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Article

RESOLVING THE COMPELLED-COMMERCIAL-SPEECH CONUNDRUM

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**Abstract**

*In the last decade the Supreme Court has modified the compelled-speech and commercial-speech doctrines by creating a hybrid of the two--compelled-commercial speech. This nascent doctrine leaves unanswered serious questions about how it coexists with other doctrines in the First Amendment landscape.*

*This Article proposes a principled means to resolve these questions with a system for categorizing forced commercial-speech regulations. By establishing which test applies to determine whether regulations violate the First Amendment, this framework should help bring consistency and predictability into a murky area of First Amendment law.*

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**\*206 Introduction**

The Food and Drug Administration recently unveiled regulations requiring that cigarette packaging and advertising contain graphic health warnings.[1](#co_footnote_F1376476655_1) These warnings contain powerful visual depictions of the possible health risks associated with smoking aimed to reduce the incidence of smoking in this country.[2](#co_footnote_F2376476655_1) One of the warnings is a picture of a blackened lung with the message “Cigarettes cause fatal lung disease.”[3](#co_footnote_F3376476655_1)

These regulations, and laws like them, raise the question of whether the government violates the First Amendment when it compels commercial speakers to espouse messages they otherwise would not.[4](#co_footnote_F4376476655_1) The Supreme Court’s jurisprudence in this arena makes answering this question challenging. The question is difficult to resolve because it implicates a relatively new doctrine of First Amendment law that the Supreme Court has not fully clarified.

In the last decade, the Supreme Court has created a hybrid First Amendment doctrine for cases involving compelled-commercial speech. This compelled-commercial-speech doctrine combines two existing doctrines: compelled speech and commercial speech. The manner in which the Court created this new doctrine leaves unanswered serious questions as to its scope and the way it fits into the existing First Amendment framework. This in turn makes determining whether compelled-commercial-speech regulations violate the First Amendment difficult.

**\*207** Historically, compelled speech and commercial speech existed in fairly separate spheres.[5](#co_footnote_F5376476655_1) Compelled speech generally involved situations in which the government compelled speech concerning ideology, politics, or other matters of opinion--speech termed “public discourse.”[6](#co_footnote_F6376476655_1) An example of such speech includes compelling the recitation of the Pledge of Allegiance.[7](#co_footnote_F7376476655_1) Commercial speech generally did not fall into this category. By 2001, however, the Court challenged this assumption in a string of cases in the related context of compelled-speech subsidies. These compelled-subsidy cases, now termed the Glickman trilogy, implicitly recognized compelled-commercial speech, but failed to provide any guidance on the boundaries of this new doctrine.[8](#co_footnote_F8376476655_1)

This new doctrine of compelled-commercial speech has created a line-drawing dilemma. For instance, it does not dictate when a factual-disclosure requirement, which may receive lenient review under Zauderer v. Office of Disciplinary Counsel, becomes compelled speech requiring strict scrutiny.[9](#co_footnote_F9376476655_1) In other words, the Court has not provided a principled way to discern, in any given case, whether a regulation mandates providing additional factual information (relatively innocuous) or compels espousing beliefs and ideology (pernicious).

Before 2001, one might have drawn a line between commercial and non-commercial speech.[10](#co_footnote_F10376476655_1) If a regulation mandated additional information in the commercial-speech context, a commercial-speech test, like Zauderer, would apply. If instead it compelled public discourse in a non-commercial context, the compelled-speech doctrine would apply. This distinction lost viability, however, with the Court’s implicit creation of compelled-commercial speech.[11](#co_footnote_F11376476655_1)

**\*208** In the absence of a Court-offered distinction, this Article attempts to provide a principled means to determine which doctrine applies. It sets forth a method that scholars, practitioners, and courts may use to ascertain what type of regulation is at issue and then determine which test to apply in scrutinizing whether the regulation violates the First Amendment. The Article begins by providing background on the two doctrines that form the hybrid of compelled-commercial speech. Part I discusses compelled speech and Part II examines commercial speech. Each part discusses the interests animating the doctrines and the frameworks used to analyze potential First Amendment violations. Part III covers the trilogy of compelled-subsidy cases that implicitly created the category of compelled-commercial speech. Finally, Part IV addresses the problems that remain in the wake of this new doctrine, and it provides a framework to solve these problems and reconcile the various doctrines that now exist. It uses a test suite to illustrate and test the framework.

**I. Compelled Speech**

The Supreme Court’s compelled-speech jurisprudence reveals a few salient points. First, the government will face high hurdles before it may compel speakers to engage in certain types of expression, such as political or ideological speech, as the First Amendment grants a right against compelled expression.[12](#co_footnote_F12376476655_1) Second, this right against compelled expression implicates both speaker and listener interests, though speaker interests predominate. Listener interests, however, are central to the First Amendment in general and to compelled-speech cases specifically.[13](#co_footnote_F13376476655_1) Third, forcing speakers to propagate false sentiments and disingenuously persuade listeners perverts public opinion toward the government’s messages. Such distortion undermines true consent of the governed and is therefore unacceptable in a democracy.

Two Supreme Court cases form the foundation of the compelled-speech doctrine, West Virginia State Board of Education v. Barnette[14](#co_footnote_F14376476655_1) and Wooley v. Maynard.[15](#co_footnote_F15376476655_1) A third Supreme Court case, **\*209** Pacific Gas & Electric Co. v. Public Utilities Commission,[16](#co_footnote_F16376476655_1) relied on these cases and is also relevant.

In 1943, the Supreme Court held in Barnette that the First Amendment protects individuals from some government-compelled expression.[17](#co_footnote_F17376476655_1) The case arose because the West Virginia school board had required students to salute the American flag while reciting the Pledge of Allegiance or face expulsion.[18](#co_footnote_F18376476655_1) Jehovah’s Witnesses sued to enjoin this requirement, claiming that it violated their First Amendment rights.[19](#co_footnote_F19376476655_1) The Court agreed with the Jehovah’s Witnesses and held that the school board could not constitutionally compel such expression.[20](#co_footnote_F20376476655_1) According to the Court, “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”[21](#co_footnote_F21376476655_1) The Court stated that the school officials’ actions impermissibly invaded the intellect and spirit of individuals, which the First Amendment protects from official control.[22](#co_footnote_F22376476655_1)

The interest the Court highlighted, protecting individual intellect and spirit, has been described as “freedom of mind.”[23](#co_footnote_F23376476655_1) Freedom of mind is an important interest animating the First Amendment.[24](#co_footnote_F24376476655_1) Ensuring that speakers maintain freedom of mind means preventing the government from using these speakers to propagate messages with which the speakers disagree. If the government compels private speakers to spread the government’s message, it forces these speakers to act as government mouthpieces who espouse government ideology. This is antithetical to the First Amendment, which safeguards self-expression. Volitional self-expression is integral to a democracy because democracy requires that the governed may freely communicate with each other and the government so that the government may adequately serve the governed.

**\*210** Although compelled speech primarily involves speaker interests, it also implicates listener interests.[25](#co_footnote_F25376476655_1) An important listener interest at stake is the right to receive expression free from government compulsion.[26](#co_footnote_F26376476655_1) Listeners have a right to observe genuine, robust expression that they can use for belief formation.[27](#co_footnote_F27376476655_1) This listener interest is important because it strikes at the very heart of the First Amendment. As the Supreme Court has explained, “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”[28](#co_footnote_F28376476655_1) The government may not distort that marketplace with forced messaging. In this way, free speech is much more than the right to express oneself: “it is the essence of self-government.”[29](#co_footnote_F29376476655_1) Thus, listener interests are also central to the First Amendment generally.[30](#co_footnote_F30376476655_1)

The Court in Barnette invoked these interests, explaining that “[s]ymbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.”[31](#co_footnote_F31376476655_1) Saluting the flag is how one person communicates to another her adherence to the government that the flag represents.[32](#co_footnote_F32376476655_1) This communication has consequences: it provides listeners with a sense of public opinion.[33](#co_footnote_F33376476655_1) For public opinion to be perceived accurately, it must be freely obtained and **\*211** not coerced. The Bill of Rights prevents the government from coercing consent of the governed.[34](#co_footnote_F34376476655_1) Public opinion must control authority, not the reverse.[35](#co_footnote_F35376476655_1)

Government-compelled expression amplifies messages of government preferences over individual preferences, which skews the picture of public opinion in the marketplace of ideas.[36](#co_footnote_F36376476655_1) This may mislead listeners to adopt beliefs simply because these beliefs have government backing and thus drown out other beliefs.[37](#co_footnote_F37376476655_1) Although listeners may realize that the government has compelled certain speech, they will not necessarily know who actually agrees with it. And the repetitive exposure to the government’s message may lead to a soft form of mind control over listeners.[38](#co_footnote_F38376476655_1) A message that is dominant in the marketplace has a better chance of prevailing.

As articulated in Barnette, the compelled-speech doctrine protects both speakers and listeners from the harm that compelled, ideological speech creates. Protecting individuals’ freedom of mind is integral to the First Amendment in our representational democracy. Freedom of thought and expression ensure that the governed control their government and not the other way around.

Thirty years after Barnette, the Court decided Wooley v. Maynard, in which it affirmed the importance of freedom of mind.[39](#co_footnote_F39376476655_1) In Wooley, petitioners challenged the State of New Hampshire’s requirement that drivers display the State’s motto, “Live Free or Die,” on vehicle license plates, or face criminal sanctions.[40](#co_footnote_F40376476655_1) Jehovah’s Witnesses, who considered the motto repugnant to their beliefs, covered up the motto and were charged multiple times with violating state law.[41](#co_footnote_F41376476655_1)

The Court framed the issue as “whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.”[42](#co_footnote_F42376476655_1) It held that the State could not.[43](#co_footnote_F43376476655_1) In finding the law unconstitutional, the Court again relied on the notion of free thought, explaining that “[t]he right to speak and the right to refrain from **\*212** speaking are complementary components of the broader concept of individual freedom of mind.”[44](#co_footnote_F44376476655_1)

In addition, the Court again alluded to the importance of listeners receiving genuine information about others’ beliefs. It characterized the state law as a “measure which forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”[45](#co_footnote_F45376476655_1) Just as speakers have a right to be free from spreading the government’s message,[46](#co_footnote_F46376476655_1) listeners have a concomitant right to receive expression free from government coercion. The government may not persuade listeners with insincere messaging.

Nearly ten years after Wooley, in Pacific Gas & Electric Co. v. Public Utilities Commission, a plurality of the Court cited Wooley in striking down a California law mandating that a utility distribute the views of a public interest organization challenging the utility’s practices in monthly billing envelopes.[47](#co_footnote_F47376476655_1) The Court again recognized the importance of listener interests, explaining that the First Amendment “protects the public’s interest in receiving information.”[48](#co_footnote_F48376476655_1) The First Amendment thus “serves significant societal interests wholly apart from a speaker’s interest in self-expression.”[49](#co_footnote_F49376476655_1) Despite these important listener interests, California’s law impermissibly compelled the utility to “use its property as a vehicle for spreading a message with which it disagree[d],” and this violated Wooley, among other cases.[50](#co_footnote_F50376476655_1)

The compelled-speech cases reveal the importance of speaker and listener interests to the First Amendment. The government faces a heavy burden when it attempts to override these interests and compel public discourse.

**II. Commercial Speech**

While compelled-speech cases have generally involved speech about politics or ideology,[51](#co_footnote_F51376476655_1) commercial-speech cases have involved speech about goods or services in commerce. Commercial speech typically receives less protection than political or ideological speech.[52](#co_footnote_F52376476655_1) **\*213** Commercial speech is defined variously, but the quintessential definition is speech that proposes an economic transaction, such as advertising.[53](#co_footnote_F53376476655_1) Similar to compelled-speech cases, speaker and listener interests animate commercial-speech cases. Unlike in compelled-speech cases, however, listener interests, rather than speaker interests, predominate in commercial-speech cases.

**A. Lesser Value Speech**

Historically, the Supreme Court has disfavored protecting commercial speech. Initially, the Court provided it with no First Amendment protection.[54](#co_footnote_F54376476655_1) When it later afforded some protection, it did so with less than full gusto. Recently, the Court has suggested that it might change this approach and provide greater protection for commercial speech, but thus far it has stopped short of doing so.

In 1942, the Supreme Court proclaimed that “the Constitution imposes no . . . restraint on government as respects purely commercial advertising.”[55](#co_footnote_F55376476655_1) First Amendment protection for purely commercial speech was virtually non-existent until the 1970s when the Court began reconsidering its approach.[56](#co_footnote_F56376476655_1) In Bigelow v. Virginia,[57](#co_footnote_F57376476655_1) citing a string of cases supporting this new direction, the Court explained that “speech is not stripped of First Amendment protection merely because it appears in [commercial advertising].”[58](#co_footnote_F58376476655_1) Only one year later, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,[59](#co_footnote_F59376476655_1) the Court disavowed the idea that commercial speech is unprotected, explaining that the notion “all but passed from the scene” in Bigelow.[60](#co_footnote_F60376476655_1)

**\*214** In Virginia State Board of Pharmacy, a case involving a pharmaceutical advertising ban, the Court considered whether speech that proposes a commercial transaction lacks First Amendment protection.[61](#co_footnote_F61376476655_1) The Court answered that question with a resounding “no.”[62](#co_footnote_F62376476655_1) This case is widely credited with formally establishing First Amendment protection for commercial speech.[63](#co_footnote_F63376476655_1)

Although the Court decided that commercial speech should receive some First Amendment protection in Virginia State Board of Pharmacy, it also decided that commercial speech should not receive the same level of protection as some other speech,[64](#co_footnote_F64376476655_1) such as political speech. Commercial speech is thus more susceptible to government regulation than its more-protected counterparts.[65](#co_footnote_F65376476655_1) One reason the Court deems less protection appropriate in this context is because regulation may help further consumer protection. According to the Court, less First Amendment protection is imperative to ensure that commercial information flows truthfully, legitimately, and freely.[66](#co_footnote_F66376476655_1)

Another reason the Court affords commercial speech less protection is because the Court claims that commercial speech is hardier than other forms of speech.[67](#co_footnote_F67376476655_1) Because it is economically motivated, commercial speech is more durable and thus less likely to be chilled.[68](#co_footnote_F68376476655_1) Commercial speech is also more easily verifiable than other forms of speech.[69](#co_footnote_F69376476655_1) The Court has said that because commercial speakers generally disseminate information on products or services about which they know more than others, they should be held to stricter standards.[70](#co_footnote_F70376476655_1)

Over time, however, members of the Court have disagreed about whether commercial speech deserves less protection. Justice Clarence Thomas in particular has voiced strong opposition to this position, maintaining that he “do[es] not see a philosophical or historical basis for **\*215** asserting that commercial speech is of lower value than noncommercial speech. Indeed, some historical materials suggest to the contrary.”[71](#co_footnote_F71376476655_1) He has repeatedly urged the Court to reconsider its position.[72](#co_footnote_F72376476655_1)

A majority of the Court recently appeared to accept Justice Thomas’s charge to reconsider its treatment of commercial speech in Sorrell v. IMS Health, Inc.[73](#co_footnote_F73376476655_1) There the Court held that a state law restricting the sale or disclosure of pharmacy records could not withstand a First Amendment challenge.[74](#co_footnote_F74376476655_1) The opinion initially suggested that the Court would start affording greater protection to commercial speech.[75](#co_footnote_F75376476655_1) The Court explained that because the law at issue regulated speech based on its content, heightened scrutiny was appropriate, irrespective of whether the law involved commercial speech.[76](#co_footnote_F76376476655_1)

In the end, however, the Court applied the more lenient Central Hudson[77](#co_footnote_F77376476655_1) test that it frequently applies to commercial speech, reasoning that because the regulation could not withstand even Central Hudson scrutiny, it was unnecessary to apply heightened scrutiny.[78](#co_footnote_F78376476655_1) The Court missed an opportunity to clarify the law further by declining to decide whether the law at issue even regulated pure commercial speech.[79](#co_footnote_F79376476655_1) The Court’s pre-Sorell position on commercial speech thus remains intact.

Although dicta in Sorrell suggests a willingness to increase protection for commercial speech, the holding does not take this step.[80](#co_footnote_F80376476655_1) **\*216** Post-Sorrell commercial speech still generally receives reduced First Amendment protection.[81](#co_footnote_F81376476655_1)

**B. Listener Interests Outshine Speaker Interests**

While both speaker and listener interests animate commercial speech, listener interests provide more support for protecting commercial speech. In Virginia State Board of Pharmacy, the Court explained that both speaker and listener interests support protecting commercial speech.[82](#co_footnote_F82376476655_1) Listener interests, however, actually motivated the suit--consumers challenged the government’s advertising restriction as an interference with their First Amendment right to receive commercial information.[83](#co_footnote_F83376476655_1) The Court explained that a listener’s interest in receiving commercial information is important.[84](#co_footnote_F84376476655_1) It is “keen, if not keener by far, than . . . [receiving] the day’s most urgent political debate.”[85](#co_footnote_F85376476655_1) Conversely, a commercial speaker’s interest, which is primarily economic, pales in comparison to the listener’s interest in receiving information.[86](#co_footnote_F86376476655_1)

Listener interest reflects society’s “strong interest in the free flow of commercial information.”[87](#co_footnote_F87376476655_1) Commercial speech is important because it disseminates information regarding who is selling what and at what price.[88](#co_footnote_F88376476655_1) Such dissemination is necessary to inform private economic decisions, which fuel the free-market economy.[89](#co_footnote_F89376476655_1) These decisions must be intelligent and well informed.[90](#co_footnote_F90376476655_1) “To this end, the free flow of commercial information is indispensable.”[91](#co_footnote_F91376476655_1)

The free flow of commercial information is indispensible for another reason: it enables formation of “intelligent opinions as to how [this country’s economic] system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking,” commercial speech serves that lofty goal.[92](#co_footnote_F92376476655_1) The Court cited the importance of providing such **\*217** information to consumers in striking down the government’s attempt to restrict access to information in Virginia State Board of Pharmacy.[93](#co_footnote_F93376476655_1)

Although Virginia State Board of Pharmacy focused significantly on listener interests,[94](#co_footnote_F94376476655_1) it did not completely disregard speaker interests. According to the Court, even though the commercial speaker’s interest is purely economic, that “hardly disqualifies him from protection under the First Amendment.”[95](#co_footnote_F95376476655_1) Commercial speakers’ interests are minimal, but they exist.[96](#co_footnote_F96376476655_1) Indeed, this commercial speaker interest in promoting one’s wares contributed to the Court’s recognition that commercial speech should receive protection in the first place.[97](#co_footnote_F97376476655_1)

Although listener interests primarily support protection for commercial speech, speaker interests also support such protection. The next question to consider is precisely what type of protection is appropriate for commercial speech.

**C. Regulation**

1. Test for Speech Restrictions: Central Hudson

Four years after Virginia State Board of Pharmacy decided that commercial speech deserves First Amendment protection, the Supreme Court considered the level of protection in Central Hudson Gas & Electric Corp. v. Public Services Commission.[98](#co_footnote_F98376476655_1) In Central Hudson, the Court considered whether a law banning a public utility’s promotional advertising violated the First Amendment. In holding that it did, the Court fashioned a multi-pronged test equivalent to intermediate scrutiny.[99](#co_footnote_F99376476655_1) To apply this test, a court first determines if the commercial speech is protected--that is, if it is neither misleading nor related to unlawful activity.[100](#co_footnote_F100376476655_1) If the speech is protected, the government must **\*218** assert a substantial interest justifying a restriction on the speech.[101](#co_footnote_F101376476655_1) The restriction must not only directly advance the government’s asserted interest, but it should also not extend more than necessary to satisfy that interest.[102](#co_footnote_F102376476655_1)

Central Hudson’s intermediate scrutiny is a departure from the strict scrutiny applied to content-based regulations of public discourse.[103](#co_footnote_F103376476655_1) As a result, a law that targets commercial speech has a better chance of survival than a content-based law targeting political speech. This disparate treatment is not universally accepted as appropriate, but it is the Supreme Court’s current approach.[104](#co_footnote_F104376476655_1)

The Court has not specified how broadly Central Hudson applies. It is unclear whether it applies only to the situation addressed in Central Hudson--where a law restricts speech--or whether it is a default framework for commercial speech that applies generally, save rare instances. Some, like Justice Thomas, argue that since Central Hudson is already a downward departure from the protection afforded public discourse, it should generally create a floor beneath which protection should not drop.[105](#co_footnote_F105376476655_1) The scope of this test is important. If courts apply a test more lenient than Central Hudson, they will be even more likely to uphold government regulation. The question that remains is just how much government control over commerce is optimal when regulation affects free-speech rights.

2. Test for Factual Disclosures: Zauderer

Five years after Central Hudson, the Court considered another type of commercial-speech regulation, a factual-disclosure requirement, in Zauderer v. Office of Disciplinary Counsel.[106](#co_footnote_F106376476655_1) There the Court explained that where the government compels disclosure of factual and **\*219** uncontroversial information, that disclosure requirement will receive lenient scrutiny.[107](#co_footnote_F107376476655_1)

Zauderer involved an attorney who advertised that clients who lost would owe no legal fees, but he omitted the fact that they would owe costs.[108](#co_footnote_F108376476655_1) The state required that the attorney disclose this additional factual information, and the attorney challenged this requirement.[109](#co_footnote_F109376476655_1) The Court considered how to test the validity of the government’s disclosure requirement.[110](#co_footnote_F110376476655_1) It questioned whether Central Hudson should apply as the default test for regulation of commercial speech or whether a more lenient test should apply.[111](#co_footnote_F111376476655_1) The Zauderer Court held Central Hudson inapplicable and adopted a more lenient test,[112](#co_footnote_F112376476655_1) a “reasonable relationship” test.[113](#co_footnote_F113376476655_1) This test provides that commercial speakers’ rights are “adequately protected as long as disclosure requirements are reasonably related to the State’s interest,” which in Zauderer was preventing consumer deception.[114](#co_footnote_F114376476655_1)

**\*220** In Zauderer, the Court explained that lenient review was appropriate for two reasons. First, the factual-disclosure requirement did not restrict speech.[115](#co_footnote_F115376476655_1) Second, it did not compel public discourse.[116](#co_footnote_F116376476655_1) Rather, it prescribed “purely factual and uncontroversial information about the terms under which [Zauderer’s] services w[ould] be available.”[117](#co_footnote_F117376476655_1) Factual-disclosure requirements, the Court went on to explain, are entitled to lenient review, unlike laws restricting speech, which receive Central Hudson’s more-rigorous scrutiny.[118](#co_footnote_F118376476655_1) In rejecting Central Hudson, the Court emphasized significant differences between factual-disclosure requirements and restrictions on speech.[119](#co_footnote_F119376476655_1) Importantly, when the State requires purely factual disclosures, it does not prevent speakers from stating anything but merely requires that they provide more information.[120](#co_footnote_F120376476655_1)

**\*221** In addition, “[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides,” a commercial speaker’s interest in not providing particular factual information is minimal.[121](#co_footnote_F121376476655_1) Accordingly, factual-disclosure requirements encroach far less on First Amendment rights than do speech prohibitions.[122](#co_footnote_F122376476655_1) This position accords with the Court’s focus in Virginia State Board of Pharmacy on the critical interest listeners have in receiving information.[123](#co_footnote_F123376476655_1) Because the primary reason commercial speech receives protection is to ensure that consumers have access to information, and a commercial speaker’s interest in not providing this information is minimal, regulation requiring that commercial speakers provide more information deserves lenient review.[124](#co_footnote_F124376476655_1)

Zauderer also highlighted material differences between factual-disclosure requirements in the commercial-speech context and the compulsion of public discourse--speech regarding politics, religion, and other matters of opinion.[125](#co_footnote_F125376476655_1) The former mandates providing purely factual information while the latter forces citizens “to confess by word or act their faith []in” politics, religion, and opinions.[126](#co_footnote_F126376476655_1) Where the former is concerned, lenient scrutiny may apply, and where the latter is concerned, rigorous scrutiny applies.[127](#co_footnote_F127376476655_1)

Factual-disclosure requirements are similar to laws compelling public discourse because both cause a speaker to speak when she otherwise would not. But Zauderer emphasized that causing a speaker to provide additional factual and uncontroversial information in the commercial arena creates far less of a First Amendment problem than causing a speaker to espouse public discourse in the non-commercial arena.[128](#co_footnote_F128376476655_1) Zauderer thus suggested that the critical factor in determining whether a law imposes a factual disclosure requirement or compels speech is whether the law impacts commercial or non-commercial speech. This all changed as a result of three compelled-subsidy cases, known as the Glickman trilogy.

**\*222 III. The Glickman Trilogy & Compelled-Commercial Speech**

Prior to 2001, “compelled-commercial speech” was somewhat of an oxymoron. Compelled speech fit one paradigm in which Barnette and Wooley applied and commercial speech fit another, in which either Central Hudson or Zauderer applied.[129](#co_footnote_F129376476655_1) Zauderer recognized this distinction when it fashioned a lenient test for factual disclosures in the commercial context, which it distinguished from compelled public discourse.[130](#co_footnote_F130376476655_1)

After Zauderer, the Supreme Court appeared to maintain this distinction. It explained that where the government requires factual disclosures, it fosters First Amendment interests.[131](#co_footnote_F131376476655_1) In contrast, when the government compels public discourse, it creates First Amendment problems.[132](#co_footnote_F132376476655_1) Because requiring factual disclosures furthers First Amendment interests, whereas compelling public discourse hinders those interests, it makes sense that mandatory disclosures receive more lenient scrutiny than laws compelling public discourse.

Post-Zauderer it seemed that requiring commercial speakers to provide additional information through factual disclosures did not implicate the interests at stake in compelled-speech cases, which generally involved compelled public discourse.[133](#co_footnote_F133376476655_1) It therefore seemed that determining whether forced speech was commercial in nature--as compared to public discourse--would signal whether the compelled-speech doctrine applied or not.[134](#co_footnote_F134376476655_1) However, this conclusion dissipated with three conflicting Supreme Court cases that arose in a slightly different, but related, context. This trilogy of cases--Glickman v. Wileman Bros. & Elliott, Inc.,[135](#co_footnote_F135376476655_1) United States v. United Foods,[136](#co_footnote_F136376476655_1) and Johanns v. Livestock Marketing Ass’n[137](#co_footnote_F137376476655_1)--are compelled-subsidy cases.

**\*223** Compelled-subsidy cases are similar to compelled-speech cases.[138](#co_footnote_F138376476655_1) With compelled speech, the government forces an individual to espouse a message.[139](#co_footnote_F139376476655_1) With compelled subsidy, it forces an individual to fund a message.[140](#co_footnote_F140376476655_1) The concerns animating First Amendment protection from compelled speech carry over to compelled subsidies.[141](#co_footnote_F141376476655_1) If the compelled-speech doctrine prevents the government from compelling a person to espouse a message, it follows that the compelled-subsidy doctrine generally prevents the government from compelling that person to fund that same message expressed by another.[142](#co_footnote_F142376476655_1)

Because compelled subsidy is so closely related to compelled speech, the compelled-subsidy cases are relevant here.[143](#co_footnote_F143376476655_1) Indeed, one of the compelled-subsidy cases, United States v. United Foods,[144](#co_footnote_F144376476655_1) implicitly created a compelled-commercial-speech doctrine. This has caused a line-drawing problem of determining where factual disclosures end and the compelled-commercial-speech doctrine begins. Answering this question requires reviewing the trilogy, which starts with Glickman v. Wileman Bros. & Elliott, Inc.[145](#co_footnote_F145376476655_1)

**A. Glickman v. Wileman Bros. & Elliott, Inc.**

The Supreme Court first analyzed a compelled-subsidy requirement in the commercial context in Glickman v. Wileman Bros. & Elliott, Inc.[146](#co_footnote_F146376476655_1) In Glickman, the Court considered whether marketing orders issued pursuant to a federal check-off program that required contributions for generic tree-fruit advertising violated the First Amendment.[147](#co_footnote_F147376476655_1) The advertisement’s message claimed that tree-fruit is “wholesome, delicious, and attractive to discerning customers.”[148](#co_footnote_F148376476655_1) It did not differentiate between brands and thus suggested that all tree-fruit is worth consuming irrespective of brand.

The Court cited multiple reasons for finding that the marketing orders compelling funding of this advertising did not violate the First Amendment. First, the Court stressed the intricacy of the regulatory regime at issue. The orders compelling funding were part of a regulatory **\*224** scheme that was already very detailed and required that tree-fruit producers trade their independence for cooperation.[149](#co_footnote_F149376476655_1) Because tree-fruit producers were already compelled to further the common good of tree-fruit generally, forcing them to fund speech furthering that aim was not a problem.[150](#co_footnote_F150376476655_1) Second, Glickman emphasized that the program did not prevent tree-fruit producers from communicating a message; it did not restrict speech like the regulation in Central Hudson.[151](#co_footnote_F151376476655_1) Because tree-fruit producers were free to supplement the advertising with their own views, the regulation did not need to satisfy more heightened scrutiny.[152](#co_footnote_F152376476655_1) Third, the Court upheld the regulation because it did not compel speech directly.[153](#co_footnote_F153376476655_1) Even though the compelled-subsidy and compelled-speech doctrines protect similar interests, the Court distinguished the compelled subsidy in Glickman on the basis that it was a subsidy rather than a forced utterance of speech.[154](#co_footnote_F154376476655_1) The Court would later undermine this distinction in United Foods.[155](#co_footnote_F155376476655_1)

The Glickman Court explained that the heightened scrutiny applied to compelled speech did not apply to the compelled subsidy because the subsidy did not require tree-fruit producers to repeat an objectionable, ideological message out of their mouths, or compel them to use their property to convey such a message.[156](#co_footnote_F156376476655_1) In other words, it did not force tree-fruit producers to publicly associate with such a message.[157](#co_footnote_F157376476655_1) Because the tree-fruit producers in Glickman were not compelled directly to express a message, the Court distinguished the compelled subsidy from traditional compelled-speech cases.[158](#co_footnote_F158376476655_1) Although Glickman treats compelled speech and compelled subsidies differently, it does so because compelled speech is a more serious problem than compelled subsidy. Thus, compelled speech should receive at least as stringent scrutiny as compelled subsidy.

Finally, and perhaps most importantly, the Court upheld the regulation because it did not compel anyone “to endorse or to finance any political or ideological views.”[159](#co_footnote_F159376476655_1) According to the Court, “requiring respondents to pay [for generic advertising] cannot be said to engender any crisis of conscience.”[160](#co_footnote_F160376476655_1) The Court distinguished between compelled **\*225** funding of generic advertising and compelled funding of political or ideological messages, which would require heightened First Amendment scrutiny.[161](#co_footnote_F161376476655_1)

The Court characterized the advertising regulations as economic regulation that should enjoy a strong presumption of validity.[162](#co_footnote_F162376476655_1) With this deferential review, the Court upheld the marketing orders.[163](#co_footnote_F163376476655_1) In reaching this conclusion, the Court apparently assumed that the producers agreed with the tree-fruit advertising because they were tree-fruit producers.[164](#co_footnote_F164376476655_1) This ignored the producers’ actual protestations that they disagreed with the advertising content because they believed tree-fruit was not fungible.[165](#co_footnote_F165376476655_1) According to the Court, that some producers may not wish to support the generic advertising of their product “is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.”[166](#co_footnote_F166376476655_1) The Court explained that the tree-fruit producers’ objections were different than where “objection rest[s] on political or ideological disagreement with the content of the message.”[167](#co_footnote_F167376476655_1)

In effect, the Court suggested that where a message is commercial it cannot be ideological, and therefore cannot implicate the compelled-speech doctrine.[168](#co_footnote_F168376476655_1) Thus, when the government requires propagating that commercial message, it does not compel speech under the First Amendment. In other words, Glickman suggested that compelled-commercial speech does not exist: where speech is compelled in the commercial context, it receives lenient review. Where a law instead compels public discourse, it receives stringent review under Barnette/Wooley.

The Court implicitly recognized that this paradigm was ill advised when it reversed itself just a few years later in United Foods.[169](#co_footnote_F169376476655_1) Glickman limited its conception of ideology too narrowly, refusing to recognize that an ideological message could occur in a commercial-speech context. A message that all tree-fruit is attractive and delicious to discerning customers is laden with value judgments and opinions.[170](#co_footnote_F170376476655_1) That tree-fruit producers disagreed with the content of the message should **\*226** have suggested that the message was not free from ideology.[171](#co_footnote_F171376476655_1) Glickman should have characterized the message as ideological and applied heightened review. If it had done so, it would have recognized that compelled ideology raises significant First Amendment concerns, even if that ideology occurs in the context of commercial speech.

The Court attempted to correct its course in United Foods by distinguishing Glickman. Unfortunately, the Court’s decision in United Foods raised more questions than it answered.

**B. United States v. United Foods, Inc.**

Four years after Glickman the Court did an abrupt about face in United States v. United Foods, Inc. There a federal statute mandated that mushroom producers subsidize mushroom advertising,[172](#co_footnote_F172376476655_1) and the Court again had occasion to consider a federal check-off program that compelled subsidization of generic advertising. It distinguished, rather than overturned, Glickman.[173](#co_footnote_F173376476655_1) United Foods contradicted Glickman in two ways. First, while Glickman had distinguished compelled speech from compelled subsidies, United Foods cited compelled-speech authority to support its decision not to apply lenient scrutiny to the compelled subsidy at issue.[174](#co_footnote_F174376476655_1) Second, United Foods contradicted Glickman’s suggestion that commercial speech cannot be compelled. The United Foods Court explained that the fact that speech aids a commercial purpose does not deprive it of First Amendment protection.[175](#co_footnote_F175376476655_1) According to the Court, “First Amendment concerns apply [to the compelled subsidy] because of the requirement that producers subsidize speech with which they disagree.”[176](#co_footnote_F176376476655_1) Mushroom producers would have liked to disseminate the message that their mushrooms are superior, but the compelled subsidy required them to fund the message that mushrooms are worth consuming irrespective of the brand.[177](#co_footnote_F177376476655_1)

This scenario was nearly identical to that in Glickman, in which the Court reached the opposite conclusion.[178](#co_footnote_F178376476655_1) In contrast to Glickman, United Foods explained that the pettiness of the disagreement with the message does not eradicate First Amendment concerns.[179](#co_footnote_F179376476655_1) The Court correctly recognized that “First Amendment values are at serious risk if **\*227** the government can compel a particular citizen, or a discrete group of citizens to pay special subsidies for speech on the side that it favors” irrespective of the loftiness of the debate.[180](#co_footnote_F180376476655_1)

The Court attempted to correct Glickman’s suggestion that commercial speech can never contain ideology.[181](#co_footnote_F181376476655_1) Rather than acknowledge that commercial speech can contain ideology and provide a principled means to ascertain when a message is ideological, however, the Court simply stated that commercial speech may be compelled.[182](#co_footnote_F182376476655_1) In doing so, United Foods implicitly created a compelled-commercial-speech doctrine.[183](#co_footnote_F183376476655_1) But, the Court failed to provide a framework for when the compelled-commercial-speech doctrine applies. Instead of clarifying matters, the Court’s decision to strike the compelled funding ultimately hinged on a different basis, the comprehensiveness of the regulatory scheme.[184](#co_footnote_F184376476655_1) It was on this sole basis that the Court distinguished Glickman, noting that the other reasons Glickman cited for its holding existed only within the context of a different, more cooperative regulatory scheme.[185](#co_footnote_F185376476655_1)

According to the Court, the advertising marketing orders in Glickman arose in the context of a regulatory scheme that displaced competition to such an extent that the freedom of individuals to act independently was already significantly constrained by means other than the compelled-advertising subsidy. In Glickman, “the mandated assessments for speech were ancillary to a more comprehensive program restricting market autonomy,” but in United Foods the advertising was “the principal object of the regulatory scheme.”[186](#co_footnote_F186376476655_1) For the Court, this was the problem.

**\*228** By distinguishing Glickman in this fashion, the Court erroneously suggested that this was the primary basis for Glickman’s holding, and it undermined the other reasons the Glickman Court cited.[187](#co_footnote_F187376476655_1) It also left unanswered questions about the scope of this newly-created compelled-commercial-speech doctrine. For instance, United Foods did not explain where compelled-commercial speech stops and factual-disclosure requirements begin. Nor did it identify which framework applies to compelled-commercial-speech regulations. This left uncertain whether Barnette/Wooley, Zauderer, Central Hudson, or something else entirely might apply to these regulations.

The Barnette/Wooley framework applies to laws compelling public discourse, but the Court did not directly apply this framework in United Foods where a subsidy, not speech, was compelled.[188](#co_footnote_F188376476655_1) Instead it relied on Abood v. Detroit Board of Education[189](#co_footnote_F189376476655_1) and Keller v. State Bar of California,[190](#co_footnote_F190376476655_1) cases in which individuals were forced to fund group expression despite disagreeing with it.[191](#co_footnote_F191376476655_1) United Foods re-examined Glickman through this framework. According to the Court, Glickman passed the Abood/Keller test because the compelled subsidy for advertising was germane to the regulatory scheme’s valid purpose of fostering cooperation to improve the tree-fruit market.[192](#co_footnote_F192376476655_1) Because the compelled subsidy for mushroom advertising in United Foods was not **\*229** pursuant to a broader, cooperative regulatory regime, the program and its compelled subsidy furthered only the very speech to which the mushroom producers objected, and this ran afoul of Abood and Keller.[193](#co_footnote_F193376476655_1) Thus, the expression the mushroom producers were “required to support [wa]s not germane to a purpose related to an association independent of the speech itself,” and therefore the assessments violated the First Amendment.[194](#co_footnote_F194376476655_1)

Applying Abood/Keller may make sense for a compelled subsidy where the government forces someone to subsidize another’s message, but it does not make sense applied to a law directly compelling speech. After all, with a compelled subsidy, the government forces a person to fund another’s speech, and a logical, preliminary question is whether the funder should be forced to associate with that person’s message. When a law compels speech directly, however, it need not be associated with another private party’s message. Often it is the government’s message that is compelled.[195](#co_footnote_F195376476655_1) United Foods did not determine whether Abood/Keller applies to laws compelling speech, as compared to subsidies.

United Foods leaves open some important questions. One must determine whether the Barnette/Wooley or the Abood/Keller line of cases applies to compelled-commercial speech. One must also determine where factual disclosures stop and compelled-commercial speech begins. The last case in the trilogy that followed United Foods failed to resolve either question.

**C. Johanns v. Livestock Marketing Association**

After United Foods, the Supreme Court considered whether a compelled subsidy of generic advertising violated the First Amendment in a third case.[196](#co_footnote_F196376476655_1) Unlike in United Foods, the Court in Johanns v. Livestock Marketing Association held that it did not.[197](#co_footnote_F197376476655_1) Once again, however, it did so for entirely different reasons.

In Johanns, beef producers argued that a federal check-off program that compelled funding for generic beef advertising constituted an improper compelled subsidy.[198](#co_footnote_F198376476655_1) According to the beef producers, the program forced them to fund advertising promoting beef as a generic **\*230** good, despite their desire to promote the superiority of their specific types of beef.[199](#co_footnote_F199376476655_1) The producers claimed that the program forced them to subsidize a message with which they disagreed and thus violated United Foods.[200](#co_footnote_F200376476655_1)

The Court disagreed, distinguishing United Foods.[201](#co_footnote_F201376476655_1) According to the Court, United Foods never considered whether the speech was “government speech” and was therefore appropriate for that reason.[202](#co_footnote_F202376476655_1) Finding that the compelled subsidy for beef advertising constituted a funding of government speech, the Court held that the check-off was proper and created a sweeping exception to the compelled-subsidy doctrine that it had not considered in Glickman or United Foods.[203](#co_footnote_F203376476655_1)

The Court held that when the government compels funding of the government’s own message, the First Amendment is not implicated at all.[204](#co_footnote_F204376476655_1) This stands, of course, in stark contrast to the compelled-speech doctrine, which involves the government compelling the direct utterance of the government’s message, which clearly does implicate the First Amendment.[205](#co_footnote_F205376476655_1) The Johanns government-speech exception thus creates a wide pass for forced funding of government speech, which should not apply to compelled-speech cases because compelled-speech cases clearly do create First Amendment issues.[206](#co_footnote_F206376476655_1) Because this exception should not apply to compelled speech, Johanns, which creates a number of issues beyond the scope of this article, does not disturb the compelled-commercial-speech doctrine of United Foods.

The Glickman trilogy reveals a few noteworthy points. First, after United Foods, courts will subject regulations compelling subsidization of commercial speech with which a speaker disagrees to heightened scrutiny as set forth in Abood/Keller. Second, the United Foods holding implicitly created the doctrine of compelled-commercial speech. Where the government compels a commercial speaker to espouse a message with which she disagrees, this too should face heightened scrutiny. Third, where the government compels subsidizing the government’s message, Johanns instructs that this does not raise a First Amendment issue. Viewed as a whole, the Glickman trilogy establishes that compelled-commercial speech exists and raises serious First Amendment concerns. **\*231** The remainder of the Article will discuss the implications of this and attempt to address some questions the cases leave unanswered.

**IV. Problems & Solutions**

The Glickman trilogy’s implicit creation of the doctrine of compelled-commercial speech raises important issues. One must now ascertain where factual disclosures stop and the doctrine of compelled-commercial speech begins. A principled means to distinguish between the two is thus necessary. Also, one must determine which test should apply to compelled-commercial speech. Is the test used for compelled public discourse (Barnette/Wooley) appropriate? Or is the test used in United Foods for compelled subsidy (Abood/Keller) proper? Perhaps an entirely different test is better.

After exploring these issues, this Part proposes a solution. The proposed framework begins by providing a meaningful way to categorize forced-speech regulations. Once a regulation is categorized, the framework dictates which test applies. This approach offers a principled means to reconcile the doctrines while remaining true to the relevant speaker and listener interests requiring First Amendment protection.

**A. Problems**

The creation of compelled-commercial speech in United Foods left some important questions unanswered. First, it did not explain how to determine when heightened review for compelled-commercial speech is appropriate, as opposed to when Zauderer’s lenient review for factual disclosures is appropriate.[207](#co_footnote_F207376476655_1) Second, it did not set out which test should apply to compelled-commercial speech.

After United Foods, the idea that the lenient review of Zauderer should generally apply to forced speech in the commercial context lost viability.[208](#co_footnote_F208376476655_1) United Foods made clear that the compulsion of commercial speech raises significant First Amendment concerns.[209](#co_footnote_F209376476655_1) One may therefore no longer argue that the decision as to when Zauderer applies turns on whether the speech is commercial or public discourse. Instead, another means of distinguishing factual disclosures from compelled-commercial speech is necessary.

**\*232** This distinction, however, is not easy as one person’s factual disclosure is another’s compelled-commercial speech. Obvious cases may exist at either end of the spectrum, but for the vast majority of gray areas (for which the law is notorious), the compelled-commercial-speech doctrine has created a line-drawing problem. A case that reached the Seventh Circuit, Central Illinois Light Co. v. Citizens Utility Board,[210](#co_footnote_F210376476655_1) provides an example. At issue in that case was an Illinois act that compelled utilities to place messages created by a citizens’ utility board in the billing envelopes mailed to customers.[211](#co_footnote_F211376476655_1) One such message read: “‘WARNING! This utility bill may be hazardous to your budget. We don’t have to tell you how much your electric, gas, and phone bills have increased in recent years. And the sad truth is that there’s no end in sight.”’[212](#co_footnote_F212376476655_1)

The Seventh Circuit distinguished Zauderer, explaining that Zauderer involved disclosure of purely factual, uncontroversial information.[213](#co_footnote_F213376476655_1) Zauderer did not suggest, insisted the Seventh Circuit, that “companies can be made into involuntary solicitors for their ideological opponents.”[214](#co_footnote_F214376476655_1) It is not clear how far this logic extends, however. The message at issue in Central Illinois Light Co. presents a fairly straightforward case because that message seems plainly problematic. Common sense suggests that forcing a utility to disseminate a message expressing values antithetical to its business should raise serious First Amendment concerns.

Central Illinois Light Co. does not do much to clarify the distinction between mandatory disclosures and compelled speech in unclear cases and certainly does not create a principled means for doing so in future cases. Skilled attorneys may argue that the same regulation falls into either category. A commercial speaker who does not want to disseminate information will argue that she disagrees with it, and that it therefore constitutes compelled speech. According to this reasoning, any message a speaker does not wish to disseminate is ipso facto compelled speech rather than a factual disclosure. And, of course, if a speaker has brought the case to court in the first place, it is because she would prefer not to disseminate the message. The government’s obvious response will be that the government is simply requiring the commercial speaker to provide additional, factual information. But this argument proves too much. The statement that a utility is charging its consumers more money than is reasonable may contain factual information, but it is also arguably ideological and viewpoint-based, as the Seventh Circuit **\*233** found.[215](#co_footnote_F215376476655_1) Ideology often contains some facts. Courts may fall victim to inconsistency based on how the issue is framed.

Central Illinois Light Co. suggests one familiar, though unsatisfying, basis for distinguishing Zauderer from compelled speech cases: preventing consumer deception.[216](#co_footnote_F216376476655_1) But the suggestion that Zauderer should only apply where the government seeks to prevent consumer deception suffers from its own infirmities. First, it fails to address those situations in which a regulation targets consumer deception, but there is disagreement over whether the regulation simply mandates factual disclosures or compels commercial speech. Second, it undermines the interest that listeners have in receiving commercial information, an interest that animates the entire commercial-speech doctrine. After all, consumers’ rights to receive information about specific products or services that they are considering purchasing should not turn only on whether the commercial speakers misled them. And third, it ignores Zauderer’s admonition that commercial speakers’ interests in not providing additional information about the products or services they are selling are minimal. If a commercial speaker’s interest in not providing this additional information is truly minimal, the government should face limited scrutiny to overcome it.

Some other means to distinguish between the doctrines is needed. Part of the problem preventing the development of an effective solution stems from the conflicting outcomes of Glickman and United Foods. Glickman distinguished ideology from the commercial speech at issue.[217](#co_footnote_F217376476655_1) However, it failed to recognize that commercial speech may be ideological.[218](#co_footnote_F218376476655_1) Ideology is defined as a body of belief that guides an individual, social movement, group, or class.[219](#co_footnote_F219376476655_1) Speech that generally proposes a commercial transaction may also be part of a body of belief: there may be overlap. Glickman itself provides such an example. The essence of the message there, that tree-fruit is worth consuming **\*234** irrespective of the brand, is ideology embedded within commercial speech. It expresses a value judgment--tree-fruit is good. And it is prescriptive--one should consume tree-fruit.[220](#co_footnote_F220376476655_1) It is ideological because it offers a belief about the positivity of tree-fruit that attempts to guide individuals towards purchasing tree-fruit.[221](#co_footnote_F221376476655_1)

Glickman’s refusal to characterize the message as ideology set the stage for United Foods. United Foods appropriately applied heightened scrutiny because the message at issue there was akin to compelled public discourse in commercial speech.[222](#co_footnote_F222376476655_1) Although United Foods did not characterize the message that mushrooms are worth consuming irrespective of the brand as ideological, it clearly is, just as the message in Glickman was. The message that mushrooms are worth consuming irrespective of their brand is an opinion, a value judgment, not a fact. Mushrooms may be rich in nutrients, but the conclusion that they are worth consuming irrespective of their brand does not necessarily follow. Perhaps some brands subject their mushrooms to harsh chemicals, for example, or do any number of things that would render their brand not worth consuming.[223](#co_footnote_F223376476655_1)

Compelled ideology, irrespective of whether it occurs in a commercial or non-commercial setting, should raise First Amendment concerns, as United Foods implicitly recognized. Compelling a speaker to espouse a belief she does not hold implicates the precise concerns at stake in Barnette and Wooley: invasion of freedom of mind.[224](#co_footnote_F224376476655_1)

A workable framework must provide a principled means to determine whether a regulation compels a factual disclosure or compels ideology within commercial speech.[225](#co_footnote_F225376476655_1) It should also remain true to the **\*235** interests at stake in both the compelled- and commercial-speech doctrines. The framework must also help determine which test applies to compelled-commercial speech.

**B. Solutions**

A workable framework faces many hurdles. It must answer the questions identified above while remaining true to the relevant doctrines. The following approach endeavors to accomplish both objectives. Under this framework, one first determines if a regulation falls into one of three categories: (1) mandatory disclosure of uncontroverted[226](#co_footnote_F226376476655_1) facts about a specific product or service sold; (2) mandatory disclosure of controverted facts about a specific product or service sold; or, (3) mandatory disclosure of facts about something other than a specific product or service sold, or compulsion of ideological speech. The category dictates which test applies. If the regulation is a Category 1, Zauderer’s lenient review applies. If it is a Category 2, Central Hudson applies. If it is a Category 3, the heightened scrutiny of Barnette/Wooley applies. A graphic display of the framework for categorizing regulations that compel commercial speech looks like this:

|  |  |  |  |
| --- | --- | --- | --- |
| Category # | Type of Regulation | Test | Standard |
| 1 | Compels disclosure of uncontroverted factual information about the specific product or service sold | Zauderer | Reasonable relationship test |
| 2 | Compels disclosure of controverted factual information about the specific product or service sold | Central Hudson | Intermediate scrutiny |
| 3 | Compels ideology within commercial speech, or compels providing information about something other than the specific product or service sold | Barnette/ Wooley | Strict Scrutiny |

**\*236** 1. The Proposed Framework

For a new First Amendment framework to work in the commercial speech arena, it must remain true to the important interests at stake in the compelled-speech and commercial-speech doctrines. It must also answer the questions created by the concept of compelled-commercial speech. The framework requires answering a threshold question of what type of regulation is at issue. A Category 1 regulation requires a commercial speaker[227](#co_footnote_F227376476655_1) to disclose uncontroverted factual information about a specific product or service sold. A Category 2 regulation requires a commercial speaker to disclose controverted factual information about a specific product or service sold. And a Category 3 regulation compels ideology within commercial speech, or it compels information about something other than a specific product or service sold. Once the category is determined, the appropriate test is applied. Zauderer applies to Category 1; Central Hudson applies to Category 2; and, Barnette and Wooley apply to Category 3 regulations.

This framework accomplishes the goals identified. It remains true to both speaker and listener interests, which animate the relevant doctrines, and it provides a principled means to determine whether a regulation is compelled-commercial speech or a factual-disclosure requirement and thus to determine which test applies.

a. Determine the Category

To determine which category applies, one must first determine whether the regulation compels an uncontroverted fact about a specific product or service sold (Category 1); a controverted fact about a specific product or service sold (Category 2); or information about something other than a specific product or service sold, or ideology (Category 3).[228](#co_footnote_F228376476655_1) The question of whether the fact is controverted or uncontroverted asks **\*237** whether there is disagreement over the fact’s truth, not whether there is disagreement over disclosing the fact.

To determine the category, one must ascertain if the information compelled is a fact, a truth.[229](#co_footnote_F229376476655_1) A fact is an actual state of affairs true in every instance. If all agree on the existence of the state of affairs, the fact is uncontroverted. If instead reasonable people disagree on the existence of the state of affairs, such as when empirical evidence is mixed, this information is a controverted fact.[230](#co_footnote_F230376476655_1) If instead the information expresses viewpoint or opinion, it has moved beyond fact to ideology.[231](#co_footnote_F231376476655_1)

Identifying what constitutes fact as opposed to opinion or viewpoint is not new to the law. To bring a claim for defamation, one must often prove that the alleged defamation is a false statement.[232](#co_footnote_F232376476655_1) Speech that is not provably true or false will not satisfy this requirement.[233](#co_footnote_F233376476655_1) “Statements that are relative in nature and depend largely upon the speaker’s viewpoint are expressions of opinion,” not facts and not susceptible to defamation suit.[234](#co_footnote_F234376476655_1) Just as courts distinguish facts in the context of defamation, so too should they in this proposed framework.

Category 1 regulations involve disclosure of uncontroverted facts about specific products or services sold. These disclosures describe a state of affairs that either exists or does not. For example, if a loaf of bread contains wheat flour, that fact is demonstrably provable and not open to value disagreements. It describes an uncontroverted state of being. The same is true of the fact that cigarettes contain nicotine. If a shirt is blue, that is also an uncontroverted state of being. Observers may disagree over its tone or shade. Colorblind, they may not perceive the shirt’s blueness. They may wish to deny that it is blue (perhaps if they detest the color). Or they may recognize the shirt’s blueness but wish to conceal this fact from the public. But if the shirt is actually blue, this is an indisputable fact. Another example of an uncontroverted factual statement, derived from Zauderer, is that a lawyer holds clients **\*238** responsible for costs but not for fees. Assuming this accurately describes reality, it is a fact, a truth. It is uncontroverted information about a state of being.[235](#co_footnote_F235376476655_1) It is a fact about the specific service the lawyer is selling. Although the lawyer may not wish to reveal this fact because it may scare off business, it is indisputably a fact nonetheless.

If instead of requiring disclosure of uncontroverted, factual information, a regulation requires disclosure of controverted factual information about a specific product or service sold, the regulation falls in Category 2.[236](#co_footnote_F236376476655_1) For factual information to be “controverted,” it must have mixed empirical support for its existence as an actual state of being. For this criterion to be meaningful, mixed empirical support requires a critical amount of divergent evidence pointing to more than one potentially accurate description of reality. A critical mass of differing evidence is an amount sufficient to cause a reasonable consumer to choose between two competing views. There may be a majority view and a minority view, but as long as there are multiple views espoused by even a substantial minority of scientists or the public, there is a controversy over whether the piece of information accurately describes reality. A party would need to present such evidence to the court. One fringe person arguing that the moon is made of green cheese will not do.

The new FDA regulation requiring that cigarette advertisements state that cigarettes cause fatal lung disease might fall into Category 2. A court would first need to determine whether there is sufficient mixed empirical support for this statement.[237](#co_footnote_F237376476655_1) If the evidence is not mixed but is instead clear that cigarettes necessarily cause lung cancer--supporting this statement as uncontroverted fact--this regulation would fall under Category 1. Assuming, however, that there is mixed empirical support, **\*239** this would be a controverted factual statement.[238](#co_footnote_F238376476655_1) This disclosure is also a statement about the specific product cigarette manufacturers sell. It therefore would fall in Category 2.

One additional point is relevant to factual-disclosure requirements in general (both Categories 1 and 2): not all facts are appropriate for any given factual-disclosure requirement. If someone sells mushrooms, and the government compels the seller to provide information about cantaloupes, this makes little sense. Appropriate factual-disclosure requirements should compel facts about the specific product or service sold. Because a commercial speaker should not bear the burden of providing information about something other than the specific product or service sold, when the government compels this, the regulation falls into Category 3. A regulation also falls into Category 3 when it compels ideology within commercial speech.

A regulation fits in Category 3 when it conscripts commercial speakers to provide information about something other than the specific products or services they are selling. For instance, if a regulation requires that an Audi dealer include price information of cheaper competitors in his advertising, this falls in Category 3. This regulation falls in Category 3 because it places a heavy burden on the Audi dealer to disseminate information antithetical to his interests that is not even about the specific product or service he is selling.[239](#co_footnote_F239376476655_1) A regulation compelling a commercial speaker to disseminate his competitor’s information should face heightened review because it compels a speaker to use his property to spread information that is antagonistic to his beliefs and purpose.[240](#co_footnote_F240376476655_1) Preventing this, like preventing compelled ideology, is at the heart of the First Amendment.[241](#co_footnote_F241376476655_1)

**\*240** Category 3 regulations also compel ideology within commercial speech. These regulations compel opinions or value judgments. A value judgment is a statement that something is good or bad, that one believes in something, or that one should do something.[242](#co_footnote_F242376476655_1) The fact that a sizeable majority of people holds an opinion does not transform it from compelled ideology to fact. Barnette and Wooley make this clear.[243](#co_footnote_F243376476655_1) To find otherwise would overlook minority rights and violate the Bill of Rights.[244](#co_footnote_F244376476655_1) When a regulation compels such ideology within commercial speech, it fits in Category 3.

The first step in the framework is to determine the category. The next step is to apply the corresponding test.

b. Apply the Corresponding Test

Once one ascertains the applicable category, one must then apply the appropriate test. Under this framework, Zauderer applies to Category 1, Central Hudson to Category 2, and Barnette/Wooley to Category 3.

Zauderer is the appropriate test for Category 1 regulations. Applying its lenient review to uncontroverted information about products or **\*241** services sold furthers the listener’s interest in receiving information, a point discussed in Zauderer and Virginia State Board of Pharmacy.[245](#co_footnote_F245376476655_1)

An important reason commercial speech receives First Amendment protection is to provide consumers with ample information in the marketplace of ideas.[246](#co_footnote_F246376476655_1) As the Supreme Court emphasized in both Zauderer and Virginia State Board of Pharmacy, commercial speakers have a minimal interest in not providing this information.[247](#co_footnote_F247376476655_1) The listener interest is thus paramount over a commercial speaker’s interest where disclosures require that commercial speakers provide information that is purely factual about specific products or services they are selling.[248](#co_footnote_F248376476655_1)

Zauderer instructs that a factual-disclosure requirement is constitutional where it requires “purely factual and uncontroversial information about the terms under which [one’s] services will be available.”[249](#co_footnote_F249376476655_1) And it requires that a disclosure be reasonably related to the government’s interest.[250](#co_footnote_F250376476655_1) Either of two possible government interests should satisfy Zauderer. The first is where the government attempts to prevent consumer deception (the interest at stake in Zauderer). The second is where the government attempts to provide uncontroversial, factual information about the specific products or services sold.[251](#co_footnote_F251376476655_1)

**\*242** In sum, if a law compels disclosure of uncontroverted facts about the specific products or services sold, the law falls into Category 1, and Zauderer applies. The test drawn from Zauderer is whether the law is reasonably related to the government interest of providing uncontroversial, factual information about the specific products or services sold, or preventing consumer deception.[252](#co_footnote_F252376476655_1)

If instead of requiring a disclosure of uncontroverted facts, a regulation compels disclosure of controverted facts, the regulation falls into Category 2. Central Hudson applies here because this category compels messages that are not clearly facts. By definition, Category 2 tempts a court to label information as factual when there is mixed empirical support for whether the information is fact or fiction.

Because Central Hudson’s intermediate scrutiny is mid-level scrutiny, it strikes the appropriate balance when the government compels information that is equivocally factual. This approach inherently recognizes that these gray areas do not involve facts on which all agree, and it therefore appropriately provides a test that is neither too lenient nor too stringent but in the middle. This test also serves speaker and listener interests. Because Central Hudson provides more heightened scrutiny than Zauderer, it recognizes that speaker interests should receive more protection when there is not unanimous agreement that the facts required for disclosure actually exist. But it also does not place too high a barrier preventing the government from informing consumers about important information regarding the products or services they may purchase. Applying Central Hudson here has the added benefit of providing a compromise for another reason: many believe it should apply to factual-disclosure requirements.[253](#co_footnote_F253376476655_1) Courts and commentators **\*243** disagree over whether Zauderer or Central Hudson applies to factual disclosures generally.[254](#co_footnote_F254376476655_1) The proposed framework suggests that each perspective is correct: Zauderer applies to factual disclosures of uncontroverted facts, while Central Hudson applies to disclosures with mixed evidentiary support.

Where a regulation moves beyond factual disclosure about the product or service sold entirely and either compels commercial speech enmeshed with ideology or compels information not about the specific product or service sold, the regulation falls into Category 3. Heightened scrutiny applies here. The actual test the framework adopts for Category 3 regulations is not the test from United Foods or Abood/Keller. Rather, it is the heightened scrutiny of Barnette/Wooley.

United Foods dictates that a law compelling ideology even within the context of regulating commercial speech raises serious First Amendment concerns for commercial speakers’ rights. Where compelled **\*244** ideology is involved, speakers’ rights not to speak become paramount. Forced ideology invades speakers’ freedom of mind, forcing them to espouse values and beliefs they do not truly hold. Compelling ideology also violates listeners’ rights to receive genuine information. Compelling speakers to provide ideology with which they disagree presents listeners with a skewed picture of speakers’ opinions. Listeners may alter their behavior after observing this coerced but insincere expression. Such government coercion obstructs true consent of the governed, as recognized in Barnette and Wooley.[255](#co_footnote_F255376476655_1)

Scholar Robert Post maintains that listener interests have become less important since United Foods. According to Post, United Foods “can be explained only on the assumption that commercial speakers retain significant constitutional interests that are not fully captured by constitutional values inherent in the circulation of information.”[256](#co_footnote_F256376476655_1) Post claims that United Foods shifted emphasis from listener to speaker interests, thus breaking with an audience-centered approach to commercial speech in favor of a speaker-centered approach.[257](#co_footnote_F257376476655_1) Because Johanns did not alter this, United Foods’s approach would therefore control.

Post is correct that United Foods shifted the focus to speaker interests in those cases where the government compels ideology enmeshed in commercial speech. The proposed framework is consistent with this aspect of United Foods because it subjects regulations compelling ideology enmeshed in commercial speech to heightened scrutiny. The proposed framework thus places speaker interests above all else where this occurs.

Although United Foods may have focused more on speaker interests where the government compels ideologically enmeshed commercial speech, this does not mean that United Foods specifically marginalized listener interests in commercial-speech cases. Instead, one may read United Foods as rejecting the notion that commercial speakers automatically have limited rights simply by virtue of their speech being commercial. In this way, one may interpret United Foods as the Court’s admonition that commercial speech is important too.[258](#co_footnote_F258376476655_1) Where a law compels ideology, the Court will scrutinize the law more strictly irrespective of whether it arises in the commercial or non-commercial **\*245** context. This does not violate Zauderer, which held that a commercial speaker’s interest in not disclosing factual information is minimal. Of course, the Court did not highlight this distinction in United Foods. Nor did it characterize the speech in that case as ideology. Instead, however, it explained that “First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.”[259](#co_footnote_F259376476655_1) In other words, the law compelled espousal of a sentiment contrary to the speakers’ beliefs, and this raised serious First Amendment concerns regardless of whether the speech was commercial.

These same concerns were vindicated in Barnette and Wooley where speakers were forced to espouse beliefs they did not hold.[260](#co_footnote_F260376476655_1) Those cases did not involve commercial speech, but the idea is the same. When regulation compels espousal of ideology, irrespective of whether it arises in the commercial or non-commercial context, it seriously threatens the First Amendment.

The First Amendment is similarly threatened when a law requires that a speaker provide information about something other than the specific products or services sold. The commercial speaker should not have to bear the burden of disseminating this information. Indeed, such information should not even fall under the less-protected category of commercial speech. Commercial speech is speech that proposes a transaction.[261](#co_footnote_F261376476655_1) Commercial speech receives less First Amendment protection because it is economically motivated by speaker self-interest.[262](#co_footnote_F262376476655_1)

Economic motivations likely only extend to the specific products or services that the commercial speaker sells.[263](#co_footnote_F263376476655_1) Because economic motivation justifies lesser protection for commercial speech in the first place, where these motivations do not exist, the compelled speech should **\*246** not receive reduced protection.[264](#co_footnote_F264376476655_1) And when the government compels a speaker to utter protected speech based on its content, this creates serious First Amendment issues.[265](#co_footnote_F265376476655_1) Heightened review is thus appropriate where the government compels a speaker to provide information about something other than the products or services she is selling.

The question remains as to what type of heightened scrutiny should apply. Although United Foods applied Abood/Keller,[266](#co_footnote_F266376476655_1) Barnette/Wooley is the more appropriate framework. Barnette/Wooley mandates strict scrutiny, while Abood/Keller provides that the government may not require dissenters to fund ideological messages of a group not germane to the reasons justifying forcing those individuals to associate with the group in the first place.[267](#co_footnote_F267376476655_1)

In United Foods, because the regulatory scheme did not require group action aside from the speech itself, the compelled subsidy ipso facto was not germane to a broader associational purpose and thus violated the First Amendment.[268](#co_footnote_F268376476655_1) United Foods appears, then, to require that a law compel association or some form of group action to fall in the category of a compelled subsidy.[269](#co_footnote_F269376476655_1) This may make sense in the compelled-subsidy arena, but it makes little sense in the compelled-speech arena. Because compelled subsidies compel support of another private-party’s speech,[270](#co_footnote_F270376476655_1) it is logical first to question whether the law appropriately compels association with that speaker and then to question whether the compelled funding is germane to that appropriately compelled association. If the government cannot force someone to associate with another, then the government should not be permitted to force that person to finance the other person’s message. This standard, however, simply does not apply to compelled speech more broadly.

**\*247** Compelled speech compels espousal of the government’s message.[271](#co_footnote_F271376476655_1) And neither Barnette nor Wooley requires a compelled association as a prerequisite for compelled speech.[272](#co_footnote_F272376476655_1) In fact, if United Foods’s application of Abood/Keller applied to compelled-commercial speech, much compelled-commercial speech would fail simply because there would not be an associational component to the law in question. Because Barnette and Wooley do not require this associational component for compelled public discourse, they should not require it for compelled-commercial speech.

United Foods’s framework is a poor fit for compelled-commercial speech; the Barnette/Wooley framework is better. It provides the heightened review that United Foods instructed was important, but its test is more appropriate in this context. Barnette and Wooley instruct that compelling ideology creates serious First Amendment problems requiring heightened review.[273](#co_footnote_F273376476655_1) United Foods reveals that the fact that the compelled ideology is enmeshed in commercial speech should not alter this. When the government compels a speaker to espouse an ideological message, it forces a speaker to utter a value that is not her own, and whether this value is commercial or not, the harm is the same: violation of freedom of mind. Because the harm stemming from compelled ideology exists even when that ideology is commercial, the test used for compelled ideology should apply to compelled-commercial speech. That same heightened scrutiny is also appropriate when the government compels a commercial speaker to provide information about something other than the specific products or services she is selling.

To recap, Barnette/Wooley is the appropriate test for Category 3 regulations, Zauderer is appropriate for Category 1 regulations, and Central Hudson is appropriate for Category 2 regulations. A test suite illustrates an application of the framework and probes its effectiveness.

**\*248** 2. Test Suite

A test suite illustrates how the framework applies and tests its effectiveness. The four regulations for this test suite are as follows: (1) a law requires that advertising specify when a product is subject to 20% or greater processing oversees; (2) a law requires that fast-food restaurants post warnings on their packaging that consuming foods high in fat causes obesity; (3) a law requires that restaurants provide the recommended daily caloric intake on their menus;[274](#co_footnote_F274376476655_1) and, (4) a law requires that accountants advertise the prices of their three major competitors.

A court confronted with these regulations would first determine which category applies. Then, it would apply the appropriate test corresponding to that category.

Regulation 1 compels providing uncontroverted, factual information about a specific product sold, and it therefore falls into Category 1. The percentage of processing of a product that occurs abroad is a demonstrable fact the content of which is uncontroverted. Category 1 thus applies.

Regulation 2 likely requires disclosing controverted facts about products sold, though a court would need to study the empirical evidence to ensure that the facts are controverted. Disagreement appears to exist over whether consumption of fat necessarily causes obesity.[275](#co_footnote_F275376476655_1) Some maintain that other factors such as refined-carbohydrate overconsumption or genetics actually play the major role.[276](#co_footnote_F276376476655_1) If a court determined that the statement that consuming fat causes obesity was a controverted fact, it would classify this regulation in Category 2.

Regulation 3, which compels restaurants to provide the recommended daily caloric intake, does not contain factual information about the specific product or service sold. It compels expression of a **\*249** value judgment--individuals should consume a certain number of calories per day. Therefore, it is a Category 3 regulation.

Regulation 4, which compels accountants to provide the price information of their three, major competitors, requires providing information about something other than the specific services the commercial speakers sell. It requires providing information about competitors’ services. It therefore also falls into Category 3.

Of course, none of the three categories automatically results in affirming or striking down the regulation seeking to compel speech. Categorization simply tilts the scales in whichever direction is appropriate in light of the type of regulation. For Category 1, scales tip toward disclosure. For Category 2, they are in relative equipoise, and for Category 3, they tip against compulsion. One must still apply the relevant standard to determine whether the regulation violates the First Amendment.

A court would likely find that Regulation 1, which requires disclosing when a product is subject to more than 20% of its production abroad, is reasonably related to the government’s interest in providing information about the specific product sold to assist a reasonable consumer in deciding whether to make a purchase. Thus, the regulation should survive Zauderer.

With Regulation 2, which requires stating that fat causes obesity, a court would first determine that the speech is protected (because it is not unlawful or inherently misleading). Then, it would ascertain whether protecting public health is a substantial government interest. Finally, the court would determine whether the regulation directly advances that interest and does so by a means no more extensive than necessary to further that interest. If these requirements are satisfied, the regulation would survive Central Hudson.

A court would apply strict scrutiny to Regulation 3, which requires disclosing the suggested daily caloric intake. First, it would determine if the government has a compelling interest in compelling disclosure of this information.[277](#co_footnote_F277376476655_1) Then a court would ask whether the government’s purpose can be more narrowly achieved in a manner that does not stifle personal liberties.[278](#co_footnote_F278376476655_1) Here a court would likely determine that the government could more narrowly achieve its purpose of informing the public about the number of calories the government recommends that **\*250** individuals consume. Rather than conscripting commercial speakers to disseminate this information, the government could provide this information through PSAs, for example. The law would most likely fail under this strict scrutiny.[279](#co_footnote_F279376476655_1)

A court would also apply strict scrutiny to Regulation 4, which requires that accountants disclose the pricing of their three major competitors. It would first determine if the government has a compelling reason justifying the regulation. Assuming that informing consumers of competing prices is a sufficiently compelling interest, the court would then decide whether this interest could be more narrowly achieved through different regulation. The court would likely find that the government could achieve its objective through narrower means. For example, it could require that all accountants advertise their own price information. This would inflict less of a burden on commercial speakers because it would force them to provide only their own price information, yet it should achieve the government’s objective of informing consumers of all accountants’ prices. Regulation 4 would therefore fail strict scrutiny.

This test suite shows that the proposed framework provides a principled means to decide which test to apply to a law forcing commercial speech. The framework also furthers the speaker and listener interests that animate the compelled-and commercial-speech doctrines.[280](#co_footnote_F280376476655_1)

**Conclusion**

The Supreme Court’s development of the compelled-commercial-speech doctrine created many questions about the scope of the doctrine and how it fits into the larger scheme of First Amendment jurisprudence. This Article has attempted to resolve these questions while remaining true to the speaker and listener interests that animate both the compelled- and commercial-speech doctrines.

The Article has proposed a framework for categorizing forced-commercial-speech regulations to determine the appropriate test to apply in order to ascertain constitutionality. It has also illustrated how this **\*251** framework applies to different types of forced-speech regulations. This framework should bring clarity and consistency into a currently confused area of First Amendment law.

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| Footnotes | |
| [a1](#co_footnoteReference_Fa1376476655_ID0EOQ) | Associate Professor, Cumberland School of Law, J.D. summa cum laude 2005, University of Michigan; B.S. cum laude (Broadcast News Journalism) B.S. cum laude (Psychology) 2002, University of Florida. Many thanks to Cory Andrews, Scott Bauries, Brannon Denning, Woodrow Hartzog, and Nancy Levit whose valuable comments much improved this Article. Any errors are solely mine. I am also grateful to Samford University for funding this research, Ryan Richardson for his excellent research assistance, and Jeremy Royal for his constant support. Thank you also to the faculty at Cumberland and Stetson law schools for providing thoughtful comments about this Article at faculty colloquia. |
| [1](#co_footnoteReference_F1376476655_ID0EK5A) | News Release, Dep’t of Health & Human Servs., FDA Unveils Final Cigarette Warning Labels, (June 21, 2011), available at http:// www.hhs.gov/news/press/2011pres/06/20110621a.html. By September 2012, cigarette packages and advertisements must display nine different poignant messages about the dangers of smoking. Cigarette Health Warnings, U.S. Food & Drug Admin., http://www.fda.gov/TobaccoProducts/Labeling/CigaretteWarningLabels/default.htm (last updated Jan. 19, 2012). |
| [2](#co_footnoteReference_F2376476655_ID0EP5A) | See Dep’t of Health & Human Servs., supra note 1. |
| [3](#co_footnoteReference_F3376476655_ID0ET5A) | See Food & Drug Admin., supra note 1. |
| [4](#co_footnoteReference_F4376476655_ID0EC6A) | Some of the nation’s largest tobacco manufacturers have already sued to enjoin the cigarette regulations on this basis, and the court granted the preliminary injunction. See [R.J. Reynolds Tobacco Co. v. FDA, No. 11-1482, 2011 WL 5307391 (D.D.C. Nov. 7, 2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026464604&pubNum=0000999&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [5](#co_footnoteReference_F5376476655_ID0EQAA) | But see [Riley v. Nat’l Fed’n of the Blind, 487 U.S. 781, 796 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988084194&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_796&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_796). Riley did not involve a true hybrid of compelled and commercial speech. It involved fully protected speech that contained an arguably commercial statement, and the Court explained that the speech does not lose its full protection because it contains an arguably commercial component. See id. The Court instructed that it will not parse protected speech to extract commercial components. As the Court acknowledged, purely commercial speech is entirely different than fully protected speech with a small, commercial component. See [id. at 796](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988084194&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_796&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_796) n.9. This paper addresses purely commercial speech, and thus Riley is inapposite. |
| [6](#co_footnoteReference_F6376476655_ID0EVAA) | See Robert Post, [Transparent and Efficient Markets: Compelled Commercial Speech & Coerced Commercial Association in United Foods, Zauderer, & Abood, 40 Val. U. L. Rev. 555, 559 (2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0325687964&pubNum=0002989&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=LR&fi=co_pp_sp_2989_559&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_2989_559). |
| [7](#co_footnoteReference_F7376476655_ID0E1AA) | See [W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 627-28, 631-33 (1943)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943120939&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_627&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_627). |
| [8](#co_footnoteReference_F8376476655_ID0EEBA) | See Post, supra note 6, at 555-56, 586 (noting the confusion that the Glickman trilogy created). |
| [9](#co_footnoteReference_F9376476655_ID0E5BA) | [471 U.S. 626 (1985)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). But see infra note 114. |
| [10](#co_footnoteReference_F10376476655_ID0EPC) | See infra Part IV.B. |
| [11](#co_footnoteReference_F11376476655_ID0EZC) | See infra Part IV.B. |
| [12](#co_footnoteReference_F12376476655_ID0E1E) | See [Wooley v. Maynard, 430 U.S. 705, 714-16 (1977)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118764&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_714&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_714); [W. Va. State Bd. of Educ. v. Barnette, 319 U.S. at 642](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943120939&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_642&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_642); see also [Riley v. Nat’l Fed’n of the Blind, 487 U.S. 781, 797-98 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988084194&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_797&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_797). |
| [13](#co_footnoteReference_F13376476655_ID0ECF) | See [Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 588 n.3 (1980)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980317157&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_588&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_588) (Brennan, J., concurring) (“[T]his Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression.” (quoting [Saxbe v. Wash. Post Co., 417 U.S. 843, 862-863 (1974)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974127240&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_862&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_862) (Powell, J. dissenting))). |
| [14](#co_footnoteReference_F14376476655_ID0E3F) | [319 U.S. 624](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943120939&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [15](#co_footnoteReference_F15376476655_ID0EHG) | [430 U.S. 705](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118764&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [16](#co_footnoteReference_F16376476655_ID0EYG) | [475 U.S. 1 (1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986109852&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (plurality). |
| [17](#co_footnoteReference_F17376476655_ID0EJH) | See [Barnette, 319 U.S. at 642](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943120939&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_642&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_642). |
| [18](#co_footnoteReference_F18376476655_ID0EOH) | [Id. at 627-29](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943120939&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_627&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_627). |
| [19](#co_footnoteReference_F19376476655_ID0ETH) | [Id. at 629](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943120939&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_629&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_629). |
| [20](#co_footnoteReference_F20376476655_ID0EYH) | See id. at 642. |
| [21](#co_footnoteReference_F21376476655_ID0EGI) | Id. |
| [22](#co_footnoteReference_F22376476655_ID0EKI) | Id. |
| [23](#co_footnoteReference_F23376476655_ID0EZI) | Laurent Sacharoff, [Listener Interests in Compelled Speech Cases, 44 Cal. W. L. Rev. 329, 341-43 (2008)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0338509676&pubNum=0003038&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=LR&fi=co_pp_sp_3038_341&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_3038_341). In reaching this conclusion, Sacharoff relied on language the Barnette Court used regarding the importance of freedom of mind. See id.; see also [Wooley v. Maynard, 430 U.S. 705, 714 (1977)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118764&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_714&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_714); [Barnette, 319 U.S. at 637](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943120939&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_637&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_637). |
| [24](#co_footnoteReference_F24376476655_ID0E5I) | See Sacharoff, supra note 23, at 341-43. |
| [25](#co_footnoteReference_F25376476655_ID0E3J) | Cf. [id. at 384-85](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0338509676&pubNum=0003038&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=LR&fi=co_pp_sp_3038_384&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_3038_384) (maintaining that listener rather than speaker interests better support compelled-speech cases). |
| [26](#co_footnoteReference_F26376476655_ID0EBK) | See id. |
| [27](#co_footnoteReference_F27376476655_ID0EGK) | See id. |
| [28](#co_footnoteReference_F28376476655_ID0EXK) | [Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969133002&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_390&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_390). |
| [29](#co_footnoteReference_F29376476655_ID0EIL) | Id. (internal quotation marks omitted); cf. id. (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”). As the Supreme Court explained in Red Lion when it interpreted the First Amendment, “[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial ....” Id. This right of the public to receive information to assist it in forming judgments is essential for a self-governing democracy. As Thomas Emerson explained:  Once one accepts the premise of the Declaration of Independence--that governments “derive their just powers from the consent of the governed”--it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.  Thomas I. Emerson, The System of Freedom of Expression, in Mass Media Law 13 (Marc A. Franklin et al. eds., 7th ed. 2005). If listeners receive forced expression, individual judgments and the common judgment will be infected with the government’s coercion. |
| [30](#co_footnoteReference_F30376476655_ID0EML) | See [Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n, 475 U.S. 1, 8 (1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986109852&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_8&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_8) (plurality); see also [Red Lion, 395 U.S. at 390](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969133002&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_390&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_390). |
| [31](#co_footnoteReference_F31376476655_ID0EHM) | [W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943120939&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_632&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_632). |
| [32](#co_footnoteReference_F32376476655_ID0EMM) | Id. |
| [33](#co_footnoteReference_F33376476655_ID0ERM) | See Sacharoff, supra note 23, at 384-85. |
| [34](#co_footnoteReference_F34376476655_ID0E5M) | [Barnette, 319 U.S. at 641](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943120939&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_641&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_641). |
| [35](#co_footnoteReference_F35376476655_ID0ECN) | Id. |
| [36](#co_footnoteReference_F36376476655_ID0ERN) | See Sacharoff, supra note 23, at 384-85. |
| [37](#co_footnoteReference_F37376476655_ID0EWN) | See id. |
| [38](#co_footnoteReference_F38376476655_ID0E5N) | See id. |
| [39](#co_footnoteReference_F39376476655_ID0EJP) | [430 U.S. 705 (1977)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118764&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [40](#co_footnoteReference_F40376476655_ID0EOP) | [Id. at 707](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118764&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_707&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_707). |
| [41](#co_footnoteReference_F41376476655_ID0ESP) | [Id. at 707-08](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118764&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_707&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_707). |
| [42](#co_footnoteReference_F42376476655_ID0EKQ) | Id. at 713. |
| [43](#co_footnoteReference_F43376476655_ID0EPQ) | See id. at 717. |
| [44](#co_footnoteReference_F44376476655_ID0EBR) | Id. at 714 (internal quotation marks omitted). |
| [45](#co_footnoteReference_F45376476655_ID0E3R) | Id. at 715. |
| [46](#co_footnoteReference_F46376476655_ID0E6R) | See id. |
| [47](#co_footnoteReference_F47376476655_ID0E2S) | See [Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n, 475 U.S. 1, 4-6, 16 & n.13, 17, 20-21 (1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986109852&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_4&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_4). |
| [48](#co_footnoteReference_F48376476655_ID0EJT) | [Id. at 8](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986109852&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_8&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_8). |
| [49](#co_footnoteReference_F49376476655_ID0EXT) | Id. (internal quotation marks omitted). |
| [50](#co_footnoteReference_F50376476655_ID0EEU) | See id. at 17-18 (emphasis omitted). |
| [51](#co_footnoteReference_F51376476655_ID0EKV) | See supra Part I. |
| [52](#co_footnoteReference_F52376476655_ID0ESV) | See [Bd. of Trs. v. Fox, 492 U.S. 469, 477 (1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989096929&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_477&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_477). |
| [53](#co_footnoteReference_F53376476655_ID0E3V) | See [Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_637&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_637); see also [Fox, 492 U.S. at 473-74](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989096929&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_473&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_473) (noting that the test for whether speech is commercial is whether it proposes a commercial transaction). A combination of other factors may also suggest speech is commercial. See [Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983129662&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_66&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_66). According to the Court, speech may be commercial where (1) it is an advertisement, (2) it refers to a specific product, or (3) it is motivated by an economic interest in selling product. [United States v. Wenger, 427 F.3d 840, 847 (10th Cir. 2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2007568558&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_847&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_847) (citing [Bolger, 463 U.S. at 66-67](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983129662&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_66&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_66)). The precise contours of “commercial speech” are unsettled. See, e.g., [Zauderer, 471 U.S. at 637](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_637&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_637). Setting these limits is beyond the scope of this paper. |
| [54](#co_footnoteReference_F54376476655_ID0E4W) | See [Valentine v. Chrestensen, 316 U.S. 52, 54 (1942)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1942121646&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_54&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_54); see also Daniel E. Troy, Do We Have a Beef with the Court? Compelled Commercial Speech Upheld, But It Could Have Been Worse, 2004-5 Cato Sup. Ct. Rev. 125, 128-29 (2005). |
| [55](#co_footnoteReference_F55376476655_ID0E1X) | [Valentine, 316 U.S. at 54](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1942121646&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_54&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_54). |
| [56](#co_footnoteReference_F56376476655_ID0E6X) | See Troy, supra note 54, at 135. |
| [57](#co_footnoteReference_F57376476655_ID0EKY) | [421 U.S. 809 (1975)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975129821&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [58](#co_footnoteReference_F58376476655_ID0EZY) | [Id. at 809](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975129821&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_809&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_809). |
| [59](#co_footnoteReference_F59376476655_ID0EEZ) | [425 U.S. 748 (1976)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142375&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [60](#co_footnoteReference_F60376476655_ID0ERZ) | [Id. at 759](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142375&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_759&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_759). |
| [61](#co_footnoteReference_F61376476655_ID0EE1) | [Id. at 762](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142375&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_762&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_762). |
| [62](#co_footnoteReference_F62376476655_ID0EJ1) | Id. |
| [63](#co_footnoteReference_F63376476655_ID0EN1) | See R. Michael Hoefges, [Regulating Professional Services Advertising: Current Constitutional Parameters & Issues Under the First Amendment Commercial Speech Doctrine, 24 Cardozo Arts & Ent. L.J. 953, 961 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0330543961&pubNum=0001109&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=LR&fi=co_pp_sp_1109_961&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_1109_961). |
| [64](#co_footnoteReference_F64376476655_ID0E11) | See Va. [State Bd. of Pharm., 425 U.S. at 771 & n.24, 772-73](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142375&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_771&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_771). |
| [65](#co_footnoteReference_F65376476655_ID0EC2) | See [Bd. of Trs. v. Fox, 492 U.S. 469, 477 (1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989096929&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_477&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_477); see also Troy, supra note 54, at 128-29. The Court’s “jurisprudence has emphasized that commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.” [Fox, 492 U.S. at 477](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989096929&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_477&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_477) (internal quotation marks omitted). |
| [66](#co_footnoteReference_F66376476655_ID0EJ2) | Va. [State Bd. of Pharm., 425 U.S. at 771 & n.24, 772](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142375&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_771&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_771). |
| [67](#co_footnoteReference_F67376476655_ID0EY2) | See [id. at 771](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142375&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_771&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_771) n.24. |
| [68](#co_footnoteReference_F68376476655_ID0E42) | Id. |
| [69](#co_footnoteReference_F69376476655_ID0EC3) | See id. |
| [70](#co_footnoteReference_F70376476655_ID0EG3) | Id. |
| [71](#co_footnoteReference_F71376476655_ID0EJ4) | See, e.g., [44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522-23 & n.4 (1996)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996113149&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_522&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_522) (Thomas, J., concurring) (internal quotation marks omitted). |
| [72](#co_footnoteReference_F72376476655_ID0EN4) | See, e.g., [Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1342-43 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021490121&pubNum=0000708&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_708_1342&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1342) (Thomas, J., concurring) (noting that he has never been persuaded that there is a basis to treat laws restricting commercial speech with relaxed scrutiny and that he would be willing to reexamine the even-more relaxed scrutiny afforded factual-disclosure requirements); [Borgner v. Fla. Bd. of Dentistry, 537 U.S. 1080, 1080 (2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002494923&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (Thomas, J., dissenting from cert. denial) (“This case presents an excellent opportunity to clarify some oft-recurring issues in the First Amendment treatment of commercial speech and to provide lower courts with guidance on the subject of state-mandated disclaimers.”). |
| [73](#co_footnoteReference_F73376476655_ID0EC5) | [131 S. Ct. 2653 (2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025536619&pubNum=0000708&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [74](#co_footnoteReference_F74376476655_ID0EH5) | [Id. at 2659](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025536619&pubNum=0000708&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_708_2659&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2659). |
| [75](#co_footnoteReference_F75376476655_ID0EM5) | See [id. at 2663-65](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025536619&pubNum=0000708&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_708_2663&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2663). |
| [76](#co_footnoteReference_F76376476655_ID0EQ5) | See id. |
| [77](#co_footnoteReference_F77376476655_ID0E45) | [Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm’n, 447 U.S. 557, 566 (1980)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980116785&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_566&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_566). |
| [78](#co_footnoteReference_F78376476655_ID0EC6) | See [Sorrell, 131 S. Ct. at 2667](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025536619&pubNum=0000708&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_708_2667&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2667); see also infra Part II.C.1. |
| [79](#co_footnoteReference_F79376476655_ID0EH6) | See [Sorrell, 131 S. Ct. at 2667](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025536619&pubNum=0000708&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_708_2667&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2667). |
| [80](#co_footnoteReference_F80376476655_ID0EY6) | See [id. at 2667-68](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025536619&pubNum=0000708&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_708_2667&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2667). |
| [81](#co_footnoteReference_F81376476655_ID0EBA) | See infra Part II.C. |
| [82](#co_footnoteReference_F82376476655_ID0E4A) | [Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762-63 (1976)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142375&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_762&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_762). |
| [83](#co_footnoteReference_F83376476655_ID0ECB) | [Id. at 753-54](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142375&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_753&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_753). |
| [84](#co_footnoteReference_F84376476655_ID0EHB) | See [id. at 763](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142375&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_763&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_763). |
| [85](#co_footnoteReference_F85376476655_ID0EYB) | Id. |
| [86](#co_footnoteReference_F86376476655_ID0E3B) | Id. at 762. |
| [87](#co_footnoteReference_F87376476655_ID0EUC) | Id. at 764. |
| [88](#co_footnoteReference_F88376476655_ID0EZC) | Id. at 765. |
| [89](#co_footnoteReference_F89376476655_ID0E5C) | See id. |
| [90](#co_footnoteReference_F90376476655_ID0EDD) | Id. |
| [91](#co_footnoteReference_F91376476655_ID0EQD) | Id. |
| [92](#co_footnoteReference_F92376476655_ID0ELE) | See id. |
| [93](#co_footnoteReference_F93376476655_ID0EUE) | See id. at 770. |
| [94](#co_footnoteReference_F94376476655_ID0EBF) | See id. at 763-65. |
| [95](#co_footnoteReference_F95376476655_ID0ESF) | Id. at 762. |
| [96](#co_footnoteReference_F96376476655_ID0EXF) | See [Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_651&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_651). |
| [97](#co_footnoteReference_F97376476655_ID0E2F) | See [Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 479 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997134126&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_479&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_479) (Souter, J., dissenting). |
| [98](#co_footnoteReference_F98376476655_ID0EVH) | [447 U.S. 557, 566 (1980)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980116785&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_566&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_566). |
| [99](#co_footnoteReference_F99376476655_ID0E4H) | See id.; [Fla. Bar v. Went for It, Inc., 515 U.S. 618, 623 (1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995132542&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_623&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_623). |
| [100](#co_footnoteReference_F100376476655_ID0EC) | Cent. [Hudson, 447 U.S. at 566](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980116785&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_566&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_566). The Supreme Court has distinguished actually misleading speech from potentially misleading speech. “Actually or inherently misleading commercial speech may be prohibited entirely, but ‘[s]tates may not completely ban potentially misleading speech if narrower limitations can ensure that the information is presented in a nonmisleading manner.”’ Christopher P. Guzelian, [True and False Speech, 51 B.C. L. Rev. 669, 706 n.131 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0353902122&pubNum=0001101&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=LR&fi=co_pp_sp_1101_706&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_1101_706) (quoting [Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, 512 U.S. 136, 152 (1994)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994126963&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_152&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_152)). According to Guzelian, “[a] ctually misleading commercial speech seems to require scientific knowledge that the speech caused injurious false perceptions.” Id. But, what is not clear is “what modicum of scientific evidence (short of scientific knowledge) suffices to say that commercial speech is potentially misleading--that is, that the speech has potentially caused injurious false perceptions, but is not known to have done so.” Id. |
| [101](#co_footnoteReference_F101376476655_ID0EM) | Cent. [Hudson, 447 U.S. at 566](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980116785&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_566&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_566). A court may not supplant the government’s stated interests with other suppositions. [Fla. Bar, 515 U.S. at 624](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995132542&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_624&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_624). |
| [102](#co_footnoteReference_F102376476655_ID0EQ) | Cent. [Hudson, 447 U.S. at 566](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980116785&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_566&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_566). |
| [103](#co_footnoteReference_F103376476655_ID0E6) | See Post, supra note 6, at 558. |
| [104](#co_footnoteReference_F104376476655_ID0EG) | See Troy, supra note 54, at 128-29; see also supra notes 72-82 and accompanying text. |
| [105](#co_footnoteReference_F105376476655_ID0E2) | See [Milavetz, Gallop, & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1342-43 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021490121&pubNum=0000708&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_708_1342&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1342) (Thomas, J., concurring). |
| [106](#co_footnoteReference_F106376476655_ID0EE) | [471 U.S. 626 (1985)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [107](#co_footnoteReference_F107376476655_ID0EN) | See [id. at 651](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_651&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_651). |
| [108](#co_footnoteReference_F108376476655_ID0E3) | [Id. at 633](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_633&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_633). |
| [109](#co_footnoteReference_F109376476655_ID0EB) | See id. at 650. |
| [110](#co_footnoteReference_F110376476655_ID0EG) | See id. |
| [111](#co_footnoteReference_F111376476655_ID0EL) | See id. at 650-51. |
| [112](#co_footnoteReference_F112376476655_ID0EO) | See id. |
| [113](#co_footnoteReference_F113376476655_ID0ET) | Id. at 651. The test goes by various names. See Dayna B. Royal, [The Skinny on the Federal Menu-Labeling Law & Why it Should Survive a First Amendment Challenge, 10 First Amendment L. Rev. 140, 184 & nn.233-35 (2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0370023462&pubNum=0189892&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=LR&fi=co_pp_sp_189892_184&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_189892_184). |
| [114](#co_footnoteReference_F114376476655_ID0EA) | [Zauderer, 471 U.S. at 651](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_651&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_651). An issue has arisen post-Zauderer over whether its test or the test of Central Hudson applies where a factual-disclosure does not target consumer deception. Many disagree. Compare [United States v. Philip Morris USA Inc., 566 F.3d 1095, 1144-45 (D.C. Cir. 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018886285&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_1144&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1144) (suggesting that for disclosure requirements to be constitutional under Zauderer, they must be geared towards thwarting efforts to mislead consumers or capitalize on prior deceptions), and [Allstate Ins. Co. v. Abbott, 495 F.3d 151, 166 (5th Cir. 2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012825771&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_166&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_166) (finding that unlike Zauderer, the case at issue involves minimal potential for customer confusion; therefore, Central Hudson applies), and [Int’l Dairy Foods Ass’n v. Amestoy, 92 F.3d 67, 71-72 (2d Cir. 1996)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996179932&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_71&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_71) (applying Central Hudson where law compels commercial speech), and [United States v. Wenger, 427 F.3d 840, 849 (10th Cir. 2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2007568558&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_849&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_849) (explaining its test as a combination of Central Hudson and Zauderer whereby satisfying Zauderer satisfies part of Central Hudson), and [Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d 950, 966 (9th Cir. 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018183992&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_966&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_966) (categorizing Zauderer’s standard as “the factual information and deception prevention” standard (emphasis added)), with N.Y. State Rest. [Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018151622&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_133&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_133) (noting that “Zauderer’s holding was broad enough to encompass nonmisleading disclosure requirements”), and [Pac. Gas & Elec. Co. v. Pub. Util. Comm’n, 475 U.S. 1, 16 n.12 (1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986109852&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_16&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_16) (plurality) (“The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations.”), and [Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 848-51 (9th Cir. 2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003623562&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_848&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_848) (analogizing to Zauderer and finding that requiring municipalities to engage in speech educating the public about the impacts of storm-water discharge and about the hazards of improper waste disposal is a proper required disclosure under the First Amendment and is not compelled speech). This disagreement over whether Zauderer applies beyond disclosure requirements that target consumer deception exists because Zauderer phrased its reasonable relationship test as it applied in that case, which incorporated the government interest at stake there, preventing consumer deception. See [Zauderer, 471 U.S. at 651](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_651&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_651). The Supreme Court has not conclusively resolved the question, though a few cases have suggested, while not squarely holding, that Zauderer is limited to preventing consumer deception. See [Milavetz, Gallop, & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1328-29 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021490121&pubNum=0000708&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_708_1328&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1328) (applying Zauderer because the law targeted misleading speech and imposed a disclosure requirement rather than an affirmative speech prohibition); [United States v. United Foods, Inc., 533 U.S. 405, 416 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_416&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_416) (distinguishing Zauderer because there was no suggestion in United Foods that the assessments were imposed to eliminate consumer deception); see also [Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, 512 U.S. 136, 142-47 (1994)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994126963&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_142&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_142) (relying on both Zauderer and Central Hudson and holding that an incredibly specific disclosure that effectively created a prohibition was unconstitutional, and limiting its holding to the record before it). This paper does not resolve the question of whether Zauderer actually applies where the government interest is something other than targeting consumer deception. Instead, it addresses the normative question--whether Zauderer should apply in such instances. See infra Part IV. |
| [115](#co_footnoteReference_F115376476655_ID0EW) | See [Zauderer, 471 U.S. at 650-51](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_650&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_650). |
| [116](#co_footnoteReference_F116376476655_ID0E2) | See [id. at 651](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_651&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_651). |
| [117](#co_footnoteReference_F117376476655_ID0EJ) | Id. |
| [118](#co_footnoteReference_F118376476655_ID0EO) | See id. at 650-51. |
| [119](#co_footnoteReference_F119376476655_ID0ET) | See id. at 650. |
| [120](#co_footnoteReference_F120376476655_ID0EX) | Id. Where on the other hand a law prohibits speech, Central Hudson applies. See id. at 638. Speech prohibitions are beyond the scope of this paper, which addresses only laws requiring commercial expression. |
| [121](#co_footnoteReference_F121376476655_ID0ET) | Id. at 651. |
| [122](#co_footnoteReference_F122376476655_ID0EY) | Id. |
| [123](#co_footnoteReference_F123376476655_ID0E4) | See supra Part II.B. |
| [124](#co_footnoteReference_F124376476655_ID0EB) | See [Zauderer, 471 U.S. at 651](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_651&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_651). |
| [125](#co_footnoteReference_F125376476655_ID0EQ) | See [id. at 650-51](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_650&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_650). Scholar Robert Post uses the term “public discourse” to describe such speech. See Post, supra note 6, at 559. |
| [126](#co_footnoteReference_F126376476655_ID0E5) | [Zauderer, 471 U.S. at 650-51](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_650&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_650). |
| [127](#co_footnoteReference_F127376476655_ID0EC) | See id.; see also Pharm. [Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 309 (1st Cir. 2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2007659419&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_309&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_309). |
| [128](#co_footnoteReference_F128376476655_ID0EU) | See [Zauderer, 471 U.S. at 650-51](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_650&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_650). |
| [129](#co_footnoteReference_F129376476655_ID0EZ) | See supra Part II.C.; see also supra note 114. |
| [130](#co_footnoteReference_F130376476655_ID0E4) | See [Zauderer, 471 U.S. at 651](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_651&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_651); see also Post, supra note 6, at 559-62. |
| [131](#co_footnoteReference_F131376476655_ID0EP) | See [Meese v. Keene, 481 U.S. 465, 480-81 (1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987052726&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_480&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_480). |
| [132](#co_footnoteReference_F132376476655_ID0EU) | See supra Part I. |
| [133](#co_footnoteReference_F133376476655_ID0EF) | But see supra note 1. |
| [134](#co_footnoteReference_F134376476655_ID0EK) | But see supra note 1. As the Supreme Court noted in Riley v. Nat’l Fed’n of the Blind, “[p]urely commercial speech is more susceptible to compelled disclosure requirements” than fully protected speech. [487 U.S. 781, 796 n.9 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988084194&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_796&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_796). |
| [135](#co_footnoteReference_F135376476655_ID0EQ) | [521 U.S. 457 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997134126&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [136](#co_footnoteReference_F136376476655_ID0E2) | [533 U.S. 405 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [137](#co_footnoteReference_F137376476655_ID0EG) | [544 U.S. 550 (2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006652306&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [138](#co_footnoteReference_F138376476655_ID0E2) | For purposes of the First Amendment values at stake here, compelled speech and compelled subsidy are the same. See Post, supra note 6, at 563. |
| [139](#co_footnoteReference_F139376476655_ID0EA) | [Johanns, 544 U.S. at 557](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006652306&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_557&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_557). |
| [140](#co_footnoteReference_F140376476655_ID0EF) | Id. |
| [141](#co_footnoteReference_F141376476655_ID0EK) | [Id. at 557-58](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006652306&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_557&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_557). |
| [142](#co_footnoteReference_F142376476655_ID0EO) | See id. |
| [143](#co_footnoteReference_F143376476655_ID0E4) | See Post, supra note 6, at 563 (noting that the values at stake in compelled-speech cases are the same as those at stake in compelled-subsidy cases). |
| [144](#co_footnoteReference_F144376476655_ID0EI) | [533 U.S. 405 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [145](#co_footnoteReference_F145376476655_ID0EZ) | [521 U.S. 457 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997134126&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [146](#co_footnoteReference_F146376476655_ID0EA) | Id. |
| [147](#co_footnoteReference_F147376476655_ID0EF) | [Id. at 460-61](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997134126&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_460&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_460). |
| [148](#co_footnoteReference_F148376476655_ID0ET) | Id. at 462. |
| [149](#co_footnoteReference_F149376476655_ID0EP) | See id. at 469. |
| [150](#co_footnoteReference_F150376476655_ID0EU) | See id. |
| [151](#co_footnoteReference_F151376476655_ID0EZ) | Id. at 469 & n.12. |
| [152](#co_footnoteReference_F152376476655_ID0E5) | Id. |
| [153](#co_footnoteReference_F153376476655_ID0ED) | Id. at 469-70. |
| [154](#co_footnoteReference_F154376476655_ID0EI) | Id. |
| [155](#co_footnoteReference_F155376476655_ID0EM) | See [United States v. United Foods, Inc., 533 U.S. 405, 410 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_410&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_410). |
| [156](#co_footnoteReference_F156376476655_ID0E2) | [Glickman, 521 U.S. at 470-71](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997134126&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_470&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_470). |
| [157](#co_footnoteReference_F157376476655_ID0EA) | Id. |
| [158](#co_footnoteReference_F158376476655_ID0EF) | See [id. at 470 & n.13, 471](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997134126&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_470&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_470). |
| [159](#co_footnoteReference_F159376476655_ID0EC) | See id. at 469-70. |
| [160](#co_footnoteReference_F160376476655_ID0EQ) | Id. at 472. |
| [161](#co_footnoteReference_F161376476655_ID0EZ) | See id. at 467 & n.10, 468 & n.11, 471-72. |
| [162](#co_footnoteReference_F162376476655_ID0EI) | Id. at 477. |
| [163](#co_footnoteReference_F163376476655_ID0EN) | See id. |
| [164](#co_footnoteReference_F164376476655_ID0ES) | See id. at 470. |
| [165](#co_footnoteReference_F165376476655_ID0EX) | See id. at 467 & n.10, 468, 472. |
| [166](#co_footnoteReference_F166376476655_ID0EF) | Id. at 477. |
| [167](#co_footnoteReference_F167376476655_ID0ES) | See id. at 472. |
| [168](#co_footnoteReference_F168376476655_ID0EC) | See supra Part I. |
| [169](#co_footnoteReference_F169376476655_ID0EZ) | See [United States v. United Foods, Inc., 533 U.S. 405, 410-11 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_410&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_410). |
| [170](#co_footnoteReference_F170376476655_ID0EB) | See infra Part IV. |
| [171](#co_footnoteReference_F171376476655_ID0EL) | See [Glickman, 521 U.S. at 467 n.10, 468 & n.11](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997134126&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_467&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_467). |
| [172](#co_footnoteReference_F172376476655_ID0EF) | See [United Foods, 533 U.S. at 408](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_408&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_408). |
| [173](#co_footnoteReference_F173376476655_ID0EN) | See [id. at 408-09](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_408&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_408). |
| [174](#co_footnoteReference_F174376476655_ID0EV) | See [id. at 410-11, 413](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_410&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_410). |
| [175](#co_footnoteReference_F175376476655_ID0E4) | See id. at 410. |
| [176](#co_footnoteReference_F176376476655_ID0EL) | Id. at 410-11. |
| [177](#co_footnoteReference_F177376476655_ID0EP) | Id. at 411. |
| [178](#co_footnoteReference_F178376476655_ID0E5) | See [Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 467 n.10, 468 & n.11, 472 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997134126&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_467&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_467). |
| [179](#co_footnoteReference_F179376476655_ID0ED) | See [United Foods, 533 U.S. at 411](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_411&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_411). |
| [180](#co_footnoteReference_F180376476655_ID0EV) | Id. |
| [181](#co_footnoteReference_F181376476655_ID0EE) | See [United Foods, 533 U.S. at 411](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_411&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_411); [Glickman, 521 U.S. at 472](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997134126&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_472&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_472). Scholar Robert Post characterizes United Foods a little differently than I do. He claims United Foods repudiated Glickman’s position “that the compelled subsidization of speech does not raise First Amendment concerns unless the compelled speech is ideological in nature.” Post, supra note 6, at 557, 574. I claim it repudiated Glickman’s position that commercial speech cannot contain ideology. In other words, he characterizes United Foods as holding that compelled speech need not be ideological. I characterize it as holding that commercial speech may contain ideology. His characterization may more closely mirror the Court’s language in United Foods, but my interpretation is also permissible. See [United Foods, 533 U.S. at 410-11](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_410&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_410). Though the distinction is more form over substance, it has consequences for the framework I propose later in the paper. |
| [182](#co_footnoteReference_F182376476655_ID0EJ) | [United Foods, 533 U.S. at 410-411](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_410&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_410). |
| [183](#co_footnoteReference_F183376476655_ID0EO) | See Post, supra note 6, at 576-78. |
| [184](#co_footnoteReference_F184376476655_ID0EW) | [United Foods, 533 U.S. at 411-12](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_411&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_411). |
| [185](#co_footnoteReference_F185376476655_ID0E1) | See id. |
| [186](#co_footnoteReference_F186376476655_ID0E5) | Id. |
| [187](#co_footnoteReference_F187376476655_ID0ET) | See Post, supra note 6, at 572 (noting that “Glickman offered three, logically distinct and independent justifications for its holding.”). |
| [188](#co_footnoteReference_F188376476655_ID0EN) | See [United Foods, 533 U.S. at 413](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_413&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_413). |
| [189](#co_footnoteReference_F189376476655_ID0EY) | [431 U.S. 209 (1977)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118782&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [190](#co_footnoteReference_F190376476655_ID0ED) | [496 U.S. 1 (1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990086713&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [191](#co_footnoteReference_F191376476655_ID0EI) | See [United Foods, 533 U.S. at 413-14](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_413&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_413). Abood and its progeny say that paying for speech is equivalent to speaking. Kathleen M. Sullivan & Robert C. Post, [It’s What’s for Lunch: Nectarines, Mushrooms, & Beef--The First Amendment & Compelled-Commercial Speech, 41 Loy. L.A. L. Rev. 359, 363 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0339197350&pubNum=0001184&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=LR&fi=co_pp_sp_1184_363&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_1184_363). And if the government compels someone to fund speech and then uses that money for purposes not germane to the valid reason justifying the exaction, the funder has “a conscientious objector’s right to have a pro rata refund of [her] funds to the extent they are going to the non-germane purpose.” [Id. at 363-64](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0339197350&pubNum=0001184&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=LR&fi=co_pp_sp_1184_363&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_1184_363). Neither Abood nor Keller arises in the commercial-speech arena. See [Keller, 496 U.S. at 4](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990086713&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_4&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_4) (involving members of California state bar who sued claiming bar’s use of bar dues to finance ideological and political causes with which members disagreed violated First Amendment rights); [Abood, 431 U.S. at 211, 221-23](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118782&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_211&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_211) (involving law that compelled state and local employees to pay fees to union so that it could act as collective-bargaining agent of all employees even if non-union members); see also [Lehnert v. Ferris Faculty Ass’n, 500 U.S. 507, 516-19 (1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991099281&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_516&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_516) (explaining that union fees may be used for expenses that are germane to collective bargaining, and this does not include political or ideological activities); [Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 447-457 (1984)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984120054&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_447&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_447) (considering whether union could use fees for various purposes attendant to running a union). |
| [192](#co_footnoteReference_F192376476655_ID0EQ) | See [United Foods, 533 U.S. at 414-15](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_414&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_414). |
| [193](#co_footnoteReference_F193376476655_ID0E1) | See [id. at 415](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_415&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_415). |
| [194](#co_footnoteReference_F194376476655_ID0EH) | See [id. at 415-16](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_415&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_415). |
| [195](#co_footnoteReference_F195376476655_ID0E6) | See supra Part I. Compelled subsidy of government speech does not even raise First Amendment problems. See [Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 562 (2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006652306&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_562&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_562). |
| [196](#co_footnoteReference_F196376476655_ID0EW) | See [Johanns, 544 U.S. at 553](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006652306&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_553&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_553). |
| [197](#co_footnoteReference_F197376476655_ID0ED) | [Id. at 550](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006652306&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_550&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_550). |
| [198](#co_footnoteReference_F198376476655_ID0EU) | See [id. at 555-56](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006652306&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_555&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_555). |
| [199](#co_footnoteReference_F199376476655_ID0E5) | Id. at 556. |
| [200](#co_footnoteReference_F200376476655_ID0EC) | See id. at 555-56. |
| [201](#co_footnoteReference_F201376476655_ID0ER) | See id. at 558-59. |
| [202](#co_footnoteReference_F202376476655_ID0EW) | See id. at 558 & n.3. |
| [203](#co_footnoteReference_F203376476655_ID0E1) | See id. at 558 & n.3, 559, 564-65. |
| [204](#co_footnoteReference_F204376476655_ID0EJ) | See id. at 559, 562-63. Where government speech is not involved, Johanns leaves United Foods intact. See Post, supra note 6, at 557. |
| [205](#co_footnoteReference_F205376476655_ID0EO) | See supra Part I. |
| [206](#co_footnoteReference_F206376476655_ID0ET) | See [Johanns, 544 U.S. at 564, 565 & n.8, 566](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006652306&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_564&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_564) (distinguishing compelled speech from subsidy); see also supra Part I. |
| [207](#co_footnoteReference_F207376476655_ID0EO) | As already noted, it is unsettled whether Zauderer or Central Hudson applies to factual-disclosure requirements where the government interest is not preventing consumer deception. See supra note 114. |
| [208](#co_footnoteReference_F208376476655_ID0E6) | United Foods modified First Amendment landscape in a number of ways, which scholar Robert Post describes as “novel” and “seriously misguided.” See Post, supra note 6, at 557. |
| [209](#co_footnoteReference_F209376476655_ID0EE) | See supra Part III.B. |
| [210](#co_footnoteReference_F210376476655_ID0EI) | [827 F.2d 1169 (7th Cir. 1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987108878&pubNum=0000350&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)). |
| [211](#co_footnoteReference_F211376476655_ID0EQ) | See [id. at 1171](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987108878&pubNum=0000350&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_350_1171&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_1171). |
| [212](#co_footnoteReference_F212376476655_ID0EI) | [Id. at 1171](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987108878&pubNum=0000350&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_350_1171&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_1171) n.2 (internal quotation marks omitted). |
| [213](#co_footnoteReference_F213376476655_ID0EY) | See id. at 1173. |
| [214](#co_footnoteReference_F214376476655_ID0EG) | See id. |
| [215](#co_footnoteReference_F215376476655_ID0EX) | See id. at 1172-74. |
| [216](#co_footnoteReference_F216376476655_ID0EL) | See id. at 1173 (charachterizing Zauderer as holding “that sellers can be forced to declare information about themselves needed to avoid deception”); see also supra note 114. |
| [217](#co_footnoteReference_F217376476655_ID0ER) | See [Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 469-70 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997134126&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_469&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_469). |
| [218](#co_footnoteReference_F218376476655_ID0EW) | Cf. [N.Y. Times v. Sullivan, 376 U.S. 254, 265-66 (1964)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124777&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_265&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_265) (explaining that despite that an advertisement was the medium for communicating a message, the message’s “existence and objectives [we]re matters of the highest public interest and concern” requiring heightened First Amendment review). The importance of the message the advertisement presented led the Court to classify the speech as non-commercial. See [id. at 266](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124777&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_266&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_266). |
| [219](#co_footnoteReference_F219376476655_ID0E2) | See 7 Oxford English Dictionary 622 (2d ed. 1989) (“A systematic scheme of ideas, usu. relating to politics or society, or to the conduct of a class or group, and regarded as justifying actions, esp. one that is held implicitly or adopted as a whole and maintained regardless of the course events.”). |
| [220](#co_footnoteReference_F220376476655_ID0ER) | See infra Part IV.B. |
| [221](#co_footnoteReference_F221376476655_ID0EV) | Admittedly, almost all advertising is value-laden and prescriptive. Advertising attempts to persuade consumers to purchase products. But the problem arises when the government prescribes that ideology rather than permitting commercial speakers to espouse their own ideology. Speakers are free to spread their own ideological messages, but the First Amendment prevents the government from coercing the content of those messages without satisfying heightened scrutiny. Cf. [Wooley v. Maynard, 430 U.S. 705, 714-16 (1977)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118764&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_714&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_714). The government is permitted, however, to compel espousal of some purely factual information. See [Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_651&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_651). |
| [222](#co_footnoteReference_F222376476655_ID0EH) | See [United States v. United Foods, Inc., 533 U.S. 405, 410-16 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_410&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_410). |
| [223](#co_footnoteReference_F223376476655_ID0EU) | If instead, the message were that mushrooms contain vitamin B, that would be an uncontroversial fact about the specific product sold, and Zauderer should apply, unless of course mixed empirical support exists that mushrooms contain this vitamin, in which case, Central Hudson should apply. See infra Part IV.B. |
| [224](#co_footnoteReference_F224376476655_ID0EF) | See supra Part I. |
| [225](#co_footnoteReference_F225376476655_ID0EU) | As discussed above, United Foods did not frame the issue this way. United Foods notes the point that the messages in Glickman and United Foods are not political or ideological, but it maintains that the speech is in need of heightened protection anyway. See [United Foods, 533 U.S. at 411-13](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_411&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_411). This suggests that commercial speech, though not ideological, requires protection. My position is a slight twist on this. I maintain that speech may be commercial and ideological and thus deserves protection. |
| [226](#co_footnoteReference_F226376476655_ID0E5) | The relevant question is whether evidence supports the existence of the facts--and thus whether the facts themselves are controverted--not whether the desire to share the information is controverted. |
| [227](#co_footnoteReference_F227376476655_ID0EJ) | This Framework only applies to commercial speech. |
| [228](#co_footnoteReference_F228376476655_ID0EC) | [Riley v. Nat’l Fed’n of the Blind, 487 U.S. 781 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988084194&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), does not prevent this distinction. There the Court instructed that where the government compels fully protected speech, it makes no difference whether the speech is fact or opinion. See [487 U.S. at 797-98](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988084194&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_797&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_797). As Riley acknowledged, it did not address where the overall speech is commercial and thus not fully protected. See [id. at 795-96](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988084194&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_795&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_795) & n.9; see also supra note 5. This is the same reason why cases like [Hurley v. Irish-American Gay, Lesbian, & Bisexual Group, 515 U.S. 557 (1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995130182&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), [Pacific Gas & Electric Co. v. Public Utility Commission, 475 U.S. 1 (1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986109852&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)) (plurality), and [Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974127241&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), do not foreclose the framework offered in this paper. They dealt with laws that interfered with a speaker’s expressive message. Cf. [Rumsfeld v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47, 63-64 (2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008590755&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_63&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_63) (describing these cases in this fashion). Under the framework proposed here, where a law compels ideology and thus interferes with a speaker’s expressive message, it too receives heightened scrutiny. See infra Part IV.B.1.ii. |
| [229](#co_footnoteReference_F229376476655_ID0EY) | “Fact” means truth. 5 Oxford English Dictionary 651 (2d. ed. 1989) (“Something that has really occurred or is actually the case; something certainly known to be of this character; hence, a particular truth known by actual observation or authentic testimony, as opposed to what is merely inferred, or to a conjecture or fiction; a datum of experience, as distinguished from the conclusions that may be based upon it.” (emphasis added)). |
| [230](#co_footnoteReference_F230376476655_ID0ED) | That a fringe, irrational person refuses to acknowledge the truth does not render it non-truth. |
| [231](#co_footnoteReference_F231376476655_ID0EH) | Admittedly, philosophers have long struggled with this fact/value distinction. See, e.g., J.P. Smit, The Supposed “Inseparability” of Fact and Value, 22 S. Afr. J. Philos. 51, 51-60 (2003). |
| [232](#co_footnoteReference_F232376476655_ID0EZ) | See Mass Media Law, supra note 29, at 252. |
| [233](#co_footnoteReference_F233376476655_ID0E5) | See, e.g., [Jordan v. Kollman, 612 S.E.2d 203, 206 (Va. 2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006512546&pubNum=0000711&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_711_206&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_711_206). |
| [234](#co_footnoteReference_F234376476655_ID0EM) | Id. (internal quotation marks omitted). |
| [235](#co_footnoteReference_F235376476655_ID0EJ) | Of course the decision to reveal this information involves individual discretion. There are numerous facts that people might think should or should not be revealed. Though the decision to reveal certain facts involves personal choice, this does not render the information non-factual. |
| [236](#co_footnoteReference_F236376476655_ID0E4) | Again, this is not asking whether reasonable people disagree on whether to share information but whether they disagree on the veracity of the content of the message. |
| [237](#co_footnoteReference_F237376476655_ID0E4) | There are some who maintain that cigarettes do not necessarily cause lung cancer, but courts will need to decide what weight to give this evidence. See, e.g., Gayle Sulik, What We Could Learn from George Burns About Breast Cancer, Pink Ribbon Blues, The Blog (July 31, 2010), http:// gaylesulik.com/2010/07/what-george-burns-could-teach-us-about-breast-cancer-risk/ (“While there is a strong probability that smoking causes lung cancer, the smoking-lung cancer equation is not definitive for all individuals.”). This article maintains that a combination of cigarette smoking and genetics causes lung disease or its absence, and the article points to the famous cigar-smoking centenarian, George Burns, as an example where genetics predominated over smoking habits. See id. |
| [238](#co_footnoteReference_F238376476655_ID0EH) | Of course the statement that cigarettes “may” cause lung disease is as uncontroverted as cigarettes contain nicotine and thus clearly falls into Category 1. |
| [239](#co_footnoteReference_F239376476655_ID0ET) | The Audi dealer and his competitor may both sell Audis of the same make and model, but they are selling different vehicles. Each has its own unique VIN, for example. Though a competitor may sell the exact same type of item, it is not the exact same item--it is discrete--thus, regulations requiring disclosure of facts about competitors’ products fall into Category 3 and not Categories 1 or 2. |
| [240](#co_footnoteReference_F240376476655_ID0EY) | Cf. [Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n, 475 U.S. 1, 17-18 (1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986109852&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_17&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_17) (plurality); [Cent. Ill. Light Co. v. Citizens Util. Bd., 827 F.2d 1169, 1171-74 (7th Cir. 1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987108878&pubNum=0000350&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_350_1171&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_1171). Pacific Gas & Electric and Central Illinois Light Co. support categorizing regulations compelling information not about the specific product or service sold as Category 3 regulations, but these cases are distinguishable. In both cases, the speech involved ideology, not just factual information. See Pac. [Gas, 475 U.S. at 8-9](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986109852&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_8&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_8); Cent. [Ill. Light Co., 827 F.2d at 1171 n.2](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987108878&pubNum=0000350&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_350_1171&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_1171). Despite this, these cases are useful by comparison because the idea is the same: a commercial speaker should not be forced to spread information not about his specific product or service. To permit this would be to permit the government to use personal property to spread information it deems important for listeners to receive despite a heavy burden on speakers. Because the information is not about the seller’s products or services, the speaker interest in not providing this information should outweigh the listener interest in receiving the information from this particular speaker. The government could of course always force the competitors to provide their own price information, which would further the listener interest of having access to price information. |
| [241](#co_footnoteReference_F241376476655_ID0E3) | Cf. supra Part I. |
| [242](#co_footnoteReference_F242376476655_ID0EV) | See Smit, supra note 231, at 52 (“A ‘value judgment’ is ... a judgment regarding the irreducible ‘goodness,’ ‘badness,’ etc., of something, or the equivalent judgment that something ‘should’ or ‘should not’ be done.”). Of course a message need not take the form of a command to constitute ideology. The message that mushrooms are worth consuming irrespective the brand implicitly suggests mushrooms should be consumed, and this renders it ideological. It is an “ought” not an “is.” Cf. Nancy Levit, [Listening to Tribal Legends: An Essay on Law & the Scientific Method, 58 Fordham L. Rev. 263, 279 (1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0101279797&pubNum=0001142&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=LR&fi=co_pp_sp_1142_279&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_1142_279). |
| [243](#co_footnoteReference_F243376476655_ID0E4) | See, e.g., [Wooley v. Maynard, 430 U.S. 705, 715 (1977)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118764&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_715&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_715) (discussing [W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943120939&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))). |
| [244](#co_footnoteReference_F244376476655_ID0EC) | An example illustrates the point. At one point in America’s history, a majority of southerners may have said that interracial marriage is wrong. But this is clearly a value judgment, an opinion, not a fact. That a majority of people may agree on an opinion may make it uncontroverted, but it does not make it fact. Compelling speakers to espouse the majority’s opinion raises serious First Amendment concerns and should receive heightened scrutiny under Barnette and its progeny. |
| [245](#co_footnoteReference_F245376476655_ID0EE) | See supra Part II. |
| [246](#co_footnoteReference_F246376476655_ID0ET) | See supra Part II.B. |
| [247](#co_footnoteReference_F247376476655_ID0EY) | See supra Part.II.B; see also [Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n, 475 U.S. 1, 34 (1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986109852&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_34&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_34) (Rehnquist, J., dissenting) (citing Zauderer’s language that a commercial speaker’s interest in not providing additional information is minimal and noting that “because the interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views clearly identified as those of the speaker is de minimis”). Rehnquist argues in dissent in Pacific Gas & Electric Co. that corporations should not have any negative free-speech rights because it strains the rationale of cases like Barnette and Wooley to the breaking point since corporations do not have a conscience or mind on which compelled speech may intrude. See Pac. [Gas, 475 U.S. at 33-35](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986109852&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_33&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_33). If a speaker’s interest in not providing information is minimal, the government should only need to overcome a lenient test, like Zauderer, when it requires that a speaker provides this information. |
| [248](#co_footnoteReference_F248376476655_ID0E3) | It is for this reason that if the government mandates that a commercial speaker disclose information about her competitors’ products or services, this would not be considered a factual-disclosure requirement under the framework because competitor information is not information about the specific products or services the commercial speaker is selling. |
| [249](#co_footnoteReference_F249376476655_ID0EU) | See [Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985126962&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_651&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_651). |
| [250](#co_footnoteReference_F250376476655_ID0EZ) | See id. |
| [251](#co_footnoteReference_F251376476655_ID0ED) | This interest is not clearly within the scope of Zauderer. Courts and commentators disagree over whether Zauderer should apply beyond laws targeting consumer deception. See supra note 115. I argue Zauderer should apply beyond laws targeting deception where laws aim to provide information to consumers about the specific products or services sold. |
| [252](#co_footnoteReference_F252376476655_ID0EY) | If a commercial speaker misled consumers by suggesting the competitors’ prices were different than they actually were, and the government required a disclosure to correct this and thus prevent consumer deception, the government’s regulation would fall into Category 1, not Category 3, despite that the regulation is not about the specific product or service sold. If, however, there is no deception to correct, forced disclosure of competitor information should generally fall into Category 3. |
| [253](#co_footnoteReference_F253376476655_ID0EF) | See [Allstate Ins. Co. v. Abbott, 495 F.3d 151, 164-68 (5th Cir. 2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012825771&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_164&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_164) (applying Central Hudson where the potential for consumer confusion is minimal, and the provisions at issue both restrict and compel commercial speech); [Borgner v. Brooks, 284 F.3d 1204, 1210 (11th Cir. 2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002166246&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_1210&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1210) (applying Central Hudson not Zauderer to disclosure requirements where speech is only potentially, not inherently misleading); [Int’l Dairy Foods Ass’n v. Amestoy, 92 F.3d 67, 69-70, 72 (2d Cir. 1996)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996179932&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_69&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_69) (applying Central Hudson where law compels, as opposed to restricts, commercial speech); Charles R. Yates, III, Note, [Trimming the Fat: A Study of Mandatory Nutritional Disclosure Laws & Excessive Judicial Deference, 67 Wash. & Lee L. Rev. 787, 792, 814 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0352697819&pubNum=0001282&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=LR&fi=co_pp_sp_1282_792&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_1282_792) (maintaining that Central Hudson should apply where a law mandates disclosure of calorie counts); see also [United States v. Wenger, 427 F.3d 840, 849 (10th Cir. 2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2007568558&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_849&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_849) (applying Central Hudson to disclosure requirement but using Zauderer to satisfy Central Hudson); supra note 114; cf. [Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 491 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997134126&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_491&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_491) (Souter, J., dissenting) (“Zauderer carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.”). |
| [254](#co_footnoteReference_F254376476655_ID0EP) | Cf. [Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 848-51 (9th Cir. 2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003623562&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_848&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_848) (analogizing to Zauderer and finding that requiring municipalities to engage in speech educating the public about the impacts of storm-water discharge and about the hazards of improper waste disposal is a properly required disclosure under the First Amendment and does not qualify as compelled speech). Compare supra note 253, with N.Y. State Rest. [Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018151622&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_133&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_133) (noting that “Zauderer’s holding was broad enough to encompass nonmisleading disclosure requirements” (emphasis added)), and Pharm. [Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 310 n.8 (1st Cir. 2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2007659419&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_310&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_310) (Toruella, concurring) (explaining that the court found no cases limiting Zauderer’s holding to potentially deceptive advertising aimed at consumers), and [United States v. Bell, 414 F.3d 474, 484-85 (3d Cir. 2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006931517&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_484&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_484) (citing Zauderer and noting that the government may impose reasonable regulations to prevent consumer deception, and likewise “mandatory disclosure of factual, commercial information does not offend the [First Amendment”), and SEC v. Wall Street Publ’g Inst., Inc., 851 F.2d 365, 373-74 (D.C. Cir. 1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988080921&pubNum=0000350&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_350_373&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_373) (citing Zauderer and noting that “disclosure requirements have been upheld in regulation of commercial speech even when the government has not shown that ‘absent the required disclosure, [the speech would be false or deceptive]”’ (citation omitted)). But see Pharm. [Care Mgmt. Ass’n, 429 F.3d at 316](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2007659419&pubNum=0000506&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_506_316&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_316) (including state interest of preventing deception to consumers as part of Zauderer’s test and suggesting state interest did concern preventing deception to consumers); Yates, supra note 253, at 812-13 (maintaining that Zauderer is limited to preventing consumer deception and is inapplicable where a law mandates disclosure of calorie counts). |
| [255](#co_footnoteReference_F255376476655_ID0EI) | See supra Part I. |
| [256](#co_footnoteReference_F256376476655_ID0ED) | Post, supra note 6, at 577. |
| [257](#co_footnoteReference_F257376476655_ID0EI) | Id. |
| [258](#co_footnoteReference_F258376476655_ID0ER) | See [United States v. United Foods, Inc., 533 U.S. 405, 410 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_410&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_410). According to the Court, “[o]ur precedents concerning compelled contributions to speech provide the beginning point of our analysis. The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection, as held in the cases already cited.” Id. |
| [259](#co_footnoteReference_F259376476655_ID0EQ) | [Id. at 410-11](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_410&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_410). Admittedly, these same concerns may arise for Category 2 cases where commercial speakers disagree that the disclosures are factual. The difference is in these cases, the required disclosures provide information about the specific products or services sold, not ideology. Where information is relevant to products or services sold, the listener interest in receiving information becomes important. And, since sufficient data supports the position that Category 2 regulations are factual, a less rigorous test should apply. The proposed framework attempts to account for these issues by applying the intermediately heightened scrutiny of Central Hudson to Category 2 regulations. |
| [260](#co_footnoteReference_F260376476655_ID0EB) | See supra Part I. |
| [261](#co_footnoteReference_F261376476655_ID0E5) | See supra Part II. |
| [262](#co_footnoteReference_F262376476655_ID0EC) | See supra Part II. |
| [263](#co_footnoteReference_F263376476655_ID0ER) | If economic motivations extend beyond that, the government would not need to compel the speech. The commercial speaker would likely share such information of her own accord. |
| [264](#co_footnoteReference_F264376476655_ID0E2) | One should not take this point too far. Where the government compels that a commercial speaker provide information about a specific product or service sold, it does not matter if it is against the speaker’s interests to disclose this information. An example of this is where a regulation mandates providing caloric information for fattening foods, and commercial speakers will earn less money as a result. This is still a required disclosure of uncontroverted, factual information about a specific product or service sold, and Zauderer applies. See supra Part IV.B.1.i. |
| [265](#co_footnoteReference_F265376476655_ID0EA) | Cf. [Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n, 475 U.S. 1, 9-13 (1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986109852&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_9&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_9) (“The order does not simply award access to the public at large; rather it discriminates on the basis of viewpoints of the selected speakers.”). |
| [266](#co_footnoteReference_F266376476655_ID0ES) | See [United States v. United Foods, Inc., 533 U.S. 405, 415-16 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_415&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_415). |
| [267](#co_footnoteReference_F267376476655_ID0EZ) | See [Keller v. State Bar, 496 U.S. 1, 13 (1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990086713&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_13&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_13). |
| [268](#co_footnoteReference_F268376476655_ID0EI) | See [United Foods, 533 U.S. at 415-16](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536113&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_415&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_415). |
| [269](#co_footnoteReference_F269376476655_ID0EN) | See id. |
| [270](#co_footnoteReference_F270376476655_ID0ET) | See [Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 559 (2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006652306&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_559&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_559). |
| [271](#co_footnoteReference_F271376476655_ID0EO) | See supra Part I. |
| [272](#co_footnoteReference_F272376476655_ID0ET) | See [Wooley v. Maynard, 430 U.S. 705, 714-15 (1977)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118764&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_714&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_714) (analogizing to Barnette where individual interests against compelled expression of message with which one disagrees motivated decision). Indeed, Wooley explained that the compelled-speech doctrine would apply even where one person’s views differ from the majority group’s views. See [Wooley, 430 U.S. at 715](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118764&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_715&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_715) (“[T]hat most individuals agree with ... New Hampshire’s motto is not the test .... The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster ... an idea they find morally objectionable.”). |
| [273](#co_footnoteReference_F273376476655_ID0EN) | See supra Part I. |
| [274](#co_footnoteReference_F274376476655_ID0EH) | See Patient Protection and Affordable Care Act, [Pub. L. No. 111-148, § 4205, 124 Stat. 119](http://www.westlaw.com/Link/Document/FullText?findType=l&pubNum=1077005&cite=UUID(I6CC1A77037-5611DF8B35E-28066BB2A1E)&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=SL&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)), 573-76 (2010) (to be codified at [21 U.S.C. § 343](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=21USCAS343&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default))). |
| [275](#co_footnoteReference_F275376476655_ID0EZ) | See, e.g., Gary Taubes, Why We Get Fat and What to Do About It (2011) (arguing that over-consumption of certain carbohydrates, as compared to fat, is what actually makes people gain weight); Susan J.G. Reed, Studies Find Genetic Link to Obesity, Harv. Crimson (Oct. 19, 2010), available at http:// www.thecrimson.com/article//2010/10/19/fat-body-obesity-researchers/ (noting that two studies “with ties to Harvard Medical School have discovered new genetic variations that predispose people to obesity”). |
| [276](#co_footnoteReference_F276376476655_ID0E5) | See, e.g., Taubes, supra note 275 (arguing that over-consumption of certain carbohydrates is what actually makes people gain weight); Reed, supra note 275 (noting that two studies “with ties to Harvard Medical School have discovered new genetic variations that predispose people to obesity”). |
| [277](#co_footnoteReference_F277376476655_ID0EX) | See [Wooley, 430 U.S. at 716](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118764&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_716&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_716). |
| [278](#co_footnoteReference_F278376476655_ID0E3) | See [id. at 716-17](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118764&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_716&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_716). “‘Strict scrutiny’ requires ‘the State [to] show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”’ Mass Media Law, supra note 29, at 31 (quoting [Ark. Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987050459&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_231&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_231)). |
| [279](#co_footnoteReference_F279376476655_ID0EL) | This analysis does not account for the possibility that the message in Regulation 3 is government speech, and may avoid First Amendment problems completely. Cf. [Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 559, 562 (2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006652306&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_559&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_559). This question is beyond the scope of this paper. |
| [280](#co_footnoteReference_F280376476655_ID0E1) | Though the First Amendment unambiguously safeguards speaker interests, the Supreme Court has noted that it serves significant societal interests wholly apart from the speaker’s interest in self-expression. It also “protects the public’s interest in receiving information.” [Pac. Gas & Elec. Co. v. Pub. Utils. Co., 475 U.S. 1, 8 (1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986109852&pubNum=0000780&originatingDoc=Ib086854c081f11e28b05fdf15589d8e8&refType=RP&fi=co_pp_sp_780_8&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_8). |

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