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Persistent Threats to Commercial Speech

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ABSTRACT

The current Supreme Court is very protective of speech, including commercial speech. Threats to commercial speech persist nonetheless. This paper, prepared for a symposium at Brooklyn Law School, examines two: 1) the use of commercial speech restrictions as a form of rent-seeking; 2) compelled commercial speech. Regulation of commercial speech protect is sometimes used to protect established corporate interests from competitors who are less able to bear the costs of regulation, with consequences that extend beyond the economic marketplace. In the case of commercial speech, courts have been unduly deferential to claims of a consumer "right to know" as a basis for mandated labeling and disclosure. Greater protection of commercial speech would be necessary to guard against these threats.

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PERSISTENT THREATS TO COMMERCIAL SPEECH

Jonathan H. Adler*

Free speech may be under fire in America today,[1] but not at One First Street. Under Chief Justice Roberts the Supreme Court has been quite protective of speech.[2] From offensive protests[3] and lies about military service[4] to violent video games[5] and campaign-related

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[1] *See, e.g.*, Taylor Maycan, *Study: Nearly Half of Millennials Not on Board with Free Speech*, USA TODAY, Nov. 25, 2015, http://college.usatoday.com/2015/11/25/millennials-free-speech-pew-survey/ (noting lower support for broad speech protections among younger generations); James Coll, *Free Speech under Siege*, ALBANY TIMES UNION, Mr. 23, 2016, http://www.timesunion.com/opinion/article/Free-speech-under-siege-6923876.php; Donal Brown, *Free Speech under Siege at Some U.S. Universities*, First Amendment Coalition, Feb. 18, 2016, https://firstamendmentcoalition.org/2016/02/free-speech-under-siege-at-some-u-s-universities/; George Leef, *Free Speech under Siege in America*, FORBES, Dec. 11, 2015, http://www.forbes.com/sites/georgeleef/2015/12/11/free-speech-under-siege-in-america/. More broadly, see GREG LUKAINOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2014).

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

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

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

[5] *See* Brown v. Entertainment Merchant's Association, 546 U.S. 786 (2011) (invalidating state law prohibiting sale of violent video games to minors).

expenditures,[6] the Supreme Court has continued to expand the range of expression protected by the First Amendment.[7] Commercial speech is no exception.[8]

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

While commercial speech enjoys a substantial degree of protection, there are threats on the horizon.[11] In this brief essay, I will focus on two. The first threat comes speech regulation

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

[7] *See also* United States v. Stevens, 559 U.S. 460 (2010) (holding the First Amendment protects depictions of animal cruelty).

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

[8] *See*, *e.g.*, Sorrell v. IMS Health Care, 546 U.S. 552 (2011) (invalidating law restricting the sale, disclosure, and use of pharmacy records that reveal prescribing practices of individual doctors).

[9] *See id.*; *see also* Thompson v. Western States Medical Center 535 U.S. 357 (2002) (invalidating prohibitions on pharmacy advertising for drug compounding); 44 Liquormart v. Rhode Island 517 U.S. 484 (1996) (invalidating prohibition on price advertising for alcoholic beverages). Not all commentators see this as a positive development. *See, e.g.*, John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, Implications*, 30 CONST. COMMENTARY 223 (2015) (lamenting "corporate takeover of the First Amendment); [CITE PIETY THIS VOLUME].

[10] *See* Rodney A. Smolla, *Afterword: Free the Fortune 500! The Debate over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1292 (2004) ("Examination of actual case decisions demonstrates that the trajectory of modern commercial speech law has been an accelerating rise of protection for advertising.").

[11] There are additional threats to the protection of commercial speech, not the least of which is the low regard with which constitutional protection of commercial speech is held by most legal academics who write in this area. *See, e.g.*, Ellen Goodman, *Dangerous Corporate First Amendment Overreach: Three Information Trends and a Data Application*, Public Knowledge, May 25, 2016, https://www.publicknowledge.org/news-blog/blogs/dangerous-corporate-first-amendment-overreach-three-information-trends-and-a-data-application; Amanda Shanor & Robert Post, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015),

that is driven by rent seeking. Economic interests regularly seek to restrict commercial speech as a way of suppressing competition, including by prohibiting or limiting the disclosure of factually true information about products or services. Control of advertising and other communication about products and services is an effective way to control the underlying market.

The second threat comes from compelled commercial speech. Governments at all levels routinely impose compelled speech requirements, such as mandatory labels or other disclosures. At present, such requirements are often subject to minimal scrutiny in federal court. Combined with the corporate use of regulation to suppress competition and entrench corporate power by limiting commercial speech and the increasing reliance upon compelled speech as a means of regulation, threaten core First Amendment values and undermine the robust protection of commercial speech more generally.

I. PROTECTING COMMERCIAL SPEECH

The Supreme Court first extended constitutional protection to commercial speech four decades ago.[12] Since then, the Court has consistently held that "[t]he fact that the speech is in aid

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http://harvardlawreview.org/2015/03/adam-smiths-first-amendment/; Coates, *surpa* note __; TAMARA PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2013); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC, June 3, 2013, https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation; C. Edwin Baker, *The First Amendment and Commercial Speech*¸ 84 IND. L.J. 981 (2009); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV 1 (2000). There are exceptions to the prevailing view, however. *See, e.g.*, Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. __ (forthcoming 2017); MARTIN REDISH, THE ADVERSARY FIRST AMENDMENT 75-121 (2013). *See also* Rodney Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993);Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 652–53 (1990); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 429 (1971)

[12] *See* Bigelow v. Virgnia, 421 U.S. 809 (1975).

of a commercial purpose does not deprive respondent of all First Amendment protection."[13] Indeed, the Court has noted repeatedly that a "'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.'[14]

Beginning in the 1970s, the Court emphasized the value of information about goods and services to consumers.[15] As the Court explained in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[16]

On this basis, the Court concluded that commercial speech should be protected by the First Amendment, but not to quite the same degree as core protected speech, such as political speech. Less explicit in the Court's decisions is the recognition that commercial speech can also serve to advance the broader interests of democratic self-governance and self-governance.[17] Indeed, as

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[13] *See* U.S. v. United Foods, 533 U.S. 405, 410 (2001).

[14] *See, e.g.* Sorrell, 546 U.S. at __ (*quoting* Bates v. State Bar of Ariz., 433 U. S. 350, 364 (1977)).

[15] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809, 818 (1975). The Court had noted the value of commercial speech in earlier cases. *See, e.g.*, Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973) (noting that "the exchange of information is as important in the commercial realm as in any other.")..

[16] *Va State Bd.*, 425 U.S.. at 765. The opinion also noted that commercial speech "is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Id.* at __.

[17] *See* Bambauer & Bambauer, *surpa* note __, at __ (noting protection of commercial speech "harmonizes with the democratic self-governance and personal autonomy theories that most legal scholars embrace"). *See also* Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41

the Court noted in *Virginia State Board*, much commercial speech is also "indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered," and thus helps to "enlighten public decision-making in a democracy."[18]

The current test applied to government measures restricting commercial speech was provided in *Central Hudson*.[19] In this case, the Court outlined a form of intermediate scrutiny to which restrictions on commercial speech are subject.[20] Since that landmark opinion, however, the degree of protection afforded to commercial expression has, if anything, increased. Several justices have suggested *Central Hudson* should be revisited,[21] and several decisions seemed to apply greater protections to commercial speech regulations than *Central Hudson* seems to

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LOY. L.A. L. REV. 67, 81 (2007)("speech concerning commercial products and services can facilitate private self-government in much the same way that political speech fosters collective self-government"); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L.. REV. 2353, 2372 (2000) (recognizing relationship between commercial information and democratic self-governance); Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 YALE J. ON REG. 85 (1999) (challenging notion that commercial information or advertising is less valuable than other forms of speech). Courts and commentators have also often neglected the political and cultural content of many otherwise "commercial" messages. *See, e.g.*, Jonathan H. Adler, *Robert Bork & Commercial Speech*, 10 J.L. ECON. & POL'Y 615 (2014).

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

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

[20] *Id.*at 566 ("For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.").

[21] *See*, *e.g.*, 44 Liquormart 517 U.S. at 522 (Thomas, J., concurring in part and concurring in the judgment) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."); *id.* at 517 (Scalia, J., concurring in part and concurring in the judgment); *see also Thompson*, 535 U.S. at 367–68 (2002); United States v. United Foods, Inc., 533 U.S. 405, 409–10 (2001) (noting "criticism" of *Central Hudson* test by multiple justices). *See also* Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Associations in* United Foods*,* Zauderer*, and* Abood, 40 VAL. U. L. REV. 555, 558 n. 15 (2006) ("More than a majority of the justices have at one time or another indicated their dissatisfaction with the test."); David C. Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1052 (2004) ("Since *44 Liquormart*, the Court has made it clear that it would be willing to revisit the doctrine should the appropriate case come along.").

require.[22] Even if one agrees that commercial speech should be protected, there is ample space to question the coherence and consistency of the Court's commercial speech jurisprudence.[23]

One deficiency in the Court's commercial speech jurisprudence (matched in much of the relevant academic literature) is the failure to give adequate regard to the extent to which otherwise "commercial" messages and communications permeate broader political and cultural discourse. Much commercial speech is imbued, if not saturated, with normative and political content.[24]

Commercial advertising and product labeling routinely appeal to the normative preferences and cultural values of potential consumers. Corporations expend substantial resources seeking to create cultural and other affinities with particular consumer groups and cultural constituencies. After the Supreme Court's decision in *Obergefell v. Hodges*, for example, numerous Fortune 500 companies covered their logos with the rainbow that has come to symbolize gay rights, celebrating the Court's decision in the context of brand messaging.[25] This was commercial speech, but it also contained a powerful political and cultural message.

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[22] *See, Sorrell* 546 U.S., 571 (suggesting that a higher level of scrutiny is appropriate where a state imposes "content-and speaker-based restrictions on protected expression.").

[23] *See, e.g.*, Elizabeth Blanks Hindman, *The Chickens Have Come Home to Roost: Individualism, Collectivism and Conflict in Commercial Speech Doctrine*, 9 COMM. L. POL'Y 237, 237 (2004) ("The Supreme Court of The United States has spent more than two decades constructing its commercial speech doctrine but has failed to articulate a principled approach, which has created disarray in the definition and protection of commercial speech"); Thomas C. Goldstein, Nike v. Kasky *and the Definition of "Commercial Speech,"* 2002-03 CATO SUP. CT. REV. 63, 71 (2003) (noting "the ambiguities and conflicting signals" in Court's commercial speech jurisprudence).

[24] *See* Adler, *Compelled Commercial Speech*, supra note __, at 429-31.

[25] *See* Susana Kim & Alexa Valiente, *Same-Sex Marriage: How Companies Responded to Supreme Court's Decision*, ABC News (Jun. 26, 2015. 1:39 PM) adcnews.go.com/Business/sex-marriage-companies-responded-supreme-courts-decision/story?id=32053240.

Individual purchasing decisions and commercial activities are often imbued with political and normative content as well.[26] Consider the person who drives a Toyota Prius hybrid, wears Toms on his feet, and carries a hemp sack emblazoned with a "fair trade" sticker when going to Whole Foods or Trader Joe's to shop for humanely raised, free-range chicken or a carbon-neutral vegan meat substitute. This individual is acting as more than a mere economic consumer. His purchasing decisions are simultaneously consumptive and communicative.[27] The inherent symbolism of these choices, for some, are more important than matters of quality or price.

Producers and consumers exchange money for goods and services. They are also engaged in a dialogue about a wider range of concerns -- cultural, normative and political. Efforts to obtain greater market share are not confined to traditional marketing or product improvement; quality and price are only two of the factors about which contemporary consumers care. Thus, companies seeking to increase their market share will seek to align themselves with the values of desired consumer demographic groups. Producers achieve this by engaging in value-laden communications, inserting cultural messages into commercial advertising and brand messaging. To gain competitive advantage, they endeavor to discover what consumers care about it now, or may care about in the future (even if only after a company communicates about it). Consider, for

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[26] *See, e.g.*, Lauren Copeland, *Value Change and Political Action: Postmaterialism, Political Consumerism, and Political Participation*, 42 AM. POL. RES. 257 (2014) (discussing the rise of "political consumerism" as a form of political participation); Michael Schudson, *Citizens, Consumers, and the Good Society*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 236, 239 (2007) (noting consumer choices may be "political in even the most elevated understandings of the term"); Dhavan V. Shah et al., *Political Consumerism: How Communication and Consumption Orientations Drive 'Lifestyle Politics,'* 611 ANNALS AM. ACAD. POL. & SOC. SCI. 217, 217 (2007) (discussing "consumer behaviors that are shaped by a desire to express and support political and ethical perspectives") ; Craig J. Thompson et al., *Emotional Branding and the Strategic Value of the Doppelgänger Brand Image*, 70 J. MKTG. 50, 63 (2006) (noting research indicating "consumers' most valued brands are those whose symbolic meanings play an important role in their self-conceptions"); Deitlind Stolle et al., *Politics in the Supermarket: Political Consumerism as a Form of Political Participation*, 26 INT'L POL. SCI. REV. 245 (2005) (noting consumer choices as political).

[27] *Cf.* Cohen v. California, 403 U.S. 15, 26 (1971) (nothing that most speech performs a "dual communicative function").

example, the proliferation of products that are advertised as "fair trade" or "GMO free."[28] Companies also adopt political positions – and perhaps even take litigation positions – as part of their effort to encourage consumer loyalty.[29] Those producers that do this successfully are rewarded handsomely, as consumers respond.

The intertwined nature of commercial and cultural content complicates the effort to consign commercial speech to a lesser degree of constitutional protection. This contemporary reality[30] may be one reason why the Court, while leaving *Central Hudson* in place, has seemed to apply a higher level of scrutiny in recent cases. If so, the Court has not said so – at least not yet. One consequence of the Court's reticence to consider the broader cultural and political context in which much commercial speech occurs this is that lower courts continue to apply *Central Hudson* with relatively little consideration for the broader implications of widespread government regulation of speech with commercial content. This may make judicial protection of

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[28] *See, e.g.*, Andrew Adam Newman, *This Wake-Up Cup is Fair-Trade Certified*, N.Y. TIMES, Sept. 28, 2012, at B3 (describing Green Mountain Coffee's advertising campaign focusing on their fair-trade coffee); *Food With Integrity*, CHIPOTLE MEXICAN GRILLE, http://chipotle.com/food-with-integrity (last visited Mar. 2, 2016) (Chipotle's marketing campaign claiming that "with every burrito we roll or bowl we fill, we're working to cultivate a better world."). Perhaps ironically, it appears that Chipotle spent more time burnishing its progressive image than actually ensuring that its food was safe to eat. *See* Susan Berfeld, *Inside Chipotle's Contamination Crisis*, BLOOMBERG BUSINESSWEEK (Dec. 22, 2015), http://www.bloomberg.com/features/2015-chipotle-food-safety-crisis/ (discussing food poisoning outbreaks at Chipotle).

[29] To take one recent, high-profile example, when Apple refused to provide a mechanism to unlock an iPhone used by the terrorist responsible for the attack in San Bernadino, it defended this position to consumers and was accused by the government of posturing for marketing purposes. *See*, Dustin Volz & Julia Edwards, *U.S., Apple Ratchet Up Rhetoric in Fight Over Encryption*, REUTERS, Feb. 22, 2016, http://www.reuters.com/article/us-apple-encryption-doj-idUSKCN0VS2FT; *see also* In the Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35kgd203, No. 15-0451m (C.D. Cal. filed Feb. 1, 2016) Government's Memorandum of Points and Authorities, (alleging Apple refuses to comply with Governments request to decrypt iPhone belonging to suspect in 2016 San Bernardino shootings). For its part, Apple also argued that its cooperation with federal law enforcement would have constituted compelled speech in violation of the First Amendment. *See* Matthew Panzarino, *Apple Files Motion To Vacate The Court Order To Force It To Unlock iPhone, Citing Constitutional Free Speech Rights*, TECHCRUNCH, Feb. 25, 2016, https://techcrunch.com/2016/02/25/apple-files-motion-to-dismiss-the-court-order-to-force-it-to-unlock-iphone-citing-free-speech-rights/.

[30] For an argument that this may not be a new development, *see* Troy, *supra* note __.

commercial speech more precarious than the Court's holdings in recent commercial speech cases might suggest.

II. SPEECH REGULATION AS RENT-SEEKING

Commercial speech is an important means for producers and sellers to communicate information about the products and services that they offer. Such communications extend well beyond the price and availability of products, however. Advertising and other speech sends explicit and implicit messages about product quality[31] and desirability.[32] It is used to appeal to existing consumer preferences as to shape such preferences over time. Advertising and other commercial speech also incorporate cultural and normative messages that both help develop brand identity and create or support affinity groups, which may or may not be centered around specific products or brands.

Just as commercial speech is an effective means for producers and sellers to communicate with consumers, restrictions on commercial speech are a powerful means of restraining competition and privileging the interests of some producers and sellers over others. For this reason, it should not be surprising at all that corporate interests have often sought to regulate commercial speech as a means of obtaining competitive advantage.[33] In this regard,

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

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

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

commercial speech regulation can be a form of "rent seeking."[34] If a new product has a feature or characteristic that differentiates it from those of existing products, incumbent producers may seek to restrict or alter communication about those characteristics, perhaps by placing limits on how products may be described or what sorts of claims can be made.[35] Such use of speech regulation has a long and sordid history.[36]

Commercial speech is essential for producers to differentiate their products from competitors in the minds of consumers and citizens. This is particularly true of new entrants that lack the brand identification, distribution networks and brand loyalty of more established brands. To protect themselves (and their existing market share), incumbents are often eager to limit the communication of their competitors, through traditional and untraditional channels alike. Incumbent firms may also benefit from across-the-board restrictions on advertising, as this may reduce the ability of new entrants to attract market share.[37]

Some dairy farmers, with the aid of biotechnology companies, have sought restrictions on commercial speech regarding the use hormones to increase milk production. Bovine somatotropin (BST) is a naturally occurring growth hormone that affects the amount of milk a

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

[35] *See* Bambauer & Bambauer, *supra* note __, at __ ("speech regulation can be exploited to dispose of information that challenges entrenched interests . . .").

[36] For discussion of one prominent historical example, see Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and* Margarine, 77 CAL. L. REV. 83, 108-09 (1989) (describing how the dairy industry lobbied state legislatures for mandatory oleomargarine labeling laws in order to thwart competition with butter.).

[37] For example, major tobacco companies benefitted from advertising restrictions that harmed smaller firms. *See*, Jonathan H. Adler et al., *Baptists, Bootleggers, & Electronic Cigarettes*, 33 YALE J. ON REG. (Forthcoming 2016) (discussing how limits on television ads benefitted larger uncumbent cigarette producers); *see also* Yandle, et al., *supra* __.

dairy cow will produce. In an effort to increase milk production, scientists learned how to synthesize BST through modern genetic engineering techniques. The result is recombinant bovine somatotropin (rBST), which increases milk production in treated cows. This can increase the efficiency of dairy production, particularly in larger firms.[38]

Although the use of rBST is controversial, the U.S. Food and Drug Administration maintains that milk produced from cows treated with rBST is not appreciably different from milk from untreated cows, and certainly no less safe.[39] Indeed, the FDA declared that any suggestion that there is a meaningful difference in milk from treated and untreated cows would be "false and misleading."[40] Despite these assurances, some consumers and producers were unconvinced. The state of Vermont even sought to require labeling of milk and other dairy products from cows treated with rBST, but these regulations were struck down in federal court.[41]

Some dairy farms oppose the use of rBST, either because they believe such treatments are "unnatural," are inhumane, or perhaps even dangerous.[42] Some milk producers may also believe that they can obtain a larger market share by appealing to consumers who prefer "organic" products or otherwise do not wish to consume products that were produced with the aid of modern biotechnology. Not only do such producers refuse to treat their cows with rBST, they would also like to inform consumers of this fact, such as by adding a voluntary "rBST free"

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[38] *See* Christopher L. Culp, *The Bovine Somatotropin Controversy*, *in* ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 47, 55-56 (Michael S. Reve & Fred L Smith Jr. eds., 1992).

[39] *Bovine Somatotropin,* U.S. Food and Drug Administration (Last Updated Jun. 22, 2016, 1:22 PM), http://www.

[40] *See* U.S. Food & Drug Admin., Interim Guidance on the Voluntary Labeling of Milk and Milk Products From Cows That Have Not Been Treated With Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279-04, 6279–80 (Feb. 10, 1994).

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

[42] One prominent concern is that there is a higher rate of infection in cows treated with rbST due to the increased milk production resulting from such treatment.

or "No rBST" label to their products. Prominent companies, such as Ben & Jerry's ice cream, supported this effort.

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

In some states, dairy producers went even farther, seeking to prevent any rBST-related claims on product labels. In Ohio, for example, the state Department of Agriculture adopted a rule that considered any dairy product label that included phrases such as "rBST free" or "Hormone Free" to be misleading.[43] Insofar as all dairy cows have hormones, the regulators may have had a point. Nonetheless, these requirements went well beyond any need to prevent consumer deception. Rather, these restrictions had, as their clear purpose, trying to prevent competing dairy producers from using commercial speech to disclose factually true information about their products and to encourage consumers to believe that these facts might be a reason to purchase their products.

These restrictions prompted a First Amendment challenge. he U.S. Court of Appeals for the Sixth Circuit recognized these restrictions for what they were, and pared back the legal requirements.[44] Were it not for the constitutional protection of commercial speech, however, Ohio's rules would have been upheld, and conventional dairy producers would have been able to

[43] Ohio Admin. Code § 901:11-8-01.

[44] *See* Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628 (6th Cir. 2010).

squelch the communication of dissenting views within the commercial marketplace. Nonetheless, some regulatory constraints on the ability of dairy and other producers to differentiate their products on value-based grounds remain.[45]

Limitations on commercial speech by competitors may harm consumers in multiple ways. Not only do such restrictions limit the information available to consumers, they may also impair efforts to protect public health. Consider the case of reduced-risk tobacco products and smoking alternatives. Not all tobacco products present the same risks to consumers, and some smoking alternatives – such as electronic cigarettes and vaping devices – appear to present a tiny fraction of the risks posed by cigarettes.[46] For this reason, many public health professionals believe that convincing smokers to switch to alternative products would help improve public health and reduce the death toll tobacco continues to inflict on American society.[47]

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

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[45] *See* FDA guidance *supra*.

[46] *See*, *e.g.*, A. McNeill et al., *E-Cigarettes: An Evidence Update–A Report Commissioned by Public Health England*, PUB. HEALTH ENG. (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/457102/Ecigarettes_an_evidence_update_A_report_commissioned_by_Public_Health_England_FINAL.pdf; David J. Nutt et al., *Estimating the Harms of Nicotine-Containing Products Using the MCDA Approach*, 20 EUR. ADDICTION RES. 218 (2014). Peter Hajek et al., *Electronic Cigarettes: Review of Use, Content, Safety, Effects on Smokers and Potential for Harm and Benefit,* 109 ADDICTION 1801 (2014).

[47] *See, e.g.*, ROYAL COLLEGE OF PHYSICIANS. NICOTINE WITHOUT SMOKE: TOBACCO HARM REDUCTION (2016), https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction-0 (urging encouragement of e-cigarettes and other tobacco alternatives as a means of curbing smoking); Stephen S. Hecht et al., *Evaluation of Toxicant Carcinogen Metabolites in the Urine of E-cigarettes Users Versus Cigarette Smokers*, 17 NICOTINE TOBACCO RES. 704 (2015); Riccardo Polosa, *Electronic Cigarette Use and Harm Reversal: Emerging Evidence in the Lung,* 13 BMC MED. 54,54 (2015) ("[S]mokers completely switching to regular EC use are likely to gain significant health benefits."); Zachary Cahn & Michael Siegel, *Electronic Cigarettes as a Harm Reduction Strategy for Tobacco Control: A Step Forward or a Repeat of Past Mistakes?*, 32 J. PUB. HEALTH POL'Y 16, 17 (2011). A similar argument has also been made with respect to smokeless tobacco products. *See* BRAD RODU, FOR SMOKERS ONLY: HOW SMOKELESS TOBACCO CAN SAVE YOUR LIFE (2013).

prohibits the sale of any tobacco product the labeling of which claims implicitly or explicitly that the product presents a lower risk of tobacco-related diseases, that the product contains a reduced level of a substance or is free of a substance, or that uses descriptors such as "light," "mild," or "low."[48] Tobacco products (which, under current regulations, include tobacco alternatives such as electronic cigarettes) can only be marketed as "reduced risk" products with FDA approval.[49] Although these regulations restrict purely factual claims that are supported by a fair amount of peer-reviewed scientific research, they have withstood legal challenge thus far.[50]

The federal statute limiting existing federal restrictions on the disclosure (let alone promotion) of scientific information on the relative risks proposed by different sorts of tobacco products and their alternatives was lobbied for and supported by the nation's largest tobacco producer, Altria (aka Philip Morris).[51] At least one opponent labeled the bill the "Marlboro Protection Act."[52] As the dominant cigarette manufacturer – and a firm well-positioned to make inroads into markets for tobacco alternatives provided that competitors are hamstrung by regulatory limitations on advertising and promotion, Altria benefits from limitations on commercial speech. Yet such limitations on speech, insofar as they inhibit consumer education

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[48] *See* 21 U.S.C. § 387(k).

[49] *See* 21 U.S.C. § 387k(g)(1).

[50] *See, e.g.*, Discount Tobacco City & Lottery, Inc. v. U.S., 674 F. 3d 509 (6th Cir. 2012).

[51] *See* Duff Wilson, *Philip Morris's Support Casts Shadow over a Bill to Limit Tobacco*, N.Y. TIMES (Mar. 1, 2009), http://www.nytimes.com/2009/04/01/business/01tobacco.html; C. STEPHEN REDHEAD & VANESSA K. BURROWS, CONG. RESEARCH SERV., R40475, FDA TOBACCO REGULATION: THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT OF 2009 (2009).

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

about the relative risks of various products, can have negative consequences on public health.[53] This is nothing new, however, as the tobacco industry long ago discovered that limitations on advertising – and limitations on comparative health claims in particular – is an effective means of suppressing competition and inhibiting consumer education about the potential health risks of their products.[54]

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

Policymakers often advocate the use of mandatory disclosure or other forms of speech compulsion as an alternative to traditional forms of product regulation.[55] In some cases, the argument for mandating disclosure of product characteristics can be based upon health risks or consumer protection concerns.[56] In other cases, mandatory product disclosures are grounded on

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[53] For a broad ranging discussion of rent-seeking in the context of the regulation of tobacco alternatives, see Jonathan H. Adler, et al., *Baptists, Bootleggers, and E-Cigarettes* (w/ Roger Meiners, Andrew Morriss & Bruce Yandle), 33 YALE J. OF REG. __ (2016).

[54] *See*, John E. Calfee, *The Ghost of Cigarette Advertising Past,* 10 REG. Nov.-Dec. 1986. ("When cigarette advertising was less regulated, competition among manufacturers routinely led to advertisements containing information on the health effects of smoking— much of it in blunt and provocative language—even though this was sometimes highly destructive to the interests of the cigarette industry as a whole. Health advertising was effective means of promoting one brand over another and thus was an important weapon for smaller firms seeking to wrest business from larger firms"); Bruce Yandle et al., *Bootleggers, Baptists, & Televangelists: Regulating Tobacco by Litigation* 2008 U. ILL. L. REV. 1225, 1248 ("In February 1960, The FTC announced that it had negotiated a voluntary agreement with the tobacco companies to cut all tar and nicotine claims from cigarette advertising. The agency heralded the ban as 'a landmark example of industry-government cooperation in solving a pressing problem. . . But the ban, while in theory improving the market for safer cigarettes, had the opposite effect. It retarded competition on the health claim margin, freeing the companies from having to modify their product to attempt to reduce its health hazards.").

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

[56] Prominent examples of such a mandatory disclosure would be food content labels and warnings about potential product dangers or risks.

the assertion that there is a consumer "right to know" about any product a characteristics in which some set of consumers may have a particular interest. This idea of a consumer right-to-know is itself a significant threat to commercial speech, particularly when combined with the false idea that the free flow of commercial information is advanced by mandatory disclosure.[57]

Information about products and services can often improve consumer decisionmaking. Disclosure requirements may empower consumers to protect themselves from health or other risks posed by particular products. So, for instance, food content requirements help those with allergies or particular dietary needs avoid those ingredients that may cause them harm. Mandatory disclosures may also help address the problem of information asymmetries[58] and may help increase consumer welfare as a result.

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

[57] For an extended argument about the threat of an alleged consumer "right to know" to the constitutional protection of commercial speech, see Jonathan H. Adler, *Compelled Commercial Speech and the Consumer Right-to-Know*, 58 ARIZ. L. REV. 421 (2016).

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

much.[59] Consumers have "limited time and cognitive energy" for the consideration and analysis of information about products and services.[60]

Mandating the additional disclosure of information, if not justified by independent interests such as a need to protect consumers from unwitting harms, may actually harm consumer welfare.[61] Indeed, mandating excessive information disclosure may actually result in the communication of less substantive content to consumers and reduced consumer understanding.[62] Factually true disclosures may also mislead consumers into thinking that information subject to such disclosure is more important than other product or service attributes that will actually have a greater effect on consumer welfare.[63]

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[59] *See*, *e.g.*, Lewis A. Grossman, *FDA and the Rise of the Empowered Consumer,* 66 ADMIN L. REV. 627, 631 (2014) ("A surfeit of information can overwhelm consumers, leading them to attend to it selectively or to ignore it altogether."); Jayson Lusk & Stephan Marette, *Can Labeling and Information Policies Harm Consumers?,* 10 J. AGRIC. & FOOD INDUS. ORG. 1, 1 (2012) (excessive information can reduce consumer welfare); Wesley A. Magat et al., *Consumer Processing of Hazard Warning Information*, 1 J. RISK & UNCERTAINTY 201, 204 (1988) ("Manufacturers of consumer products are also concerned with the possibility of information overload because regulatory agencies are requiring them to include more and more information on labels, a practice they fear will make the labels less effective as a communication instrument."); Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulations*, 81 WASH. U. L.Q. 417 (2003) (observing that fewer disclosures may better serve customers due to risk of information overload); Yvette Salaüna & Karine Flores, *Information Quality: Meeting the Needs of the Consumer*, 21 INT'L J. INFO. MGMT. 21, 23 (2001) (noting that excessive information can impose costs on consumers).

[60] *See* Weil et al., *The Effectiveness of Regulatory Disclousre Policies*, 25 J. POL'Y ANALYSIS & MGMT, 155,158 (noting consumers have "limited time and cognitive energy.").

[61] *See* Jane Bambauer, Jonathan Loe & Alex Winkelman, *A Bad Education* (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795808.

[62] *See, e.g.*, Svetlana E. Bialkova et al., *Standing Out in the Crowd: The Effect of Information Clutter on Consumer Attention for Front-of Pack Nutrition Labels*, 41 FOOD POL'Y 65, 69 (2013) (recognizing that increases in information can reduce consumer attention and discernment); Elise Golan et al., *Economics of Food Labeling,* 24 J CONSUMER POL'Y 117, 139 (2001) (noting that increased disclosure requirements can result in less consumer understanding); Mario F. Teisl & Brian Roe, *The Economics of Labeling: A Overview of Issues for Health and Environmental Disclosure*, 27 AGRIC. & RESOURCE ECON. REV. 141, 148 (1998) ("[S]imply increasing the amount of information on a label may actually make any given amount of information harder to extract.").

[63] For example, warnings on trace levels in mercury in fish may take consumer attention away from the helath benefits of consuming fish high in Omega-3 fatty acids. In this way, such warnings can actually work against efforts to improve public health. *See, e.g.*, Joshua T. Cohen, *Matters of the Heart and Mind: Risk-Risk Tradeoffs in Eating Fish Containing* Methylmercury, 14 RISK IN PERSPECTIVE 2-3 (2006) available at https://cdn1.sph.harvard.edu/wp-content/uploads/sites1273/2013/06/RISK_IN_PERSP_JANUARY2006.pdf (Suggesting that warnings about the

Most recent challenges to compelled disclosures in federal court have been unsuccessful.[64] This may be due to the Court's failure to explain how the constitutional protection afforded to commercial speech should be applied to compelled commercial speech. The Court's central precedent on compelled commercial speech is *Zauderer v. Office of Disciplinary Counsel*.[65] This decision is a bit opaque, and widely misunderstood. Generally perceived (even by some of the justices) as an alternative to *Central Hudson*, when it is better seen as an application of the same overall approach.

Zauderer concerned an Ohio requirement that attorneys who advertise contingent-fee rates must disclose that clients could be liable for court costs if their suits were unsuccessful. The justification for this requirement was that, absent disclosure, some consumers might be misled into thinking that a contingent-fee arrangement protected them against any financial risk of a failed lawsuit when, in fact, they could still be financially liable for court costs. In upholding the disclosure requirement, the Court explained a requirement that a seller or service provider disclose factual information will be upheld so long as the requirement is not unduly burdensome and the requirement is "reasonably related to the State's interest in preventing deception of consumers."[66]

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danger of mercury contamination in fish to pregnant women could have the negative effect of decreasing intake of beneficial omega-3 oils, also found in fish.).

[64] *See*, American Meat Institute v. U.S. Dept. of Agric., 780 F.3d 18 (D.C. Cir. 2014) (upholding a regulation requiring country-of-origin labeling for meat products); Grocery Mfrs. Ass'n v. Sorrell 102 F.Supp.3d 583 (D. Vt. 2015) (upholding Vermont's mandatory GMO food labeling law); New York State Restaurant Ass'n v. New York City Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (Upholding NY law requiring restaurants to disclose calorie counts in dishes) *but see Nat'l Ass'n. of Mfrs. v. SEC*, 800 F.3d 518, 530 (Holding that provision of conflict mineral law requiring disclosure of use of conflict minerals in specific language violated the First Amendment.) (D.C. Cir. 2015)

[65] 471 U.S. 626 (1985).

[66] *Id.* at 651

Some courts and commentators have read *Zauderer* to establish that the compelled disclosure of factual information is subject to a lesser degree of scrutiny than is provided by *Central Hudson*.[67] As I have argued elsewhere at greater length,[68] this interpretation reflect s a misunderstanding of *Zauderer* and its place in the constellation of the Court's commercial speech jurisprudence.[69] *Zauderer* concerned a mandatory disclosure that was necessary to prevent consumer deception, which is undisputably a "substantial interest" under the *Central Hudson* framework. Moreover, the state's position was that a failure to disclose could render the regulated advertising misleading, and (again under *Central Hudson*) inherently misleading commercial speech does not receive any protection at all. As the Court held more recently in *Milavetz, Gallop & Milavetz, P.A. v. United States*, the "essential features of the rule at issue in *Zauderer*" required disclosures "intended to combat the problem of inherently misleading commercial advertisements;" only entailed "an accurate statement" about the nature of what was being advertised.[70]

The misunderstanding and misapplication of *Zauderer* has led some courts to apply the most minimal scrutiny to mandatory disclosures and other compelled commercial speech requirements.[71] This is problematic because such mandates, even when confined to factually true

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[67] *See, e.g.*, Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 28–30 (Rogers, J., concurring); Post, *Transparent and Efficient*, *supra* note __, at 560 (*Zauderer* "advanced an extraordinarily lenient test for the review of compelled commercial speech.")

[68] *See* Adler, *Compelled Commercial Speech*, *supra* note __.

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

[70] 559 U.S. 229, 230–31 (2010).

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

information, are often imbued with normative and political content. The decision that some information is more or less relevant to a consumer's purchase decision is not a value-free choice. There is a near-infinite number of things about a given product or service that may interest some portion of consumers. Choosing to prioritize or privilege some over others necessarily embraces the judgment that some are more important or worthy than others.

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

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

CONCLUSION

Over the past decade, the Supreme Court has expanded the range of speech and expressive activity protected by the First Amendment. Commercial speech has, thus far, been no exception to this larger trend. Yet lower courts have not been as aggressive in the protection of commercial speech as has been the Supreme Court. Moreover, the weight of academic

commentary is decidedly critical of constitutional protection of commercial speech (and speech by corporations in particular).[72]

Because commercial speech can pose a threat to established economic interests, the pressure to adopt new commercial speech restrictions will continue. Insofar as courts (and commenators) have a blind spot for the threat compelled commercial speech poses to the protection of commercial speech and underlying First Amendment values, this is likely to be an appealing avenue for those who wish to restrict marketplace speech, whether for pecuniary or more noble purposes. Compelled speech requirements motivated by ideological agendas appear to be proliferating.[73] Thus while the protection of commercial speech appears to be robust today, there is no guarantee it will continue.

[72] *See infra* note __.

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