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### Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech

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# PRAGMATISM, PATERNALISM, AND THE CONSTITUTIONAL PROTECTION OF COMMERCIAL SPEECH

Allen Rostron<sup>†</sup>

## INTRODUCTION

As the summer of 2012 began, Americans faced an array of gravely serious issues. National elections in Greece could soon determine whether Europe's debt crisis triggered a worldwide financial collapse.<sup>1</sup> Presidential campaigns were underway in the United States as well, with the candidates charting manifestly different paths for the nation and the polls showing a tight race.<sup>2</sup> The outcome of a gubernatorial recall vote in Wisconsin promised to have a profound impact on the future of organized labor and government finances throughout the country.<sup>3</sup> A landmark Supreme Court ruling on the constitutionality of federal health care reform legislation was only weeks away.<sup>4</sup> Meanwhile, a host of serious, intractable problems continued to loom over the nation, from budget deficits and unemployment to illegal immigration and climate change.

In the midst of these concerns, a new issue suddenly riveted the nation's attention. Americans discovered that the right to drink super-size sodas had come under attack. Michael Bloomberg, Mayor of New York City, proposed a ban on the sale of sugary drinks in containers larger than sixteen fluid ounces.<sup>5</sup> Bloomberg argued that the measure would benefit

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1. See Gail MarksJarvis, *Stock Market's Next Act May Hinge on Greek Drama in June: Elections Will Be Crucial to U.S., Global Economy*, CHI. TRIB., May 30, 2012, [http://articles.chicagotribune.com/2012-05-30/business/ct-biz-0530-gail-20120530\\_1\\_painful-austerity-financial-crisis-greeks-vote](http://articles.chicagotribune.com/2012-05-30/business/ct-biz-0530-gail-20120530_1_painful-austerity-financial-crisis-greeks-vote) (explaining how the elections in Greece will impact the global economy).

2. See Richard W. Stevenson, *Political Memo: Not the '08 Campaign, but More May Be at Stake*, N.Y. TIMES, June 10, 2012, <http://query.nytimes.com/gst/fullpag.html?res=9B07EFDC1123F933A25755C0A9649D8B63> (describing the ideological divide between the candidates).

3. See Thomas Fitzgerald, *Wisconsin Recall Triggering National Issues*, PHILA. INQUIRER, June 6, 2012, [http://articles.philly.com/2012-06-06/news/32056782\\_1\\_watchdog-group-middle-class-milwaukee-mayor-tom-barrett](http://articles.philly.com/2012-06-06/news/32056782_1_watchdog-group-middle-class-milwaukee-mayor-tom-barrett) (discussing the attempted recall of Wisconsin Governor Scott Walker).

4. See Editorial, *Historical Marker: Ruling on Obamacare Will Chart the Future of Our Republic*, AUGUSTA CHRON., June 2, 2012, <http://chronicle.augusta.com/opinion/editorials/2012-06-02/historical-marker> (declaring that June 2012 is "the month history will be made" by a landmark Supreme Court ruling on the constitutionality of the federal health care law).

5. Michael M. Grynbaum, *New York Plans to Ban Sales of Big Sizes of Sugary Drinks*, N.Y. TIMES, May 30, 2012, [http://www.nytimes.com/2012/05/31/nyregion/bloomberg-plans-a-ban-on-large-sugaredrinks.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/05/31/nyregion/bloomberg-plans-a-ban-on-large-sugaredrinks.html?pagewanted=all&_r=0). The New York City Board of Health adopted Bloomberg's

public health in the city,<sup>6</sup> where a majority of adults are obese or overweight, as are forty percent of young children.<sup>7</sup> Bloomberg emphasized that his proposal would not actually impose a limit on anyone's consumption of any beverage. A person who wanted to guzzle a hefty amount of sugar-laden soda could still do so, but would have to purchase it in sixteen-ounce increments rather than in a single giant cup.<sup>8</sup> The Bloomberg proposal thus would serve principally as a way to send a message to consumers. A person buying multiple smaller servings of soda, rather than one immense container, might be more inclined to think about and to moderate the amount consumed. Indeed, Bloomberg's proposal was an example of what Richard Thaler and Cass Sunstein call "libertarian paternalism," the idea that governments should devise ways to "nudge" people toward wise choices without denying anyone the ultimate individual freedom to choose.<sup>9</sup>

The outcry against Bloomberg's proposal was nevertheless intense. Critics denounced Bloomberg as a "soda jerk,"<sup>10</sup> a "big soda scrooge,"<sup>11</sup> and the embodiment of a "Noodge Nation"<sup>12</sup> or "Nanny Police state" run amok.<sup>13</sup> A full-page ad in the *New York Times* accused Bloomberg of being "The Nanny," depicting him with his head photoshopped onto a matronly woman's body.<sup>14</sup> "You only thought you lived in the land of the free," the ad ominously warned.<sup>15</sup> Supporters of Bloomberg's proposal were equally passionate, applauding the mayor for calling attention to the obesity

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proposal in September 2012. See N.Y.C. HEALTH CODE § 81.53 (2012) (banning sale of sugary drinks in containers larger than sixteen fluid ounces).

6. Grynbaum, *supra* note 5.

7. Tina Moore et al., *New Yorkers Rip Bloomberg's Proposed Ban on Big Sugary Sodas*, N.Y. DAILY NEWS, May 31, 2012, <http://www.nydailynews.com/new-york/thirsty-nyers-bloomy-article-1.1087913>.

8. Grynbaum, *supra* note 5. Bloomberg's proposal also would apply only to sales of beverages at locations regulated by the city's health department, such as restaurants, movie theaters, sports stadiums, and sidewalk food carts. It would not affect sales at grocery or convenience stores. *Id.*

9. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 4–5 (2009).

10. Tina Moore & Oren Yaniv, *Soda Jerk: Thirsty Critics Pan Mike's New 'Nanny' Plan*, N.Y. DAILY NEWS, May 31, 2012, at 2.

11. *Id.*

12. Ruth Marcus, *The Rise of Noodge Government*, WASH. POST, June 5, 2012, [http://articles.washingtonpost.com/2012-06-05/opinions/35462459\\_1\\_sugary-drinks-food-allergies-super-size](http://articles.washingtonpost.com/2012-06-05/opinions/35462459_1_sugary-drinks-food-allergies-super-size).

13. Editorial, *New Soda Wars: Infringement on Freedoms?*, PHILA. DAILY NEWS, June 6, 2012, [http://articles.philly.com/2012-06-06/news/32056729\\_1\\_nanny-state-soda-tax-sugary-drinks](http://articles.philly.com/2012-06-06/news/32056729_1_nanny-state-soda-tax-sugary-drinks).

14. Press Release, Ctr. for Consumer Freedom, Full-Page Advertisement in The New York Times Condemns "Nanny" Bloomberg's Latest Attack on Personal Responsibility (June 1, 2012) (on file with author).

15. *Id.*

epidemic and the adverse effects of excessive sugar consumption.<sup>16</sup> A day before the new law was set to take effect, a judge struck it down as “arbitrary and capricious,” concluding that Bloomberg had improperly infringed on legislative authority by implementing his proposal as a Board of Health regulation rather than having it enacted by the City Council.<sup>17</sup> Bloomberg vowed that he would prevail on appeal.<sup>18</sup>

The furor surrounding Bloomberg’s proposal reflected a larger conflict of values and beliefs about the role of governments. The soda controversy arose in the midst of “a broader public anxiety about overbearing government,” fueled by “[t]he bank and auto bailouts, the massive stimulus package, and sweeping new regulations of health care and the financial industry.”<sup>19</sup> A large portion of Americans feel that government has overstepped its bounds. Yet, an equally ardent bloc looks at the array of dilemmas facing the nation and demands that government should be doing more to solve problems, not less.

This debate about the perils and potential benefits of governmental intervention is reverberating in legal arenas as well as in the broader realm of politics and society. In particular, a recent wave of litigation about the commercial speech rights of product manufacturers provides a prime example of this tension. Pharmaceutical manufacturers have questioned laws that limit what they can tell doctors about using drugs in ways federal regulators have not yet approved.<sup>20</sup> Tobacco companies have challenged the federal government’s push to dramatically expand the warnings on cigarette packages.<sup>21</sup> Cell phone providers claim that San Francisco has infringed First Amendment rights by requiring them to provide notice to customers about radiation emitted by wireless devices.<sup>22</sup> The food industry has entered the fray as well, asserting that freedom of speech should protect restaurants from being forced to disclose the calorie content of items on their menus.<sup>23</sup>

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16. See, e.g., Mike Lupica, *Mayor Bloomberg Deserves Credit for Trying to Do the Right Thing by Banning Big Sugary Drinks*, N.Y. DAILY NEWS, June 1, 2012, <http://www.nydailynews.com/new-york/mayor-bloomberg-deserves-credit-banning-big-sugary-drinks-article-1.1087905> (defending the soda ban as a necessary first step in fighting the obesity epidemic in New York City).

17. N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, No. 653584/12, slip op. at 34 (N.Y. Sup. Ct. Mar. 11, 2013); see Michael M. Grynbaum, *Judge Blocks New York City’s Limits on Big Sugary Drinks*, N.Y. TIMES, Mar. 12, 2013, [http://www.nytimes.com/2013/03/12/nyregion/judge-invalidates-bloombergs-soda-ban.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/12/nyregion/judge-invalidates-bloombergs-soda-ban.html?pagewanted=all&_r=0) (discussing court’s recent decision to strike soda ban).

18. Grynbaum, *supra* note 17.

19. Marcus, *supra* note 12.

20. See *infra* Part II-A.

21. See *infra* Part II-B.

22. See *infra* Part II-C.

23. See *infra* Part II-D.

This Article looks at the intriguing battles that have been and continue to be fought over commercial speech rights. It explores the evolution of commercial speech's treatment under the First Amendment and how new cases now underway might affect the future of commercial speech regulation. For several decades, commercial speech has floated somewhere in the middle of the free speech spectrum, receiving an intermediate level of protection.<sup>24</sup> Two basic competing themes have emerged in the Supreme Court's commercial speech decisions. Some members of the Court have suggested that the government should have little power to regulate commercial speech beyond a narrow interest in preventing deception or fraud.<sup>25</sup> If a commercial message is not false or misleading, the government must let people hear it and decide for themselves whether they find it persuasive. That view, currently championed by Clarence Thomas, sees impermissible paternalism in any suggestion that the public could be better off acquiring less knowledge from commercial marketing efforts.<sup>26</sup>

The rival viewpoint, once advanced primarily by William Rehnquist and now by Stephen Breyer, emphasizes judicial deference to reasonable legislative determinations about the best way to balance the interests of commercial speakers and the public.<sup>27</sup> Preventing consumer deception is not the government's only legitimate concern, and courts should approach commercial speech issues with a pragmatic eye toward all of the interests at stake rather than a rigidly anti-paternalistic dogma.<sup>28</sup>

The Supreme Court's decisions have wavered between these two perspectives, with neither achieving complete dominance. Both views show up in lower court opinions on commercial speech issues as well.<sup>29</sup> Despite the tension between these two paradigms, judges need not make a categorical choice between them. Constitutional analysis of commercial speech issues can strike a balance between the two. Freedom of speech is undoubtedly a vital, cherished ideal, and commercial speech can serve important interests by bringing useful information to the public as well as promoting businesses and their productive economic activities. Courts should be wary of laws that assume society would be better off with less information exchanged. At the same time, governments must be able to respond to matters of genuine public concern. Paternalism has acquired a bad name, and surely even the most well-meaning government efforts can

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24. *See infra* Parts I-B, I-C.

25. *See infra* Part I-C.

26. *See infra* Part I-E.

27. *See infra* Part III.

28. *See infra* Parts I-D, I-F.

29. *See infra* Part IV.

be taken too far, but governments should not entirely foreswear efforts to encourage people toward making better choices. Rather than allowing doctrinaire abstractions to drive their decisions, judges should strive to be relentlessly realistic about what is at stake on each side of these cases.

This Article thus steers a middle course through the scholarly literature on the commercial speech doctrine, most of which has taken one of two extreme positions. Some have argued that commercial speech should receive no constitutional protection at all,<sup>30</sup> while others have argued that it should receive the full protection accorded to the most valued types of political, artistic, or other expression.<sup>31</sup> Eschewing those extremes, this Article urges courts to maintain an intermediate level of constitutional protection for commercial expression and preserve the flexibility needed to reach decisions that best accommodate the overall interests of businesses and consumers.

Part I of this Article begins by looking at the development of constitutional protection for commercial speech, focusing on key decisions made by the U.S. Supreme Court. This Part describes the origins of commercial speech doctrine and lays out the basic tests that the Court has used to evaluate the constitutionality of laws that restrict commercial speech or that require businesses to disclose more information about their products or services. This Part of the Article also traces the emergence of two fundamental themes in the Supreme Court's commercial speech jurisprudence: (1) a pragmatic inclination to defer to reasonable legislative judgments, and (2) an anti-paternalistic impulse that condemns governments for acting on fears that truthful information will encourage people to make bad choices. Part II focuses on recent controversies about commercial speech that have worked their way to or through the lower courts. Pharmaceutical companies' speech about off-label uses of drugs provides an example of how government regulators can strive to achieve a fair balance between commercial speech and public health interests. New federal laws regarding tobacco have raised novel questions about the

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30. See, e.g., C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 9, 13 (1976); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 355 (1978); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 484–89 (1985); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 14–40 (1979).

31. See, e.g., Elizabeth Blanks Hindman, *The Chickens Have Come Home to Roost: Individualism, Collectivism and Conflict in Commercial Speech Doctrine*, 9 COMM'N L. & POL'Y 237, 269–71 (2004); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780, 791–93 (1993).

expressive significance of visual images in advertising and on product packaging and government-mandated warning labels. A San Francisco ordinance concerning cell phones has forced judges to confront the difficult issue of what to do when a government wants businesses to warn consumers about a danger that might exist but probably does not. And finally, laws requiring restaurants to post calorie counts on their menus acutely raise the fundamental question of where to draw the line on paternalistic efforts to promote public health. Pragmatism about government efforts to solve problems and wariness about overreaching paternalism are not mutually exclusive concerns, but instead can coexist within soundly balanced First Amendment doctrine on commercial speech rights.

### I. THE SUPREME COURT'S WINDING ROAD

Commercial speech has been one of the most controversial and unsettled areas of constitutional law in recent years. It is “frequently considered an area in need of reform, and possibly even of demolition.”<sup>32</sup> The Supreme Court’s decisions have been “unsteady and somewhat unpredictable.”<sup>33</sup> Those decisions nevertheless provide a basic framework and starting point for the analysis of commercial speech issues. Moreover, looking back at the major opinions underscores important features of the Court’s reasoning and significant ways in which the debate over commercial speech has shifted. As commercial speech doctrine evolved over the years, so did the ideological orientations of its supporters and opponents. The Supreme Court’s liberal lions led the charge for commercial speech in the 1970s and 1980s, but gradually the tables turned and the Court’s conservative members became some of the most ardent advocates for commercial speech rights.

#### A. *The Origins of Commercial Speech Rights*

Constitutional protection for commercial speech got off to a very slow start. In its 1942 decision in *Valentine v. Chrestensen*, the Supreme Court unanimously found it quite obvious that “purely commercial advertising” was beyond the scope of the First Amendment’s protection.<sup>34</sup> The opinion

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32. Charles Fischette, *A New Architecture of Commercial Speech Law*, 31 HARV. J. L. & PUB. POL’Y 663, 663 (2008).

33. Joseph Blocher, *School Naming Rights and the First Amendment’s Perfect Storm*, 96 GEO. L.J. 1, 32 (2007).

34. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). The Bill of Rights applies directly to the federal government only, but freedom of speech and all other rights protected by the First Amendment

was brief and the analysis was remarkably scant. One of the Justices who joined in making the decision, William O. Douglas, later described the ruling as “casual, almost offhand.”<sup>35</sup> But the decision nevertheless reflected a sensible, pragmatic perspective. In making this decision, the Court did not indulge in abstract theorizing or subtle arguments about the constitutional text or history. Rather, the Court based its decision entirely on a policy judgment that courts should defer to legislative determinations about how best to regulate business activities and balance the interests of commercial enterprises and the public.<sup>36</sup> While recognizing that in some instances a commercial message might be intertwined with other types of expression, the Court stressed that businesses should not be able to invoke the First Amendment’s protection through the subterfuge of inserting some “civil appeal” or “moral platitude” into their advertising.<sup>37</sup>

Over the next several decades, the Court gradually backed away from the stark pronouncement of *Valentine v. Chrestensen* and began to bring commercial speech within the First Amendment’s reach. But the Court principally did so in cases involving advertisements quite different than a typical business promotion. For example, the Court’s seminal decision about First Amendment limits on libel actions, *New York Times Co. v. Sullivan*, concerned a newspaper advertisement.<sup>38</sup> The ad, however, was not placed by a business to promote a conventional product or service. Instead, the ad editorialized about conflicts between civil rights protestors and law enforcement authorities in the South.<sup>39</sup> Additionally, it solicited donations to support the protest movement and to pay for Martin Luther King, Jr.’s legal defense against a perjury charge.<sup>40</sup> The Court concluded that the ad presented information and argument about matters of great public concern and was clearly “not a ‘commercial’ advertisement in the sense in which the word was used in *Chrestensen*.”<sup>41</sup>

The Court further opened the door to constitutional protection for commercial speech in *Bigelow v. Virginia*,<sup>42</sup> a case that concerned a Virginia newspaper editor convicted for publishing an advertisement about

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have been incorporated into the Fourteenth Amendment so that they apply with equal force to state and local government actions. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034–35 (2010). For the sake of brevity, I will simply use the term “First Amendment” in this Article even when technically a First Amendment right incorporated into the Fourteenth Amendment is actually at issue.

35. *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

36. *Valentine*, 316 U.S. at 54–55.

37. *Id.* at 55.

38. *New York Times Co. v. Sullivan*, 376 U.S. 254, 254 (1964).

39. *Id.* at 256–57.

40. *Id.* at 257.

41. *Id.* at 266.

42. *Bigelow v. Virginia*, 421 U.S. 809 (1975).



abortion services available in New York.<sup>43</sup> The *Bigelow* case arrived at the Court two years after *Roe v. Wade*.<sup>44</sup> Although the Court insisted that *Bigelow* was a First Amendment case, and not an abortion case, the *Bigelow* ruling was essentially an addendum to *Roe*'s conclusion that women have a constitutional right to have an abortion in some circumstances.<sup>45</sup> The same nine men decided both cases, and they split 7-2 in *Bigelow* just as they had in *Roe*, with Harry Blackmun writing the majority opinion in both instances.<sup>46</sup>

Commercial speech thus did not make its way unescorted into the arena of constitutional protection. It instead arrived there via cases involving advertisements implicating other significant constitutional interests. The civil rights movement and abortion were obviously major topics of national controversy, and concerns about promoting racial equality and access to abortion services raised the constitutional stakes well above those surrounding routine business promotions. As the Court put it, the cases implicated "the constitutional interests of the general public," not just the rights of a business hoping to promote itself or a newspaper hoping to profit by running the ads.<sup>47</sup>

Liberal justices eagerly embraced the idea of extending First Amendment protection to commercial speech. Again, it surely did not hurt that commercial speech issues reached the Court intertwined with other rights that liberals would be most likely to favor and interpret expansively. But the liberal justices' enthusiasm for protecting commercial speech was also a natural offshoot of their highly libertarian perspective on other freedom of speech issues.<sup>48</sup> The Court's liberal members in that era "evinced an increasing hostility to the exclusion of specific categories of speech from First Amendment protections," and therefore they resisted the notion that commercial speech stood entirely outside the Constitution's reach.<sup>49</sup>

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43. *Id.* at 811-12.

44. *Roe v. Wade*, 410 U.S. 113 (1973).

45. *Bigelow*, 421 U.S. at 815 n.5.

46. The Court would later extend *Bigelow* to protect commercial speech concerning contraceptives. See *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 61 (1983) (striking down ban on unsolicited mailing of contraceptive advertisements); see also *Carey v. Population Servs. Int'l*, 431 U.S. 678, 681-82 (1977) (striking down ban on advertisement or display of contraceptives).

47. *Bigelow*, 421 U.S. at 822; see also *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 345-46 (1986) (noting that the constitutional right to abortion was a crucial ingredient in *Bigelow*).

48. See Eric M. Maltz, *The Strange Career of Commercial Speech*, 6 CHAP. L. REV. 161, 162-63 (2003) (discussing the libertarian views of the Court during the Warren era).

49. *Id.*

Liberal justices also favored protecting commercial speech as a means of advancing the interests of consumers. Their opinions emphasized the consumers' perspective rather than that of businesses. For example, in striking down restraints on pharmacy advertising of prescription drug prices, the Court noted that drug prices varied dramatically from store to store, but that the advertising restriction prevented consumers from knowing where to find the lowest prices.<sup>50</sup> While enlarging the speech rights of pharmacies, the Court did so in a way likely to result in an overall net financial gain for consumers through increased competition, lower pharmacy prices, and lower profit margins. Likewise, the Court's decisions about attorney advertising reflected a liberal desire to expand access to legal services, particularly in situations involving left-leaning causes like protecting reproductive rights.<sup>51</sup> Thurgood Marshall, for example, suggested that the central objective was not to help lawyers but instead to ensure that bar disciplinary rules "not be utilized to obstruct the distribution of legal services to all those in need of them."<sup>52</sup>

The Supreme Court thus emphasized that commercial speech receives constitutional protection for the sake of the speech's potential audience, not just to satisfy the individualistic interests of the speaker.<sup>53</sup> A consumer's interest in "the free flow of commercial information" may be even stronger "than his interest in the day's most urgent political debate."<sup>54</sup> The public has a corresponding interest in ensuring that consumers have information with which to form intelligent opinions and make wise choices.<sup>55</sup> From the beginning, these practical considerations about promoting the public's best interests were a crucial part of the Court's rationale for extending constitutional protection to commercial speech.

The Supreme Court's most conservative member at that time, William Rehnquist, stubbornly and vociferously dissented from each step of the

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50. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 754 & n.11 (1976).

51. *Compare* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449, 454 (1978) (upholding prohibition on in-person solicitation of clients by personal injury lawyer), *with* *In re Primus*, 436 U.S. 412, 422 (1978) (invalidating punishment for in-person solicitation where attorney was affiliated with American Civil Liberties Union and potential clients were women sterilized or threatened with sterilization as a condition for receiving Medicaid assistance).

52. *Ohralik*, 436 U.S. at 468–69 (Marshall, J., concurring in part and concurring in the judgments).

53. *Va. State Bd. of Pharmacy*, 425 U.S. at 756–57 (recognizing the existence of a "right to receive the advertising" as well as a "right to advertise").

54. *Id.* at 763.

55. *Id.* at 765.

Court's march toward First Amendment rights for commercial speech.<sup>56</sup> In Rehnquist's view, the First Amendment right to freedom of speech should remain "a sanctuary for expressions of public importance or intellectual interest,"<sup>57</sup> and the Court demeaned the right by "elevat[ing] commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas."<sup>58</sup>

A lonely voice for judicial restraint on the issue, Rehnquist argued that courts could safely defer to legislative determinations about society's best interests.<sup>59</sup> An unimpeded flow of commercial information from businesses to consumers could be harmful or beneficial, and it should be the legislature's job to decide how to factor those considerations into the process of making laws.<sup>60</sup> Virginia consumers might benefit from more information about drug prices, for example, but surely that "should presumptively be the concern of the Virginia Legislature, which sits to balance these and other claims in the process of making laws."<sup>61</sup> And if elected officials reached a different conclusion than the Court about what policy would best serve the public's interests, Rehnquist found "nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions."<sup>62</sup>

Rehnquist warned that the Supreme Court's decisions would soon lead down a slippery slope.<sup>63</sup> Unless judges bestowed on themselves the undeserved task of selecting what sorts of commercial messages deserved special favor, constitutional armor would shield every commercial proposition. Without courts discriminating on the basis of advertising's content, why would a promotion of abortion services deserve more protection than "an advertisement for a bucket shop operation or a Ponzi scheme"?<sup>64</sup> If a pharmacy has a constitutional right to run an ad touting its low prices for prescription drugs, why not an ad urging patients to ask their doctors to prescribe opiates for minor pain relief?<sup>65</sup> "Pain getting you down? Insist that your physician prescribe Demerol."<sup>66</sup> Indeed, once the

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56. For a discussion of Rehnquist's commercial speech jurisprudence, see Maltz, *supra* note 48, at 167-69.

57. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 404 (1977) (Rehnquist, J., dissenting).

58. *Va. State Bd. of Pharmacy*, 425 U.S. at 781 (Rehnquist, J., dissenting).

59. *Id.* at 781-84.

60. *Id.* at 783.

61. *Id.*

62. *Id.* at 784.

63. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 405 (1977) (Rehnquist, J., dissenting).

64. *Bigelow v. Virginia*, 421 U.S. 809, 831 (1975) (Rehnquist, J., dissenting).

65. *Va. State Bd. of Pharmacy*, 425 U.S. at 788 (Rehnquist, J., dissenting).

66. *Id.*

constitutional door was open, judges would be unable to exclude promotions of products like tobacco, alcohol, and “other products the use of which it has previously been thought desirable to discourage.”<sup>67</sup> Any hope of establishing “understandable and workable differentiations between protected and unprotected speech in the field of advertising” would soon disappear.<sup>68</sup>

*B. The Central Hudson Test for Restrictions on Commercial Speech*

Once the Supreme Court decided to bring commercial speech within the First Amendment’s reach, the obvious next question was what analysis or tests would be used to determine the validity of the wide range of government actions that could infringe on commercial speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court laid out a framework to analyze commercial speech restrictions.<sup>69</sup> First, the Court declared that speech that is deceptive or promotes illegal activities falls entirely outside the scope of the First Amendment.<sup>70</sup> Government bans on those types of expression, therefore, do not infringe the right to freedom of speech.<sup>71</sup> But if commercial speech is not misleading or related to illegal activity, the government can restrict it only if: (1) the government has a substantial interest that will be served by the restriction, (2) the restriction directly advances that government interest, and (3) the restriction is not more extensive than is necessary to serve the government’s interest.<sup>72</sup>

The *Central Hudson* test essentially imposed an intermediate level of scrutiny on commercial speech restrictions. The Court has emphasized that this is a “lesser” level of protection than that afforded to other types of speech.<sup>73</sup> For example, while the First Amendment generally prohibits content-based censorship of speech, the Court did not insist that restrictions on commercial speech must be content-neutral.<sup>74</sup> Businesses have financial incentives that make commercial speech a “hardy breed of expression” unlikely to be chilled by government regulation.<sup>75</sup>

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67. *Id.* at 781.

68. *Bates*, 433 U.S. at 405 (Rehnquist, J., dissenting).

69. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

70. *Id.* at 563–64.

71. *Id.*

72. *Id.* at 566. In subsequent cases, the Court tweaked the third prong of the test, concluding that the government is not required to employ the least restrictive of all conceivable means of achieving its objective. *See infra* notes 110–115 and accompanying text.

73. *Cent. Hudson*, 447 U.S. at 562–63.

74. *Id.* at 564 n.6.

75. *Id.*

While the Court settled on an intermediate scrutiny analysis for restrictions on commercial speech in *Central Hudson*, the Court's liberal wing wanted to go further and subject at least some types of commercial speech restraints to even more demanding scrutiny.<sup>76</sup> They urged that only a "clear and present danger" could justify government restrictions aimed at suppressing truthful information about a legal product.<sup>77</sup>

At the conservative end of the Court's ideological spectrum, William Rehnquist remained appalled by the Court's exaggeration of the constitutional significance of commercial speech. In *Central Hudson*, he was the only member of the Court who thought it was reasonable for the state of New York to promote energy conservation by prohibiting electric utilities from advertising.<sup>78</sup> While the other justices offered only a vague acknowledgement that saving energy was an important objective,<sup>79</sup> Rehnquist emphasized that the state had issued the challenged policy in 1973, at the height of the national energy crisis precipitated by Arab countries' embargo of oil exports to the United States.<sup>80</sup> Although the advertising ban remained in effect after the embargo's end, Rehnquist recognized that the episode had unequivocally established the "paramount national interest" in energy conservation.<sup>81</sup> Indeed, the Supreme Court rendered its decision in *Central Hudson* in the middle of 1980, a time when energy prices had surged dramatically because of the oil crisis brought on by Iran's Islamic Revolution of 1979.<sup>82</sup>

Rehnquist thus emphasized the practical consequences of the Court's decision while the rest of the Court focused on abstract ideals. Rehnquist criticized the majority for its skepticism about the extent to which a ban on electric utility advertising would really serve the government's asserted

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76. See, e.g., *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 351 (1986) (Brennan, Marshall, and Blackmun, JJ., dissenting) ("Where the government seeks to suppress the dissemination of nonmisleading commercial speech relating to legal activities, for fear that recipients will act on the information provided, such regulation should be subject to strict judicial scrutiny.")

77. *Cent. Hudson*, 447 U.S. at 574–75 (Blackmun and Brennan, JJ., concurring in the judgment); *id.* at 581 (Stevens and Brennan, JJ., concurring in the judgment).

78. *Id.* at 583–84 (Rehnquist, J., dissenting).

79. See *id.* at 568 (majority opinion) ("In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation.")

80. *Id.* at 583 (Rehnquist, J., dissenting).

81. *Id.*

82. See Jad Mouawad, *Gas Prices Soar, Posing a Threat to Family Budget*, N.Y. TIMES, Feb. 27, 2008, [http://www.nytimes.com/2008/02/27/business/27gas.html?\\_r=0&pagewanted=print](http://www.nytimes.com/2008/02/27/business/27gas.html?_r=0&pagewanted=print) (noting that oil prices reached an inflation-adjusted all-time high in April 1980). In a newspaper article published just a few days after the Supreme Court's decision in *Central Hudson*, a utility company analyst lamented that "[i]t's very hard for people to realize that the days of energy availability and lower prices are gone forever." Phil McCombs, *Rising Electricity Prices: Real Impetus to Conserve*, WASH. POST, June 24, 1980, at B1.

goal of energy conservation. “Until I have mastered electrical engineering and marketing,” Rehnquist declared, “I am not prepared to contradict by virtue of my judicial office those who assume that the ban will be successful in making a substantial contribution to conservation efforts.”<sup>83</sup>

According to Rehnquist, the Court’s commercial speech decisions threatened to drag the country back to the discredited doctrines of the *Lochner* era, when “it was common practice for this Court to strike down economic regulations adopted by a State based on the Court’s own notions of the most appropriate means for the State to implement its considered policies.”<sup>84</sup> The Court, in Rehnquist’s view, had unwisely “unlocked a Pandora’s Box.”<sup>85</sup>

### C. *The Zauderer Test for Compelled Commercial Speech*

While most of the Supreme Court’s commercial speech cases have dealt with government attempts to censor or restrict expression, the Court has also faced situations where a government sought to require a commercial speaker to communicate a particular message. In other words, some cases lie at the intersection of the First Amendment doctrines of commercial speech and compelled speech.

As soon as it began to bring commercial speech within the First Amendment’s protection, the Supreme Court emphasized the distinction between speech restrictions and speech requirements.<sup>86</sup> In some other contexts, the notion of government-compelled speech is as abhorrent as any restrictive censorship law. For example, the Supreme Court has held that children cannot be forced to recite a pledge that is contrary to the religious beliefs of the children and their parents.<sup>87</sup> Even when patriotic feelings are at a peak or partisan disputes are at their most intense, there is no clamor for the Supreme Court to overrule that decision. Forcing people to speak in defiance of their most fundamental personal beliefs violates autonomy and freedom of conscience in an unmistakable and unsupportable way. But there is nothing as repulsive about the government inserting additional messages into businesses’ commercial appeals. Business transactions and

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83. *Cent. Hudson*, 447 U.S. at 601 (Rehnquist, J., dissenting).

84. *Id.* at 589 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

85. *Id.* at 598.

86. *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 650–651 (1985).

87. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If 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.”).

advertising are typically not the most deeply personal part of one's life and being. Recognizing this clear difference in the degree of intrusion involved, the Court explicitly noted, in early cases in the evolution of commercial speech doctrine, that the Constitution would not prevent governments from requiring "that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."<sup>88</sup>

When a compelled commercial speech case finally came before the Court, the justices concluded that the *Central Hudson* analysis is not the appropriate way to analyze situations in which the government compels commercial speech rather than restricts it.<sup>89</sup> Requiring speech is fundamentally different from prohibiting it. Compelled speech expands communication, albeit in a way that the speaker does not prefer. When the government mandates the insertion of a new message into advertisements, for example, the government has not stopped the advertisers from saying whatever they want to say. Instead, "[I]t has only required them to provide somewhat more information than they might otherwise be inclined to present."<sup>90</sup>

The Supreme Court's leading case on compelled commercial speech is *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, which concerned an Ohio attorney's advertisements offering to represent clients in certain product liability cases on a contingent fee basis.<sup>91</sup> The ad stated that "[i]f there is no recovery, no legal fees are owed by our clients."<sup>92</sup> The state bar authorities reprimanded the attorney because the ad did not explain that a client who brought an unsuccessful claim could be liable for legal costs, even if the attorney charged no fees in such a situation.<sup>93</sup> The ad was deceptive, according to the bar authorities, because potential clients might not realize their potential liability for costs unless the advertisement explained the distinction between costs and fees.<sup>94</sup>

The Supreme Court ruled against the advertising attorney in *Zauderer* on this point, upholding the disclosure demanded by the state bar's disciplinary officials.<sup>95</sup> The Court held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably

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88. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 & n.24 (1976).

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

90. *Id.*

91. *Id.* at 630.

92. *Id.* at 631.

93. *Id.* at 633.

94. *Id.* at 634–635.

95. *Id.* at 635.

related to the State's interest in preventing deception of consumers."<sup>96</sup> This test would ensure, the Court suggested, that governments would have adequate ability to protect consumers while precluding truly "unjustified or unduly burdensome disclosure requirements."<sup>97</sup>

*Zauderer* thus provided a legal test for situations in which the government seeks to compel the addition of uncontroversial facts to advertisements that would otherwise be deceptive. But beyond that, uncertainties remained. To what extent can the government require the inclusion of a message that does not consist merely of uncontroversial facts?<sup>98</sup> And to what extent can the government compel the addition of speech to a commercial message that is not false or misleading?<sup>99</sup> *Zauderer* did not explicitly provide answers to those questions.

#### D. Greater Deference to Legislatures

With the *Central Hudson* test governing commercial speech restrictions and *Zauderer* providing a standard for evaluating at least some varieties of compelled commercial speech, the Supreme Court had a basic framework in place for itself and lower courts to follow. Several decades of adjudication under that framework, however, produced uneven results and proved that the constitutional controversy over commercial speech was far from over.

William Rehnquist, the Supreme Court's foremost critic of commercial speech rights, realized that the Court was not going to reverse itself and exclude commercial speech from the First Amendment's reach. He grudgingly accepted the rules established by the Court's commercial speech precedents and began focusing his arguments on how those tests should be

96. *Id.* at 651.

97. *Id.* The Court's two most liberal members, William Brennan and Thurgood Marshall, argued that the test established by the majority opinion would make it too easy for governments to compel commercial speech. *See id.* at 657–64 (Brennan and Marshall, JJ., concurring in part and dissenting in part) (arguing that the *Central Hudson* test should apply to compelled commercial speech as well as commercial speech restrictions).

98. For discussion of how this question should be answered, see *infra* notes 336–343 and accompanying text.

99. Lower courts generally have read *Zauderer* broadly to cover disclosures intended to better inform consumers, not just those intended to prevent consumer deception. *See* N.Y. State Restaurant Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009) (citing Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (finding that *Zauderer* is not limited to situations where the government seeks to cure what would otherwise be deceptive advertising); Pharm. Care Mgt. Ass'n v. Rowe, 429 F.3d 294, 310 n.8 (1st Cir. 2005) (rejecting the argument that *Zauderer* applies only to potentially deceptive advertising and explaining that "we have found no cases limiting *Zauderer* in such a way"). *But see* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1213–14 (D.C. Cir. 2012) (holding that *Zauderer* applies only to disclosure requirements that correct misleading commercial speech).



applied, rather than arguing that the past cases were wrong and should be overruled.<sup>100</sup>

In doing so, Rehnquist soon began to find some success in influencing the outcome of commercial speech cases. He finally had the chance to write a majority opinion concerning commercial speech in 1986, when the Court upheld a restriction on casino advertising in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.<sup>101</sup> The case concerned a law that prohibited casinos in Puerto Rico from engaging in any gambling advertising aimed at the people of Puerto Rico.<sup>102</sup> In other words, the casinos could advertise only in ways that would lure tourists to the island to gamble rather than encourage local residents to gamble.

Writing for a 5-4 majority, the central thrust of Rehnquist's analysis was judicial deference to legislators.<sup>103</sup> Puerto Rico's elected representatives enacted the law, they presumably had good reasons for doing so, and courts need not override that judgment.<sup>104</sup>

Rehnquist added an important assertion about the potential illogic of overzealously protecting commercial speech rights. The casino operator that brought the *Posadas* case argued that, having chosen to legalize casino gambling, the Puerto Rico legislature should not then be allowed to turn around and put restrictions on advertising in order to discourage people from patronizing the casinos.<sup>105</sup> Rehnquist concluded that the casino operator "has the argument backwards."<sup>106</sup> If a legislature has the power to prohibit a good or service altogether, it surely has the power "to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising."<sup>107</sup> Rehnquist added that it would be a "Pyrrhic victory" for casinos if they won the right to advertise freely but thereby drove the Puerto Rico legislature to prohibit casino gambling by local residents.<sup>108</sup> Likewise, it would be a "strange constitutional doctrine" that gave legislatures the power to pull a product off the market but not the

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100. For example, Rehnquist did not dissent when the Court found advertising restrictions unconstitutional in *In re R.M.J.*, 455 U.S. 191, 192, 205 (1982) (striking down restrictions on attorney advertising), or *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 61 (1983) (striking down ban on unsolicited mailing of contraceptive advertisements).

101. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 330-31 (1986).

102. *Id.* at 332-33.

103. *Id.* at 341-42.

104. *See id.* at 352 (Brennan, J., dissenting) (complaining that Rehnquist's opinion "does little more than defer to what it perceives to be the determination by Puerto Rico's Legislature that a ban on casino advertising aimed at residents is reasonable").

105. *Id.* at 346.

106. *Id.*

107. *Id.*

108. *Id.*

lesser power to prohibit or regulate advertising for it.<sup>109</sup> If taken to its logical conclusion, Rehnquist's greater-includes-lesser reasoning would reach far beyond cases about gambling and justify sweeping censorship or prohibition of advertising for all sorts of other goods and services.

Rehnquist gained a deeply conservative ally when Antonin Scalia took a seat on the Court, and it initially appeared that Scalia would join Rehnquist in pushing back against the expansion of commercial speech rights. Scalia wrote the majority opinion in *Board of Trustees of the State University of New York v. Fox*,<sup>110</sup> which considered whether a state university could prohibit product demonstrations, such as "Tupperware parties," in dormitory rooms. Over the dissent of its three most liberal members, the Court tweaked the third prong of the *Central Hudson* test.<sup>111</sup> That prong of the test, requiring the government's action to be "not more extensive than is necessary" to serve the government's interest,<sup>112</sup> had been understood to mean that the government must employ the least restrictive means of achieving its objective.<sup>113</sup> In other words, the government could not justify censorship of commercial expression if it had some other conceivable way to achieve its goal. But in *Board of Trustees v. Fox*, the Court disavowed that demanding rule in favor of a softer standard requiring the government merely to show that its chosen course of action was narrowly tailored to achieve its goal, so that the restriction imposed on speech was not significantly more extensive than necessary.<sup>114</sup> This requires only a "reasonable" fit between the government's action and its objective, not a perfect correspondence.<sup>115</sup>

*Board of Trustees v. Fox* thus moved the law in Rehnquist's direction, even if it was a limited step. The opinion echoed Rehnquist's past arguments about the need for judicial deference to legislative determinations, explaining that its holding would give governments "needed leeway" to regulate commercial speech.<sup>116</sup> It appeared that the Court, growing more conservative thanks to appointments made by President Reagan and his successor George H.W. Bush, might be ready to follow Rehnquist's lead toward curtailing First Amendment protection for commercial speech even further.

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109. *Id.*

110. *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989).

111. *Id.* at 486 (Blackmun, Brennan, and Marshall, JJ., dissenting).

112. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

113. *See Fox*, 492 U.S. at 476 (noting that the Court has employed a "least-restrictive" means approach in commercial speech cases).

114. *Id.* at 480.

115. *Id.*

116. *Id.* at 481.

*E. The Push Against Paternalism*

Rehnquist's hopes were dashed, as a conservative coalition that would significantly curb commercial speech rights never emerged. The Court splintered in several directions on commercial speech issues, but rather than simply dividing along the customary liberal-conservative ideological dimension, the principal fault line was attitudes toward governmental paternalism. Through a series of cases spread across two decades, the Justices have carried on a vigorous debate about the extent to which the government should ever be permitted to suppress advertisers' dissemination of true information on the ground that the public would be better off not hearing it.

Some of the more liberal members of the Court had long denounced the "highly paternalistic" idea that the government should ever strive to keep people uninformed for their own good.<sup>117</sup> It is always better, they argued, to assume 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>118</sup> Harry Blackmun, in particular, tirelessly argued that truthful commercial speech should receive greater protection than the intermediate scrutiny afforded by the *Central Hudson* test.<sup>119</sup>

The anti-paternalist perspective gained stalwart support from the conservative side of the Court when Clarence Thomas became a staunch advocate for commercial speech rights.<sup>120</sup> In his first few years on the Court, Thomas seemed to share Rehnquist's highly deferential attitude

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117. See *supra* notes 76–77 and accompanying text.

118. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

119. See *Edenfield v. Fane*, 507 U.S. 761, 777–78 (1993) (Blackmun, J., concurring) (disagreeing with the majority's analysis that commercial speech "that is free from fraud or duress or the advocacy of unlawful activity is entitled to only an 'intermediate standard'" of scrutiny); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 431–38 (1993) (Blackmun, J., concurring) (stating that the *Central Hudson* analysis provides insufficient protection for truthful, noncoercive commercial speech concerning lawful activities); see also *United States v. Edge Broad. Co.*, 509 U.S. 418, 439 (1993) (Stevens, J., dissenting) (denouncing restriction on lottery advertising as "extremely paternalistic" measure that could be justified only "by a truly substantial governmental interest").

120. For analysis of Thomas's position on commercial speech, see Jennifer R. Franklin, *Peaches, Speech, and Clarence Thomas: Yes, California, There Is a Justice Who Understands the Ramifications of Controlling Commercial Speech*, 12 REGENT U. L. REV. 627, 638 (2000); David L. Hudson, Jr., *Justice Clarence Thomas: The Emergence of a Commercial-Speech Protector*, 35 CREIGHTON L. REV. 485, 487 (2002); Steven B. Lichtman, *Black Like Me: The Free Speech Jurisprudence of Clarence Thomas*, 114 PENN. ST. L. REV. 415, 426–29 (2009).

toward commercial speech restrictions.<sup>121</sup> But Thomas soon shifted direction. The first major hint of this came in *Rubin v. Coors Brewing Co.*,<sup>122</sup> where Thomas led the Court in rejecting the notion that the government should have extra leeway to regulate commercial speech concerning “socially harmful” vices like gambling or alcohol.<sup>123</sup>

A year later, in *44 Liquormart, Inc. v. Rhode Island*, the Court unanimously struck down a state ban on alcohol price advertising.<sup>124</sup> The pendulum had swung a long way from where it had been a decade earlier, when the Court upheld the restriction on Puerto Rico casino gambling in *Posadas*.<sup>125</sup> Even Rehnquist now conceded that his opinion for the majority in *Posadas* had gone too far in its deference to legislative determinations.<sup>126</sup> Courts needed to carefully examine legislative assertions about the need for commercial speech restrictions rather than accepting them at face value.<sup>127</sup>

Clarence Thomas went further in his concurring opinion in *44 Liquormart*, staking a claim as the foremost proponent of commercial speech rights in the Court’s history. Thomas challenged the notion that commercial speech should receive only an intermediate level of constitutional scrutiny, finding no “philosophical or historical basis” for the idea that commercial speech is of less value than the sorts of speech receiving full constitutional protection.<sup>128</sup> Moreover, Thomas emphatically denounced the idea that a government restriction of commercial speech could ever be justified on the ground that it would benefit society “to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace.”<sup>129</sup> That sort of paternalistic government interest, Thomas argued, should be “*per se* illegitimate.”<sup>130</sup>

The Court came tantalizingly close to embracing Thomas’s view in *44 Liquormart*. Three other members of the Court (John Paul Stevens, Anthony Kennedy, and Ruth Ginsburg) similarly concluded that judges

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121. For example, Thomas joined Rehnquist’s dissenting opinion in *City of Cincinnati v. Discovery Network*, 507 U.S. at 438–46, urging that a city’s ban on commercial news racks should be upheld.

122. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478 (1995) (striking down federal law prohibiting beer labels displaying alcohol content).

123. *Id.* at 482 n.2.

124. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J. concurring in part and concurring in the judgment).

125. *See supra* notes 101–109 and accompanying text.

126. *See 44 Liquormart*, 517 U.S. at 531–32 (O’Connor, J., concurring in the judgment, joined by Rehnquist, Souter, and Breyer, JJ.).

127. *Id.*

128. *Id.* at 522 (Thomas, J., concurring).

129. *Id.* at 518.

130. *Id.*; *see also id.* at 526 (“[A]ll attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.”).

should be “especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”<sup>131</sup> Justice Scalia sympathized with that view, but declined to provide a fifth vote for dramatically revamping the Court’s commercial speech jurisprudence until he had a chance to gain better insight into eighteenth and nineteenth century legislative practices and understandings about government authority to regulate commercial speech.<sup>132</sup> The *Central Hudson* test thus survived, but barely so, and its days seemed numbered.

Defying expectations, *Central Hudson* proved to be oddly resilient. In case after case, the Supreme Court acknowledged the controversy surrounding the *Central Hudson* standard, noting that many judges and scholars had called for intensifying the scrutiny of commercial speech restrictions, but nevertheless concluded that there was no immediate need for the Court to reconsider *Central Hudson* and break new ground.<sup>133</sup> Only Clarence Thomas seemed ready and willing to take the plunge and disavow *Central Hudson* once and for all.<sup>134</sup> Thomas eventually set his sights on overruling *Zauderer* as well. He expressed skepticism about *Zauderer*’s basic premise that the government deserves more leeway when compelling commercial speech than when restricting it.<sup>135</sup> In his view, the government should bear an equally strict burden when telling a commercial advertiser what to say as when telling it what not to say.<sup>136</sup>

While the Court never overruled *Central Hudson* or *Zauderer*, or expressly replaced their tests with more demanding requirements, it sometimes applied the tests in ways that inched toward giving more exacting scrutiny to commercial speech restraints. For example, in

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131. The relevant portion of Justice Stevens’ opinion, *id.* at 503, was joined only by Justices Kennedy and Ginsburg.

132. *Id.* at 517–18 (Scalia, J., concurring in part and concurring in the judgment).

133. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011) (declining to reconsider *Central Hudson* because Vermont restriction on use of pharmacy data was invalid even under *Central Hudson*); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367–68 (2002) (declining to reconsider *Central Hudson* because federal restriction on pharmacy advertising of compounded drugs was invalid even under *Central Hudson*); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554–55 (2001) (declining to reconsider *Central Hudson* because Massachusetts limits on tobacco advertising were invalid even under *Central Hudson*); *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 184 (1999) (declining to reconsider *Central Hudson* because federal ban on broadcast ads for casinos was invalid even under *Central Hudson*).

134. See, e.g., *Thompson*, 535 U.S. at 377 (Thomas, J., concurring); *Lorillard*, 533 U.S. at 572 (Thomas, concurring in part and concurring in the judgment); *Greater New Orleans Broad.*, 527 U.S. at 197 (Thomas, J., concurring in the judgment).

135. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1343 (2010) (Thomas J., concurring in part and concurring in the judgment).

136. *Id.*

*Edenfield v. Fane*,<sup>137</sup> the Court described the *Central Hudson* test as placing a burden on the government that “is not satisfied by mere speculation or conjecture.”<sup>138</sup> The government instead “must demonstrate that the harms it recites are real” and that restraining commercial speech “will in fact alleviate them to a material degree.”<sup>139</sup> That formulation put sharp teeth in the *Central Hudson* test and went a significant step toward Justice Thomas’s desire to elevate the scrutiny of commercial speech restrictions.

#### F. *The Pragmatic Perspective*

Meanwhile, other members of the Court continued to debate whether paternalism might ever be an adequate justification for government restrictions on commercial speech. If censoring certain commercial messages would yield tremendous benefits for public health, for example, should judges interpret the First Amendment in ways that will permit such censorship to occur?

Restrictions on the advertising of tobacco, a product with an unusually severe and unequivocally detrimental impact on Americans’ health, squarely raised that dilemma. In *Lorillard Tobacco Co. v. Reilly*, the Court examined Massachusetts regulations that banned outdoor advertising of tobacco products within one thousand feet of a school or playground, and required indoor ads to be at least five feet off the ground to reduce their visibility to young children.<sup>140</sup> The majority struck down the regulations, concluding that no matter how harmful tobacco may be, it is a legal product for adult use, and therefore “the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.”<sup>141</sup>

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137. *Edenfield v. Fane*, 507 U.S. 761, 763 (1993) (striking down a Florida statute prohibiting in-person solicitation of clients by certified public accountants).

138. *Id.* at 770.

139. *Id.* at 771. *But cf.* *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628–29 (1995) (noting that while *Edenfield* requires a “concrete, nonspeculative” showing of harm, it does not necessarily require detailed empirical proof).

140. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 535 (2001). The Court held that federal law preempted the advertising restrictions as to cigarettes, and so the Court’s analysis of the First Amendment issues pertained only to the limits on cigar and smokeless tobacco advertising. *Id.* at 553 (Thomas, J., concurring).

141. *Id.* at 571. The majority included the three members of the Court (Rehnquist, Scalia, and Thomas) reported to have a personal fondness for smoking cigarettes, cigars, or pipes. See Frank J. Murray, *High Court Puffing over Laststand Plea on Tobacco Rules*, WASH. TIMES, Apr. 25, 1999, at C4; *Tobacco Firms Can’t Hide Behind Warning Labels*, HOUSTON CHRON., June 25, 1992, at A1.

Striking down the restrictions on tobacco ads went too far for dissenters John Paul Stevens, Ruth Ginsburg, and Stephen Breyer.<sup>142</sup> They emphasized above all else the need to be practical rather than purely idealistic.<sup>143</sup> Unlike most other products, tobacco is “addictive and ultimately lethal for many long-term users.”<sup>144</sup> While balancing the First Amendment concerns against the public health considerations was “no easy matter,” the dissenters concluded that Massachusetts deserved “some latitude in imposing restrictions that can have only the slightest impact on the ability of adults to purchase a poisonous product and may save some children from taking the first step on the road to addiction.”<sup>145</sup>

More than any other justice, Stephen Breyer exemplified the pragmatic, cautious approach to constitutional protection of commercial speech. It was an approach perfectly in line with his overall theory of constitutional interpretation, with its emphasis on practical consequences, balancing interests, judicial modesty, and promoting effective government policymaking.<sup>146</sup> In Breyer’s view, First Amendment analysis must pay careful attention to context and not shy away from drawing distinctions between types of speech that merit greater protection and those that deserve less.<sup>147</sup> Freedom of expression serves vital goals, particularly by protecting the flow of information and debate that sustains sound democratic decisionmaking.<sup>148</sup> Nevertheless, a wide range of laws inevitably limit speech rights in pursuit of worthy interests like “the absence of anti-competitive restraints; the accuracy of information; the absence of discrimination; the protection of health, safety, the environment, the consumer; and so forth.”<sup>149</sup> Elevating routine commercial speech to the highest rung of the free speech ladder would unreasonably limit the public’s choices about how economic matters should be regulated, dooming the

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142. David Souter joined Stevens, Ginsburg, and Breyer in voting to remand for further factual development concerning the ban on outdoor advertisements within one thousand feet of schools and playgrounds, but he joined the majority’s conclusion that the regulation requiring indoor ads to be five feet above the ground was unconstitutional because it was unlikely to be effective in reducing children’s exposure to tobacco advertising. *Lorillard*, 533 U.S. at 590 (Souter, concurring in part and dissenting in part).

143. *Lorillard*, 533 U.S. at 599–605 (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part).

144. *Id.* at 599.

145. *Id.* at 601, 605.

146. See generally STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW (2010) (discussing Breyer’s views on the role of the Court, constitutional interpretation, and the importance of finding a balance between conflicting views).

147. STEPHEN BREYER, ACTIVE LIBERTY 40–41 (2005).

148. See *id.* at 41–42 (suggesting that absent the First Amendment’s protection of the free exchange of ideas, the health of the democracy would be at risk).

149. *Id.* at 40.

country to a replay of the *Lochner* era “in modern First Amendment guise.”<sup>150</sup>

Breyer’s first significant judicial opinion on commercial speech came in *Thompson v. Western States Medical Center*.<sup>151</sup> The case concerned a challenge to a federal law governing pharmacists who compound prescription drugs, meaning they combine ingredients to make medications specially tailored to the needs of particular patients.<sup>152</sup> For example, a pharmacist might concoct a special version of a drug for a patient who is allergic to an ingredient in the mass-marketed varieties of the drug or create a liquefied version of a drug for patients unable to swallow pills.<sup>153</sup>

Pharmaceutical manufacturers cannot put a new drug on the market without first conducting extensive testing and obtaining approval from the federal Food and Drug Administration (FDA).<sup>154</sup> Congress opted not to apply that regulatory regime to pharmacists’ drug compounding.<sup>155</sup> But while allowing pharmacists to compound drugs without going through the FDA’s new drug approval process, Congress imposed a variety of requirements and restrictions on pharmacists’ practices.<sup>156</sup> Among other things, federal law allowed a pharmacy to advertise the fact that it compounds drugs, but prohibited ads mentioning the availability of any particular compounded drug.<sup>157</sup>

The Supreme Court voted 5-4 in *Thompson* to strike down the ban on pharmacy advertising referring to specific compounded drugs.<sup>158</sup> The majority concluded that the law failed to satisfy *Central Hudson*’s requirement that a commercial speech restriction be no more extensive than necessary.<sup>159</sup> The majority suggested a number of alternative measures that the government could have employed before resorting to a restraint on advertising—such as directly regulating compounding so as to limit the circumstances in which it can be done or limit the amount of any particular compounded drug that a pharmacist could produce.<sup>160</sup>

Writing for the dissenters in *Thompson*, Justice Breyer provided an archetypical example of his pragmatic approach. He recognized that the

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150. *Id.* at 41.

151. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

152. *Id.* at 360–61.

153. *Id.* at 361, 377.

154. *Id.* at 361.

155. *Id.* at 362–65.

156. *Id.* at 364–65.

157. *Id.*

158. *Id.* at 366–77.

159. *Id.* at 371.

160. *Id.* at 372.



challenged law struck a delicate compromise on a complex and important regulatory issue.<sup>161</sup> Allowing the sale of compounded drugs has benefits and risks for patients. Compounded drugs are not subject to the extensive testing and review required by the FDA's new drug approval regime.<sup>162</sup> Congress did not want to prohibit compounded drugs entirely, but it also did not want to create a loophole allowing pharmacists to produce large quantities of unregulated drugs and promote their sale to patients without a genuine medical need for them.<sup>163</sup> Ads touting specific compounded drugs would increase the number of patients who ask their doctors to prescribe compounded drugs, and some doctors would inevitably yield to those requests even if they normally would not prescribe the compounded drug.<sup>164</sup> By allowing pharmacists to compound drugs but prohibiting specific advertising about them, Congress struck a sensible balance of the competing interests at stake.

To the Justices on the majority side of the case, Breyer's reasoning reeked of paternalism. In their view, Breyer was simply afraid to trust doctors and patients, and his defense of the advertising restriction "amount[ed] to a fear that people would make bad decisions if given truthful information about compounded drugs."<sup>165</sup>

Breyer insisted that he was just being realistic, because evidence shows that advertising affects consumer demand for prescription drugs and physicians' prescribing decisions.<sup>166</sup> The government sometimes has good reasons to be paternalistic, and the majority's blithe dismissal of concerns about compounded drug advertising "seriously undervalues the importance of the Government's interest in protecting the health and safety of the American public."<sup>167</sup> More broadly, Breyer recognized that the rigid strains of anti-paternalism working their way into the Court's commercial speech jurisprudence threatened a "tragic constitutional misunderstanding" of Lochnerian proportions.<sup>168</sup> In Breyer's view, commercial speech should be subject to a more flexible and lenient approach, "an application that reflects the need for distinctions among contexts, forms of regulation, and forms of speech."<sup>169</sup> While censorship of other types of speech infringes on individual self-expression and impairs democratic processes, government

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161. *Id.* at 379 (Breyer, J., dissenting).

162. *Id.* at 378, 382–83.

163. *Id.* at 379.

164. *Id.* at 383.

165. *Id.* at 374 (O'Connor, J., opinion of the Court).

166. *Id.* at 383–84 (Breyer, J., dissenting).

167. *Id.* at 379.

168. *Id.* at 389.

169. *Id.*

restrictions on commercial speech usually represent sound legislative or regulatory determinations about the best way to protect public health and safety.<sup>170</sup> Those determinations, Breyer argued, deserved more deference from judges than the Court's majority in *Thompson* was willing to give.<sup>171</sup>

William Rehnquist joined Breyer's dissent in *Thompson*—the moment was like a passing of the baton between the two men.<sup>172</sup> For more than a quarter of a century, Rehnquist had been the Supreme Court's principal voice of skepticism about commercial speech rights. *Thompson* would turn out to be one of the last commercial speech cases that he would hear, and Breyer was there to carry on the cause in Rehnquist's stead.

The Supreme Court's most recent decision about commercial speech confirmed where the battle lines have been drawn. In *Sorrell v. IMS Health Inc.*, the Court struck down a Vermont law restricting the transfer and use of information about doctors and the prescriptions they write.<sup>173</sup> Pharmaceutical manufacturers market their products by sending sales representatives to visit doctors. The sales representatives can tailor the sales pitch and be more effective if they know a lot about each doctor's prescription-writing habits, such as which drugs the doctor prescribes most often.<sup>174</sup> To get that information, the manufacturers turn to reports prepared by firms known as "data miners."<sup>175</sup> The data miners purchase the information that goes into these reports from pharmacies, which gather data about doctors in the course of filling prescriptions.<sup>176</sup> Concerned that the pharmaceutical manufacturers' marketing efforts had become too aggressive and intrusive, the Vermont legislature enacted a law prohibiting pharmacies from selling data for use in drug marketing or promotion efforts without the prescribing doctor's consent.<sup>177</sup>

The anti-paternalist impulse prevailed at the Supreme Court, which held that Vermont had no legitimate interest in trying to cut off a means by which drug manufacturers' sales representatives could influence doctors.<sup>178</sup> Vermont worried that a sales representative armed with detailed information about a doctor's prescription-writing practices would be able to unduly pressure the doctor and subvert future decisions about which drugs

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170. *Id.* at 388.

171. *Id.*

172. *Id.* at 378.

173. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011).

174. *Id.* at 2659.

175. *Id.* at 2660.

176. *Id.*

177. *Id.* at 2660–61, 2668.

178. *Id.* at 2670.

to prescribe.<sup>179</sup> But in the Court's view, that amounted to nothing more than a fear that doctors will make bad decisions if exposed to true information.<sup>180</sup> "If pharmaceutical marketing affects treatment decisions," the Court concluded, "it does so because doctors find it persuasive," and "the fear that speech might persuade provides no lawful basis for quieting it."<sup>181</sup>

Writing for the dissenters in *Sorrell*, Justice Breyer once again preached the need for pragmatic assessment of the challenged law's actual effects.<sup>182</sup> The Vermont statute "neither forbids nor requires anyone to say anything."<sup>183</sup> Although the law could diminish the effectiveness of drug makers' sales efforts to some extent, the harm was "modest at most."<sup>184</sup> The law certainly posed no real threat to the First Amendment's protection of the marketplace of ideas, for it did not suppress any ideas or prevent anyone from fully participating in the debate and determination of public policy.<sup>185</sup>

In Breyer's view, Vermont lawmakers had legitimate concerns about the use of information that data miners acquired from pharmacies.<sup>186</sup> When a manufacturer's sales representative talks to a doctor, the conversation should focus on general, neutral information about the drug and its risks and benefits.<sup>187</sup> That does not require the manufacturer to know what prescriptions the doctor has written most often in the past or any other information gleaned through the data mining process.<sup>188</sup> Although having specific information about each doctor's practices might help drug makers increase their sales, it would not advance the interests of doctors, patients, or the public.<sup>189</sup> Vermont's lawmakers compiled a "substantial legislative record" supporting their conclusions, and Breyer saw no reason for judges to second-guess them.<sup>190</sup>

Finally, Breyer emphasized that Vermont's restriction on the use of prescriber data for marketing purposes was but one part of "a traditional, comprehensive regulatory regime" governing all aspects of prescription

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179. *Id.*

180. *Id.* at 2670–71.

181. *Id.* at 2670.

182. *See id.* at 2673 (Breyer, J. dissenting) (arguing that Vermont's statute "adversely affects expression in one, and only one way" by "depriv[ing] pharmaceutical and data mining companies of data . . . that could help [them] create better sales messages").

183. *Id.* at 2675.

184. *Id.* at 2681.

185. *Id.* at 2679.

186. *See id.* at 2681 (describing Vermont's statute as serving legitimate state interests, such as "public health" and "privacy" (quoting VT. STAT. ANN. tit. 18, § 4631(a) (2012))).

187. *Id.* at 2682.

188. *Id.*

189. *Id.*

190. *Id.* ("[I]t is the job of regulatory agencies and legislatures to make just these kinds of judgments.").

drug distribution.<sup>191</sup> Breyer warned again that if the Supreme Court launched a crusade against every incidental way in which ordinary commercial regulations and economic programs affect speech, the results would be disastrous.<sup>192</sup> The nation would be thrown back to the *Lochner* era and its regrettable judicial usurpation of legislative authority.<sup>193</sup> Echoing the mythological allusion that William Rehnquist employed in *Central Hudson*,<sup>194</sup> Breyer warned that the Court's dogmatic inflexibility on commercial speech issues threatened to open "a Pandora's Box of First Amendment challenges."<sup>195</sup>

The Supreme Court's commercial speech jurisprudence thus remains an unsettled and hotly disputed terrain. In the most superficial sense, the rules governing the area have been quite stable. For more than thirty years, the intermediate scrutiny of *Central Hudson* has been the test for government actions that restrict commercial speech,<sup>196</sup> and, for almost that long, *Zauderer* has provided the rule for government-mandated disclosures and other types of compelled commercial speech.<sup>197</sup> But beneath that illusion of stability lies tremendous uncertainty. Intense debate continues about how to apply the existing tests, whether they should be discarded, and what would replace them.

The difficulty of predicting the Supreme Court's future course in this realm is exacerbated by the fact that the debate over commercial speech has not consistently divided along conventional ideological lines. The arch-conservative Clarence Thomas now takes the hardest line in favor of elevating the constitutional protection of commercial speech, but he inherited that mantle from liberals like Harry Blackmun and John Paul Stevens.<sup>198</sup> On the other side of the field, left-leaning Stephen Breyer is now the Court's leading skeptic of commercial speech rights, a role previously played by the conservative stalwart William Rehnquist.<sup>199</sup> The issue defies simple liberal/conservative classifications, making it unusually difficult to forecast the direction in which the seven justices currently drifting between Thomas's and Breyer's positions will wind up moving.

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191. *Id.* at 2676.

192. *See id.* at 2674–75 (“[T]he same First Amendment standards that apply to Vermont would apply to similar regulatory actions taken by other States or by the Federal Government.”); *see also id.* at 2677–78 (adding that the creation of “constitutional barriers” to regulation would affect “widely accepted” agencies, including the Federal Reserve, the FDA, and electricity regulators).

193. *Id.* at 2675, 2679, 2685.

194. *See supra* note 85 and accompanying text.

195. *Sorrell*, 131 S. Ct. at 2685 (Breyer, J., dissenting).

196. *See supra* notes 69–75 and 133–134 and accompanying text.

197. *See supra* notes 89–98 and 135–136 and accompanying text.

198. *See supra* notes 120–136 and accompanying text.

199. *See supra* notes 146–171 and accompanying text.

## II. NEW CONTROVERSIES IN THE LOWER COURTS

While the Supreme Court's rulings obviously have a major impact and receive widespread attention, the vast bulk of constitutional adjudication plays out in the lower courts. In recent years, those courts have grappled with a variety of vexing commercial speech issues. The remainder of this Article looks at several of the most interesting topics of recent controversy, with a particular emphasis on how the competing themes of pragmatism and anti-paternalism run through the courts' reasoning.

*A. Promotion of Off-Label Drug Uses*

The FDA has struggled for years to reconcile the free speech interests of pharmaceutical companies with the government's obligation to protect public health by overseeing and controlling the marketing and sale of drugs. In several recent policy statements, the Agency has done a commendable job of attempting to accommodate First Amendment concerns while maintaining sound limits on manufacturers' marketing activities.<sup>200</sup>

The First Amendment issues that have bedeviled the FDA relate principally to speech concerning "off-label" uses of drugs. A new drug cannot be sold without the FDA's approval.<sup>201</sup> To obtain that approval, the manufacturer must submit testing data and other information establishing that the drug is both safe and effective.<sup>202</sup> When the FDA approves a drug, it specifies the particular medical uses for which the drug can be sold.<sup>203</sup> For example, the FDA might approve "Drug XYZ" to be sold for treatment of high blood pressure in adults. The drug's labeling (such as the information on the drug's packaging or on inserts inside the package) will reflect and provide instructions concerning the approved uses.<sup>204</sup> Any use of the drug that goes beyond the approved uses on the label is considered an off-label use.<sup>205</sup> For example, using the hypothetical "Drug XYZ" to treat migraine

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200. FDA, Guidance for Industry—Good Reprint Practice for the Distribution of Medical Journal Articles and Medical or Scientific Reference Publications on Unapproved Drugs and Approved or Cleared Medical Devices, 74 Fed. Reg. 1694 (Jan. 13, 2009); FDA, Guidance for Industry—Responding to Unsolicited Requests for Off-Label Information About Prescription Drugs and Medical Devices, 76 Fed. Reg. 82303 (Dec. 30, 2011).

201. 21 U.S.C. § 355(a) (2006).

202. *Id.* § 355(b)(1).

203. See *Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 55 (D.D.C. 1998) (describing how Congress amended 21 U.S.C. § 321(p) in 1962 to make clear "that all uses for a drug must obtain FDA approval"), *appeal dismissed & judgment vacated in part sub nom.*, *Wash. Legal Found. v. Henney*, 202 F.3d 331 (D.C. Cir. 2000).

204. *Wash. Legal Found.*, 13 F. Supp. 2d at 55.

205. *Id.*

headaches or cardiac arrhythmias, as opposed to high blood pressure in adults, would be an off-label use. Additional off-label uses would include treating children, using it in higher doses, or using it in any other ways outside the scope of the directions for the drug's use appearing in its FDA-approved labeling.

Off-label use of drugs has both substantial risks and important potential benefits. The worst-case scenario is that an off-label use of the drug will cause serious injuries or deaths.<sup>206</sup> For example, the off-label use may pose a danger that would have been detected by the extensive testing required if the manufacturer had gone to the FDA to obtain approval for its new use. In addition, even if an off-label use is not dangerous, it may be ineffective. Patients suffer harm if they waste time and money taking a useless drug, particularly if the off-label drug use takes the place of an alternative drug regimen that would have been effective.<sup>207</sup> Critics of off-label use thus contend that it essentially amounts to conducting dangerous medical experiments on the public.<sup>208</sup>

On the other hand, off-label use may be an enormously valuable way for doctors to accelerate the availability of new treatment options for patients who need them. The FDA approval process is long and expensive.<sup>209</sup> If doctors had to wait for the manufacturer and the FDA to complete that process every time someone discovered a new use for a drug, many patients would be harmed by their inability to immediately receive drugs that their doctors recommend.<sup>210</sup>

Faced with these competing interests, federal law has struck a compromise. Off-label use of drugs is perfectly legal.<sup>211</sup> In other words, a doctor is free to treat a patient with whatever drug the doctor chooses, even if that use of the drug falls outside the uses for which the FDA approved the drug.<sup>212</sup> But, on the other hand, federal law makes it a crime for a manufacturer to sell a drug with the intent that it be used for an off-label purpose.<sup>213</sup> The crime becomes a felony if it is done with intent to defraud

206. *Id.* at 56.

207. *Id.* at 56–57.

208. Steven R. Salbu, *Off-Label Use, Prescription, and Marketing of FDA-Approved Drugs: An Assessment of Legislative and Regulatory Policy*, 51 FLA. L. REV. 181, 204 (1999).

209. See Allen Rostron, *Prescription for Fairness: A New Approach to Tort Liability of Brand-Name and Generic Drug Manufacturers*, 60 DUKE L.J. 1123, 1130–31 & nn. 15–17 (2011) (noting that the approval process for a new drug takes an average of eight-and-a-half years and typically costs many millions of dollars).

210. *Id.* at 1130.

211. See *Wash. Legal Found. v. Henney*, 202 F.3d 331, 332 (D.C. Cir. 2000).

212. *Id.* at 333.

213. Federal law prohibits selling a drug that is “misbranded.” 21 U.S.C. §§ 331(a), 352 (2006). A drug is misbranded if its labeling does not bear “adequate directions for use.” *Id.* § 352(f).

or mislead,<sup>214</sup> and the manufacturer's potential financial liability for fines and penalties can run into the millions or even billions of dollars.<sup>215</sup>

Congress and the FDA thus have taken the position that off-label use of drugs should be a choice that doctors are free to make, but it is a choice that manufacturers should not encourage. As a result, if a manufacturer wants to promote an off-label use, it must first go back to the FDA and go through the process of obtaining approval so that the off-label use becomes an on-label use.<sup>216</sup> This regulatory approach may seem asymmetrical, but it protects patients and doctors from having treatment options curtailed, while maintaining incentives for manufacturers to seek FDA approval for new uses of drugs.

This compromise approach to the regulation of off-label drug use leads to a First Amendment dilemma. Each manufacturer knows that doctors can use products for off-label purposes, but the manufacturer cannot market the products for those purposes. To what extent can the manufacturer talk about off-label uses of a drug without crossing the line into illegal promotion of such uses? And if the manufacturer cannot talk about off-label uses without risking punishment, does that violate the manufacturer's freedom of speech?

From an anti-paternalism perspective, a drug manufacturer's expression about off-label drug uses deserves strong protection as long as it is not false or misleading. Suppose, for example, that a team of research scientists writes an article for a medical journal about how some doctors have begun prescribing a certain drug for a use not approved by the FDA. The drug's manufacturer would obviously like to spread the word about the discovery, for example, by having its sales representatives distribute copies of the article to doctors. The government might be afraid to let the manufacturer do so. The manufacturer's distribution of the article would

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Consequently, if a manufacturer intentionally promotes off-label uses of a drug, it is guilty of misbranding because it is selling the drug for uses not covered by the directions in the drug's labeling. See *Wash. Legal Found.*, 202 F.3d at 332–33.

214. 21 U.S.C. § 333(a)(2).

215. For example, the British drug company GlaxoSmithKline agreed to pay a record \$3 billion in fines when it pled guilty to promoting off-label use of antidepressant drugs like Paxil and Wellbutrin. Katie Thomas & Michael S. Schmidt, *Drug Firm Guilty in Criminal Case*, N.Y. TIMES, July 3, 2012, <http://www.nytimes.com/2012/07/03/business/glaxosmithkline-agrees-to-pay-3-billion-in-fraud-settlement.html?scp=1&sq=Drug+Firm+Guilty+in+Criminal+Case&st=nyt>.

216. See 21 U.S.C. § 355(a), (b)(1), (j)(1) (prohibiting the introduction of a new drug into interstate commerce, unless approved by the FDA); see also Guidance for Industry—Good Reprint Practice for the Distribution of Medical Journal Articles and Medical or Scientific Reference Publications on Unapproved Drugs and Approved or Cleared Medical Devices, 74 Fed. Reg. 1694 (Jan. 13, 2009) (“An approved new drug that is marketed for an unapproved use is an unapproved new drug with respect to that use.”).

increase the drug's off-label use, putting more patients at risk in the event that the off-label use turns out to be dangerous or ineffective. A steadfastly anti-paternalist judge like Clarence Thomas would not let the government censor the manufacturer's speech on that basis. In his view, the First Amendment prevents the government from trying to hide information because it thinks the public would be better off not knowing the truth. The government should not be permitted "to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace."<sup>217</sup> The more information that doctors have, the better. And it would be particularly perverse to single out and silence the drug's manufacturer, for that company would presumably be the most knowledgeable of all sources of information about the product.<sup>218</sup>

Not surprisingly, this anti-paternalist line of reasoning can be found in court decisions on the promotion of off-label uses. In particular, it was an important element of Judge Royce Lamberth's influential rulings in a late-1990s lawsuit filed in the U.S. District Court for the District of Columbia by a conservative legal center, the Washington Legal Foundation.<sup>219</sup> The lawsuit charged that the FDA's policies violated drug manufacturers' freedom of speech, such as by limiting the manufacturers' ability to distribute reprints of articles discussing off-label uses or sponsor medical conferences at which off-label uses would be discussed.<sup>220</sup> In the course of applying the *Central Hudson* test, Judge Lamberth emphatically rejected the notion that the FDA could censor the drug makers' speech in order to stop doctors from receiving information they might misuse.<sup>221</sup> According to Judge Lamberth, the Supreme Court's commercial speech rulings have "repeatedly rejected governmental attempts to equate less information with better decision-making."<sup>222</sup> He concluded that "[t]o endeavor to support a restriction upon speech by alleging that the recipient needs to be shielded from that speech for his or her own protection, which is the gravamen of FDA's claim here, is practically an engraved invitation to have the restriction struck."<sup>223</sup>

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217. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment).

218. See *United States v. Caputo*, 517 F.3d 935, 939 (7th Cir. 2008) (suggesting that manufacturers should not be censored when doctors and everyone else in society is permitted to freely discuss off-label uses of a drug).

219. *Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed & judgment vacated in part sub nom. Wash. Legal Found. v. Henney*, 202 F.3d 331 (D.C. Cir. 2000).

220. *Id.* at 57–58.

221. *Id.* at 69–70.

222. *Id.* at 70.

223. *Id.*



Judge Lamberth ruled that the FDA's policies were unnecessarily restrictive and therefore unconstitutional.<sup>224</sup> He declared that rather than trying to prohibit manufacturers from distributing information, the FDA should simply ensure that the information would always be accompanied by "full, complete, and unambiguous disclosure by the manufacturer."<sup>225</sup> For example, the FDA could require a manufacturer distributing articles or sponsoring conferences about a drug's off-label use to make a clear disclosure of its financial interest in the drug and the fact that the FDA has not approved the off-label use.<sup>226</sup>

One can easily imagine the alternative conclusions that a judge like Stephen Breyer might reach, emphasizing the need for greater deference to the FDA's expertise on an issue that is tremendously complex and has very significant practical consequences. Everything that Breyer said in his dissent in *Thompson v. Western States Medical Center*, about deferring to the FDA's concerns about pharmacy advertising of compounded drugs, would apply with even greater force to restrictions on drug manufacturers' promotion of unapproved drug uses.<sup>227</sup> Drug safety issues can literally be matters of life and death, and courts should not undervalue the government's interest in public health and safety or overstate the importance of the manufacturers' ability to promote their commercial interests.

The federal government appealed Judge Lamberth's ruling, setting the stage for the D.C. Circuit Court of Appeals to decide "a difficult constitutional question of considerable practical importance."<sup>228</sup> The D.C. Circuit never got the chance to decide the issue, however, because the government opted to back off and try to make peace with the drug manufacturers. The government's lawyers announced that the challenged policies had been profoundly misunderstood.<sup>229</sup> Contrary to what had been assumed throughout the litigation, the policies did not impose any mandatory limits or restrictions on the manufacturers. Instead, the policies merely created an optional "safe harbor" that manufacturers could choose to use.<sup>230</sup> If a manufacturer's distribution of journal articles and sponsorship of conferences stayed within the safe harbor guidelines, the government would not use those activities as evidence if it ever charged the manufacturer with

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224. *Id.* at 74.

225. *Id.* at 73.

226. *Id.* at 75.

227. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 384–85 (2002) (Breyer, J., dissenting); *see supra* notes 161–170 and accompanying text.

228. *Wash. Legal Found. v. Henney*, 202 F.3d 331, 335 (D.C. Cir. 2000).

229. *Id.* at 335.

230. *Id.*

intentionally selling a drug for off-label uses.<sup>231</sup> But no manufacturer was under any obligation to take advantage of the safe harbor's protections. As a result of that clarification of the government's position, the D.C. Circuit dismissed the case as presenting no justiciable case or controversy.<sup>232</sup>

The FDA thus made a major strategic shift to try to improve its odds in the First Amendment battle over off-label drug uses. Rather than directly imposing legal limits on what drug makers can say, the government put its focus on what drug makers do, vowing that a manufacturer would be punished only if its conduct amounted to intentionally selling a drug for off-label uses.<sup>233</sup> Of course, the manufacturers' speech might be crucial evidence supporting such a charge, so the government was still in the business of policing drug makers' speech in an indirect way. But the government hoped that its indirect regulation of manufacturers' speech would prove to be less vulnerable to First Amendment attack than the more direct and blatant types of speech restriction that Judge Lamberth had found objectionable. Defendants charged with promoting off-label uses nevertheless continued to raise First Amendment challenges to the FDA's approach.<sup>234</sup>

Shortly before President George W. Bush's administration left office in January 2009, the FDA finalized new recommendations for manufacturers distributing reprints of medical journal articles or other scientific publications referring to off-label drug uses.<sup>235</sup> The FDA emphasized that it is a crime for manufacturers to promote off-label uses, but simultaneously recognized both "the important public health and policy justification supporting dissemination of truthful and non-misleading" information to doctors and the fact that "off-label uses or treatment regimens may be important and may even constitute a medically recognized standard of care."<sup>236</sup> The FDA basically urged manufacturers to distribute only sound scientific information in a neutral manner. For example, an article distributed by a manufacturer should come from a peer-reviewed

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231. *Id.*

232. *Id.* at 336–37.

233. Guidance for Industry—Good Reprint Practice for the Distribution of Medical Journal Articles and Medical or Scientific Reference Publications on Unapproved Drugs and Approved or Cleared Medical Devices, 74 Fed. Reg. 1694 (Jan. 13, 2009).

234. Compare *United States v. Caputo*, 288 F. Supp. 2d 912, 919, 922 (N.D. Ill. 2003) (rejecting First Amendment challenge to prosecution for selling a misbranded medical device), with *United States v. Caputo*, 517 F.3d 935, 938–940 (7th Cir. 2008) (suggesting that drug manufacturers might have a First Amendment right to promote off-label drug uses, but finding it unnecessary to reach that question).

235. Guidance for Industry—Good Reprint Practices for the Distribution of Medical Journal Articles and Medical or Scientific Reference Publications on Unapproved Uses of Approved Drugs and Approved or Cleared Medical Devices, 74 Fed. Reg. 1694.

236. *Id.*

publication with an editorial board of independent experts.<sup>237</sup> Along with the reprinted article, the manufacturer should provide a copy of the drug's labeling and a comprehensive bibliography of other articles about the drug.<sup>238</sup> If the reprinted article conflicts with other published studies, the manufacturer should provide a copy of a representative example of one of the other publications so that doctors see both sides of the debate.<sup>239</sup> The FDA also emphasized the need for full disclosure, telling manufacturers that the reprinted articles they distribute should have statements prominently and permanently affixed to them informing recipients that the article describes uses not approved by the FDA and informing them about any risks known to the manufacturer concerning the off-label use.<sup>240</sup> Again, these guidelines are not mandatory, but a manufacturer complying with them would not risk having its dissemination of articles used as evidence that the manufacturer intentionally sold a drug for off-label use.<sup>241</sup>

Congressional leaders from both sides of the aisle criticized the guidelines, saying they opened the door too widely for manufacturers to push off-label uses under the guise of merely distributing unbiased medical information.<sup>242</sup> But the FDA professed that it was doing its best to balance the public's health interests and the manufacturers' and doctors' free speech rights.<sup>243</sup> After the Obama administration took office, the FDA continued the same basic approach. For example, the FDA proposed new guidelines in December 2011 for manufacturers wondering how to handle unsolicited requests for information about off-label uses, particularly requests received through emerging electronic media such as Twitter or Facebook.<sup>244</sup> Again, the FDA's draft guidance struck a balance, trying to craft an approach under which manufacturers could safely provide "truthful, balanced, non-misleading, and non-promotional scientific or medical information that is responsive to the specific request."<sup>245</sup>

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237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *See supra* notes 230–232 and accompanying text.

242. *See* Chris Adams, *Late Move on Drugs by Bush FDA Could Be Dangerous*, MCCLATCHY NEWSPAPERS, Feb. 1, 2009, <http://www.mcclatchydc.com/2009/02/01/61113/late-move-on-drugs-by-bush-fda.html> (quoting Senator Charles Grassley, an Iowa Republican, and Representative Henry Waxman, a California Democrat).

243. *Id.*

244. Guidance for Industry—Responding to Unsolicited Requests for Off-Label Information About Prescription Drugs and Medical Devices, 76 Fed. Reg. 82303 (Dec. 30, 2011).

245. FDA, DRAFT GUIDANCE FOR INDUSTRY—RESPONDING TO UNSOLICITED REQUESTS FOR OFF-LABEL INFORMATION ABOUT PRESCRIPTION DRUGS AND MEDICAL DEVICES 6 (Dec. 2011).

The FDA's handling of the off-label drug issue thus illustrates how the judiciary is not necessarily the only branch of government interested in preserving commercial speech rights. Although surely driven in part by the risk that courts might invalidate more drastic restrictions, the FDA's actions also seem to reflect a genuine belief that the manufacturer's speech has value and can be reconciled with adequate safeguards to protect the public's health interests.

The FDA nevertheless may not have the last word on the commercial speech rights of drug makers, for litigation continues to percolate in the lower courts. In particular, the Second Circuit Court of Appeals issued a major decision on the issue in late 2012.<sup>246</sup> The case concerned Alfred Caronia, who worked as a sales representative for a pharmaceutical company that marketed Xyrem, a powerful central nervous system depressant approved by the FDA for treatment of narcolepsy and "excessive daytime sleepiness" disorder.<sup>247</sup> In conversations audio-recorded by doctors cooperating with government investigators, Caronia promoted the use of Xyrem for unapproved uses such as treating fibromyalgia, muscle disorders, and chronic pain.<sup>248</sup> A federal jury found Caronia guilty of conspiring to introduce a misbranded drug into interstate commerce.<sup>249</sup> By a 2-1 vote, the Second Circuit overturned the conviction, emphasizing that it makes little sense to prohibit drug manufacturers and their representatives from making true statements about off-label drug uses when it is perfectly legal for doctors to prescribe drugs for off-label uses.<sup>250</sup> That approach "legalizes the outcome—off-label use—but prohibits the free flow of information that would inform that outcome"<sup>251</sup> and thus "'paternalistically' interferes with the ability of physicians and patients to receive potentially relevant treatment information."<sup>252</sup>

Many observers portrayed the *Caronia* decision as "big, big news," predicting that it "could dramatically expand the free-speech rights of pharmaceutical companies."<sup>253</sup> Some suggested, for example, that the case

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246. See *United States v. Caronia*, 703 F.3d 149, 152 (2d Cir. 2012) (agreeing with pharmaceutical sales representatives that the First Amendment protects promotion of an FDA-approved drug for off-label uses).

247. *Id.* at 155. Xyrem's active ingredient is gamma-hydroxybutyrate or GHB, also known as the "date rape drug." *Id.*

248. *Id.* at 156–57.

249. *Id.* at 159.

250. *Id.* at 164–69.

251. *Id.* at 167.

252. *Id.* at 166 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976)).

253. David Frum, *Drug Industry's Free Speech Helps Doctors*, CNN (Dec. 10, 2012, 2:00 PM), <http://www.cnn.com/2012/12/10/opinion/frum-off-label-use-of-drugs/index.html>; see also Eric F.

would force federal regulators to narrow their focus and bring charges only where they can show that a drug company's off-label promotions were false or misleading.<sup>254</sup> But the *Caronia* decision can be read in a way that produces more of a pyrrhic victory for drug makers than a real triumph.<sup>255</sup>

The government argued that it sought to punish Caronia only for his conduct, not his speech.<sup>256</sup> In other words, his crime was conspiring to sell a misbranded drug—a drug intended to be used in ways for which its labeling did not contain instructions.<sup>257</sup> His statements promoting off-label use of the drug were not a crime in and of themselves, but instead merely served as evidence of his intent to misbrand the drug.<sup>258</sup> The Second Circuit rejected this characterization, finding that the prosecutors in fact presented the case to the jury on the theory that Caronia's speech was illegal and not mere evidence of his intent to sell the misbranded drug.<sup>259</sup> But the court assumed, without actually deciding the question, that the conviction would have been valid if the prosecutors had been more careful about how they characterized Caronia's offense.<sup>260</sup> Prosecutors simply needed to tell the jury that "Caronia is guilty because his statements about off-label uses of the drug show he had the intent to introduce a misbranded drug into interstate commerce" rather than merely saying "Caronia is guilty because he made statements promoting off-label uses of the drug." If that semantic shift is sufficient to get around the problem, *Caronia* does not actually represent a significant hurdle to future prosecutions.

The *Caronia* decision nevertheless increases the odds that the Supreme Court eventually has the opportunity to rule on the underlying question of whether drug makers have a First Amendment right to promote off-label uses of their products. Justice Breyer has already indicated, albeit only in dicta, that he would vote in the government's favor in such a case. In his

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Greenberg, *Label This Free Speech Decision a Very Big Deal*, PACKAGING WORLD (Jan. 4, 2013), <http://www.packworld.com/label-free-speech-decision-very-big-deal> ("I'm not saying the world as we know it is about to end, but a big court just reached a big decision that might overturn [the] FDA's whole regulatory apple cart.").

254. *Caronia Ruling Could Unravel 1962 Drug Law, but Near-Term Impact Unclear*, FDA NEWS, Dec. 14, 2012; *Defense Lawyers Predict No FDA Action on Caronia, Say Off-Label Guidance Crucial*, DRUG INDUS. DAILY, Dec. 14, 2012.

255. The FDA has made clear that it does not regard *Caronia* as dramatically diminishing its authority to bring civil or criminal actions against drug makers for off-label marketing. *FDA to Let Caronia Stand; Agency Will Factor Ruling into Guidance Development*, DRUG INDUS. DAILY, Jan. 31, 2013.

256. See *Caronia*, 730 F.3d at 160–61 (reciting the government's argument that Caronia was not prosecuted for his speech but, rather, that his speech served as evidence of intent).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 162 & n.9.

dissent in *Sorrell v. IMS Health, Inc.*,<sup>261</sup> Breyer argued that regulatory programs often justifiably result in regulated firms being subject to speech restrictions that do not apply to other individuals or entities.<sup>262</sup> As one of his examples, Breyer explained that the FDA can prohibit a drug manufacturer from encouraging off-label use “even if the manufacturer, in good faith and with considerable evidence, believes the drug will help.”<sup>263</sup>

Drugs can do enormous good, but they can also pose potentially catastrophic risks, and so pharmaceutical regulation is the sort of complex and vitally important government undertaking for which Breyer’s brand of deferential pragmatism should be ideally suited. But in other respects, the issue of off-label drug promotion seems tailor-made for Clarence Thomas’s devout anti-paternalism. Doctors are highly trained experts. If the government cannot trust them to make good use of an unrestricted flow of true information about medications, who can be trusted? If the issue ever comes before the Supreme Court, it should go a long way toward showing whether the pragmatic or anti-paternalist perspective ultimately comes to dominate the Court’s commercial speech jurisprudence.

### B. Tobacco

While pharmaceutical products have tremendous potential benefits as well as serious risks, tobacco raises intriguing First Amendment issues because it is so unequivocally and severely dangerous. Tobacco causes so much death and disease—with so little offsetting utility—that governments are quite understandably tempted to restrict tobacco advertising in ways that they would not consider restricting advertising for any other product.

The federal government has limited the commercial speech of tobacco companies for almost half a century. In 1965, the United States became the first nation to require health warnings on cigarette packages.<sup>264</sup> The wording of the required warnings was mild (“Caution: Cigarette Smoking May Be Hazardous to Your Health”) and the law protected tobacco companies from being required to put any health warnings in their advertising.<sup>265</sup> A few years later, Congress strengthened the language of the warnings (“Warning: The Surgeon General Has Determined That Cigarette Smoking Is

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261. For more detailed discussion of the *Sorrell* case, see *supra* notes 173–195 and accompanying text.

262. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2678 (2011) (Breyer, J., dissenting).

263. *Id.*

264. Duff Wilson, *U.S. Releases Graphic Images to Deter Smokers*, N.Y. TIMES, June 21, 2011, [http://www.nytimes.com/2011/06/22/health/policy/22smoke.html?\\_r=0&pagewanted=print](http://www.nytimes.com/2011/06/22/health/policy/22smoke.html?_r=0&pagewanted=print).

265. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, §§ 4, 5(b), 79 Stat. 282, 283 (1965).

Dangerous to Your Health”) and prohibited radio and television advertisements for tobacco.<sup>266</sup> Concluding that those measures had not done enough to change public attitudes toward smoking, Congress enacted legislation in 1984 creating a set of four warnings for cigarette packaging and print or outdoor advertising.<sup>267</sup> Rotated so that consumers do not grow accustomed to seeing the same warning all the time, the four warnings refer to specific risks such as cancer, carbon monoxide, and smoking during pregnancy.<sup>268</sup>

As the health risks of tobacco became increasingly well known, the percentage of Americans using tobacco decreased substantially.<sup>269</sup> But even with its use declining, tobacco continues to be an enormous public health hazard. Tobacco is the leading preventable cause of death and disease, killing approximately 443,000 people in the United States per year.<sup>270</sup> The economic toll is staggering as well, with tobacco accounting for an estimated \$96 billion in medical costs and \$97 billion in lost productivity each year.<sup>271</sup> Despite the risks, about one in five adult Americans smokes cigarettes.<sup>272</sup> Over eighty percent of them became addicted to tobacco at or before reaching the age of eighteen.<sup>273</sup> Each day, about 4,000 Americans under eighteen try their first cigarette and another 1,500 begin smoking on a daily basis.<sup>274</sup>

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266. See Public Health Cigarette Smoking Act, Pub. L. No. 91-222, § 2, 84 Stat. 87, 88, 89 (1970) (changing the language of the act from “may be” to “is”).

267. See Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4, 98 Stat. 2200, 2201–02 (1984) (stating that it “shall be unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear” one of the four required labels).

268. *Id.*

269. Per capita consumption of tobacco in the United States has decreased steadily since the 1960s. See David M. Burns et al., *Cigarette Smoking Behavior in the United States*, in CHANGES IN CIGARETTE-RELATED DISEASE RISKS AND THEIR IMPLICATIONS FOR PREVENTION AND CONTROL 13 (1997) (No. 8 in the National Cancer Institute’s Tobacco Control Monograph Series), available at [http://cancercontrol.cancer.gov/tcrb/monographs/8/m8\\_complete.pdf](http://cancercontrol.cancer.gov/tcrb/monographs/8/m8_complete.pdf) (charting per capita tobacco consumption in the United States between 1880 and 1995).

270. SMOKING & TOBACCO USE: FAST FACTS, CDC (June 7, 2012), [http://www.cdc.gov/tobacco/data\\_statistics/fast\\_sheets/fast\\_facts/](http://www.cdc.gov/tobacco/data_statistics/fast_sheets/fast_facts/).

271. *Id.*

272. CTRS. FOR DISEASE CONTROL & PREVENTION, VITAL SIGNS: CURRENT CIGARETTE SMOKING AMONG ADULTS AGED ≥ 18 YEARS—UNITED STATES, 2005–2010 (Sept. 9, 2011), available at [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6035a5.htm?s\\_cid=mm6035a5\\_w](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6035a5.htm?s_cid=mm6035a5_w).

273. SUZANNE H. REUBEN, PRESIDENT’S CANCER PANEL, NAT’L CANCER INST., PROMOTING HEALTHY LIFESTYLES: POLICY, PROGRAM, AND PERSONAL RECOMMENDATIONS FOR REDUCING CANCER RISK 64 (2007), available at <http://deainfo.nci.nih.gov/advisory/pcp/annualReports/pcp07rpt/pcp07rpt.pdf>.

274. *Id.*

During President Bill Clinton's administration, the FDA asserted for the first time that it had jurisdiction to regulate tobacco products.<sup>275</sup> The FDA began issuing regulations imposing new restrictions on the sale and marketing of tobacco.<sup>276</sup> For example, the regulations prohibited the sale of cigarettes to persons under eighteen and required retailers to check photo identification of purchasers to verify their age.<sup>277</sup> On the marketing side, the FDA regulations required print advertisements for tobacco products to be in a black-and-white text format, with no color or graphic imagery, unless the ad appeared in a publication read almost exclusively by adults.<sup>278</sup> The regulations also prohibited outdoor ads within 1,000 feet of playgrounds or schools, prohibited the distribution of promotional items featuring tobacco brand names, and prohibited tobacco companies from sponsoring sporting events or music concerts.<sup>279</sup> Under the FDA's rules, the Surgeon General's warning on tobacco packaging would be supplemented by a further description of the product as a "Nicotine Delivery Device for Persons 18 or Older."<sup>280</sup>

The Supreme Court concluded that the FDA had overstepped its authority and that Congress had intended to keep tobacco products outside the FDA's jurisdiction.<sup>281</sup> Congress overrode the Supreme Court's decision by enacting the Family Smoking Prevention and Tobacco Control Act of 2009.<sup>282</sup> In addition to giving the FDA authority to regulate tobacco products, the statute specifically provided for tougher warnings and advertising restrictions.<sup>283</sup> The legislation replaced the previous set of four rotating warning statements with a new group of nine.<sup>284</sup> The text of the new warnings, consisting of blunt statements like "Cigarettes are addictive"

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275. Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,619 (1996).

276. *See, e.g.*, Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,396 (Aug. 28, 1996) ("[I]ssuing regulations governing access to and promotion of nicotine-containing cigarettes and smokeless tobacco to children and adolescents.").

277. *Id.* at 44,399.

278. *Id.*

279. *Id.*

280. *Id.* at 44,464 (internal quotation marks omitted).

281. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 128, 144 (2000). The vote was 5-4, with Justice Breyer writing the dissent for the Court's liberal faction. *See id.* at 161-92 (Breyer, J., dissenting).

282. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 101(b)(3), 123 Stat. 1776, 1786-88 (2009) (codified at 21 U.S.C. § 387a(a)).

283. *See id.* § 201(a), 123 Stat. at 1842-43 (requiring cigarette packaging and advertising to bear one of the specified warnings).

284. *Id.* § 201(a), 123 Stat. at 1842-43 (amending 15 U.S.C. § 1333(a)(1)).



and “Smoking can kill you,” was not substantially new or different from what was previously required.<sup>285</sup> The new law, however, dramatically increased the visibility of the warnings, requiring that they cover the top half of both the front and rear of each cigarette package.<sup>286</sup> The law also called for the addition of graphic images to accompany the text of the warnings.<sup>287</sup> Specifically, the law gave the Department of Health & Human Services twenty-four months in which to produce “regulations that require color graphics depicting the negative health consequences of smoking to accompany the label statements.”<sup>288</sup>

In addition to requiring the enhanced warnings, the 2009 legislation put tight new constraints on tobacco advertising, most of which were the same measures that the FDA had first tried to implement in 1996.<sup>289</sup> Under the new law, the advertising and labeling of cigarettes and smokeless tobacco products can contain only black text on a white background.<sup>290</sup> The law thus prohibited tobacco companies from using colors, symbols, logos, photographs, or other graphic images on labels or in advertising. The law provided exceptions for advertising inside adults-only establishments and in publications proven by survey data to have few readers under the age of eighteen.<sup>291</sup>

Congress also cracked down on the marketing of tobacco products as being “light,” “mild,” “low,” or otherwise posing a reduced health risk.<sup>292</sup> The law prohibited the sale of such a “modified risk tobacco product” unless the manufacturer proves to the FDA’s satisfaction that the product would significantly reduce the risk of disease, and that its sale would benefit public health.<sup>293</sup>

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285. *Id.* (amending 15 U.S.C. §1333(a)–(b), which required cigarette packages and advertisements to bear warnings, such as “Cigarettes cause cancer” and “Smoking during pregnancy can harm your baby”).

286. *Id.* (amending 15 U.S.C. § 1333(a)(2)). For print and outdoor advertising, the warnings appear at the top of the ad and occupy at least one-fifth of the overall ad space. *See id.* (amending 15 U.S.C. § 1333(b) and requiring the warning to occupy twenty percent of the advertisement).

287. *Id.* § 201(a), 123 Stat. at 1845 (amending 15 U.S.C. § 1333(d)).

288. *Id.*

289. *See Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 520 & n.2 (W.D. Ky. 2010), *aff’d in part & rev’d in part sub nom. Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. (U.S. Oct. 26, 2012) (No. 12-521, 12A102). For example, the law barred tobacco companies from sponsoring sporting events or concerts, giving away free samples or promotional items featuring tobacco brand names, or advertising on billboard within 1,000 feet of a school or playground. *Id.* at 520.

290. *Id.* at 519, 521–22.

291. *Id.* at 522.

292. Pub. L. No. 111-31, § 101, 123 Stat. at 1812 (creating 21 U.S.C. § 911(a)-(b)).

293. *Id.* § 101, 123 Stat. at 1812, 1814 (creating 21 U.S.C. § 911(g)(1)).

Shortly after the 2009 legislation's enactment, tobacco companies brought suit in federal court in Kentucky, claiming that the new warning requirements and advertising restrictions violated their freedom of speech.<sup>294</sup> The case worked its way up to the Sixth Circuit, which upheld most of the law but struck down two parts of it.<sup>295</sup>

First, the Sixth Circuit concluded that the government had not sufficiently justified its ban on "continuity programs" such as "Camel Cash" or "Marlboro Miles," in which customers earn points for each package of cigarettes purchased and can redeem those points for free items like t-shirts, lighters, or ash trays.<sup>296</sup> The government cited several studies from the mid-1990s indicating that a substantial percentage of adolescents owned branded clothing or other promotional items distributed by tobacco companies, but the Sixth Circuit concluded that this was weak proof that the continuity programs actually increase rates of tobacco use among juveniles.<sup>297</sup>

In addition, the Sixth Circuit struck down the portion of the law requiring that tobacco packaging and advertising contain nothing but black text on a white background.<sup>298</sup> The court reasoned that the government went too far by imposing a "sweeping and complete ban" on all uses of color or imagery, rather than selectively prohibiting only marketing efforts that utilize color or graphics in ways that target young people.<sup>299</sup> A tobacco company, for example, should be entitled to use color or images merely to help customers spot their preferred brand in a crowded marketplace.<sup>300</sup>

The Sixth Circuit upheld the law's new requirements for warning labels.<sup>301</sup> The court concluded that the text of the warnings consists entirely of uncontroversial facts.<sup>302</sup> For example, tobacco companies no longer dispute that their products pose serious health risks.<sup>303</sup> Although the new law significantly increased the size of the warnings—so that they would occupy the top half of the front and back of every package—the

294. *Commonwealth Brands*, 678 F. Supp. 2d at 521.

295. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 518 (6th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. (U.S. Oct. 26, 2012) (No. 12-521, 12A102).

296. *Id.* at 543–44; see *Artifacts of the Tobacco Epidemic—Brand Loyalty*, TRINKETS & TRASH, [http://trinketsandtrash.org/visual\\_exhibits/visual\\_exhibits\\_loyalty.html](http://trinketsandtrash.org/visual_exhibits/visual_exhibits_loyalty.html) (last visited April 9, 2013) (displaying various programs used by tobacco companies over the years to encourage use of their products).

297. *Disc. Tobacco City*, 674 F.3d at 544.

298. *Id.* at 544–48.

299. *Id.* at 548.

300. *Id.* at 547.

301. *Id.* at 552–69.

302. *Id.* at 558.

303. *Id.*

government adequately justified this as a reasonable way to enhance visibility.<sup>304</sup> Moreover, the court felt that adding a graphic component to the warnings was also a legitimate step, at least as a general matter. The case involved only a facial challenge to the statute, and therefore the question before the court was merely whether the government could come up with some type of graphic warnings about smoking that would pass constitutional muster.<sup>305</sup> The court could easily imagine satisfactory graphics, such as a picture of a person suffering from a smoking-related disease, or a picture of a doctor looking at an x-ray of a smoker's cancerous lungs.<sup>306</sup>

With the Sixth Circuit upholding the general idea of graphic warnings, other litigation focused on the particular images that the FDA decided to use. The FDA initially came up with thirty-six graphic, color images and invited feedback on them.<sup>307</sup> The FDA also conducted a study in which some participants were shown a cigarette package or advertisement with one of the proposed graphic images and a text warning, while other participants were shown a package or ad with only the text warning.<sup>308</sup> The participants then answered questions about their reactions to the warning and their attitudes and beliefs about smoking.<sup>309</sup> Participants were contacted again a week later to test how well they recalled the warnings they saw.<sup>310</sup> Based on the study's results, as well as public comments and scientific literature, the FDA issued a final rule selecting nine of the images.<sup>311</sup> The images are not timid. For example, one depicts a man exhaling cigarette smoke through a tracheotomy hole in his neck.<sup>312</sup> Another shows a healthy pair of lungs next to a diseased pair.<sup>313</sup> Another depicts a corpse with post-autopsy staples down the middle of his chest.<sup>314</sup>

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304. *Id.* at 567 (citing World Health Org., *WHO Framework Convention on Tobacco Control* 10 (2003) (calling for warnings that cover fifty percent of more of packages' principal display areas)).

305. *Disc. Tobacco City*, 674 F.3d at 552–54, 558–59.

306. *Id.* at 559.

307. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,636 (June 22, 2011); *see also* Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69524 (Nov. 12, 2010) (proposing graphic images).

308. 76 Fed. Reg. at 36,638.

309. *Id.*

310. *Id.*

311. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628 (June 22, 2011) (codified at 21 C.F.R. pt. 1141). The warnings, including the graphic images, are available at FDA, Tobacco Products, Overview: Cigarette Health Warnings, <http://www.fda.gov/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels/ucm259214.htm> (last visited April 9, 2013).

312. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,649.

313. *Id.* at 36,651.

314. *Id.* at 36,654–55.

Tobacco companies brought a suit in federal court in the District of Columbia to stop the government from requiring them to put these images on their product packaging and in their advertising.<sup>315</sup> By a 2-1 vote, the D.C. Circuit affirmed a district court ruling in favor of the tobacco companies, concluding that the FDA had chosen images that were too emotional and did not merely convey neutral facts.<sup>316</sup> The D.C. Circuit majority noted that *Zauderer* provides a very deferential standard of judicial review for laws requiring disclosure of factual and uncontroversial information.<sup>317</sup> But in the court's view, the FDA's graphics crossed the line into government advocacy of controversial opinions.<sup>318</sup> Unlike the disclosure requirements approved in cases like *Zauderer*, the FDA's graphic warnings were not designed to remedy any specific attempt by tobacco companies to mislead consumers.<sup>319</sup> Moreover, the graphic warnings did not merely convey accurate and uncontroversial information. The FDA instead admitted that the images were "primarily intended to evoke an emotional response, or, at most, shock the viewer."<sup>320</sup> Some of the images (such as a picture of a woman crying) conveyed no warning information of any sort.<sup>321</sup> Others could be misinterpreted by consumers. For example, the image of a man smoking through a tracheotomy hole would be factual if the government were trying to tell people that tracheotomies are a common result of smoking.<sup>322</sup> But the government's real point was that smoking is addictive, and the image was an unnecessarily subjective and emotional way of making that point.<sup>323</sup>

The D.C. Circuit majority concluded that the case fell outside the parameters of *Zauderer* and therefore *Central Hudson's* intermediate scrutiny test applied.<sup>324</sup> In the court's view, the FDA did not satisfy *Central Hudson* because it had no proof that including the proposed graphics in tobacco product warnings would actually advance the government's interest

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315. R.J. Reynolds Tobacco Co. v. FDA., 696 F.3d 1205, 1208 (D.C. Cir. 2012), *aff'g* 845 F. Supp. 2d 266 (D.D.C. 2012), *and vacating* 823 F. Supp. 2d 36 (D.D.C. 2011).

316. *Id.* at 1216–17.

317. *Id.* at 1213.

318. *Id.* at 1216.

319. *Id.* at 1215–16.

320. *Id.* at 1216.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 1217. The dissenting member of the court disagreed on this point, contending that *Zauderer* applied because the government intended the graphic warnings to counteract the tobacco companies' long history of deceiving the public about the risks of smoking. *See id.* at 1222–23 (Rogers, J., dissenting).

in reducing smoking.<sup>325</sup> The FDA referenced studies suggesting that graphic warnings encouraged Canadian and Australian youth smokers to think more about quitting, but no evidence indicated whether those thoughts led to actual reductions in smoking.<sup>326</sup> Indeed, the FDA's own estimates suggested that the graphic warnings would reduce smoking rates by less than one-tenth of one percent—a statistically insignificant amount.<sup>327</sup> The court thus criticized the graphics for being too inflammatory and alarmist, but simultaneously suggested that there was no reason to assume that they would stop a significant number of people from smoking.<sup>328</sup>

The D.C. Circuit opinion also tentatively embraced the broader proposition that the government should not be trying to dissuade people from purchasing a legal product.<sup>329</sup> The court assumed for the sake of argument that the FDA had a legitimate interest in reducing smoking rates, but noted that “we are skeptical that the government can assert a substantial interest in discouraging consumers from purchasing a lawful product, even one that has been conclusively linked to adverse health consequences.”<sup>330</sup> Contrary to that suggestion, however, there is no rule of law that forbids the government from attempting to discourage legal activities. For example, the government unveiled a nationwide anti-smoking campaign in 2012, spending \$54 million on a series of advertisements “highlighting the grisly toll of smoking.”<sup>331</sup> Likewise, no serious constitutional objection could be made to programs in public schools that aggressively proselytize against smoking and go well beyond merely teaching neutral information about tobacco.<sup>332</sup> Of course, one might distinguish those efforts as involving the government's own speech rather than infringements on the tobacco

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325. *Id.* at 1219–21.

326. *Id.* at 1219.

327. *Id.* at 1220. The FDA estimates that even this small decrease in smoking rates would translate into about 4,000 fewer people smoking, for an overall welfare gain of \$500 million to \$4.7 billion. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36628, 36724 (June 22, 2011).

328. *R.J. Reynolds*, 696 F.3d at 1216–17.

329. *Id.* at 1218 & n.13.

330. *Id.* This was a central premise of the district court's ruling in the case. *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266, 275 (D.D.C. 2012) (“Although an interest in informing or educating the public about the dangers of smoking *might* be compelling, an interest in simply advocating that the public not purchase a legal product is not.”).

331. Gardiner Harris, *U.S. Backs Antismoking Ad Campaign*, N.Y. TIMES, Mar. 15, 2012, <http://www.nytimes.com/2012/03/15/health/policy/cdc-finances-nationwide-antismoking-ad-campaign-a-first.html>.

332. See Ctrs. for Disease Control, *Guidelines for School Health Programs to Prevent Tobacco Use and Addiction*, MORBIDITY & MORTALITY WKLY REP., Feb. 25, 1994, at 8 (calling for programs that “use a variety of educational techniques to decrease the social acceptability of tobacco use”).

companies' freedom of expression.<sup>333</sup> But while many of the Supreme Court's decisions about commercial speech reflect a deeply anti-paternalist impulse, none go so far as to say that the government cannot try to discourage use of a legal product.<sup>334</sup>

The D.C. Circuit's decision sparked immediate speculation that the U.S. Supreme Court would agree to hear the case.<sup>335</sup> If the Supreme Court does so, it would have the opportunity to resolve important general questions about commercial speech analysis in addition to determining the validity of the graphic warnings for tobacco. In particular, the case revealed a split among judges over what test should apply to government-mandated disclosures that fall outside the scope of *Zauderer*. The district court contended that *Zauderer* applies only to disclosure of purely factual and uncontroversial information, and that strict scrutiny must apply to any compelled disclosures going beyond that.<sup>336</sup> In other words, the district judge treated strict scrutiny as the general rule, and *Zauderer* as a narrow exception to it. The D.C. Circuit acknowledged that some courts have endorsed that view, but instead concluded that *Central Hudson's* intermediate scrutiny standard is the fallback rule for disclosures that are not sufficiently accurate or uncontroversial to fit within *Zauderer's* protection.<sup>337</sup>

Neither *Zauderer* nor any other Supreme Court decision clearly explains what test should apply to laws requiring disclosure of information that is not entirely factual or uncontroversial.<sup>338</sup> But the more sensible approach is to apply the intermediate scrutiny of *Central Hudson* rather than strict scrutiny. *Central Hudson* provides the general rule for commercial speech rights, and *Zauderer* carves out an exception to it. If the disclosure requirements go beyond what *Zauderer* can support, the analysis

333. *R.J. Reynolds*, 696 F.3d at 1211–12.

334. *See supra* Part I-E.

335. *See* Ricardo Carvajal & J.P. Ellison, *D.C. Circuit Affirms District Court Decision Striking Down FDA Regulation Requiring Graphic Warnings on Cigarette Packages*, FDA LAW BLOG (Aug. 28, 2012), [http://www.fdalawblog.net/fda\\_law\\_blog\\_hyman\\_phelps/2012/08/dc-circuit-affirms-district-court-decision-striking-down-fda-regulation-requiring-graphic-warnings-o.html](http://www.fdalawblog.net/fda_law_blog_hyman_phelps/2012/08/dc-circuit-affirms-district-court-decision-striking-down-fda-regulation-requiring-graphic-warnings-o.html) (asserting that the Supreme Court is almost certain to take the case); *see also* Troutman Sanders, *Cigarette Warning Label Dispute Headed for High Court?*, TROUTMAN SANDERS TOBACCO LAW, [www.tobaccolawblog.com/2012/11/cigarette-warning-label-dispute-headed-to-high-court/](http://www.tobaccolawblog.com/2012/11/cigarette-warning-label-dispute-headed-to-high-court/) (last visited April 9, 2013) (explaining that the case is ripe for Supreme Court review).

336. *R.J. Reynolds Tobacco Co. v. FDA*, 823 F. Supp. 2d 36, 46 (D.D.C. 2011).

337. *R.J. Reynolds*, 696 F.3d at 1217. The court noted that the Sixth Circuit and Seventh Circuit treat strict scrutiny as the alternative to *Zauderer*. *Id.* (citing *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 554 (6th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. (U.S. Oct. 26, 2012) (No. 12-521, 12A102); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006)).

338. *See supra* notes 100–101 and accompanying text.

should revert to what *Central Hudson* requires, not revert to the realm of strict scrutiny.

Again, the *Zauderer* opinion does not clearly address this point. It does, however, emphasize the difficulty of drawing the line between what is factual and what is not.<sup>339</sup> The Court pointed out that “distinguishing deceptive from nondeceptive advertising in virtually any field of commerce may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics.”<sup>340</sup> In other words, one often finds a hazy middle ground, rather than a bright line, between truth and falsehood or between fact and opinion. That does not mean the distinction between purely factual information and other statements is entirely unhelpful and should be excluded from the analysis. But it does counsel in favor of not overemphasizing the distinction. If a court decides that a disclosure goes slightly beyond pure and uncontroversial facts, that impurity should not shift the analysis all the way from what is essentially a rational or reasonable basis review under *Zauderer* to full-blown strict scrutiny. That is a dramatic swing from a highly deferential, lenient standard to a very demanding one.

Applying strict scrutiny to compelled disclosures that fall outside *Zauderer* also runs counter to the Supreme Court’s frequent suggestion that disclosure requirements pose much less of a threat to First Amendment values than speech restrictions. Indeed, the Supreme Court has repeatedly urged governments to consider mandating disclosures as a less burdensome alternative to regulating what advertisers can say.<sup>341</sup> For example, in cases about restrictions on lawyer advertising, the Court has emphasized that “the preferred remedy is more disclosure, rather than less.”<sup>342</sup> In other words, a state concerned about legal advertising should compel speech, by requiring attorneys to insert appropriate disclaimers or explanations into their ads, rather than restricting what lawyers say.<sup>343</sup> Applying strict scrutiny to disclosures that step beyond *Zauderer* would have the odd effect of subjecting many disclosure or warning requirements, like the graphic

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339. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 645 (1985).

340. *Id.*

341. *See, e.g.,* *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 376 (2002) (suggesting that requiring warnings about compounded drugs would be a less restrictive alternative to banning ads for the drugs); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 571 (1980) (suggesting that the government should require more disclosure of information rather than banning advertising by electric utility companies).

342. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977).

343. *See In re R.M.J.*, 455 U.S. 191, 203 (1982) (“[T]he remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation.”).

components of the FDA's tobacco warnings, to much tougher scrutiny than commercial speech restrictions typically receive under *Central Hudson*.

Hearing the case about the tobacco warnings would also enable the Supreme Court to underscore the importance of being realistic and even-handed about the expressive significance of visual images. The Court has previously recognized that "[t]he use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly."<sup>344</sup> Images in commercial advertising therefore receive the same level of constitutional protection as verbal messages.<sup>345</sup>

The Supreme Court should confirm that the visual aspect of expression is significant not only for advertisers, but also for the government's efforts to craft effective warnings or other disclosures. The Sixth Circuit struck down the statutory provision prohibiting manufacturers from using colors and graphics, finding that the use of colors and graphics "has great expressive value for the tobacco industry" and protecting the industry's ability to use colors and images to attract consumers' attention.<sup>346</sup> Meanwhile, the D.C. Circuit invalidated the FDA's chosen graphics, belittling the notion that the government would need to use vivid imagery to drive home a message to consumers about the severity of tobacco's dangers.<sup>347</sup> The net result is that courts have given great weight to the tobacco companies' need for visual flair in their product promotions, while essentially telling the government that plain text is all that is required to make its point.

If the case about the tobacco warnings reaches the Supreme Court, the result will obviously depend not only on the justices' overall outlooks on protection of commercial speech, but also on their more specific sentiments about tobacco. The Sixth Circuit's opinion, for example, emphasized that tobacco is a uniquely destructive product. "[T]here are ways for a person to drink beer, watch R-rated movies, buy lottery tickets, and drive fast cars, that do not necessarily cause harm to that person," the court noted, but there is no healthy or safe way to use tobacco.<sup>348</sup> On the other hand, the D.C. Circuit essentially concluded that people should be allowed to make up

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344. *Zauderer*, 471 U.S. at 647 (striking down state ban on use of illustrations in advertising by lawyers).

345. *Id.*

346. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 547 (2012), *petition for cert. filed*, 81 U.S.L.W. (U.S. Oct. 26, 2012) (No. 12-521, 12A102).

347. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1221 (D.C. Cir. 2012).

348. *Disc. Tobacco City*, 674 F.3d at 547.



their own minds about tobacco use and the government should not be trying to “browbeat consumers into quitting.”<sup>349</sup> Tobacco thus provides a crucial test of the limits of commercial speech protection as well as paternalistic government efforts to steer individuals away from unhealthy choices.

### C. Cell Phones

Cell phones certainly do not have as sinister a reputation as tobacco. They may be addictive in some sense, but only by virtue of being useful and enjoyable devices.<sup>350</sup> Nevertheless, a bitter dispute has arisen in California over what information should be provided to those considering the purchase of a cell phone. Cell phones emit radio frequency energy, a form of electromagnetic radiation.<sup>351</sup> The cell phone user’s body absorbs some of that radiation, particularly at the head and neck because those are close to where the phone is typically held during use.<sup>352</sup> Because some types of radiation (such as X-rays or radon) increase the risk of developing cancer, concerns exist that cell phones could pose a cancer risk as well.<sup>353</sup>

Scientific studies have not found a consistent link between cancer and cell phone use.<sup>354</sup> Unlike forms of radiation known to be carcinogenic, radiofrequency does not appear to damage DNA in animal or human cells.<sup>355</sup> Likewise, epidemiologic studies have generally not found a connection between cell phone use and incidence of cancer.<sup>356</sup> Exceptions do exist, however, and therefore the issue is not entirely free from scientific controversy. For example, a large international study found no overall link between cell phone use and brain tumors, but observed a statistically significant increase in the risk of glioma (a deadly type of brain or spinal tumor) among the one-tenth of the study subjects who reported having spent

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349. *R.J. Reynolds*, 696 F.3d at 1217.

350. See Cynthia Hubert, *When Cell Phone Love Becomes Hang-Up*, CHI. TRIB., June 13, 2005, [http://articles.chicagotribune.com/2005-06-13/features/0506130079\\_1\\_cell-phones-addiction-researchers](http://articles.chicagotribune.com/2005-06-13/features/0506130079_1_cell-phones-addiction-researchers) (describing the widespread and growing dependence on electronic devices).

351. See *Cell Phones and Cancer Risk Fact Sheet*, NAT’L CANCER INST., <http://www.cancer.gov/cancertopics/factsheet/Risk/cellphones> (last reviewed June 18, 2012).

352. *Id.*

353. *Id.*

354. *Id.*

355. See, e.g., Hirose H. Suhara et al., *Mobile Phone Base Station Radiation Does Not Affect Neoplastic Transformation in BALB/3T3 Cells*, 29 *BIOELECTROMAGNETICS* 55, 63 (2008) (examining the effects of RF field exposure on cellular functions of BALB/3T3 cells); B.C. Zook & S.J. Simmens, *The Effects of Pulsed 860 MHz Radiofrequency Radiation on the Promotion of Neurogenic Tumors in Rats*, 165 *RADIATION RESEARCH* 608 (2006).

356. NAT’L CANCER INST., *supra* note 351.

the most time talking on cell phones.<sup>357</sup> The researchers deemed their evidence on this point to be inconclusive, noting a variety of potential weaknesses in their data,<sup>358</sup> but nevertheless concluded that “[t]he possibility of raised risk in heavy users of mobile phones is an important issue because of their ever-increasing use.”<sup>359</sup> The bulk of the available scientific evidence thus suggests that cell phones are safe, but scientists agree that more research should be conducted, particularly because cell phone technology and use patterns continue to evolve.<sup>360</sup>

In light of this tension, some legislators in California decided that consumers should be given more information about the issue. After an unsuccessful attempt to pass legislation at the state level, the mayor and board of supervisors in San Francisco took up the cause.<sup>361</sup> In the summer of 2010, the city became the first place in the nation requiring disclosures regarding the amount of radio frequency energy absorbed by cell phone users.<sup>362</sup> Specifically, the San Francisco ordinance required retailers to provide educational materials and post the Specific Absorption Rate (SAR) value, a measure of radio frequency energy absorbed by the body, for each type of phone sold.<sup>363</sup>

In drafting the warning materials, city officials relied upon information from the Federal Communications Commission (FCC) website.<sup>364</sup> The FCC soon revised its materials to disclaim any suggestion that phones with lower SAR values are safer than those with higher SAR values.<sup>365</sup> In response, San Francisco altered its approach and amended the ordinance to drop the

357. INTERPHONE Study Group, *Brain Tumor Risk in Relation to Mobile Telephone Use: Results of the INTERPHONE International Case-Control Study*, 39 INT’L J. EPIDEMIOLOGY 675, 685–88 (2012).

358. For example, the researchers noted that the increased risk of glioma showed up only for those in the top decile of cell phone users (i.e., the one-tenth reporting the highest cumulative time spent on cell phone calls), rather than showing an upward trend across the first nine deciles of users. *Id.* at 687.

359. *Id.* at 688.

360. *Id.*

361. Rachel Gordon, *Supes Back Posting of Cell Phone Emission Levels*, S.F. CHRON., June 16, 2010, <http://www.sfgate.com/news/article/Supes-back-posting-of-cell-phone-emission-levels-3185404.php>. A bill requiring warnings on cell phones was also introduced in the Maine legislature in 2010, but it was not enacted. See L.D. 1706, 124<sup>th</sup> Leg., 2d Sess. (Me. 2010).

362. Gordon, *supra* note 361.

363. See CTIA—The Wireless Ass’n v. City & Cnty. of San Francisco, 827 F. Supp. 2d 1054, 1056 (N.D. Cal. 2011), *aff’d in part, vacated in part, and remanded*, Nos. 11-17707, 11-17773, 2012 WL 3900689 (9th Cir. Sept. 10, 2012).

364. *Id.* at 1056.

365. *Id.* The FCC prohibits the sale of cell phones with SAR values exceeding 1.6 watts per kilogram. See 47 C.F.R. § 2.1093(d)(2) (2012) (setting exposure limits at 1.6 W/kg); FED. COMM’N COMM., SAR FOR CELL PHONES: WHAT IT MEANS FOR YOU 1–2 (2011), available at <http://transition.fcc.gov/cgb/consumerfacts/sar.pdf>.

disclosure requirement for SAR values and to remove references to “radiation.”<sup>366</sup> The amended ordinance focused on advising consumers about ways to reduce bodily absorption of radio frequency energy and required the dissemination of this message through three means: posters, fact sheets, and stickers.<sup>367</sup> First, the law required each retailer to display a small poster stating that cell phones emit radio frequency energy, that “[s]tudies continue to assess potential health effects of mobile phone use,” and that cell phone users can reduce their exposure by using a headset or speakerphone.<sup>368</sup> Second, the ordinance required retailers to give each phone purchaser (and any shopper who requested it) a small fact sheet with a more detailed explanation of the city’s recommendations for reducing exposure to radio frequency energy.<sup>369</sup> Finally, the ordinance required retailers to paste small stickers on promotional materials displayed adjacent to phones in stores.<sup>370</sup> The stickers would state that cell phone users’ bodies absorb radio frequency energy, and encourage interested customers to request the city’s fact sheet for more information about ways to reduce exposure.<sup>371</sup>

City leaders did not explicitly claim that cell phones cause cancer or any other health problem. Instead, they based their action on the existence of uncertainty.<sup>372</sup> Although scientific studies had not proven a link between cell phones and cancer, neither had they definitely ruled out such a link.<sup>373</sup> The ordinance explained that San Francisco believes in the “Precautionary Principle, which provides that the government should not wait for scientific proof of a health or safety risk before taking steps to inform the public of the potential for harm.”<sup>374</sup> The ordinance’s proponents emphasized that the information would merely help consumers make informed choices. “This is not about discouraging people from using their cell phones,” the mayor’s office explained.<sup>375</sup> “This is a modest and commonsense measure to provide greater transparency and information to consumers.”<sup>376</sup>

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366. *CTIA*, 827 F. Supp. 2d at 1057; Defendant City and County of San Francisco’s Opposition to Plaintiff’s Motion for Preliminary Injunction at 6–8, *CTIA—The Wireless Ass’n v. City & Cnty. of San Francisco*, 827 F. Supp. 2d 1059 (N.D. Cal. Oct. 7, 2011) (No. 3:10-cv-03224 WHA).

367. *CTIA*, 827 F. Supp. 2d at 1058.

368. *Id.*

369. *Id.* at 1056.

370. *Id.* at 1058.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. Gordon, *supra* note 361.

376. *Id.*

The cell phone industry, through its international trade association, filed a lawsuit in federal court in San Francisco seeking to enjoin enforcement of the ordinance.<sup>377</sup> At the trial level, Judge William Alsup ruled in favor of the industry on most points.<sup>378</sup> The decision illustrated how a court can strive to balance commercial speech interests and governmental concerns.

Judge Alsup recognized that the Supreme Court's decision in *Zauderer* was a key precedent, because San Francisco sought to compel speech rather than restrict it.<sup>379</sup> If the ordinance had merely required disclosure of accurate and uncontroversial facts, the government would have faced only the low hurdle posed by the *Zauderer* test and would have prevailed if the required disclosures were "reasonably related" to the government's interest in informing the public about a potential safety issue.<sup>380</sup>

The case, however, demonstrates that it is not always easy to decide what constitutes an accurate and uncontroversial fact. Judge Alsup observed that whether cell phones cause cancer is a "debatable question," but San Francisco's ordinance "deftly dodged" this problem by not making any definitive statement about cancer risks.<sup>381</sup> Indeed, Judge Alsup concluded that San Francisco's required disclosures consist entirely of true statements.<sup>382</sup> For example, no one disputes that cell phones emit radio frequency energy, that the user's body absorbs some of this energy, or that the energy absorption can be reduced by using a headset or speaker or by spending less time using the phone.<sup>383</sup>

One might think that would be the end of the story. But Judge Alsup was troubled that the statements in San Francisco's disclosure materials, "all of which seem to be literally true," nevertheless added up to a misleading message.<sup>384</sup> The disclosures consisted of "a series of factoids" that were each "accurate or at least [had] some anchor in the scientific

377. The industry initially attacked the ordinance only on federal preemption grounds, but later amended its complaint to assert a First Amendment claim as well. *Compare* First Amended Complaint for Declaratory and Injunctive Relief at 1–2, *CTIA—The Wireless Ass'n v. City & Cnty. of San Francisco*, 827 F. Supp. 2d 1054 (N.D. Cal. Jan. 21, 2011) (No. 3:10-cv-03224 WHA), *with* Complaint for Declaratory and Injunctive Relief at 2, 5, *CTIA—The Wireless Ass'n v. City & Cnty. of San Francisco*, 827 F. Supp. 2d 1054 (N.D. Cal. July 23, 2010) (No. 3:10-cv-03224 WHA).

378. *CTIA*, 827 F. Supp. 2d at 1062–63.

379. *Id.* at 1059–60.

380. *Id.* at 1059; *see supra* note 96 and accompanying text.

381. *CTIA*, 827 F. Supp. 2d at 1060.

382. *Id.* at 1060, 1062.

383. *Id.* at 1062; *see also* Carleigh Cooper, *Cell Phones and the Dark Deception*, 23 SYRACUSE SCI. & TECH. L. REP. 147,161 (2010) (describing various methods to limit absorption of radiofrequency given off by cell phones).

384. *CTIA*, 827 F. Supp. 2d at 1060, 1062.

literature” but together created an “overall message” or “overall impression” that was misleading.<sup>385</sup> In Judge Alsup’s view, the disclosures would tend to make people think that cell phones are dangerous and that they are not regulated by the FCC or any other government agency.<sup>386</sup>

Judge Alsup was particularly troubled by a sentence on San Francisco’s fact sheet stating that the World Health Organization (WHO) has classified radio frequency energy as a “possible carcinogen.”<sup>387</sup> The WHO maintains lists of substances that are carcinogenic or probably carcinogenic, but the evidence of a danger was insufficient for radio frequency energy to make either of those lists.<sup>388</sup> The WHO instead put radio frequency energy on its “possible” carcinogen list, and according to Judge Alsup, “it does not take much to list something as ‘possible.’”<sup>389</sup> Indeed, he pointed out, the WHO has also listed coffee and pickled vegetables as possible carcinogens.<sup>390</sup>

While focusing on coffee and pickles makes it sound like the WHO will put virtually anything on its possibly-carcinogenic list, the compilation of the lists is far from reckless.<sup>391</sup> The WHO assembles working groups of reputable scientists with appropriate expertise.<sup>392</sup> To put an item on the possibly-carcinogenic list, the scientists must find some evidence of carcinogenicity, whether it comes from studies of humans, experiments on animals, or other relevant data.<sup>393</sup> For example, a substance will be classified as possibly carcinogenic if epidemiological studies produce “limited evidence” of carcinogenicity in humans.<sup>394</sup> The possibly

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385. *Id.*

386. *Id.* at 1062.

387. *Id.* at 1058, 1062.

388. *Id.* at 1060.

389. *Id.*

390. *Id.*

391. In addition to coffee and pickles, the WHO’s list of possible carcinogens includes a few familiar substances like lead, gasoline, engine exhaust, and welding fumes. WORLD HEALTH ORG., INT’L AGENCY FOR RESEARCH ON CANCER, AGENTS CLASSIFIED BY THE IARC MONOGRAPHS, VOLUMES 1-106, at 9–17 (2012), available at <http://monographs.iarc.fr/ENG/Classification/index.php>. Most items on the list are chemicals like anthraquinone, carbon tetrachloride, dibrommoacetic acid, vinyl acetate, and the controversial pesticide DDT. *Id.* Occupational settings with substantial exposure to potentially hazardous substances have also been categorized as possibly carcinogenic, including carpentry, dry cleaning, and firefighting. *Id.*

392. WORLD HEALTH ORG., INT’L AGENCY FOR RESEARCH ON CANCER, IARC MONOGRAPHS ON THE EVALUATION OF CARCINOGENIC RISK TO HUMANS PREAMBLE 4 (2006), available at <http://monographs.iarc.fr/ENG/Preamble/CurrentPreamble.pdf> (describing the selection criteria for working group members and how other invited specialists and national and international health agencies have the opportunity to participate).

393. *Id.* at 23. Other relevant evidence could include mechanistic data suggesting the means or process by which the substance causes cancer to develop. *See id.* at 15–18.

394. *Id.* at 23.

carcinogenic classification thus requires some indication that the substance might cause cancer, albeit significantly less than it would take to make the organization's carcinogenic or probably-carcinogenic lists. The WHO noted that its decision to put radio frequency energy on the possibly-carcinogenic list was based largely on the study finding an increased risk of glioma for those making the most extensive use of cell phones.<sup>395</sup>

Judge Alsup sensibly feared that the public would misunderstand what it means to be listed as a possible carcinogen and overestimate the danger presented.<sup>396</sup> But rather than simply invalidating the San Francisco ordinance, Judge Alsup specified edits that would cure the fact sheet's constitutional flaws.<sup>397</sup> For example, he proposed revising the fact sheet to include a statement explaining that all cell phones sold in the United States must comply with radiofrequency energy emission limits set by the FCC.<sup>398</sup> To avoid any possible misunderstanding created by the reference to the WHO's list, the judge proposed amending the fact sheet further to say that "RF Energy has been classified by the World Health Organization as a possible carcinogen rather than as a known carcinogen or a probable carcinogen and studies continue to assess the potential health effects of cell phones."<sup>399</sup>

Judge Alsup also objected to the illustrations that San Francisco proposed to put on the fact sheet and on the poster that cell phone retailers would be required to display.<sup>400</sup> The graphics consisted of two human silhouettes, one with a cell phone next to the head and one with a cell phone in a hand near the figure's hip.<sup>401</sup> Each phone was surrounded by red, orange, and yellow concentric circles "radiating from the phones into the bodies."<sup>402</sup> Judge Alsup noted that images are always "subject to interpretation" and that the colored circles emanating from the cell phones might be interpreted in a variety of ways.<sup>403</sup> For example, consumers might interpret the images simply to mean that cell phones emit radio frequency energy, because the images on the poster appear directly under the heading "Cell Phones Emit Radio-frequency Energy," and the images on the fact sheet appear below the heading: "You can limit exposure to Radio-

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395. *Electromagnetic Fields and Public Health: Mobile Phones: Fact Sheet No. 193*, WORLD HEALTH ORG. (June 2011), <http://www.who.int/mediacentre/factsheets/fs193/en/>.

396. *CTIA*, 827 F. Supp. 2d at 1063.

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* at 1063.

401. *Id.* at 1058.

402. *Id.*

403. *Id.* at 1063.

frequency (RF) Energy from your cell phone.”<sup>404</sup> If understood that way, the images communicate an accurate and uncontroversial message, for no one disputes that cell phones emit radio frequency energy and that a cell phone user’s body absorbs some of that energy.<sup>405</sup> But Judge Alsup concluded that the images should be deleted because some consumers might interpret them to mean that cell phones are dangerous.<sup>406</sup> The images were “too much opinion and too little fact.”<sup>407</sup>

Like the D.C. Circuit in the litigation about the FDA’s graphic images for tobacco warnings, Judge Alsup interpreted the Supreme Court’s decision in *Zauderer* in a way that makes it difficult for governments to require the inclusion of images in mandated disclosures.<sup>408</sup> Again, *Zauderer* established that the government can require a commercial speaker to disclose accurate and uncontroversial facts if the disclosure is reasonably related to the interests the government seeks to achieve.<sup>409</sup> But in Judge Alsup’s view, a graphic image cannot be considered accurate and uncontroversial if there is a “plausible” way to interpret the image that would make it inaccurate or controversial.<sup>410</sup> In other words, to qualify for the relaxed scrutiny available under *Zauderer*, the government would be obligated to come up with an image that is not susceptible to any reasonable misinterpretation or misunderstanding. That is likely to be an extremely tough standard for the government to satisfy.

Having re-written San Francisco’s fact sheet and ruled out its use of graphic images, Judge Alsup went on to invalidate the city’s poster and sticker requirements.<sup>411</sup> He concluded that a “large wall poster is not reasonably necessary and would unduly intrude on the retailers’ wall space.”<sup>412</sup> Retailers, the judge added, should not be forced “to convert their

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404. Second Amended Complaint for Declaratory and Injunctive Relief at 3, 20, CTIA—The Wireless Ass’n v. City & Cnty. of San Francisco, 827 F. Supp. 2d 1054 (N.D. Cal. 2011) (No. 3:10-cv-03224 WHA).

405. See NAT’L CANCER INST., *supra* note 351 and accompanying text.

406. CTIA, 827 F. Supp. 2d at 1063.

407. *Id.*

408. See *supra* notes 316–347 and accompanying text.

409. For discussion of *Zauderer*, see *supra* note 96 and accompanying text. In one respect, Judge Alsup interpreted *Zauderer* in a way that favors governments. Although *Zauderer* talks only about situations where the government requires disclosures to offset commercial speech that would otherwise deceive consumers, Judge Alsup read *Zauderer* as also supplying the test for government disclosures meant to serve purposes other than preventing deception. See CTIA, 827 F. Supp. 2d at 1059 (“[T]he First Amendment permits a government to require businesses to disclosure accurate and uncontroversial facts as long as the disclosures are reasonably related to a governmental interest in preventing deception or in protecting public health and safety, among other allowable objectives.”).

410. CTIA, 827 F. Supp. 2d at 1063.

411. *Id.*

412. *Id.*

walls to billboards for the municipal message.”<sup>413</sup> Likewise, requiring retailers to put a sticker on their display materials, even a sticker merely stating that cell phone users’ bodies absorb radio frequency energy, would “unduly intrude” on the retailers’ commercial messages.<sup>414</sup> “San Francisco cannot paste its municipal message over the message of the retailers,” Judge Alsup concluded.<sup>415</sup>

Those conclusions overstate the burden imposed by San Francisco’s ordinance. The required poster was only eleven by seventeen inches in size.<sup>416</sup> A person cannot reasonably describe a poster no larger than two pieces of paper as being a large wall poster, let alone a billboard. The ordinance required each retailer to put up a single copy of the poster, not to plaster them all over the store.<sup>417</sup> The stickers for cell phone display materials were just one by two-and-a-half inches in size.<sup>418</sup> That is about the size of a stick of chewing gum. Again, that hardly seems like an undue intrusion on the retailers’ communication with customers.

Indeed, Judge Alsup seemed to give little weight to the fact that San Francisco’s ordinance left cell phone companies completely free to express whatever arguments or information they might want to share with consumers about the safety of their products. In other words, while San Francisco sought to compel the disclosure of certain information, it did not impose any restriction on the affected business’s own speech. San Francisco specifically avowed that it would not object to any company’s decision “to disseminate any message they want, including disagreement with any aspect of, or implication of, the City’s message.”<sup>419</sup> A store thus would be free to make up its own posters, fact sheets, and stickers rebutting everything in the city’s materials and telling consumers about the extensive federal regulation of cell phones and all the scientific studies that have found no link between cell phone use and any health danger.

Of course, the counterargument would be that even if San Francisco’s ordinance is unconstitutional, the city remains free to disseminate messages about cell phones through independent means. San Francisco could put big signs about cell phone safety on every city bus, hang posters throughout every city building, and even run informational ads in newspapers and on

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413. *Id.*

414. *Id.* at 1064.

415. *Id.*

416. *Id.* at 1058.

417. *Id.* at 1057.

418. *Id.* at 1058.

419. Defendant City and County of San Francisco’s Opposition to Plaintiff’s Motion for Preliminary Injunction at 2, 14, CTIA—The Wireless Ass’n v. City & Cty. of San Francisco, 827 F. Supp. 2d 1054 (N.D. Cal. 2011) (No. 3:10-cv-03224 WHA).



television and radio. The city could promote its message about cell phones in all of those ways, but it would have to do the work itself, rather than forcing cell phone providers to disseminate the city's message. San Francisco would argue, however, that it makes an enormous difference for it to be able to present its message in stores at the time of purchase, because that is the moment when the city has the best chance of attracting the consumer's attention to information relating to cell phones. The issue is a genuinely close one, with good arguments on both sides, proving once again the need for judicial analysis that looks realistically at the overall balance of interests and consequences.

While Judge Alsup essentially tried to split the difference between the two sides' positions, the U.S. Court of Appeals for the Ninth Circuit came down squarely on the side of the industry.<sup>420</sup> In a terse, unpublished opinion, the Ninth Circuit found that San Francisco's proposed fact sheet contained "misleading and controversial" information and therefore was not the sort of disclosure requirement protected by *Zauderer*.<sup>421</sup> Moreover, the court concluded that even Judge Alsup's revised version of the fact sheet contained more than just pure, uncontroversial facts.<sup>422</sup> The information on the sheet, such as recommendations about how to reduce radio frequency energy exposure, "could prove to be interpreted by consumers as expressing San Francisco's opinion that using cell phones is dangerous."<sup>423</sup> The Ninth Circuit thus enjoined enforcement of San Francisco's entire ordinance.<sup>424</sup>

The Ninth Circuit not only construed *Zauderer* narrowly, but also failed to even address the possibility that some or all of San Francisco's disclosure requirements could survive under *Central Hudson*'s test, strict scrutiny, or whatever other analysis might apply to disclosures stepping beyond *Zauderer*'s limits. The Ninth Circuit judges showed no hint of concern for the interests motivating San Francisco's ordinance or the simple, practical realities underlying the legal issues. Imagine asking a wide array of Americans to name the significant problems facing the nation today. No matter how far and wide you searched, you would be hard pressed to find anyone worrying that Americans are too reluctant to purchase and use cell phones. At most, being informed or reminded that cell phones emit a type of radiation would inspire some consumers to be a little

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420. CTIA—The Wireless Ass'n v. City & Cty. of San Francisco, Nos. 11-17707, 11-17773, 2012 WL 3900689, at \*1 (9th Cir. Sept. 10, 2012).

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.*

more cautious about how they use these beloved devices.<sup>425</sup> Allowing San Francisco to require some type of disclosure, but with a moderate tone along the lines of what Judge Alsup proposed, would have been a reasonable way to accommodate government, business, and consumer interests.<sup>426</sup>

#### D. *Restaurant Menus*

The marketing of unhealthy foods and beverages may soon be the hottest of all topics in the battle over commercial speech rights. Obesity rates in the United States have increased significantly over the past three decades.<sup>427</sup> More than one-third of adults are obese, and another one-third are overweight.<sup>428</sup> Obesity increases the risk of a variety of health problems, including heart disease, strokes, diabetes, hypertension, and certain types of cancer.<sup>429</sup> Although the causes of the nation's obesity epidemic are difficult to determine with certainty, the types and amounts of food that people consume obviously play some role.<sup>430</sup>

Clarence Thomas offered an early warning that paternalistic legislators or regulators would eventually threaten commercial speech rights in an effort to improve Americans' diets. When the Court struck down restrictions on tobacco advertising in *Lorillard*,<sup>431</sup> Thomas foresaw that food advertising would be the next target.<sup>432</sup> While tobacco companies have been accused of secretly trying to lure underage customers, food companies openly and aggressively target children with promotions like McDonald's

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425. Microwave ovens provide a useful example. The FDA believes that the radiation involved in microwave cooking does not pose a health threat. But the agency nevertheless makes the common-sense recommendation that "[a]s an added safety precaution," no one should stand directly against a microwave oven for long periods while it is operating. *Radiation-Emitting Products, Microwave Oven Radiation*, FDA, <http://www.fda.gov/Radiation-EmittingProducts/ResourcesforYouRadiationEmittingProducts/ucm252762.htm> (last updated Apr. 26, 2011).

426. If the FCC finds that state or local disclosure requirements pose a serious problem, the federal government can exercise its power to preempt them. *See CTIA*, 827 F. Supp. 2d at 1059 (noting that federal law already preempts state or local regulation of cell phones' radiofrequency emissions).

427. *See* Katherine M. Flegal et al., *Prevalence and Trends in Obesity Among US Adults, 1999–2008*, 303 J. AM. MED. ASS'N 235, 240 (2010) (reporting that obesity rates were relatively stable in the 1960s and 1970s, increased significantly in the 1980s and 1990s, and leveled off or increased at a slower pace in the 2000s).

428. *Id.* at 236.

429. *Id.* at 240.

430. *See id.* at 240–41 (discussing how programs that promote healthier eating will likely lead to overall improvements in the obesity issues facing the United States).

431. *See supra* notes 140–145 and accompanying text.

432. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 587–88 (2001) (Thomas, J., concurring in part and concurring in the judgment).

Happy Meals.<sup>433</sup> Thomas called for courts to be firm in their defense of commercial speech rights, even when it means giving constitutional shelter to the marketing of extremely harmful products, because the First Amendment protects bad ideas as well as good ones.<sup>434</sup>

If there is a slippery slope from tobacco advertising restrictions to new restraints on food marketing, many public health advocates are eager to see governments take that slide. In their view, obesity is quickly replacing tobacco as the nation's greatest public health threat. As with tobacco, dealing with obesity will require an enormous change in both attitudes and regulations.<sup>435</sup> A wide array of regulations could be imagined, ranging from advertising restrictions—like the ban on broadcast advertising of tobacco<sup>436</sup>—to disclosure requirements—like the Surgeon General's warnings on tobacco packaging.<sup>437</sup>

As demonstrated by the furor over Mayor Bloomberg's proposed ban on big sodas, such regulations will be intensely controversial.<sup>438</sup> Many people view weight problems as primarily a matter of individual choice and personal responsibility, while others are more inclined to emphasize environmental or societal factors like food advertising's manipulation of consumer choices.<sup>439</sup>

The Patient Protection and Affordable Care Act, informally known as Obamacare, may give courts an important opportunity to weigh in on the issue. Section 4205 of the Act requires restaurant chains with twenty or more locations to start listing the calorie count for each item on their menus, including the big menu boards typically behind the counter and by the drive-through lane of fast food restaurants.<sup>440</sup> The new law imposes a

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433. *Id.* at 588.

434. *Id.* at 590; *see also* R.J. Reynolds Tobacco Co. v. FDA, 823 F. Supp. 2d 36, 48 n.26, 52 (D.D.C. 2011) (warning that if courts do not adequately protect tobacco companies' commercial speech, the government will curtail the rights of the food and alcohol industries). In their appellate brief concerning the FDA's graphic warnings, *see supra* Part II-B, the tobacco companies made the same argument by creating hypothetical warnings for food and alcohol packages, such as a McDonald's bag with the FDA's image of a cadaver accompanying a warning about heart disease. Brief for Appellees at 32–33, R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. Jan. 23, 2012) (No. 11-5332).

435. *See, e.g.*, Jonathan D. Klein & William Dietz, *Childhood Obesity: The New Tobacco*, 29 HEALTH AFF. 388, 388, 390 (2010) (arguing that obesity epidemic demands a public health social movement similar to the one aimed at tobacco).

436. *See supra* note 266 and accompanying text.

437. *See supra* notes 264–268 and accompanying text.

438. *See supra* notes 5–16 and accompanying text.

439. *See* Colleen L. Barry et al., *Obesity Metaphors: How Beliefs About the Causes of Obesity Affect Support for Public Policy*, 87 MILBANK Q. 7, 7, 18, 38 (2009) (reporting results of survey on how public perceptions of obesity shape opinions on policies like requiring warnings on food packaging or restricting food advertising aimed at children).

440. Patient Protection and Affordable Care Act § 4205(b), 21 U.S.C. § 343(q)(5)(H) (2012).

similar requirement for food vending machines.<sup>441</sup> In addition to the calorie disclosures, the restaurants also must post “a succinct statement concerning suggested daily caloric intake” designed to help the public understand the significance of the calorie counts in relation to an overall daily diet.<sup>442</sup> The restaurants also must have written materials available that provide more detailed nutritional information about each item on their menus, such as sodium, carbohydrate, and fat levels, and give those materials to any customers who request them.<sup>443</sup> These new statutory requirements have not yet taken effect, as the FDA is still in the process of preparing the regulations to implement them.<sup>444</sup>

Should anyone challenge the new federal law on First Amendment grounds, precedent will be on the government’s side. Several cities and states already require restaurants to post calorie counts.<sup>445</sup> New York City was the first place in the country to enact such a law, and the Court of Appeals for the Second Circuit upheld it as constitutional in a 2009 ruling.<sup>446</sup> The court reasoned that calorie counts are the sort of purely factual and uncontroversial commercial speech covered by the Supreme Court’s decision in *Zauderer*.<sup>447</sup> As a result, New York City merely needed to show that requiring restaurants to post calorie data was “reasonably related” to its goal of reducing obesity.<sup>448</sup> The Second Circuit felt that requirement was easily satisfied, citing evidence that obesity is a serious problem and that studies have linked obesity to frequent consumption of high-calorie meals at fast food restaurants.<sup>449</sup>

While the Second Circuit’s ruling certainly bodes well for the validity of the new federal law requiring disclosure of calorie counts, the issue is hardly free from doubt. The Second Circuit treated the *Zauderer* test, which requires the mandated disclosure to be reasonably related to the government’s objective, as equivalent to the weakest sort of rational basis

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441. *Id.* § 343(q)(5)(H)(viii).

442. *Id.* § 343(q)(5)(H)(ii)(I)(bb), (II)(bb).

443. *Id.* § 343(q)(5)(H)(ii)(III).

444. *See Implement Section 4205 of the Patient Protection and Affordable Care Act*, FDA, <http://www.accessdata.fda.gov/FDATrack/track-proj?program=healthcare-reform&id=ACA-4205-Implementation> (last visited April 9, 2013) (providing timetable for development of the regulations).

445. *See, e.g., State and Local Menu Labeling Policies*, CTR. FOR SCI. IN THE PUB. INTEREST (Apr. 2011), [http://cspinet.org/new/pdf/ml\\_map.pdf](http://cspinet.org/new/pdf/ml_map.pdf) (displaying the status of state and local menu labeling policies).

446. *N.Y. State Restaurant Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 137 (2d Cir. 2008).

447. *Id.* at 134.

448. *Id.* at 136; *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (explaining that advertisers’ rights are adequately protected if there is a reasonable relationship between disclosure and state’s interests).

449. *N.Y. State Restaurant Ass’n*, 556 F.3d at 135–36.

review.<sup>450</sup> New York City therefore needed merely to offer a plausible theory as to how posting calorie counts might help to prevent obesity.<sup>451</sup> In other words, the city prevailed because one could reasonably imagine that the calorie disclosures might encourage someone to eat less and lose weight, and it did not matter that the city had no proof that the law would actually have such an effect.

If a court required strong proof of the effectiveness of calorie disclosure laws, the outlook for such laws would be bleak. Studies have produced mixed results rather than clear answers. For example, some researchers measuring the effects of New York City's law have found that the posting of calorie information had no significant effect on what customers purchased.<sup>452</sup> Indeed, some evidence suggests that having more information about the nutritional content of menu items will actually drive customers away from the healthier options.<sup>453</sup> Other studies have produced somewhat more encouraging results. They suggest that even though a large majority of restaurant-goers will disregard the calorie information, the fifteen or twenty percent of customers who do pay attention to the information will order significantly fewer calories as a result.<sup>454</sup>

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450. *Id.* at 134.

451. *See id.* at 134 n.23 (“New York ‘has no obligation to produce evidence, or empirical data to sustain . . . rationality.’” (quoting *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001))). For example, in the equal protection context, rational basis review is satisfied if any reasonably conceivable state of facts could provide a plausible justification for the government's action. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993).

452. Brian Elbel et al., *Child and Adolescent Fast-Food Choice and the Influence of Calorie Labeling: A Natural Experiment*, 35 INT'L J. OF OBESITY 493, 497 (2011); *see also* Brian Elbel et al., *Calorie Labeling and Food Choices: A First Look at the Effects on Low-Income People in New York City*, 28 HEALTH AFF. w1110, w1117 (2009) (“Even those who indicated that the calorie information influenced their food choices did not actually purchase fewer calories.”); Eric A. Finkelstein et al., *Mandatory Menu Labeling in One Fast-Food Chain in King County, Washington*, 40 AM. J. OF PREVENTIVE MED. 122, 125 (2011) (finding no evidence that mandatory menu labeling had a positive influence on food choices); Lisa J. Harnack, *Effects of Calorie Labeling and Value Size Pricing on Fast Food Meal Choices: Results from an Experimental Trial*, 5 INT'L J. OF BEHAVIORAL NUTRITION & PHYSICAL ACTIVITY 63, 73 (2008) (finding that calorie data on menus caused no significant change in average calorie content of fast food meal choices).

453. *See, e.g.*, Harnack, *supra* note 452, at 73 (finding that study data suggested some men might use calorie information on menus to order “energy dense” higher calorie meals); George Loewenstein, *Confronting Reality: Pitfalls of Calorie Posting*, 93 AM. J. OF CLINICAL NUTRITION 679, 680 (2011) (suggesting that calorie disclosures might backfire by causing low-income consumers to purchase food with the most calories for the price or by causing dieters to realize that food items do not contain as many calories as they otherwise would have imagined).

454. *See* Bryan Bollinger et al., *Calorie Posting in Chain Restaurants*, 3 AM. ECON. J.: ECON. POL'Y 91, 92 (2011) (finding that calorie postings at Starbucks reduced average calories per order by six percent); Tamara Dumanovsky et al., *Changes in Energy Content of Lunchtime Purchases from Fast Food Restaurants After Introduction of Calorie Labelling: Cross Sectional Customer Surveys*, 343 BRIT. MED. J. 299 (2011) (finding that even though calorie disclosures produced no overall decline in calories purchased, the disclosures led to significant reductions at several major restaurant chains and that the

With studies pointing in different directions, the constitutionality of calorie disclosure requirements ultimately depends on the attitude that judges bring to bear on the question. A court sharing Justice Breyer's preference for deferring to legislative decisions about complex and debatable policy matters would easily uphold such requirements, just as the Second Circuit upheld New York City's law.<sup>455</sup> But a court demanding to see solid proof that calorie listings on menus will in fact reduce obesity could easily conclude that such proof does not exist. The Supreme Court has shown that sort of skepticism about the justifications for commercial speech restrictions in cases like *Edenfield v. Fane*, where the Court faulted Florida authorities for presenting no studies to support the state's fears about in-person solicitation of clients by certified public accountants.<sup>456</sup> The Court wanted real proof that the solicitation ban was necessary, not mere speculation. *Edenfield* involved a restriction on speech, rather than a government-mandated disclosure like the calorie counts, but judges like Clarence Thomas will want to dissolve that distinction and apply the same degree of exacting scrutiny to laws that restrict speech and those that compel it.<sup>457</sup>

The new federal requirements concerning restaurant menus may survive simply because no one sues to challenge them. Some restaurant chains have concluded that posting calorie data is good for business because

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fifteen percent of customers who reported using the calorie information purchased an average of 106 fewer calories than those who did not use the information); Elizabeth Pulos & Kirsten Leng, *Evaluation of a Voluntary Menu-Labeling Program in Full-Service Restaurants*, 100 AM. J. OF PUB. HEALTH 1035, 1037 (2010) (finding that nutrition information on menus caused about twenty percent of full-service restaurant customers to order an entrée with fewer calories); Christina A. Roberto et al., *Evaluating the Impact of Menu Labeling on Food Choices and Intake*, 100 AM. J. OF PUB. HEALTH 312, 316 (2010) ("Calorie information on restaurant menus reduced the total amount of calories people ordered and consumed for a meal, improved their ability to estimate calories consumed, and, perhaps most important, affected their eating later in the day."); Pooja S. Tandon et al., *Nutrition Menu Labeling May Lead to Lower-Calorie Restaurant Meal Choices for Children*, 125 PEDIATRICS 244, 246 (2010), available at <http://pediatrics.aappublications.org/content/early/2010/01/25/peds.2009-1117> (finding that calorie data on McDonald's menus did not affect what parents order for themselves, but resulted in an average reduction of 100 calories in the foods that parents selected for their young children); Julienne A. Yamamoto et al., *Adolescent Fast Food and Restaurant Ordering Behavior With and Without Calorie and Fat Content Menu Information*, 37 J. OF ADOLESCENT HEALTH 397, 402 (2005) (finding that calorie and fat content data on menus affected the food orders of less than twenty percent of adolescents, but resulted in a substantial calorie and fat reduction for those orders).

455. See *supra* notes 446–449 and accompanying text.

456. *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993); see *supra* notes 137, 139, and accompanying text.

457. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1343 (2010) (Thomas J., concurring in part and concurring in the judgment) (arguing that there is no constitutional distinction between government compelling and restricting protected speech and both should be analyzed under strict scrutiny); see *supra* notes 133–34 and accompanying text.

it pleases customers who want the information.<sup>458</sup> Other companies may decide that given a choice between a federal requirement and a variety of state and local ones, they would prefer the former. For example, the National Restaurant Association praised Congress for providing a uniform national standard to replace the “growing patchwork of varying state and local regulations.”<sup>459</sup>

If courts do hear challenges to the new federal rules for menus, the issues will ultimately boil down once again to a conflict between the Breyer and Thomas perspectives. Obesity is such a significant problem that some judges will be inclined to give every benefit of the doubt to governments trying to do something about it. Others will regard the measure as pointless and offensive paternalism, concluding that, if the government wants to nag consumers about what to eat, it can launch its own public education campaign rather than forcing the restaurant industry to spread the government’s messages about food choices. Given that it essentially requires restaurants to disclose objective data, the calorie posting law is likely to be upheld. But to the extent that governments take the fight against obesity a step further and attempt to require more aggressive warnings or to put restrictions on advertising of disfavored foods, the legal conflict over food sellers’ commercial speech rights will intensify sharply.

#### CONCLUSION

In one of its early rulings finding commercial speech to be within the First Amendment’s reach, the Supreme Court emphasized the “commonsense differences” that distinguish business promotions from the types of speech receiving the strongest constitutional protection, such as political expression or news reporting.<sup>460</sup> Common sense should continue to be the guide. Tough questions will always arise and close calls will need to be made, but courts can maintain a sensible spectrum of scrutiny on which commercial speech receives some but not the most stringent degree of protection. A flexible, intermediate analysis can reflect Justice Breyer’s pragmatic focus on real consequences, and his inclination toward judicial

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458. See Georgina Gustin, *Menus Soon Will Shed Light on Calorie Load*, ST. LOUIS POST-DISPATCH, Mar. 23, 2010, [http://www.stltoday.com/news/local/metro/menus-soon-will-shed-light-on-calorie-load/article\\_001f4ca5-e209-5ce6-ae9d-0d472d197c99.html](http://www.stltoday.com/news/local/metro/menus-soon-will-shed-light-on-calorie-load/article_001f4ca5-e209-5ce6-ae9d-0d472d197c99.html).

459. See *National Restaurant Association Says Nutrition Information Provision Is Win for Consumers and Restaurants*, NEV. REST. ASS’N (Mar. 22, 2010), <http://www.nvrestaurants.com/displaycommon.cfm?an=1&subarticlenbr=840> (reprinting National Restaurant Association’s press release).

460. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 & n.24 (1976).

deference to legislative policy determinations. At the same time, the skepticism of government paternalism favored by judges like Clarence Thomas can be an ingredient in the analysis as well. Courts should be wary of government attempts to justify censorship on the grounds that people will be better off knowing less. While an intermediate approach cannot fully embrace either the anti-paternalistic or pragmatic perspectives, it can strive for a fair balance between the two. Embracing a more rigid and extreme position in one direction or the other might be more satisfying as a matter of abstract principle. But an intermediate stance offers the best chance to reasonably accommodate all the interests at stake.