973).

[63] *Id.* at 55–56.

[64] *Bovine Somatotropin (BST)*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm055435.htm (last updated Oct. 19, 2016).

[65] *See* FDA Guidance, *supra* note 61.

[66] *See, e.g.*, *Study Shows Consumer Concern over Bovine Growth Hormone-Tainted Milk*, ORGANIC CONSUMERS ASS'N (Sept. 17, 2003), https://www.organicconsumers.org/old_articles/rbgh/rbgh_tainted_milk.php (showing public concern about use of hormones in milk production).

[67] *See* Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69–74 (2d Cir. 1995).

even dangerous.[68] Some milk producers may also believe that they can obtain a larger market share by appealing to consumers who prefer "organic" products or otherwise do not wish to consume products that were produced with the aid of modern biotechnology. Not only do such producers refuse to treat their cows with rBST, they would also like to inform consumers of this fact, such as by adding a voluntary "rBST free" or "No rBST" label to their products. Prominent companies, such as Ben & Jerry's ice cream, supported this effort.[69]

Dairy farmers who use rBST understandably object to any implication that their milk may be less desirable, or even less safe.[70] For this reason, many dairy producers (and the producers of rBST) sought to impose limits on such claims by non-rBST-using producers.[71] Rather than defend the safety and quality of their product in an open marketplace, or supporting a broader public education program about the technology and its uses, these producers sought to squelch claims made by their competitors.[72]

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[68] One prominent concern is that there is a higher rate of infection in cows treated with rbST due to the increased milk production resulting from such treatment. *See About rbGH*, CTR. FOR FOOD SAFETY, http://www.centerforfoodsafety.org/issues/1044/rbgh/about-rbgh (last visited Nov. 28, 2016).

[69] *See, e.g.*, *rBGH*, BEN & JERRY'S, http://www.benjerry.com/values/issues-we-care-about/rbgh (last visited Nov. 28, 2016) (explaining company's opposition to the use of rBST); Sarah Lozanova, *Back to Basics: When Ben & Jerry's Dropped rBGH*, TRIPLE PUNDIT (Apr. 6, 2015), http://www.triplepundit.com/special/disrupting-short-termism/back-to-basics-when-ben-jerrys-dropped-rgbh (discussing ice-cream maker's decision to source from farms not treating cows with rBST).

[70] *See* Culp, *supra* note 62, at 59–60 ("Since labels are associated with products that are considered bad or risky, they could well reduce the demand for bst product vis-à-vis unlabeled, 'pure' milk products, despite the lack of any significant chemical difference between the two.").

[71] *See* Keith Schneider, *F.D.A. Warns the Dairy Industry Not to Label Milk Hormone-Free*, N.Y. TIMES (Feb. 8, 1994), www.nytimes.com/1994/02/08/us/fda-warns-the-dairy-industry-not-to-label-milk-hormone-free.html (noting that F.D.A. directive against hormone-free labels was "requested by some states and the dairy industry").

[72] *See* Stephen J. Hedges, *Monsanto Having a Cow in Milk Label Dispute*, CHICAGO TRIBUNE (Apr. 15, 2007), http://www.articles.chicagotribune.com/2007-04-15/news/0704140151_1_monsanto-states-growth-hormone-labels.

In some states, dairy producers went even further, seeking to prevent any rBST-related claims on product labels.[73] In Ohio, for example, the State Department of Agriculture adopted a rule that considered any dairy product label that included phrases such as "rBST free" or "Hormone Free" to be misleading.[74] Insofar as all dairy cows have hormones, the regulators may have had a point. Nonetheless, these requirements went well beyond any need to prevent consumer deception. The clear purpose of these restrictions was to protect favored dairy farmers by preventing their competitors from using commercial speech to disclose factually true information about their products and to encourage consumers to believe that these facts might be a reason to purchase their products.

These restrictions prompted a First Amendment challenge.[75] The U.S. Court of Appeals for the Sixth Circuit recognized these restrictions for what they were, and pared back the legal requirements.[76] Were it not for the constitutional protection of commercial speech, however, Ohio's rules would have been upheld, and conventional dairy producers would have been able to squelch the communication of dissenting views within the commercial marketplace. Nonetheless, some regulatory constraints on the ability of dairy and other producers to differentiate their products on value-based grounds remain.[77]

Limitations on commercial speech by competitors may harm consumers too. Such restrictions limit the information available to consumers, and may even impair efforts to protect public health or

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[73] *See* Andrew Martin, *Fighting on a Battlefield the Size of a Milk Label*, N.Y. TIMES (Mar. 9, 2008) www.nytimes.com/2008/03/09/business/09feed.html (discussing efforts to ban hormone-free labeling in New Jersey, Ohio, Indiana, Kansas, Utah, Missouri and Vermont).

[74] *See* Peggy Hall, *Federal Court Decided Ohio Dairy Labeling Case*, OHIO AGRIC. L. BLOG (Oct. 4, 2010, 3:16 PM), https://ohioaglaw.wordpress.com/2010/10/04/federal-court-decides-ohio-dairy-labeling-case/ (quoting Ohio Admin. Code § 901:11-8-01 (repealed 2012)).

[75] Int'l Dairy Foods Ass'n v. Boggs, No. 2:08-CV-628, 2:08-CV-629, 2009 WL 937045, at *2–4 (S.D. Ohio Apr. 2, 2009).

[76] *See* Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 635–40 (6th Cir. 2010) (holding that the Ohio rule banning claims such as "rBST free" is more extensive than necessary to protect against consumer deception, and thus cannot survive *Central Hudson* scrutiny).

[77] *See* FDA Guidance, *supra* note 61.

advance other social goals. Consider the case of reduced-risk tobacco products and smoking alternatives. Not all tobacco products present the same risks to consumers, and some smoking alternatives—such as electronic cigarettes and vaping devices—appear to present a tiny fraction of the risks posed by cigarettes.[78] For this reason, many public health professionals believe that convincing smokers to switch to alternative products would help improve public health and reduce the death toll tobacco continues to inflict on American society.[79]

Under the Family Smoking Prevention and Tobacco Control Act,[80] the makers and sellers of tobacco products and tobacco substitutes, such as electronic cigarettes, are extremely limited in their ability to inform consumers about the relative risks of

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[78] A. MCNEILL ET AL., PUB. HEALTH ENG., E-CIGARETTES: AN EVIDENCE UPDATE–A REPORT COMMISSIONED BY PUBLIC HEALTH ENGLAND (Aug. 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/457102/Ecigarettes_an_evidence_update_A_report_commissioned_by_Public_Health_England_FINAL.pdf; David J. Nutt et al., *Estimating the Harms of Nicotine-Containing Products Using the MCDA Approach*, 20 EUR. ADDICTION RES. 218, 222–24 (Apr. 2014); Peter Hajek et al., *Electronic Cigarettes: Review of Use, Content, Safety, Effects on Smokers and Potential for Harm and Benefit*, 109 ADDICTION 1801, 1801–10 (2014).

[79] *See, e.g.*, Royal College of Physicians, *Nicotine Without Smoke: Tobacco Harm Reduction*, PCR LONDON (Apr. 28, 2016), https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0 (encouraging the use of e-cigarettes and other tobacco alternatives as a means of curbing smoking); Stephen S. Hecht et al., *Evaluation of Toxicant Carcinogen Metabolites in the Urine of E-cigarettes Users Versus Cigarette Smokers*, 17 NICOTINE TOBACCO RES. 704, 704–09 (2015) (finding lower levels of toxic compounds in urine of e-cigarette users than in that of smokers); Riccardo Polosa, *Electronic Cigarette Use and Harm Reversal: Emerging Evidence in the Lung,* 13 BMC MED. 54, 54 (2015) ("[S]mokers completely switching to regular EC use are likely to gain significant health benefits."); Zachary Cahn & Michael Siegel, *Electronic Cigarettes as a Harm Reduction Strategy for Tobacco Control: A Step Forward or a Repeat of Past Mistakes?*, 32 J. PUB. HEALTH POL'Y 16, 27 (2011). A similar argument has also been made with respect to smokeless tobacco products. *See generally* BRAD RODU, FOR SMOKERS ONLY: HOW SMOKELESS TOBACCO CAN SAVE YOUR LIFE (2013) (arguing smokeless tobacco is significantly safer than smoking regular tobacco, while at the same time still satisfying the smoker's craving for nicotine).

[80] Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. NO. 111-31, 123 Stat. 1776 (2009).

competing products. Federal law prohibits the sale of any tobacco product containing a label which claims, implicitly or explicitly, that the product presents a lower risk of tobacco-related diseases, that the product contains a reduced level of a substance or is free of a substance, or that uses descriptors such as "light," or "low."[81] Tobacco products, which, under current regulations, include tobacco alternatives such as electronic cigarettes,[82] can only be marketed as "reduced risk" products with FDA approval.[83] Although these regulations restrict purely factual claims that are supported by a fair amount of peer-reviewed scientific research, they have withstood legal challenge thus far.[84]

The nation's largest tobacco producer, Altria (a.k.a. Philip Morris), lobbied for and supported the federal statute limiting the disclosure and promotion of scientific information on the relative risks proposed by different sorts of tobacco products and their alternatives.[85] At least one opponent labeled the bill the "Marlboro Protection Act."[86] As the dominant cigarette manufacturer—and a firm well-positioned to make inroads into markets for tobacco alternatives provided that competitors are hamstrung by regulatory limitations on advertising and promotion—Altria benefited from limitations on commercial speech. Yet such limitations on speech, insofar as they inhibit consumer education about the relative risks of various products, can have negative consequences on public

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[81] 21 U.S.C. § 387(k) (2009).

[82] Nat'l Archives and Records Admin., No. 90, Food and Drug Admin., 81 Fed. Reg 28973, 28975 (2016), http://www.fda.gov/downloads/AboutFD . . . /UCM394933.pdf.

[83] *See* 21 U.S.C. § 387k(g)(1).

[84] *See, e.g.*, Disc. Tobacco City & Lottery, Inc. v. United States, 674 F. 3d 509, 518 (6th Cir. 2012) (rejecting, *inter alia*, First Amendment challenges to federal tobacco regulations).

[85] *See* Duff Wilson, *Philip Morris's Support Casts Shadow over a Bill to Limit Tobacco*, N.Y. TIMES (Mar. 31, 2009), http://www.nytimes.com/2009/04/01/business/01tobacco.html; C. STEPHEN REDHEAD & VANESSA K. BURROWS, CONG. RES. SERV., FDA TOBACCO REGULATION: THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT OF 2009 (2009).

[86] *See* Mike Enzi, *HELP Committee Passes a "Marlboro Protection Act"*, HILL (Aug. 1, 2007, 2:24 PM), http://thehill.com/blogs/congress-blog/politics/27745-help-committee-passes-a-marlboro-protection-act-sen-mike-enzi.

health.[87] This is nothing new, however, as the tobacco industry long ago discovered that limitations on advertising—and limitations on comparative health claims in particular—is an effective means of suppressing competition and inhibiting consumer education about the potential health risks of their products.[88]

It may be tempting to think that restrictions on commercial speech typically involve well-intentioned and public-spirited efforts to counteract firms' profit-seeking behavior. This is undoubtedly true in some cases. Yet, as the above examples illustrate, some restrictions on commercial speech are motivated by economic concerns and represent efforts to obtain competitive advantage through government intervention in the marketplace. Insofar as such measures restrict information that could lead consumers to choose less dangerous products, the consequences of such regulations are more than economic.

IV. THE MYTH OF A CONSUMER "RIGHT-TO-KNOW"

Policymakers often advocate the use of mandatory disclosure or other forms of speech compulsion as an alternative to traditional

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[87] For a broad ranging discussion of rent-seeking in the context of the regulation of tobacco alternatives, see Jonathan H. Adler et al., *Baptists, Bootleggers, and E-Cigarettes*, 33 YALE J. ON REG. 313, 318–19 (2016).

[88] *See* Calfee, *supra* note 59, at 35 ("When cigarette advertising was less regulated, competition among manufacturers routinely led to advertisements containing information on the health effects of smoking—much of it in blunt and provocative language—even though this was sometimes highly destructive to the interests of the cigarette industry as a whole. Health advertising was an effective means of promoting one brand over another and thus was an important weapon for smaller firms seeking to wrest business from larger firms."); Bruce Yandle et al., *supra* note 58, at 1248 ("In February 1960, the FTC announced that it had negotiated a voluntary agreement with the tobacco companies to cut all tar and nicotine claims from cigarette advertising. The agency heralded the ban as 'a landmark example of industry-government cooperation in solving a pressing problem . . . But the ban, while in theory improving the market for safer cigarettes, had the opposite effect. It retarded competition on the health claim margin, freeing the companies from having to modify their product to attempt to reduce its health hazards.").

forms of product regulation.[89] In some cases, the argument for mandating disclosure of product characteristics can be based upon health risks or consumer protection concerns.[90] In other cases, mandatory product disclosures are grounded on the assertion that there is a consumer "right-to-know" about any product characteristics in which some set of consumers may have a particular interest.[91] This idea of a consumer right-to-know is itself a significant threat to commercial speech, particularly when combined with the false idea that the free flow of commercial information is advanced by mandatory disclosure.[92]

Information about products and services can often improve consumer decision-making.[93] Disclosure requirements may

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[89] For a general discussion and critique, see, e.g., OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

[90] *See* Adler, *Compelled Commercial Speech*, *supra* note 35, at 447. Prominent examples of such mandatory disclosures would be food content labels and warnings about potential product dangers or risks.

[91] *See, e.g.*, Leo Hickman, *Consumers Should Have the Right to Know if they are Eating GM Food*, GUARDIAN (April 19, 2013, 7:40 PM), http://www.theguardian.com/environment/blog/2013/apr/19/gm-food-labelling-consumers ("Consumers should have the right to know what's in the food they eat—and know how it was produced."); Roger Johnson, *Consumers Have a Right to Know Where Their Food Comes From*, HILL (Aug. 5, 2014, 11:00 AM), http://thehill.com/blogs/congress-blog/education/214268-consumers-have-a-right-to-know-where-their-food-comes-from (supporting country of origin labels); Steve Keane, *Can a Consumer's Right to Know Survive the WTO?: The Case of Food Labeling*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 291, 292 n.3 (2006) (citing examples of groups urging a "consumer right to know"). *See generally* Frederick H. Degnan, *The Food Label and the Right-to-Know*, 52 FOOD & DRUG L.J. 49 (1997) (underscoring that the right-to-know idea "at its core this perspective is the notion that the public has a basic right to know any fact it deems important about a food or a commodity before being forced to make a purchasing decision"); Shannon M. Roesler, *The Nature of the Environmental Right to Know*, 39 ECOL. L.Q. 989 (2012) (demonstrating "how the assessment of right-to-know interests can help resolve conflicts created by competing claims to nondisclosure of environmental information").

[92] For an extended argument about the threat of an alleged consumer "right to know" to the constitutional protection of commercial speech, see, e.g., Adler, *Compelled Commercial Speech*, *supra* note 35, at 426, 446.

[93] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763–64 ("Those whom the suppression of prescription drug price

empower consumers to protect themselves from health or other risks posed by particular products. For instance, food content requirements help those with allergies or particular dietary needs avoid those ingredients that may cause them harm. Mandatory disclosures may also help address the problem of information asymmetries,[94] and may help increase consumer welfare as a result.

While information often has value, it is a mistake to assume that more information is always better. Just as a consumer may have too little information, a consumer may also have too much.[95]

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information hits the hardest are the poor, the sick, and particularly aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities."); Edenfield v. Fane, 507 U.S. 761, 766 (1993) ("In the commercial context, solicitation may have considerable value. Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication between buyer and seller . . . . For the buyer, it provides an opportunity to explore in detail the way in which a particular product or service compares to its alternatives in the market.").

[94] *See* David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS & MGMT. 155, 156 (2006) ("[I]nformation asymmetries in market or political processes obstruct progress toward specific policy objectives. Asymmetries arise because manufacturers, service providers, and government agencies have exclusive access to information about products and practices and they often have compelling reasons to keep that information confidential.").

[95] *See*, *e.g.*, Lewis A. Grossman, *FDA and the Rise of the Empowered Consumer*, 66 ADMIN. L. REV. 627, 631 (2014) ("A surfeit of information can overwhelm consumers, leading them to attend to it selectively or to ignore it altogether."); Jayson Lusk & Stephan Marette, *Can Labeling and Information Policies Harm Consumers?*, 10 J. AGRIC. & FOOD INDUS. ORG. 1, 1 (2012) (discussing how excessive information can reduce consumer welfare); Wesley A. Magat et al., *Consumer Processing of Hazard Warning Information*, 1 J. RISK & UNCERTAINTY 201, 204 (1988) ("Manufacturers of consumer products are also concerned with the possibility of information overload because regulatory agencies are requiring them to include more and more information on labels, a practice they fear will make the labels less effective as a communication instrument."); Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulations*, 81 WASH. U. L.Q. 417, 418–19 (2003) (observing that fewer disclosures may better serve customers due to risk of information overload); Yvette Salaüna & Karine Flores, *Information Quality:*

"Information overload" is a real phenomenon.[96] Consumers have "limited time and cognitive energy" for the consideration and analysis of information about products and services.[97] Mandating the disclosure of additional information, such as the pages of information contained in a pharmaceutical insert, may not actually increase consumer understanding.[98] In some cases, the surfeit of information may actually make it more difficult for some consumers to understand which information is most important, such as which potential risks of a product are those with which the consumer should be most concerned.

Mandating the additional disclosure of information, if not justified by independent interests such as a need to protect consumers from unwitting harms, may actually harm consumer welfare.[99] Indeed, mandating excessive information disclosure may actually result in the communication of less substantive content to consumers and reduced consumer understanding.[100] Factually true

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Meeting the Needs of the Consumer, 21 INT'L J. INFO. MGMT. 21, 23 (2001) (noting that excessive information can impose costs on consumers).

[96] *See, e.g.*, Svetlana E. Bialkova et al., *Standing Out in the Crowd: The Effect of Information Clutter on Consumer Attention for Front-of-Pack Nutrition Labels*, 41 FOOD POL'Y 65, 68 (2013) (recognizing that increases in information can reduce consumer attention and discernment); Elise Golan et al., *Economics of Food Labeling*, 24 J. CONSUMER POL'Y 117, 139 (2001) (noting that increased disclosure requirements can result in less consumer understanding); *see also* W. Kip Viscusi, *Efficacy of Labeling of Foods and Pharmaceuticals*, 15 ANN. REV. PUB. HEALTH 325, 334 (1994) (evaluating what makes warning labels effective).

[97] *See* Weil et al., *supra* note 94, at 158 (noting consumers have "limited time and cognitive energy").

[98] *See* Sarah L. Labor et al., *Information Overload with Written Prescription Drug Information*, 29 DRUG INFO. J. 1317, 1317 (1995); Jon Duke et al., *A Quantitative Analysis of Adverse Events and "Overwarning" in Drug Labeling*, 171 ARCHIVES INTERNAL MED. 944, 944–46 (2011).

[99] *See* Jane Bambauer et al., *A Bad Education*, 2016 U. ILL. L. REV. (forthcoming) (manuscript at 3), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795808.

[100] *See, e.g.*, Svetlana E. Bialkova et al., *Standing Out in the Crowd: The Effect of Information Clutter on Consumer Attention for Front-of-Pack Nutrition Labels*, 41 FOOD POL'Y 65, 69 (2013) (recognizing that increases in information can reduce consumer attention and discernment); Elise Golan et al., *Economics of Food Labeling*, 24 J CONSUMER POL'Y 117, 139 (2001) (noting that increased disclosure requirements can result in less consumer understanding); Mario F. Teisl & Brian Roe, *The Economics of Labeling: A Overview of Issues for Health*

disclosures may also mislead consumers into thinking that information subject to such disclosure is more important than other product or service attributes that will actually have a greater effect on consumer welfare.[101]

Most recent challenges to compelled disclosures in federal court have been unsuccessful.[102] This may be due to the Supreme Court's failure to fully explain how the constitutional protection afforded to commercial speech should be applied to compelled commercial speech. The Court's central precedent on compelled commercial speech is *Zauderer v. Office of Disciplinary Counsel*.[103] This decision is a bit opaque, and widely misunderstood; generally perceived (even by some of the Justices) as an alternative to *Central Hudson*, when it is better seen as an application of the same overall approach.[104]

Zauderer concerned an Ohio requirement that attorneys who advertise contingent-fee rates must disclose that clients could be

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and Environmental Disclosure, 27 AGRIC. & RESOURCE ECON. REV. 141, 148 (1998) ("[S]imply increasing the amount of information on a label may actually make any given amount of information harder to extract.").

[101] For example, warnings on trace levels of mercury in fish may take consumer attention away from the health benefits of consuming fish high in Omega-3 fatty acids. In this way, such warnings can actually work against efforts to improve public health. *See, e.g.*, Joshua T. Cohen, *Matters of the Heart and Mind: Risk-Risk Tradeoffs in Eating Fish Containing Methylmercury*, RISK IN PERSPECTIVE, Jan. 2006, at 1, 2–3, https://cdn1.sph.harvard.edu/wp-content/uploads/sites/1273/2013/06/RISK_IN_PERSP_JANUARY2006.pdf (suggesting that warnings about the danger of mercury contamination in fish to pregnant women could have the negative effect of decreasing intake of beneficial omega-3 oils, also found in fish).

[102] *See* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (en banc) (upholding a regulation requiring country-of-origin labeling for meat products); Grocery Mfrs. Ass'n v. Sorrell 102 F. Supp. 3d 583 (D. Vt. 2015) (upholding Vermont's mandatory GMO food labeling law); N.Y. State Restaurant Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (upholding a New York law requiring restaurants to disclose calorie counts in dishes). *But see* Nat'l Ass'n of Mfrs. v. Sec. & Election Comm'n, 800 F.3d 518, 530 (D.C. Cir. 2015) (holding that a provision of conflict mineral law requiring disclosure of use of conflict minerals in specific language violated the First Amendment).

[103] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

[104] *See* Adler, *Robert Bork & Commercial Speech*, *supra* note 28, at 621–22 n.48.

liable for court costs if their suits were unsuccessful.[105] The justification for this requirement was that, absent disclosure, some consumers might be misled into thinking that a contingent-fee arrangement protected them against any financial risk of a failed lawsuit when, in fact, they could still be financially liable for court costs.[106] In upholding the disclosure requirement, the Court explained a requirement that a seller or service provider disclose factual information will be upheld so long as the requirement is not unduly burdensome and the requirement is "reasonably related to the State's interest in preventing deception of consumers."[107]

Some courts and commentators have read *Zauderer* to establish that the compelled disclosure of factual information is subject to a lesser degree of scrutiny than is provided by *Central Hudson*.[108] As I have argued elsewhere at greater length,[109] this interpretation reflects a misunderstanding of *Zauderer* and its place in the constellation of the Court's commercial speech jurisprudence.[110] *Zauderer* concerned a mandatory disclosure that was necessary to prevent consumer deception, which is indisputably a "substantial interest" under the *Central Hudson* framework.[111] Moreover, the state's position was that a failure to disclose could render the

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[105] *See Am. Meat Inst.*,760 F.3d at 27–28 (Rogers, J., concurring) (suggesting *Zauderer* can be seen as "an application of *Central Hudson*").

[106] *Zauderer*, 471 U.S. at 633.

[107] *Id.* at 651

[108] *See, e.g.*, *Am. Meat Inst.*, 760 F.3d at 28–30 (Rogers, J., concurring); Post, *Transparent and Efficient*, *supra* note 32, at 560 (discussing how *Zauderer* "advanced an extraordinarily lenient test for the review of compelled commercial speech").

[109] *See* Adler, *Compelled Commercial Speech*, *supra* note 35.

[110] Although, to be fair, the Court's own decisions have not been particularly clear on this point.

[111] *See Zauderer*, 471 U.S. at 631 (invalidating a Ohio rule that banned attorneys from advertising contingency-fee representation without also explaining that clients would be liable for costs, on the basis that such advertising would mislead potential clients to believe they would bear no financial risk); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980) ("If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The state must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest.").

regulated advertising misleading, and inherently misleading commercial speech does not receive any protection at all.[112] As the Court held more recently in *Milavetz, Gallop & Milavetz, P.A. v. United States*, the "essential features of the rule challenged in *Zauderer*" required disclosures "intended to combat the problem of inherently misleading commercial advertisements;" only entailed "an accurate statement" about the nature of what was being advertised.[113]

The misunderstanding and misapplication of *Zauderer* has led some courts to apply the most minimal scrutiny to mandatory disclosures and other compelled commercial speech requirements.[114] This is problematic because such mandates, even when confined to factually true information, are often imbued with normative and political content. The decision that some information is more or less relevant to a consumer's purchase decision is not a value-free choice. There is a near-infinite number of things about a given product or service that may interest some portion of consumers. Choosing to prioritize or privilege some over others necessarily embraces the judgment that some are more important or worthy than others.

This reality justifies treating commercial speech compulsions like speech restrictions (much as occurs in the noncommercial speech context). Subjecting speech compulsions to *Central Hudson* scrutiny does not represent an undue obstacle to legitimate disclosure requirements, such as may be necessary for public health or consumer protection. Most existing federal disclosure requirements easily meet this level of scrutiny.[115]

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[112] *Zauderer*, 471 U.S. at 638 ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.") (quoting Friedman v. Rogers, 440 U.S. 1 (1979)).

[113] Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 230–31 (2010).

[114] *See, e.g.*, Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 28–30 (D.C. Cir. 2014) (Rogers, J., concurring); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113–14 (2d Cir. 2001) ("Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not . . . offend core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests.").

[115] *See* Adler, *Compelled Commercial Speech*, *supra* note 35, at 458.

Abandoning *Central Hudson* in the context of compelled commercial speech, on the other hand, makes it too easy for the government—and concentrated interest groups—to manipulate the flow of information in the marketplace, as well as to distort important dialogue about broader political and cultural messages.

CONCLUSION

Over the past decade, the Supreme Court has expanded the range of speech and expressive activity protected by the First Amendment.[116] Commercial speech has, thus far, been no exception to this larger trend. Yet, lower courts have not been as aggressive in the protection of commercial speech as has been the Supreme Court. Moreover, the weight of academic commentary is decidedly critical of constitutional protection of commercial speech, and speech by corporations in particular.[117]

Because commercial speech can pose a threat to established economic interests, the pressure to adopt new commercial speech restrictions will continue. Insofar as courts and commentators have a blind spot for the threat compelled commercial speech poses to the protection of commercial speech and underlying First Amendment values, this is likely to be an appealing avenue for those who wish to restrict marketplace speech, whether for pecuniary or more noble purposes. Compelled speech requirements motivated by ideological agendas appear to be proliferating.[118] Thus while the protection of commercial speech appears to be robust today, there is no guarantee it will continue.

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[116] *See* United States v. Stevens, 559 U.S. 460, 482 (2010); Sorrell v. IMS Health Care, 564 U.S. 552, 557 (2011).

[117] *See* Coates IV, *supra* note 9, at 225; Piety, *Why Personhood Matters*, *supra* note 9, at 378–79.

[118] To take one prominent example, some jurisdictions have imposed mandatory disclosure requirements on abortion providers and crisis pregnancy centers. *See, e.g.*, B. Jessie Hill, *Casey Meets the Crisis Pregnancy Centers*, 43 J.L. MED. & ETHICS 59 (2015) (finding that some jurisdictions have imposed mandatory disclosure requirements on crisis pregnancy centers); David Orentlicher, *Abortion and Compelled Physician Speech*, 43 J.L. MED. & ETHICS 9 (2015) (discussing that some jurisdictions have imposed mandatory disclosure requirements on abortion providers).