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Nat Stern

*Florida State University College of Law*

Mark Joseph Stern

*Slate Magazine*

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# ADVANCING AN ADAPTIVE STANDARD OF STRICT SCRUTINY FOR CONTENT-BASED COMMERCIAL SPEECH REGULATION

*Nat Stern* \*

*Mark Joseph Stern* \*\*

## INTRODUCTION

In *Sorrell v. IMS Health Inc.*, the United States Supreme Court struck down a Vermont law restricting the commercial exploitation by pharmaceutical companies of information acquired about the prescribing practices of individual physicians.<sup>1</sup> That decision marked the most recent step in the gradual elevation of commercial speech from “its subordinate position in the scale of First Amendment values”<sup>2</sup> to its status as a form of expression that routinely enjoys robust protection from the Court. Indeed, the *Sorrell* Court intimated that its long-established framework for reviewing commercial speech regulation—the standard announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission*<sup>3</sup>—embodies a more rigorous review than the intermediate level of scrutiny often ascribed to it.<sup>4</sup>

This article argues that the Court should continue the progression of its commercial speech jurisprudence by promulgating an

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\* John W. and Ashley E. Frost Professor of Law, Florida State University College of Law; J.D., 1979, Harvard University; A.B., 1976, Brown University.

\*\* Writer, SLATE MAGAZINE.

1. 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2653, 2659 (2011).

2. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

3. 447 U.S. 557, 566 (1980) (setting forth a four-part test to examine validity of commercial speech restriction). The *Central Hudson* test is discussed *infra* notes 46–50 and accompanying text. The *Sorrell* Court’s application of the test is discussed *infra* text accompanying notes 107–16.

4. See *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 623–24 (1995); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1178–79 (2005).

adaptive standard of strict scrutiny for content-based commercial speech regulation. The standard would be adaptive in the sense that it would take into account commercial expression's distinctive aspects. While strict scrutiny has often been called "'strict' in theory, [but] fatal in fact,"<sup>5</sup> the Court has repudiated that notion and emphasized that "[c]ontext matters" when applying this level of review.<sup>6</sup> A strict scrutiny standard that accommodates the context of commercial speech would offer a more coherent approach than *Central Hudson's* oft-criticized<sup>7</sup> multi-pronged test, while retaining the most useful aspects of that standard. It would effectively align formal doctrine with the arc of the Court's decisions in this area—no longer treating commercial speech as a doctrinal stepchild but rather applying to its regulation broader principles of expression.

Section I of this article briefly reviews the evolution of commercial speech doctrine from the Court's initial recognition that this expression is entitled to qualified protection through its increasing willingness to review commercial speech regulation through the exacting lens of core First Amendment tenets. Section II discusses the rationale for an adaptive standard of strict scrutiny and describes the manner in which it could operate. Section III then describes how this standard could be invoked to invalidate Food and Drug Administration regulations requiring tobacco companies to place graphic images on cigarette packages warning of the dangers of smoking.

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5. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

6. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (finding that a state university law school's race-conscious admissions policy was narrowly tailored to serve a compelling government interest); *see also* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620–21 (1984) (finding that local chapters of the Jaycees were neither small nor selective and lacked the characteristics necessary to afford constitutional protection to the decision of its membership to exclude women).

7. Criticism has focused on the test's asserted inconsistency and unpredictability. *See, e.g.*, Alex Kozinski & Eugene Volokh, *Commentary, A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1644–45 (1993); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000); Michael R. Siebecker, *Building a "New Institutional" Approach to Corporate Speech*, 59 ALA. L. REV. 247, 252 (2008).

## I. THE RISE OF PROTECTION FOR COMMERCIAL SPEECH

Modern commercial speech doctrine was launched by the Court's landmark decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>8</sup> For nearly two decades afterward, the Court frequently invalidated restrictions on the content of commercial speech while sustaining enough regulation to leave unclear its exact position under the First Amendment. Since the end of that ambiguous period, however, the Court's vigorous enforcement of First Amendment safeguards has overwhelmingly overturned restrictions on commercial speech. Only in the realm of compelled disclosure has the periodic impulse toward modified scrutiny from the earlier era persisted.

### A. *Virginia State Board of Pharmacy and Its Dual Progeny: 1976–1995*

The Court's ruling in *Virginia State Board of Pharmacy* formally brought commercial speech within the ambit of First Amendment protection.<sup>9</sup> In the Court's eyes, Virginia's ban on advertising prescription drug prices clashed with central values of free expression.<sup>10</sup> Depriving consumers of knowledge about comparative prices, for example, thwarted their capacity for self-fulfillment by preventing "the alleviation of physical pain or the enjoyment of basic necessities."<sup>11</sup> Shrouding prices in secrecy also interfered with the public's ability to make informed economic policy decisions essential to democratic governance.<sup>12</sup> Most conspicuously at odds with First Amendment assumptions, it appeared, was the statute's premise that exposure to this information would tempt consumers to act in ways that would

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8. 425 U.S. 748 (1976).

9. *Virginia State Board of Pharmacy* formally overruled the Court's declaration in *Valentine v. Chrestensen* that "purely commercial advertising" does not warrant First Amendment protection. *Id.* at 758, 770 (citing *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942)).

10. *Id.* at 770.

11. *Id.* at 763–64; see Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 879–80 (1963) (asserting that individual self-fulfillment and self-realization are two fundamental values that justify freedom of expression).

12. See *Va. State Bd. of Pharmacy*, 425 U.S. at 765 n.19 (citing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)).

ultimately harm their own interests.<sup>13</sup> Rejecting this "highly paternalistic approach,"<sup>14</sup> the Court held that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients."<sup>15</sup>

*Virginia State Board of Pharmacy* and its anti-paternalistic thrust spawned a series of decisions hostile to bans on commercial speech derived from what the Virginia Board disparaged as the "advantages of their being kept in ignorance."<sup>16</sup> In the very next term, the Court struck down two such laws. In *Linmark Associates, Inc. v. Township of Willingboro*, the Court held invalid a township's ban on the display of signs announcing the sale of residential homes.<sup>17</sup> The ordinance sought to advance the legitimate purpose of "stem[ming] . . . the flight of white homeowners from a racially integrated community"<sup>18</sup> through illegitimate means: suppressing specific messages out of fear "that they will cause those receiving the information to act upon it."<sup>19</sup> More far-reaching in its practical consequences was the Court's ruling in *Bates v. State Bar of Arizona* that a state could not prohibit attorney advertising about the price of routine legal services.<sup>20</sup> As in *Virginia State Board of Pharmacy*, the state contended in effect that citizens lacked the sophistication to respond properly to the forbidden advertisements.<sup>21</sup> To the Court, however, such justifications amounted to the discredited case for "the benefits of public ignorance."<sup>22</sup>

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13. See *id.* at 768-69. The state argued that open advertising would lure consumers to patronize cheaper but less professional pharmacists, upset the stability of pharmacist-customer relationships, and dampen the entry of talented individuals into a profession whose practitioners had been reduced to "mere retailer[s]." *Id.* at 768.

14. *Id.* at 770.

15. *Id.* at 773.

16. *Id.* at 769-70.

17. 431 U.S. 85, 86, 97 (1977).

18. *Id.* at 86.

19. *Id.* at 94.

20. See 433 U.S. 350, 353, 384 (1977); see also Horace E. Johns, *From Bigelow to Zauderer: Steps Along the Way in Attorney Advertising*, 22 AKRON L. REV. 173, 177-78, 182 (1988) (discussing state responses to *Bates*).

21. See *Bates*, 433 U.S. at 372, 374-75 (asserting that clients could not rely on advertising to make appropriate choice of lawyer because advertisements would "highlight irrelevant factors").

22. *Id.* at 375 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 769-70 (1976)).

With efforts to limit lawyer advertising persisting in the wake of *Bates*, the Court's invalidation of restrictions became a frequent platform for the denial of state power to shield citizens from accurate commercial expression for their own putative good. The Court's objection to condescending assumptions about a client's capacity to grasp truthful advertisements disposed of bans on advertising areas of practice other than in officially prescribed language,<sup>23</sup> listing courts in which an attorney was admitted to practice,<sup>24</sup> self-recommendation for employment to persons who had not sought an attorney's legal advice,<sup>25</sup> inclusion of illustrations in advertising,<sup>26</sup> any targeted direct-mail solicitation,<sup>27</sup> publicizing certification by private organizations,<sup>28</sup> and touting one's credential as a Certified Public Accountant.<sup>29</sup> Even an attorney's identification in advertising as a "Certified Financial Planner"—while arguably confusing or misleading absent explanation<sup>30</sup>—could not be forbidden where it correctly reflected her status.<sup>31</sup>

In addition to overturning restrictions rooted in paternalism, the Court also rejected prohibitions based on rationales unrelated to distinctive concerns posed by commercial speech. In *Carey v. Population Services International*, the Court struck down a complete ban on the advertisement or display of contraceptives.<sup>32</sup> The state's justification that advertisements of contraceptive products would prove "offensive and embarrassing" ran afoul of the First Amendment principle that offense to sensibilities does not license suppression of otherwise protected speech.<sup>33</sup> Likewise in *Bolger v. Youngs Drug Products Corp.*, the Court struck down a ban on mailing unsolicited advertisements for contraceptives on the grounds that homeowners had the same ability to deal with of-

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23. See *In re R.M.J.*, 455 U.S. 191, 194–96, 206–07 (1982).

24. See *id.* at 198, 206–07.

25. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 639, 642 (1985).

26. See *id.* at 647.

27. See *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 476 (1988); see also *Edenfield v. Fane*, 507 U.S. 761, 763–64, 777 (1993) (striking down a restriction on prohibition of in-person solicitation by certified public accountants).

28. See *Peel v. Att'y Registration & Disciplinary Comm'n*, 496 U.S. 91, 96, 110–11 (1990) (plurality opinion).

29. See *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 143–44 (1994).

30. See *id.* at 150–52 (O'Connor, J., concurring in part and dissenting in part).

31. *Id.* at 138, 145 (majority opinion). The petitioner had been authorized by a well-known private organization to designate herself in this manner. *Id.* at 138.

32. 431 U.S. 678, 681–82 (1977).

33. *Id.* at 701 (citing *Cohen v. California*, 403 U.S. 15 (1971)).

fensive advertisements as those exposed to such material in public.<sup>34</sup> Perhaps the most explicit statement of the Court's unwillingness to automatically exempt commercial speech from the ordinary operation of First Amendment principles came in *City of Cincinnati v. Discovery Network, Inc.*<sup>35</sup> There, the Court invalidated an ordinance barring distribution of "commercial" publications through freestanding newsracks located on public property.<sup>36</sup> Noting that newsracks holding noncommercial publications produced similar harms to public safety and aesthetics,<sup>37</sup> the Court dismissed the city's argument that the "low value" of commercial speech justified its targeted ban on commercially oriented newsracks.<sup>38</sup>

Moreover, the Court refused to automatically accept, at face value, the government's explanation for restrictions on commercial speech. In *Rubin v. Coors Brewing Co.*, the Court rejected the intent to combat "strength wars" among brewers as a valid justification for a federal prohibition on displaying the alcohol content of beer on labels or in advertising.<sup>39</sup> Instead, the Court independently assessed whether the ban squared with other provisions of the government's regulatory scheme.<sup>40</sup> Finding inconsistencies in that framework,<sup>41</sup> the Court doubted that the labeling ban could even survive *Central Hudson's* third requirement that regulation of commercial speech directly advance the relevant government interest.<sup>42</sup> Even granting that assumption, however, the Court ruled that the restriction failed because less restrictive alternatives existed for addressing "strength war[s]."<sup>43</sup>

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34. 463 U.S. 60, 72 (1983) (alteration in original) (citation omitted) (internal quotation marks omitted) ("[T]he short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.").

35. 507 U.S. 410 (1993).

36. *See id.* at 416-17.

37. *See id.* at 425-26.

38. *Id.* at 428 (internal quotation marks omitted).

39. 514 U.S. 476, 479, 488 (1995) (internal quotation marks omitted). Among the less speech-restrictive alternatives noted by the Court was simply limiting the alcohol content of beer. *Id.* at 490.

40. *Id.* at 488-89.

41. For example, beer companies could still disclose alcohol content in advertisements in those states that permitted it. *Id.* at 488.

42. *See id.* at 486.

43. *Id.* at 490-91 (noting, for example, direct limitations on the alcohol content of beer).

Even as the Court frequently struck down restrictions, however, it stopped short of equating commercial speech with fully protected expression; rather, it sought to determine the scope of the “limited measure of protection” to which commercial speech is entitled.<sup>44</sup> *Virginia State Board of Pharmacy* itself acknowledged state latitude to take measures designed to assure dissemination of “truthful and legitimate commercial information.”<sup>45</sup> In addition, the *Central Hudson* Court invalidated New York’s ban on advertising by electric utilities to promote the use of electricity, relying on reasoning that seemed to reserve significant power to limit even truthful commercial speech.<sup>46</sup> The Court found that the blanket ban violated the fourth—and most stringent—prong of the standard announced in the case<sup>47</sup>: that a regulation not be “more extensive than is necessary to serve [the state’s] interest.”<sup>48</sup> Still, by faulting the state’s failure to demonstrate that “a more limited restriction on the content of promotional advertising”<sup>49</sup> could not achieve its goal, the Court seemed to suggest that the state can sometimes suppress accurate information about a legal product in order to “dampen” demand for it.<sup>50</sup>

Moreover, even the level of vigor for the standard’s fourth prong was called into question nine years later in *Board of Trustees of the State University of New York v. Fox*.<sup>51</sup> The *Fox* Court refused to characterize that criterion as a “least-restrictive-means” test.<sup>52</sup> Instead, the state need only demonstrate a “fit between the legislature’s ends and . . . means . . . that is not necessarily per-

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44. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

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

46. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 571–72 (1980).

47. *Id.* at 569–72.

48. *Id.* at 566. The first three prongs inquire whether the commercial speech meets the threshold for protection by concerning lawful activity and not being misleading, whether the interest asserted in the state’s justification for the restriction is substantial, and whether the regulation directly advances that interest. *Id.*

49. *Id.* at 570.

50. See *id.* at 574 (Blackmun, J., concurring in the judgment) (disagreeing with the Court “when it says that suppression of speech may be a permissible means to achieve” energy conservation).

51. 492 U.S. 469 (1989).

52. *Id.* at 480–81; see ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 817 (4th ed. 2011) (“Under strict scrutiny it is not enough for the government to prove a compelling purpose behind a law; the government also must show that the law is necessary to achieve the objective. This requires that the government prove that it could not attain the goal through any means less restrictive of the right.”).

fect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.<sup>53</sup>

On the other hand, most occasions when the Court sustained commercial speech restrictions could be understood as recognitions of distinct and dispositive factual circumstances rather than indulgences of paternalism. The decisions in *Friedman v. Rogers*<sup>54</sup> and *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,<sup>55</sup> for example, were consistent with the Court's traditional deference to government's role as market regulator.<sup>56</sup> In *Friedman*, the Court found a Texas law barring the practice of optometry under a trade name justified by the state's interest in preventing misleading impressions of the nature of a professional practice.<sup>57</sup> *San Francisco Arts* affirmed the Olympic Committee's "legitimate property right" in the exclusive use of the word "Olympic" in the commercial promotion of athletic events.<sup>58</sup>

Similarly, two decisions upholding restrictions on attorneys' solicitation reflected concern with the impact of aggressive behavior on vulnerable individuals, not the naïveté of clients. In *Ohralik v. Ohio State Bar Ass'n*, the Court upheld enforcement of a prohibition on in-person solicitation of clients "for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."<sup>59</sup> The case offered little doubt of the presence of undue influence. Ohralik had approached, uninvited, two young accident victims to solicit them as clients—one while she lay in traction in a hospital—and had made secret recordings of his conversations with them.<sup>60</sup>

Additionally, the Court's ruling in *Florida Bar v. Went for It, Inc.*,<sup>61</sup> though more debatable,<sup>62</sup> did not appreciably dilute the

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53. *Fox*, 492 U.S. at 480 (citations omitted) (internal quotation marks omitted).

54. 440 U.S. 1 (1979).

55. 483 U.S. 522 (1987).

56. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942).

57. *Friedman*, 440 U.S. at 13, 15–16.

58. *S.F. Arts & Athletics, Inc.*, 483 U.S. at 541, 548 (internal quotation marks omitted). The statutory right was applied to prohibit promotion of an athletic competition called the "Gay Olympic Games." *Id.* at 525–27 (internal quotation marks omitted).

59. 436 U.S. 447, 449 (1978).

60. *Id.* at 450–51.

61. 515 U.S. 618 (1995).

62. *See id.* at 635 (Kennedy, J., dissenting) (5-4 decision); Amy Busa & Carl G. Sussman, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solici-*

Court's general resistance to limitations on truthful lawyer advertising.<sup>63</sup> The decision allowed a ban on personal injury lawyers' sending targeted, direct-mail solicitations within thirty days of an accident.<sup>64</sup> Though noting the state's interest in avoiding harm to the legal profession's image, the Court viewed the ban's principal purpose as keeping "bereaved or injured individuals" from suffering a "willful or knowing affront to or invasion of the[ir] tranquility."<sup>65</sup> The Court thus distinguished the circumstances presented by the case from those "situations in which the government is motivated primarily by paternalism."<sup>66</sup> Indeed, the Court emphatically signaled only two months prior to its decision in *Florida Bar* that it did not intend to retreat from its anti-paternalistic stance.<sup>67</sup>

Admittedly, two decisions from this period permitting restrictions on commercial speech did smack of overt paternalism; both, however, have been undercut by subsequent rulings. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, the Court upheld Puerto Rico's ban on advertising for casino gambling aimed at Puerto Rican residents.<sup>68</sup> While such gambling was legal there, the Court accepted Puerto Rico's rationale that its residents were "already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct."<sup>69</sup> This reasoning was obviously paternalistic, but just as clearly abandoned in later cases.<sup>70</sup>

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tation, 34 HARV. C.R.-C.L. L. REV. 487, 502 (1999) (asserting that reasoning in *Florida Bar* contradicted heightened scrutiny of restrictions on commercial speech that the Court had previously applied elsewhere).

63. See Arlen W. Langvardt & Eric L. Richards, *The Death of Posadas and the Birth of Change in Commercial Speech Doctrine: Implications of 44 Liquormart*, 34 AM. BUS. L.J. 483, 516-17 (1997).

64. *Fla. Bar*, 515 U.S. at 635.

65. See *id.* at 630.

66. *Id.* at 631 n.2.

67. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995); *id.* at 497 (Stevens, J., concurring).

68. 478 U.S. 328, 345-46 (1986).

69. *Id.* at 344.

70. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509-12 (1996) (plurality opinion); *id.* at 531-32 (O'Connor, J., concurring); Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 603-05 (2004); Langvardt & Richards, *supra* note 63, at 485 (asserting that *44 Liquormart* "sound[ed] . . . the death knell for *Posadas* and its modes of analysis"). See generally *supra* Section I.A.

The other decision, *United States v. Edge Broadcasting Co.*,<sup>71</sup> combined the paternalism of *Posadas* with *Fox's* relaxed approach to the needed congruence between means and end. *Edge Broadcasting* upheld enforcement of a federal ban on lottery advertisements by broadcasters licensed in states that did not conduct lotteries,<sup>72</sup> notwithstanding that the vast majority of the company's audience resided in a state that sponsored a lottery.<sup>73</sup> The Court was satisfied that the restriction was reasonably tailored to the federal policy of supporting non-lottery states' efforts to discourage participation in lotteries.<sup>74</sup> The *Edge* Court's reliance on *Posadas*,<sup>75</sup> however, gives the decision tenuous precedential force. Furthermore, to the extent that *Edge* and *Posadas* imply special tolerance of speech-restrictive measures to reduce demand for legal vices, their vitality has been drained by later decisions rejecting such efforts.<sup>76</sup>

Finally, one aspect of lesser protection for commercial speech, spanning both the early and later periods of commercial speech jurisprudence, is the government's heightened power to compel disclosure.<sup>77</sup> Even while disapproving a paternalistic ban on honest advertising, the *Virginia State Board of Pharmacy* Court noted that the need to ensure the truthfulness of commercial information could "make it appropriate to require 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>78</sup> A later decision clarified that requiring such content might be appropriate to avoid consumer confusion as well as deception.<sup>79</sup> In *Central Hudson*, the Court suggested that

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71. 509 U.S. 418 (1993).

72. *Id.* at 421, 436.

73. *See id.* at 423.

74. *Id.* at 429-30.

75. *Id.* at 434 (citing *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 344 (1986)).

76. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001) (tobacco products); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 176 (1999) (casino gambling); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489, 510 (1996) (retail price of alcoholic beverages); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478 (1995) (alcoholic content of malt beverages). These cases are discussed *infra* text accompanying notes 90-99.

77. *See supra* notes 71-76 and accompanying text; *see infra* notes 130-53 and accompanying text.

78. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976).

79. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (leaving open the possibility

directing advertisers to include information about the efficiency and cost of services offered might serve as a less restrictive alternative to the blanket ban on promotional advertising invalidated in that case.<sup>80</sup>

The Court's most thorough discussion of compulsory disclosure of factual information by commercial speakers occurred in *Zauderer v. Office of Disciplinary Counsel*.<sup>81</sup> There, the Court held valid rules mandating that advertisements of contingent-fee rates disclose, where true, that calculation of expenses included court costs and expenses and that clients would be liable for costs whatever the outcome of the suit.<sup>82</sup> Unlike illegitimate compulsions of speech on matters of opinion, the state here had only required that advertising include "purely factual and uncontroversial information about the terms under which [their] services will be available."<sup>83</sup> The Court condoned disclosure requirements "reasonably related to the State's interest in preventing deception of consumers" if they were not "unjustified or unduly burdensome."<sup>84</sup> Though the Court later held that commercial speech can gain greater protection from compelled disclosure when intertwined with fully protected speech,<sup>85</sup> that decision did not purport to alter the application of *Zauderer's* approach to ordinary commercial advertising.<sup>86</sup>

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of requiring a warning or disclaimer in the kind of advertisements protected from the ban in order to avoid misleading consumers); see also *In re R.M.J.*, 455 U.S. 191, 201 (1982).

80. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 570-71 (1980).

81. 471 U.S. 626 (1985).

82. *Id.* at 652.

83. *Id.* at 651.

84. *Id.*; see also Colloquy, *It's What's for Lunch: Nectarines, Mushrooms, and Beef—the First Amendment and Compelled Commercial Speech*, 41 LOY. L.A. L. REV. 359, 374 (2007) (statement of Robert C. Post) (arguing that the principle established by *Zauderer* also permits mandatory disclosure to promote market efficiency).

85. See *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (invalidating the requirement that professional fundraisers disclose to potential donors the percentage of donations turned over to charities over the past twelve months). But see *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983) (quoting *Cent. Hudson*, 447 U.S. at 563 n.5) (stating that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech"); Nathan Cortez, *Can Speech by FDA-Regulated Firms Ever be Noncommercial?*, 37 AM. J.L. & MED. 388, 404 (2011) (discussing the problem of "hybrid" speech).

86. See *Riley*, 487 U.S. at 796 n.9.

B. *From 44 Liquormart to Sorrell: Ascendancy of Robust Scrutiny*

Whatever ambiguity marked the Court's approach to truthful, nonmisleading commercial speech through 1995, *Rubin* presaged a more recent regime of steadily vigorous protection. In particular, the Court's enforcement of a muscular version of *Central Hudson's* fourth prong has repeatedly produced invalidation of government attempts to cloak accurate information about legal commercial activities.<sup>87</sup> Any lingering discrepancy between commercial speech and fully protected expression can be found chiefly in government power to compel disclosure.<sup>88</sup>

A trio of decisions involving advertising of legal vices—potentially vulnerable to suppression in light of *Posadas* and *Edge*<sup>89</sup>—underscore the Court's hardening skepticism to restrictions rooted in paternalistic anxiety about consumers' reactions to truthful speech. In a virtual sequel, only a year after *Rubin*, the Court unanimously struck down a state law forbidding advertisement of retail liquor prices except at the place of sale.<sup>90</sup> While the Court in *44 Liquormart* spoke in a cacophony of voices, even the mildest of these concluded that the ban failed *Central Hudson's* requirement that a restriction be no "more extensive than necessary to serve the State's interest."<sup>91</sup>

Three years later in *Greater New Orleans Broadcasting Ass'n v. United States*, the Court cast an even more critical eye on a federal law forbidding the broadcast of promotional advertisements for privately operated, for-profit casinos, regardless of a station's or casino's location.<sup>92</sup> Noting the extent to which federal law allowed certain forms of gambling and broadcast of some kinds of gambling, the Court chided the government for its "decidedly

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87. See *infra* note 128 and accompanying text.

88. See *infra* notes 122–26 and accompanying text.

89. See *supra* notes 68–76 and accompanying text.

90. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996).

91. *Id.* at 529 (O'Connor, J., concurring). Three Justices joined Justice O'Connor's opinion. *Id.* at 528. Four other Justices, speaking through Justice Stevens, determined that this "wholesale suppression of truthful, nonmisleading information" had not even met *Central Hudson's* third criterion that the restriction be shown to "significantly advance" the state's interest in promoting temperance. *Id.* at 488–89, 505 (plurality opinion). Justice Thomas argued that the First Amendment categorically prohibits "attempts to dissuade legal choices by citizens by keeping them ignorant." *Id.* at 518, 526 (Thomas, J., concurring).

92. 527 U.S. 173, 176 (1999).

equivocal” putative interest in discouraging gambling.<sup>93</sup> Even assuming the authenticity of the federal policy, however, the Court found the federal scheme for regulating the broadcast of gambling advertisements “so pierced by exemptions and inconsistencies” that it foundered on both the third and fourth prongs of the *Central Hudson* analysis.<sup>94</sup>

Finally, in *Lorillard Tobacco Co. v. Reilly*, tobacco joined alcohol and gambling on the roster of legal substances and activities whose dangers could not be combatted by unnecessary restrictions on speech.<sup>95</sup> The case involved an elaborate set of state regulations designed largely to curb underage use of tobacco products.<sup>96</sup> One feature—the state’s limitations on locations of outdoor advertising for smokeless tobacco and cigar advertising—failed *Central Hudson*’s fourth prong because the limitations effectively excluded advertising of these products from large areas without a showing that this “broad sweep” was needed.<sup>97</sup> In addition, the Court struck down the state’s prohibition of indoor, point-of-sale advertising of smokeless tobacco and cigars lower than five feet from the floor of a retail establishment located within one thousand feet of a school or playground.<sup>98</sup> These regulations satisfied neither the third nor the fourth prong of *Central Hudson*; the proscribed advertising would be visible to both children taller than five feet and those who looked upward.<sup>99</sup>

Even the government’s interest in protecting health has not justified gratuitous encroachment on truthful speech. In *Thompson v. Western States Medical Center*, the Court overturned a federal law permitting pharmacists to dispense compounded drugs only if the pharmacists did not advertise or solicit prescriptions for the compounding of a specific drug or type of drug.<sup>100</sup> The condition was attached to small-scale, compounding pharmacies’ exemption from the extensive testing to which mass-produced drugs were subject; advertising was deemed a signal that an operation

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93. *Id.* at 187.

94. *Id.* at 188–90.

95. 533 U.S. 525, 571 (2001).

96. *See id.* at 533.

97. *Id.* at 561–66.

98. *See id.* at 566 (citing 940 MASS. CODE REGS. § 22.06(5)(a)–(b) (2000)).

99. *Id.*

100. 535 U.S. 357, 360 (2002). When compounding, pharmacists combine ingredients to create medication tailored to a particular patient. *Id.* at 360–61.

had attained a scale at which testing was appropriate.<sup>101</sup> Expressing doubt that the condition directly advanced the government's interest as required by the third prong of the *Central Hudson* standard,<sup>102</sup> the Court proceeded to invalidate the ban under the standard's fourth prong that restrictions on commercial speech be no more extensive than necessary.<sup>103</sup> To the Court, the government failed to show that the ban's asserted purpose could not be achieved through alternative methods that would not inhibit speech.<sup>104</sup> And continuing to reject paternalistic rationales, the majority also rebuffed the dissenters' contention that the restriction furthered the government's interest in curbing the sale of compounded drugs to "patients who may not clearly need them."<sup>105</sup> As in *Virginia State Board of Pharmacy*, the First Amendment did not countenance "preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."<sup>106</sup>

Nearly a decade later, the Court's decision in *Sorrell v. IMS Health Inc.* reaffirmed that the aim of safeguarding health would not sustain first resort to restrictions based on apprehension of recipients' reaction to truthful speech.<sup>107</sup> Absent express consent by prescribers, Vermont's law forbade the sale of "prescriber-identifiable information" by pharmacies to data-mining companies, and by data-mining companies to pharmaceutical companies, "for marketing or promoting a prescription drug."<sup>108</sup> The law was intended to prevent marketing representatives of pharmaceutical manufacturers, known as "detailers," from exploiting their knowledge of individual prescribing practices when approaching physicians.<sup>109</sup> At the same time, the state afforded opportunity for the information to be "purchased or acquired by other speakers with diverse purposes and viewpoints," for example,

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101. *See id.* at 369–70.

102. *See id.* at 371.

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

104. *Id.* at 372–73 (suggesting alternatives such as limiting the amount of particular compounded drugs that pharmacists could sell in certain periods of time).

105. *Id.* at 373 (quoting *id.* at 379 (Breyer, J., dissenting)) (internal quotation marks omitted).

106. *Id.* at 374.

107. *See supra* notes 1–4 and accompanying text.

108. VT. STAT. ANN. tit. 18, § 4631(d) (2011).

109. *See Sorrell v. IMS Health Inc.*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2653, 2661 (2011).

academic organizations seeking to counter the promotion of brand-name pharmaceutical drugs.<sup>110</sup> Indeed, legislative findings accompanying the law showed that its “express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs.”<sup>111</sup> The law therefore imposed both a “content- and speaker-based” burden on speech.<sup>112</sup> Accordingly, the Court reasoned that the restriction warranted “heightened” scrutiny.<sup>113</sup> Almost inevitably, the Court concluded that “[t]he law cannot satisfy that standard.”<sup>114</sup> In what might serve as a synopsis of its logic, the Court observed: “If pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it.”<sup>115</sup> Thus, whether the Court employed *Central Hudson’s* standard for commercial speech or “a stricter form of judicial scrutiny,” the underlying principles and outcome were the same.<sup>116</sup>

The Court, however, still did not extend enhanced scrutiny of either sort to compelled disclosures in commercial speech. Only a year before *Sorrell*, the Court in *Milavetz, Gallop & Milavetz, P.A. v. United States* upheld a requirement that attorneys who furnish bankruptcy-assistance services include in advertisements a statement to the effect that: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.”<sup>117</sup> The law was designed to avert the misleading impression created by advertisements that offer debt relief without mention of the costs associated with a possible bankruptcy.<sup>118</sup> In assessing the law, the Court invoked *Zauderer’s* touchstone that disclosure requirements be “reasonably related to the State’s interest in preventing deception of consumers” and neither “[u]njustified” nor “burdensome.”<sup>119</sup> Under this “less exacting scrutiny,”<sup>120</sup> the gov-

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110. *Id.* at \_\_\_, 131 S. Ct. at 2663.

111. *Id.* at \_\_\_, 131 S. Ct. at 2663.

112. *Id.* at \_\_\_, 131 S. Ct. at 2663.

113. *Id.* at \_\_\_, 131 S. Ct. at 2667.

114. *Id.* at \_\_\_, 131 S. Ct. at 2659.

115. *Id.* at \_\_\_, 131 S. Ct. at 2670.

116. *Id.* at \_\_\_, 131 S. Ct. at 2667.

117. 559 U.S. \_\_\_, \_\_\_, 130 S. Ct. 1324, 1329–30 (2010) (quoting 11 U.S.C. § 528(a)(4) (2006)) (internal quotation marks omitted).

118. *Id.* at \_\_\_, 130 S. Ct. at 1340.

119. *Id.* at \_\_\_, 130 S. Ct. at 1339–40 (quoting *Zauderer v. Office of Disciplinary Coun-*

ernment was entitled to require “an accurate statement identifying the advertiser’s legal status and the character of the assistance provided.”<sup>121</sup>

## II. ADAPTING STRICT SCRUTINY TO CONTENT-BASED COMMERCIAL SPEECH REGULATION

*Sorrell’s* emphasis on the First Amendment’s aversion to content-based restraints, together with its suggestion that commercial speech restrictions often trigger “heightened” scrutiny,<sup>122</sup> highlights a central theme of the Court’s commercial speech jurisprudence: the narrowing gap between the principles that govern fully protected speech and those peculiar to commercial expression. This near-convergence can be detected not only in the Court’s intolerance of restrictions on truthful, nonmisleading commercial speech, but also in the pronouncements that accompany these decisions.

At the outset of modern doctrine, *Virginia State Board of Pharmacy* explained in expansive terms the First Amendment tenet on which the decision rested: “[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them.”<sup>123</sup> A later decision striking down a restriction on solicitation by certified public accountants had echoed this premise: “[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.”<sup>124</sup> Thus, time and again, the Court has chastised the government for paternalistic efforts to withhold truthful information about legal commercial activities from presumably unwitting consumers.<sup>125</sup> Likewise, *Sorrell’s* disapproval of government partisanship in the marketplace of ideas drew on reasoning that

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sel, 471 U.S. 626, 651 (1985)).

120. *Id.* at \_\_\_, 130 S. Ct. at 1339.

121. *Id.* at \_\_\_, 130 S. Ct. at 1340.

122. See *Sorrell v. IMS Health Inc.*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2653, 2664 (2011); Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech or Restricting Lochner?*, CATO SUP. CT. REV. 129, 129–30 (2010–2011).

123. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 415 U.S. 748, 770 (1976).

124. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

125. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565 (2001).

transcends genres of speech: “The First Amendment requires heightened scrutiny whenever the government creates ‘a regulation of speech because of disagreement with the message it conveys.’”<sup>126</sup>

The Court’s antipaternalism and its broad resistance to unnecessary suppression of commercial speech have been implemented by the growing stringency with which *Central Hudson’s* fourth prong has been enforced.<sup>127</sup> To reject the restrictions in *Thompson* and *Sorrell*, for example, it sufficed that the Court could conceive of potentially feasible alternatives for achieving the government’s goal.<sup>128</sup> Moreover, the burden has come to rest on government to demonstrate the negative proposition that such alternatives would not serve the government’s interest.<sup>129</sup>

Accordingly, this article proposes that the Court take the next logical step in the evolution of doctrine by announcing a formal standard of strict scrutiny<sup>130</sup> for content-based commercial speech regulation. Little strain is required to construe the Court’s more recent invalidations of bans on truthful, nonmisleading commercial speech as government failure to show that the measures were narrowly tailored to achieve a compelling state interest.<sup>131</sup> As Martin Redish and others have long urged, First Amendment values do not point to separate regimes for commercial and non-commercial speech.<sup>132</sup> Of course this principle would have to be

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126. *Sorrell*, 564 U.S. at \_\_\_, 131 S. Ct. at 2664 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

127. See Kerry C. Donovan, *Vanity Fare: The Cost, Controversy, and Art of Fashion Advertisement Retouching*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 581, 602–03 (2012); Coleen Klasmeyer & Martin H. Redish, *Off-Label Prescription Advertising, the FDA and the First Amendment: A Study in the Values of Commercial Speech Protection*, 37 AM. J.L. & MED. 315, 348 (2011).

128. See *Sorrell*, 564 U.S. at \_\_\_, 131 S. Ct. at 2669–70 (noting that physicians can decline to meet with detailers or forego detailing altogether); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371–72 (2002); *supra* note 104 and accompanying text.

129. See, e.g., *Thompson*, 535 U.S. at 373 (finding that the government failed to show that regulations did not restrict speech more than necessary to further state’s interest).

130. See *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002) (stating that when strict scrutiny applies to restrictions on speech government has the burden of proving that restriction is “(1) narrowly tailored, to serve (2) a compelling state interest”).

131. See, e.g., *Citizens United v. FEC*, 558 U.S. \_\_\_, \_\_\_, 130 S. Ct. 876, 898 (2010) (describing strict scrutiny in these terms); *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 469 (2009) (same).

132. See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 630–33 (1982) (asserting that commercial and noncommercial speech deserve comparable constitutional protection because both serve the value of self-realization); Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990) (con-

adapted to the “context”<sup>133</sup> of commercial speech, especially with respect to the problem of false or misleading speech. Here it is important to recognize that strict scrutiny does not inevitably entail an undifferentiated weighty burden on government. Rather, the nature of a subject might make more modest threshold showings appropriate. Adapting strict scrutiny to compelled disclosure in commercial speech entails departure from the Court’s doctrine, but not from its results.

The *Zauderer-Milavetz* reasonable relationship standard<sup>134</sup> is adequate for typical requirements for pertinent information, but it does not expressly account for circumstances in which there is a “realistic possibility that official suppression of ideas is afoot.”<sup>135</sup> Here, it is compulsion rather than suppression that is at issue. However, the “constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression”<sup>136</sup> should apply to mandatory commercial speech that raises the danger of government overreach posed by compelled speech in other contexts.<sup>137</sup> Moreover, in the commercial setting, suppression and compulsion often cannot be neatly distinguished; as a matter of physical space or consumers’ attention, government-required content may crowd out or overshadow an advertiser’s own message. Thus, the government’s burden of justification should be heightened only when compelled disclosures carry facial indicia of aims other than providing consumers with sufficient information to make informed decisions.

This burden could be triggered by one or both of two factors. First, as the Court has already stated, the government cannot impose “unjustified or unduly burdensome” disclosure requirements.<sup>138</sup> However, since this is a discrete criterion apart from the

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tending that the “commercial/noncommercial distinction makes no sense”).

133. See *supra* note 6 and accompanying text.

134. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. \_\_\_, \_\_\_, 130 S. Ct. 1324, 1339–40 (2010) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)) (holding that disclosure requirements must be “reasonably related to the State’s interest in preventing deception of consumers” and neither “[u]njustified” nor “unduly burdensome”).

135. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992) (permitting content discrimination within proscribable categories of speech when such a possibility is excluded).

136. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988).

137. See generally David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995 (1982).

138. *Zauderer*, 471 U.S. at 651.

reasonable relationship test, the government's difficulty in satisfying it is not clear.<sup>139</sup> A compelled disclosure that is reasonably related to preventing deception can hardly be unjustified,<sup>140</sup> and so scrutiny should be focused on its burden. The scrutiny accorded to government-required content should be commensurate with the content's relative prominence and the cost of including it. Thus, a requirement that 90% of the advertising space for a certain product be devoted to warning of its danger might well pass the presumably permissive reasonable relationship criterion,<sup>141</sup> but the burden on the sponsor's message should evoke a more skeptical review.

The second consideration is arguably implicit in the reasoning of *Zauderer* and *Milavetz* but was not squarely addressed there. *Zauderer* assumed that the required disclosure of costs and expenses incurred by clients mandated the inclusion of "purely factual and uncontroversial information" about attorneys' services;<sup>142</sup> *Milavetz*, in sustaining the compulsory statements in advertisements that "[w]e are a debt relief agency," likewise appeared to rest on a similar premise.<sup>143</sup> Such a premise itself, however, should be subject to careful inspection whenever the compelled disclosure diverges from communication of obviously objective information. Given the straightforward distinction between legal costs and fees, *Zauderer*'s disclosure requirement did not warrant this concern.<sup>144</sup> Designation of an attorney who provides bankruptcy-assistance services as "a debt relief agency,"<sup>145</sup> though still

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139. The Court rejected stricter standards "[b]ecause the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Id.* at 651 n.14. However, the Court did not offer any exact standards the government must meet.

140. *See id.* at 651 (describing the rational-relationship test); *see also* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (using the *Zauderer* test to find that "[b]y encouraging such changes in consumer behavior, the labeling requirement is rationally related to the state's goal of reducing mercury contamination"), *cert. denied*, 536 U.S. 905 (2002).

141. *See City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985); *CHEMERINSKY*, *supra* note 52, at 553 (describing the rational basis test as "enormously deferential to the government").

142. *Zauderer*, 471 U.S. at 651.

143. *See Milavetz, Gallop & Milavetz, P.A. v. United Sates*, 559 U.S. \_\_\_, \_\_\_, 130 S. Ct. 1324, 1330, 1340 (2010). ("[T]he disclosures entail only an accurate statement identifying the advertiser's legal status and the character of the assistance provided . . .").

144. *See Zauderer*, 471 U.S. at 652–53.

145. *See Milavetz*, 559 U.S. at \_\_\_, 130 S. Ct. at 1330–32.

within the latitude of interpretation afforded commercial information, should have aroused more attention to its potential for conveying an officially chosen viewpoint than it received in *Milavetz*. One need not categorically transplant principles governing compelled disclosure in other settings to commercial speech<sup>146</sup> in order to recognize potential danger to First Amendment values when government dictates messages whose content is not unquestionably a provably true assertion.<sup>147</sup> The further a compelled disclosure strays from this description, the more searching the scrutiny to which it should be subject.

In support of this approach, it should be noted that the idea of enclaves of strict scrutiny within a broader standard of less demanding review is a familiar one.<sup>148</sup> In equal protection doctrine, the overwhelming majority of government classifications enjoy the rational relationship standard's presumption of validity,<sup>149</sup> with heightened scrutiny reserved for suspect classifications like race<sup>150</sup> and quasi-suspect categories like gender.<sup>151</sup> Free exercise doctrine is perhaps even more instructive. As its central principle, the Court allows enforcement of valid "generally applicable prohibitions of socially harmful conduct" to religiously motivated instances of that conduct.<sup>152</sup> In some instances involving "hybrid situation[s]," however, the Court applies strict scrutiny where the

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146. See *id.* at \_\_\_, 130 S. Ct. at 1343 (Thomas, J., concurring in part and concurring in the judgment) (quoting *Zauderer*, 471 U.S. at 652 n.14) ("I am skeptical of the premise on which *Zauderer* rests—that, in the commercial-speech context, 'the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.'").

147. See Stephanie J. Bennett, Comment, *Paternalistic Manipulation Through Pictorial Warnings: The First Amendment, Commercial Speech, and the Family Smoking Prevention and Tobacco Control Act*, 81 MISS. L.J. 1909, 1910–13 (2012) (criticizing government compelled inclusion of graphic images in place of written factual statements).

148. See, e.g., CHEMERINSKY, *supra* note 52, at 688 ("Rational basis review is the minimum level of scrutiny that all laws challenged under equal protection must meet. All laws not subjected to strict or intermediate scrutiny are evaluated under the rational basis test.").

149. See, e.g., *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174–75 (1980) (discussing the Court's deferential approach in a number of different cases); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (per curiam).

150. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 235 (1995).

151. See, e.g., *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)); *J.E.B.*, 511 U.S. at 135.

152. *Emp't Div. v. Smith*, 494 U.S. 872, 885 (1990).

Free Exercise Clause operates “in conjunction with other constitutional protections.”<sup>153</sup>

Under an adaptive strict scrutiny for commercial speech, these enclaves would comprise those compulsions of commercial speech that are facially onerous or ideologically tinged. While strict scrutiny would presumptively apply to suppression of truthful, non-misleading commercial speech, government would continue in most cases to have more leeway to require warnings, disclaimers, and disclosures that reasonably relate to government’s interest in deterring fraud and promoting health and safety. It is only when the government resorts to mandating commercial speech that clearly imposes a substantial burden on the speaker, or arouses real suspicion that the required message strays from objective communication, that strict scrutiny would be triggered.

### III. GRAPHIC IMAGES ON CIGARETTE PACKAGES: AN APT OCCASION FOR STRICT SCRUTINY

A notable recent example of legislation to which adaptive strict scrutiny could be appropriately applied appears in the 2009 Family Smoking Prevention and Tobacco Control Act.<sup>154</sup> One provision of the Act directs the FDA to develop new disclosures for cigarette packages that take the form of “color graphics depicting the negative health consequences of smoking.”<sup>155</sup> These labels are to be accompanied by a textual statement warning of the negative health risks of tobacco use.<sup>156</sup> Together, the illustrations and statements

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153. *Id.* at 881–82.

154. Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of titles 15 and 21 of the United States Code).

155. 15 U.S.C. § 1333(d) (Supp. V 2012).

156. *See id.* The textual warnings proposed by the FDA were

1. WARNING: Cigarettes are addictive
2. WARNING: Tobacco smoke can harm your children
3. WARNING: Cigarettes cause fatal lung disease
4. WARNING: Cigarettes cause cancer
5. WARNING: Cigarettes cause strokes and heart disease
6. WARNING: Smoking during pregnancy can harm your baby
7. WARNING: Smoking can kill you
8. WARNING: Tobacco smoke causes fatal lung disease in nonsmokers
9. WARNING: Quitting smoking now greatly reduces serious risks to your health

76 Fed. Reg. 36,628 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141) (internal quotation marks omitted).

must occupy 50% of the front and back sides of cigarette packages.<sup>157</sup> Though the statute's requirements may not be inevitably suspect, their implementation by the FDA provides an apt occasion for application of strict scrutiny. The impact of the images deviates too far from objective disclosure of pertinent data to earn the lenient review found in *Zauderer* and *Milavetz*.<sup>158</sup> Addressing challenges to these regulations, the Sixth Circuit Court of Appeals held them valid,<sup>159</sup> while the District of Columbia Circuit Court of Appeals ruled them in violation of the First Amendment.<sup>160</sup> The principles supporting an adaptive standard of strict scrutiny explain why the District of Columbia Circuit Court of Appeals was correct to strike down the FDA's attempt to compel speech that far exceeded conveyance of factual information.

### A. *The Circuit Split*

Unsurprisingly, the opposing outcomes in the Sixth and District of Columbia Circuits flowed from different understandings of the level of scrutiny required by *Zauderer* in this instance. Reading *Zauderer's* permissive language broadly, the Sixth Circuit signaled the government's low threshold of proof: "Deciding whether a disclosure requirement is reasonably related to the purpose is all the law requires to assess constitutionality."<sup>161</sup> Underscoring the strength of the presumption of validity, the court later employed the famously government-friendly parlance of rationality.<sup>162</sup> Under its "rational-basis" analysis, the required textual and graphic warnings need only have "a rational connection between the warnings' purpose and the means used to achieve that purpose."<sup>163</sup> Predictably, the court determined that the warnings were "reasonably related to promoting greater public understanding of the risks" of tobacco use.<sup>164</sup>

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157. 15 U.S.C. § 1333(a)(2) (Supp. V 2012).

158. See *Cigarette Health Warnings*, FDA, <http://www.fda.gov/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels/default.htm> (last visited Apr. 00, 2012) (presenting the images to be placed on all cigarette packaging).

159. See *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 518 (6th Cir. 2012).

160. See *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1208 (D.C. Cir. 2012).

161. See *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 566–67.

162. See *id.* at 561–62.

163. *Id.* (citing *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001)).

164. *Id.* at 564. The extent to which the court's scrutiny favored the law is indicated by

In contrast, the District of Columbia Circuit reasoned that the “inflammatory images” fell “outside the ambit of *Zauderer*” because they did not constitute “pure attempts to convey information to consumers.”<sup>165</sup> Rather, the images amounted to “unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.”<sup>166</sup> Nevertheless, unlike the district court below, the court did not rely on strict scrutiny to invalidate the compulsory warnings.<sup>167</sup> Rather, the court decided that *Central Hudson’s* intermediate standard of review applied.<sup>168</sup> Conducting this review with a critical eye, the court concluded that the government had failed to show that the graphic warnings even directly advanced its interest in reducing smoking, much less that its regulation of speech was not more extensive than necessary to serve that interest.<sup>169</sup> The FDA, the court declared, had “not provided a shred of evidence” that the warnings would directly advance this interest.<sup>170</sup>

### B. *Application of the Adaptive Standard of Strict Scrutiny*

It is understandable that the Sixth and District of Columbia Circuits applied divergent levels of scrutiny for the speech at issue here. As discussed in Section I, the Supreme Court’s commercial speech jurisprudence has left this area with a significant amount of uncertainty. Under the approach proposed in Section II, however, the constitutionality of the newly required tobacco labels can be readily resolved. That approach would produce a different result from the facile validation of these requirements by the Sixth Circuit’s reliance on rational basis review.<sup>171</sup> Moreover,

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its response to the plaintiffs’ contention that the size of the required warnings was unduly burdensome because they would drown out the companies’ own speech. *See id.* at 567. Denying that the question of burden involved a separate analysis, the court reaffirmed its conclusion that the warnings were reasonably related to the government’s interest in preventing consumer deception. *Id.* The court also cited the companies’ assertion that the warnings would not reduce demand for tobacco products as evidence that the law did not unduly burden their speech. *Id.*

165. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1216–17.

166. *Id.* at 1217.

167. *Compare id.*, with *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266, 271, 277 (D.D.C. 2012).

168. *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1217.

169. *See id.* at 1218–20.

170. *Id.* at 1219.

171. *See supra* notes 161–64 and accompanying text.

though the District of Columbia Circuit's analysis led to the same outcome as would the adaptive standard of strict scrutiny,<sup>172</sup> it left speech vulnerable to later restrictions in a way that the adaptive standard would not. By holding that the government had failed to demonstrate that the required labels directly advanced its interest in curbing smoking, the court left the door open to the efficacy of even more frightening images.<sup>173</sup>

The critical threshold issue, of course, is the standard of review to which the label requirement should be subjected. Under the approach advanced here, the default mild scrutiny of *Zauderer* should be confined to compelled provision of objectively verifiable information—speech based on fact and impartially conveyed.<sup>174</sup> Nutritional information and ingredient lists fall into this category, as do current tobacco warning labels.<sup>175</sup> Such disclosures significantly further substantial governmental interests in preventing false or deceptive claims and promoting health or safety.<sup>176</sup> Moreover, current tobacco labels and other such disclosures are not obviously burdensome in conveying vital facts to the consumer.<sup>177</sup>

These new warning labels, however, are a wholly different species of disclosure and thus warrant the adaptive level of strict scrutiny. The images may be animated by factual realities, but the images themselves are subjective and dramatic: for example, the juxtaposition of pictures of healthy and diseased lungs.<sup>178</sup> Unlike a factual statement, an image does not state a fact; it tells a story or conveys an emotion.<sup>179</sup>

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172. See *supra* notes 165–70 and accompanying text.

173. See generally Recent Case, *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), 126 HARV. L. REV. 818 (2013).

174. See *N.Y. State Rest. Assoc. v. N.Y. City Bd. of Health*, 556 F.3d 114, 131–34 (2d Cir. 2009); *supra* notes 134–37 and accompanying text.

175. See 15 U.S.C. § 1333 (2006) (Supp. V 2012).

176. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 541 (6th Cir. 2012); see also Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL'Y 159, 159 (2009).

177. See *supra* notes 161–64 and accompanying text.

178. For a composite of images proposed by the FDA, see *Overview: Cigarette Health Warnings*, FDA, <http://www.fda.gov/TobaccoProducts/Labeling/ucm259214.htm> (last visited Apr. 18, 2013).

179. See Emily A. Holmes et al., *The Causal Effect of Mental Imagery on Emotion Assessed Using Picture-Word Cues*, 8 EMOTION 395, 407 (2008) (“The present findings have provided the strongest evidence, to our knowledge, that imagery has a significantly great-

Undoubtedly, vivid images are not necessarily frightening and frightening images are not necessarily nonfactual. For instance, an image of a tar-marred lung of a lifelong smoker is only frightening if one can recognize what it is—an organ—and why it is being presented—to illustrate the harm of cigarettes. And the image's frightfulness does not undermine its factual nature; it is undoubtedly accurate to imply that many who smoke will experience such lung mutation. What is not factual, however, is the emotional appeal inherent to such an image.

Yet the distinction between an objective and an emotional warning may be somewhat obscured by widespread cultural aversion toward tobacco, and so a neutral example proves instructive here. Consider naproxen sodium, the analgesic contained in Bayer's Aleve.<sup>180</sup> Each bottle of Aleve carries the following warning: "This product . . . may cause severe stomach bleeding."<sup>181</sup> This is a fact, substantiated by clinical tests, telegraphed to the consumer in text, allowing her to weigh the benefits of the drug against its potential side effects. Imagine now, that in addition to carrying this disclosure, each bottle of Aleve contained a large color image of a man vomiting up blood—a common side effect of stomach bleeding—which in turn can be a side effect of Aleve. Embedded in that image is an indisputable fact—Aleve can have this effect—but the picture itself vaults beyond fact to affect the consumer's emotions rather than her intellect. The same is true of the FDA's proposed images, and the government acknowledges as much; it believes that textual disclosures are more memorable when coupled with a vivid pictorial aid—tacitly conceding that such an aid will strike a deeper emotional chord with consumers than mere text.<sup>182</sup> And in attempting to influence the emotions of consumers by dictating the speech of tobacco companies in this manner, the government has augmented facts with propaganda.<sup>183</sup>

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er impact on emotion than verbal representations of the same material. Additional self-report data suggest that images may exert these differential emotional effects in part because they are more likely to appear similar in form to actual percepts, may recruit episodes in autobiographical memory, and include personal involvement in events.”)

180. See *Aleve*, BAYER, <http://aleve.com/products.php#caplets> (last visited Apr. 00, 2013).

181. See *id.*

182. See *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 528 (6th Cir. 2012).

183. See V.A. Gaitonde, *Methods of Ideological Suppression*, 2 SOC. SCIENTIST 49, 49

Even an intermediate standard of review—such as that for time, place, and manner regulations of commercial speech<sup>184</sup>—is insufficient under these circumstances. That level of scrutiny could be appropriately applied to compelled disclosures that are factual but facially onerous to the commercial speaker such as compelled speech that imposes appreciable costs on the speaker or detracts from the speaker's ability to project its message.<sup>185</sup> Such a level of scrutiny could apply, for example, if the government mandated that liquor companies devote three quarters of their advertisement space to factual, textual warning labels or required that the current textual warning labels for cigarettes dominate the surface of cigarette packages.

Here, however, because the graphic labels are burdensome<sup>186</sup> and not exclusively factual or objective,<sup>187</sup> adaptive strict scrutiny should apply. In a sense, the standard amounts to a stringent version of *Central Hudson's* mandate that the speech regulation not be "more extensive than is necessary to serve" the government's interest in question.<sup>188</sup> While that command as traditionally interpreted allows room for considerable speech regulation, a stricter reading would force the state to prove why elements such as the size, style, and phrasing of the disclosure are absolutely crucial in conveying the state's message. Such a standard should be triggered when compelled commercial speech on its face is patently ideological or materially onerous. There can be little question that these labels fit both categories.

The images on the labels are designed specifically to discourage consumers from using the product, not just to warn them of its risks.<sup>189</sup> Moreover, in taking up 50% of each package's space, the

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(1974).

184. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 535 (1980).

185. See *Turner Broad. Sys., Inc.*, 512 U.S. at 661.

186. See *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d, 266, 272 (D.D.C. 2012).

187. See *supra* notes 178–79 and accompanying text.

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

189. See *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 530–31 (6th Cir. 2012) (quoting *Family Smoking Prevention and Tobacco Control Act*, Pub. L. No. 111-31, § 3(2), 123 Stat. 1776, 1781 (2009)) ("[T]he purpose of the labels—to provide truthful information regarding the health consequences of the product in order to decrease 'the use of tobacco by young people and dependence on tobacco.'"); 155 Cong. Rec. 14169 (2009) (statement of Sen. Reid).

labels heavily detract from the tobacco companies' own speech.<sup>190</sup> In their subjectivity and prominence, these "disclosures" are hardly disclosures at all, but rather government-compelled editorials criticizing the product to which they are affixed.<sup>191</sup> In *Wooley v. Maynard*, the Court overturned the respondents' convictions for covering the state's motto, "Live Free or Die," on their license plate;<sup>192</sup> the state could not compel the Maynards to act as a "mobile billboard" for conveying an "ideological message" that they found "morally objectionable."<sup>193</sup> Likewise, the graphic labels heavily interfere with the speech of tobacco companies, forcing them to serve as billboards for the government's ideology without proof that less intrusive means of reducing smoking rates are unavailable.<sup>194</sup>

Additionally, the graphic images implicate a number of First Amendment symmetries that may be obscured by the distasteful nature of cigarettes and their promotion. Here, the adaptive standard of strict scrutiny is uniquely effective in recognizing the distinctiveness of commercial speech while adhering to basic First Amendment principles. Long before affirming the "constitutional equivalence of compelled speech and compelled silence" for fully protected expression,<sup>195</sup> the Court in *West Virginia State Board of Education v. Barnette* had disavowed the notion that "a Bill of Rights which guards the individual's right to speak his own mind [allows] public authorities to compel him to utter what is not in his mind."<sup>196</sup> *Zauderer's* permissive standard accounts for the government's authority to prescribe useful factual disclosures for ad-

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190. See *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 528–29 (W.D. Ky. 2010); Reply/Response Brief of Plaintiffs-Appellants/Cross-Appellees at 38, *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d 509 (Nos. 10-5234 & 10-5235).

191. For an overview of the Act's requirements, see *Overview of the Family Smoking Prevention and Tobacco Control Act: Consumer Fact Sheet*, FDA, <http://www.FDA.gov/tobaccoproducts/guidancecomplianceregulatoryinformation/ucm246129.htm> (last visited Apr. 00, 2013).

192. 430 U.S. 705, 706–07, 717 (1977) (internal quotation marks omitted).

193. *Id.* at 715; see Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 398 (2008) (describing *Wooley* as supporting the claim that government "may not get free advertising through compulsion").

194. Indeed, the Court of Appeals for the District of Columbia Circuit found that the label requirement did not even meet the less demanding requirement that the measure "directly advance[] the governmental interest asserted." *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1218–21 (D.C. Cir. 2012) (alteration in original) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)).

195. *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988).

196. 319 U.S. 624, 634 (1943).

vertisements, and the danger of tobacco products was amply conveyed by the older labels containing statements of fact about the chemicals contained in cigarettes and the diseases they could cause.<sup>197</sup> That latitude, however, does not erode *Barnette's* injunction against official attempts to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."<sup>198</sup> As *Sorrell's* disapproval of Vermont's effort to stack the debate over prescription drugs demonstrates,<sup>199</sup> indicia of such attempts in any context deserves close judicial review.<sup>200</sup>

Concerns that requiring graphic labels constitutes government overreach are not met by the FDA's contention that the new labels merely change the medium but not the message; the Court has long recognized that when form and content are intertwined, a change to one changes the other. In *Cohen v. California*, the Court noted that "words are often chosen as much for their emotive as their cognitive force."<sup>201</sup> The Court, therefore, would not "sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."<sup>202</sup> In *Texas v. Johnson*, the Court rejected the notion that a flag burner could be punished because he might have made his point in innumerable other ways,<sup>203</sup> ruling that it was the means of his expression that deserved protection.<sup>204</sup> The "particular mode in which one chooses to express an idea," the Court noted, may be just as vital as the message of the expression itself.<sup>205</sup>

Certainly the factual basis behind the old and new disclosure labels—that smoking has adverse health effects—remains the

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197. See 15 U.S.C. § 1333(a) (2006).

198. *Barnette*, 319 U.S. at 642.

199. See *supra* notes 107–16 and accompanying text.

200. See *Sorrell v. IMS Health Inc.*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2653, 2663–65 (2011); *supra* notes 129–30.

201. 403 U.S. 15, 26 (1971).

202. *Id.*

203. See 491 U.S. 397, 431 (1989) (Rehnquist, C.J., dissenting) ("[Johnson's] act . . . conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways.").

204. See *id.* at 404–05 (majority opinion).

205. *Id.* at 416.

same.<sup>206</sup> Yet when that information is communicated through a gruesome picture instead of a written statement, the message is fundamentally altered. To read that smoking harms one's health is to learn of the risks of using tobacco. To see a post-autopsy corpse with its lungs removed is to be told: "Do not smoke." In effect, then, tobacco companies are being forced to tell their customers, through the traumatic impact of a graphic image, not to buy what they are selling.<sup>207</sup> A disclosure designed to repel customers from a product by provoking their disgust through a dramatic image is one different in kind, not degree, from a disclosure of fact. As is so often the case in speech, changing the mode of expression does indeed change the message.<sup>208</sup>

The government has tacitly conceded this point, and in so doing highlighted the clash between the rationale requiring graphic labels and the antipaternalistic philosophy at the heart of recent commercial speech jurisprudence. The statute and its regulations reflect the belief that the old labels are simply not effective enough to keep people from using tobacco products and that the new, graphic labels are necessary to reinforce the risks of smoking.<sup>209</sup> Textual warnings, in other words, are not sufficiently dra-

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206. See Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,629 (June 22, 2011) (codified at 21 C.F.R. pt. 1141).

207. *Pacific Gas & Electric Co. v. Public Utilities Commission of California* offers an analogy. There, the Court barred the state from forcing a company to carry in its billing statements editorials that were hostile to the company's commercial interests. See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 17–18 (1986). The Court stated:

For corporations as for individuals, the choice to speak includes within it the choice of what not to say. . . . Were the government freely able to compel corporate speakers to propound political messages with which they disagree, [First Amendment] protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next.

*Id.* at 16. The FDA's new cigarette labels are, in a very real sense, editorials—even propaganda—and of course they are at complete odds with the interests of tobacco companies.

208. See *Johnson*, 491 U.S. at 402 n.2.

209. See *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1221–22 (D.C. Cir. 2012) (finding that the FDA had not provided enough evidence that the new labels would accomplish the objective of reducing smoking rates); see also *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d. 512, 530 (W.D. Ky. 2010) (quoting INST. OF MED. OF THE NAT'L ACADEMIES, ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION 291 (Richard J. Bonnie et. al. eds., 2007)) (noting a statement issued by the Institute of Medicine that cigarette warning labels "are unnoticed and stale, and they fail to convey relevant information in an effective way"). The government also claims that its new label requirements are constitutional because the inclusion of graphic images does nothing to erode the accuracy of the message conveyed by the warnings. Brief for Appellants at 27, 48–51, *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d. 266 (D.D.C. 2012) (No. 11-5332). This argument raises questions as to how far the FDA can go when developing a label it deems "effective" in light of its stated goal of using the labels to "effectively convey

matic to curb smoking rates to the FDA's satisfaction, necessitating the introduction of more disturbing and memorable labels.<sup>210</sup> Having determined that potential smokers will not respond appropriately to truthful information about a legal product, the government has resorted to shouting down tobacco companies' message with vivid, frightening images.<sup>211</sup> While the government's own speech is unconstrained by the First Amendment,<sup>212</sup> it lacks the same sweeping power to commandeer private channels of communication to advance its viewpoint. Censorship of truthful, nonmisleading commercial speech and injection of official belief into that speech are two sides of the same paternalistic coin.

Neither paternalism nor, of course, the unpopularity of tobacco companies is any gauge of the protection to which it is entitled under the First Amendment. On the contrary, it is a truism of free speech jurisprudence that the courts must safeguard this right for those whose message resonates least in society.<sup>213</sup> Two

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the negative health consequences of smoking on cigarette packages and in advertisements." Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,697 (June 22, 2011). The government has obviously decided that only traumatic, grotesque, or emotional images will "effectively" convey this alleged goal.

210. It is true that other products—cleaning chemicals, insect poisons—are required to display disquieting warning labels (such as a skull and crossbones) to notify consumers of their toxic nature. *See, e.g.*, Labeling Requirements for Pesticides and Devices, 40 C.F.R. pt. 156 (2012). The difference between insect poison and cigarettes, of course, is that ingestion of insect poison can be immediately fatal, while the negative effects of smoking occur over years and decades. A person who drinks a gallon of insect poison is in clear and present danger of dying immediately; a person who smokes a pack of cigarettes still has years to quit before experiencing any lethal effects. And while the smoker may be dissuaded through more speech—through, for instance, a public health campaign to curb smoking rates—the drinker of rat poison cannot be persuaded to make a different choice before experiencing the fatal effects of her decision.

211. As noted above, even those images fundamentally rooted in fact (most prominently, the image of the ruined smoker's lung) extend beyond the factual domain when converted into pictorial form. This distinction was noted by the *Zauderer* Court, which 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." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985). This recognition of an image's dual function—not only to convey fact, but also to engage a consumer to a degree not necessarily possible with mere text—further demonstrates why, in the realm of speech regulation, altering the medium alters the message.

212. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005).

213. *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) ("But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."); *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of

examples, among many, serve to illustrate this bedrock principle. As noted above, in *Texas v. Johnson*, the Court overturned a conviction for flag-burning as a means of political protest—a form of expression that reduced the symbol of the nation to ashes.<sup>214</sup> In *Snyder v. Phelps*, the Court overturned the defendants' liability for picketing the funeral of a soldier killed in the line of duty, though their signs' contention that deaths of American soldiers reflected God's wrath for the nation's tolerance of homosexuality—especially in the military<sup>215</sup>—was surely regarded with near-universal repugnance.<sup>216</sup> In reviewing the constitutionality of the FDA labels, then, public disdain for tobacco companies must not be considered. The government may decide to ban cigarettes altogether, but in the meantime, it cannot warp public opinion by restricting the speech of despised corporations. Protection of “the thought that we hate” does not exclude purveyors of unhealthy but legal products.<sup>217</sup>

With such core First Amendment principles implicated, only the tautological proposition that commercial speech deserves less protection because it is commercial speech precludes the stringent scrutiny of ideologically tinged compelled expression. Application of an adaptive form of strict scrutiny, on the other hand, would be entirely in line with the First Amendment jurisprudence over the past several decades—a period during which the Court has granted increasing protections to commercial speech.<sup>218</sup> Starting with *Virginia State Board of Pharmacy* and continuing through *Sorrell*, the distinction between individual expression and commercial speech has become even more diminished.<sup>219</sup> *Sorrell* leaves little question that the distinction between individual and commercial speech is often thin and artificial, noting that though “the burdened speech results from an economic motive, so too does a great deal of vital expression.”<sup>220</sup> Taking this refine-

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ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”).

214. 491 U.S. 397, 399 (1989).

215. 562 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1207, 1210 (2011).

216. See Lee Ross, *Westboro Funeral Pickets are Protected Speech, High Court Rules*, FOX NEWS (Mar. 2, 2011), <http://www.foxnews.com/politics/2011/03/02/westboro-funeral-pickets-protected-speech-high-court-rules/>.

217. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting); see also *supra* note 210.

218. See *supra* notes 87–116 and accompanying text.

219. See *supra* notes 9–15, 107–16, 122–29 and accompanying text.

220. *Sorrell v. IMS Health Inc.*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2653, 2665 (2011).

ment of its commercial speech doctrine a step further, the Court also recognized that often, "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied."<sup>221</sup> To bring *Sorrell* to its logical conclusion, the Court should now acknowledge that general First Amendment principles should apply to commercial speech as they do to noncommercial speech.

The theory that corporate and economic speech is less important to the marketplace of ideas than individual speech has always been a deeply flawed one. The marketplace of ideas includes ideas about commerce; as the *Virginia State Board of Pharmacy* Court observed, "society . . . may have a strong interest in the free flow of commercial information," one which may at times be "keener by far than [its] interest in the day's most urgent political debate."<sup>222</sup> Perhaps those citizens who are more interested in cigarettes than in elections number few. But our judicial system has never allowed legislatures to dictate what speech is most valued by censoring speech that is least desired. The First Amendment simply does not support the "commonsense" distinction made between personal and commercial speech.<sup>223</sup> Such a distinction is "commonsense" only if our sense leads to the abridgment of expression we find worthless.<sup>224</sup>

Perhaps the danger of compelling unwanted speech in order to manipulate the public's beliefs and actions seems, in this case, rather insignificant—no more than a "trifling and annoying instance."<sup>225</sup> But the dangers posed by a government free to "force[] speakers to alter their speech to conform with an agenda they do not set"<sup>226</sup> do not end with cigarettes. The burden of unwanted expression, once condoned by courts, would undoubtedly extend far beyond tobacco companies. If the government is permitted to

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221. *Id.* at \_\_\_, 131 S. Ct. at 2667.

222. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–64 (1976).

223. *Id.* at 771 n.24.

224. *United States v. Stevens*, 559 U.S. \_\_\_, \_\_\_, 130 S. Ct. 1577, 1585 (2010) ("The First Amendment . . . reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgement simply on the basis that some speech is not worth it.").

225. *Cohen v. California*, 403 U.S. 15, 25 (1971).

226. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 9 (1986) (plurality opinion).

“prescribe what shall be orthodox”<sup>227</sup> by means of compelling speech unto commercial speakers, it may use its power to manipulate the free flow of information in accordance with its own wishes. The immediate effects for commercial speech are easy to imagine: a liquor company could be forced to have three-quarters of its label bear upsetting pictures of drunk-driving fatalities; a fast-food restaurant employee could be required to warn patrons, in language designed to make them squeamish, of the adverse effects of high-fat meals.

Moreover, the perils of the power to compel this type of speech extend well beyond such relatively mundane scenarios. Once government is given the power to control the public discourse through regulation of speech, it may easily distort the discourse to fit its own agenda. A government politically reliant on oil interests could mandate that all electric cars bear stickers conspicuously warning of their limitations compared to oil-fueled cars; its opponents, once in power, could mandate that all non-electric cars come with stickers depicting images of the environmental degradation of oil drilling. A political message may masquerade as a benign public service announcement, and an attempt to manipulate conduct may be disguised as a neutral and considerate suggestion. Once government is authorized to leap beyond fact-based warnings into compelled propaganda through private instruments, its power will not end with the objective goal of conveying facts to consumers. The marketplace of ideas will be manipulated to suit the government’s own ends, and free choice of thoughts and action will be distorted to fit the government’s ideology.<sup>228</sup> Though the process may begin with the tempting goal of disparaging the noxious product of callous companies, these larger perils loom. As Justice Brandeis warned:

Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-

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227. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

228. *Wooley v. Maynard*, 430 U.S. 705 (1977), is again instructive here. *See supra* notes 192–93 and accompanying text. Empowered to place a state-identifying phrase on license plates, New Hampshire’s government selected a highly ideological message with violent undertones in the form of its state motto. *See Wooley*, 430 U.S. at 707. When Jehovah’s Witnesses objected, the state refused to revoke the policy, implying that those not willing to carry the axiom were not good citizens of New Hampshire. *See id.* at 709 n.6, 717. The step from a state-identifying phrase to an ideological—even propagandistic—motto in *Wooley* may have been small, but the harm it inflicted upon citizens unwilling to express such a message was substantial. *See id.* at 713.

minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.<sup>229</sup>

Cigarettes may be dangerous, tobacco companies obnoxious—even odious. There is no question that the government’s goal of curbing smoking rates is a worthy one. The Court, however, has affirmed that in commercial speech, as with other expression, freedom of speech may not be infringed because the choices it inspires are sometimes unwise.<sup>230</sup> Government may deploy the formidable means at its disposal to discourage smoking, including loud and pervasive official campaigns and prohibitive taxes.<sup>231</sup> But if ever the state may foist its tendentious message onto private speakers, including commercial ones, strict scrutiny demands that this compulsion be government’s last resort—not its first.<sup>232</sup>

## CONCLUSION

An adaptive standard of strict scrutiny for content-based commercial speech regulation would remove the uncertainty produced by formal adherence to *Central Hudson’s* ambiguous framework. The standard would account for the Supreme Court’s now consistent disapproval of the suppression of truthful, non-misleading commercial speech. Adoption of this standard would not contradict the Court’s tolerant review of compelled disclosures that are factual, objective, and not unduly burdensome; rather, it would clarify that compulsions failing to meet these criteria are subject to a more demanding level of justification. As the recent requirement of graphic images on cigarette packages illustrates, fundamental First Amendment principles—and the danger of government overreach against which they guard—are relevant to this realm as well.

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229. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

230. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769–71 (1976) (striking down a state’s ban on advertising by pharmacists even though doing so might lead to customers choosing low cost, low quality pharmacists and an end to the pharmacist-customer relationship).

231. *See, e.g., 15 U.S.C. § 1341(a)(4)* (2006) (requiring the Secretary of Health and Human Services to “collect, analyze, and disseminate (through publications, bibliographies, and otherwise) information, studies, and other data relating to the effect of cigarette smoking on human health”); 26 U.S.C. § 5701(a)–(d), (f)–(g) (Supp. V 2012) (taxing cigars, cigarettes, cigarette papers, cigarette tubes, pipe tobacco, and roll-your-own tobacco).

232. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 665–66 (2004) (citing *Reno v. ACLU*, 521 U.S. 844, 874 (1997)) (describing the least restrictive means test).