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Graphic Labels, Dire Warnings and the Facile Assumption of Factual Content in Compelled Commercial Speech

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INTRODUCTION

The Supreme Court has adopted distinct approaches to reviewing two types of government regulation of commercial speech. Where government seeks to limit commercial expression, the Court has applied a steadily increasing level of scrutiny.[1] On the other hand, required disclosures and warnings said to inform and protect consumers have been examined under a relatively lenient standard.[2] The current regime, however, does not satisfactorily account for compelled commercial speech that is not purely factual but instead amounts to official editorializing. This Article first locates the place of this gap in the Court's commercial speech jurisprudence. It then offers as principal illustration a mandated commercial message (since suspended) that strays well beyond the communication of helpful information. After discussing the dangers to First Amendment values posed by such compulsion, the Article proposes an approach to subjective compelled commercial speech. This approach augments but draws on existing doctrine.[3]

I.

This section begins with a brief overview of the framework the Court has evolved to gauge measures forbidding or compelling commercial speech. Next, it features a description of the two judicial efforts to apply that framework in reviewing graphic labels mandated by the Food and Drug Administration (FDA) to appear on tobacco products. The courts' contrasting dispositions highlight the need for a discrete standard for

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[1] *See infra* notes 17-24 and accompanying text.

[2] *See infra* notes 27-32 and accompanying text.

[3] Though the problem of compelled subsidization of commercial speech is relevant to the theme of this Article, that phenomenon also presents considerations apart from those involved in the direct compulsion of speech. *See infra* Part I-C and accompanying text.

compulsory commercial expression that may impermissibly force speakers to act as a "billboard"[4] for conveying government views.

A.

While the Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[5] launched modern commercial speech doctrine, the standard set forth later in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*[6] has largely guided the Court's rulings on government efforts to restrain such speech. *Virginia Pharmacy* overturned the Court's formal stance that commercial speech does not warrant First Amendment protection.[7] Striking down Virginia's ban on advertising prescription drug prices, the Court explained that such a prohibition fell afoul of central goals of free expression.[8] First, commanding retailers to withhold prices hindered consumers' self-fulfillment because ignorance of pricing disparities interfered with "the alleviation of physical pain or the enjoyment of basic necessities."[9] In addition, this official veil of secrecy diminished the public's capacity to perform its vital democratic function of making informed economic policy decisions.[10] Finally, the state's contention that exposure to advertised drug prices would lure consumers into self-destructive behavior[11] represented a "highly paternalistic approach"[12] contrary to First Amendment values. Thus, a state could not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients."[13]

Four years later, the Court in *Central Hudson* announced that a four-part test for regulation of commercial speech had crystallized.[14] The final and most demanding prong requires that a restriction not be "more

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[4] Wooley v. Maynard, 430 U.S. 705, 715 (1977) (internal quotation marks omitted).

[5] 425 U.S. 748 (1976).

[6] 447 U.S. 557 (1980).

[7] *See Va. Pharmacy*, 425 U.S. at 758, 770 (overruling Valentine v. Chrestensen, 316 U.S. 52, 54 (1942)).

[8] *Id.* at 770.

[9] *Id.* at 763-64; *see* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) (identifying individual self-fulfillment and self-realization as among fundamental values that justify freedom of expression).

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

[11] *See id.* at 768 (noting the state's argument, *inter alia*, that advertising would spur consumers to patronize cheaper but less professional pharmacists).

[12] *Id.* at 770.

[13] *Id.* at 773.

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

extensive than is necessary to serve [the state's] interest."[15] Some decisions following *Central Hudson* raised doubts about the rigor of this ostensibly stringent criterion.[16] For nearly two decades, however, the Court has routinely cast the fourth prong in potent terms while striking down restrictions whose aim might be attained by means that curtailed less speech.[17] This trend culminated in *Sorrell v. IMS Health Inc.*,[18] where the Court struck down a Vermont law prohibiting the sale of "prescriber-identifiable information" by pharmacies to data-mining companies, and by data-mining companies to pharmaceutical companies, "for marketing or promoting a prescription drug."[19] The law foundered on its character as a "content- and speaker-based" limitation on speech,[20] and on its root in the state's fear of the communicative impact of marketers' use of the information.[21] Perhaps most notably, the *Sorrell* Court, despite the dissent's characterizing the *Central Hudson* inquiry as an "intermediate" test,[22] observed that the result was the same whether the Court applied its commercial speech standard or "a stricter form of judicial scrutiny."[23] In the wake of *Sorrell*'s outcome and language, the Court is widely perceived to have ratcheted up the intensity of its review of commercial speech restrictions.[24]

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

[16] *See, e.g.*, Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (describing the fourth part of the *Central Hudson* test as requiring a "fit between the legislature's ends and . . . means . . . that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served" (citations and internal quotation marks omitted)).

[17] *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 371 (2002) (stating that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so"); Greater New Orleans Broad. Ass'n. v. United States, 527 U.S. 173, 188 (1999) (requiring the government to "demonstrate narrow tailoring"); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993) (discussing "less drastic measures" by which the city could achieve its aims).

[18] 131 S. Ct. 2653 (2011).

[19] VT. STAT. ANN. tit. 18, § 4631(d) (2011). The statute provided an exception where prescribers had granted their express consent for such sale of this information. *Id.*

[20] *Sorrell*, 131 S. Ct. at 2663. Vermont permitted this information to be acquired by other speakers with a variety of agendas. *Id.*

[21] *Id.* at 2670. Vermont had argued that use of prescriber-identifying information by pharmaceutical representatives ("detailers") would enable them to exert inappropriate influence on treatment decisions. *Id.*

[22] *Id.* at 2674 (Breyer, J., dissenting) (internal quotation marks omitted).

[23] *Id.* at 2667.

[24] *See, e.g.*, Minority Television Project, Inc. v. Fed. Commc'n Comm'n, 676 F.3d 869, 881 n.8 (9th Cir. 2012), *reh'g en banc granted*, 704 F.3d 1009 (9th Cir. 2012); Marc J. Scheineson & Guillermo Cuevas, United States v. Caronia—*The Increasing Strength of Commercial Free Speech and Potential*

In contrast to the Court's increasingly rigorous review of curbs on commercial speech, its pronouncements on compelled commercial messages have signaled wider latitude for government regulation. This approach was prefigured by dicta in *Virginia Pharmacy* indicating government's power to "require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."[25] A later opinion suggested "dissipat[ion] [of] the possibility of consumer confusion" as an additional ground for required warnings or disclaimers.[26] It was in *Zauderer v. Office of Disciplinary Counsel*,[27] however, that the Court articulated the extent of government power to compel disclosure in commercial speech. In *Zauderer*, the Court sustained a requirement that advertisements of certain contingent-fee rates disclose that clients would be liable for costs irrespective of the outcome and that calculation of expenses included court costs and expenses.[28] Such disclosure requirements would be sustained if they were "reasonably related to the State's interest in preventing deception of consumers" and not "unjustified or unduly burdensome."[29] The leniency of this review was underscored in *Milavetz, Gallop & Milavetz, P.A. v. United States*,[30] where the Court approved a law directing attorneys providing bankruptcy-assistance services to include in advertisements a statement to the effect that: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."[31] Under *Zauderer*'s "less exacting scrutiny," the government could require "an accurate statement identifying the advertiser's legal status and the character of the assistance provided."[32]

New Emphasis on Classifying Off-Label Promotion As "False and Misleading", 68 FOOD & DRUG L.J. 201, 207-08 (2013).

[25] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 n.24 (1976).

[26] *In re* R.M.J., 455 U.S. 191, 201 (1982).

[27] 471 U.S. 626 (1985).

[28] *Id.* at 652.

[29] *Id.* at 651; *see also* Colloquy, *It's What's for Lunch: Nectarines, Mushrooms, and Beef—The First Amendment and Compelled Commercial Speech*, 41 LOY. L.A. L. REV. 359, 374 (2007) (statement of Robert C. Post) (asserting that the principle announced in *Zauderer* also permits mandatory disclosure to promote market efficiency).

[30] 559 U.S. 229 (2010).

[31] *Id.* at 233, 232 (2010) (quoting 11 U.S.C. § 528(a)(4) (2006)) (internal quotation marks omitted).

[32] *Id.* at 249-50. The government argued that the required statement was needed to avoid misunderstanding engendered by advertisements for debt relief that omitted the costs associated with bankruptcy. *Id.* at 250. For a thoughtful analysis of government-mandated disclosure of information outside the commercial context, see Leslie Kendrick, *Disclosure and its Discontents*, 27 J.L. & POL. 575 (2012).

B.

While the Court's two-track system—*Central Hudson*'s heightened scrutiny for restrictions and *Zauderer*'s permissive review for compelled disclosure—may operate straightforwardly in most instances, its application becomes blurred where the compelled government message straddles the line between fact and exhortation. A recent example of this ambiguity flowed from the divergent treatment of regulations proposed pursuant to the 2009 Family Smoking Prevention and Tobacco Control Act.[33] Under the Act, the FDA must devise new disclosures for cigarette packages in the form of "color graphics depicting the negative health consequences of smoking."[34] These illustrations are to be accompanied by a statement warning of the negative health risks of tobacco use.[35] Together, the image and text must occupy fifty percent of the front and back sides of cigarette packages.[36]

Confronted with challenges to the FDA's regulations, the Sixth Circuit Court of Appeals and the District of Columbia Circuit Court of Appeals reached opposite results. For the Sixth Circuit, the mandated textual and graphic warnings triggered an exceedingly modest evidentiary burden for government under *Zauderer*; they were only required to have "a rational connection between the warnings' purpose and the means used to achieve that purpose."[37] Under this version of the dependably indulgent "rational basis" test,[38] the court found the warnings to be "reasonably related to promoting greater public understanding of the risks" of tobacco use.[39] The D.C. Circuit, by contrast, declared *Zauderer* inapposite because the "inflammatory images"[40] did not qualify as "pure attempts to convey information to consumers."[41] Instead, the court in *R.J. Reynolds Tobacco Co. v. FDA* applied the *Central Hudson* standard to these "unabashed

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[33] Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of titles 15 and 21 of the U.S.C.).

[34] 15 U.S.C. § 1333(d) (Supp. V 2012).

[35] *See id.* Example written warning labels include: "Cigarettes are addictive" and "Cigarettes cause cancer." *Id.* at § 1333(a)(1).

[36] 15 U.S.C. § 1333(a)(2) (Supp. V 2012).

[37] Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 561 (6th Cir. 2012).

[38] *See* City of Dallas v. Stanglin, 490 U.S. 19, 26 (1989); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881 (1985); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 540 (3d ed. 2006) (describing rational basis test as "enormously deferential to the government").

[39] *Disc. Tobacco*, 490 U.S. at 564.

[40] R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216 (D.C. Cir. 2012). Among the images were those of a woman crying and of a man smoking through a tracheotomy hole. *Id.* at 1231. For a composite of images proposed by the FDA, see *U.S. Requires Bold New Cigarette Warnings*, CAMPAIGN FOR TOBACCO-FREE KIDS, http://www.tobaccofreekids.org/what_we_do/federal_issues/graphic_warning_labels/ (last visited Dec. 6, 2013).

[41] *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1216-17.

attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting."[42] In the court's eyes, the FDA had offered paltry evidence for the efficacy of the graphic warnings.[43] Accordingly, the government failed to satisfy even *Central Hudson*'s relatively modest[44] third requirement of showing that the warnings directly advanced the interest in reducing smoking.[45]

Though it would be illogical to dispute both outcomes, even what this Article regards as the D.C. Circuit's correct holding[46] contains flawed reasoning. On the one hand, that court rejected the Sixth Circuit's misguided premise that the graphic warnings should be governed by the light scrutiny of *Zauderer*. After all, images such as juxtaposed pictures of healthy and diseased lungs or a man smoking through a tracheotomy hole hardly qualify as the kind of "purely factual and uncontroversial" information assumed by *Zauderer*[47] or as "accurate statement[s]" allowed under *Milavetz*.[48] With representations of a small child or crying woman, it is doubtful whether the image carries a coherent message at all. Indeed, the FDA tacitly conceded the nonfactual dimension of the warnings by relying on research showing the value of evoking emotional responses in consumers.[49]

The inappropriateness of *Zauderer*, however, does not inevitably make *Central Hudson* the relevant standard for compelled subjective expression by default. On the contrary, the Court crafted *Zauderer*'s standard to create an analysis separate from the *Central Hudson* four-part test for restrictions on compelled commercial speech. Admittedly, the Court's formulation of the *Central Hudson* test can literally encompass compulsion as well as limitation; the test applies to "commercial speech cases," and the final two prongs address the efficacy and breadth of "the regulation."[50] In passages

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[42] *Id.* at 1217.

[43] *See id.* at 1219 (stating that the FDA had "not provided a shred of evidence").

[44] In *Central Hudson*, for example, the Court tersely assumed that the state's ban on utilities' promotional advertising directly advanced the state's interest in conservation. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 569 (1980).

[45] R.J. Reynolds Tobacco Co., 696 F.3d at 1218-20. After the court denied the FDA's petition for rehearing en banc, R.J. Reynolds Tobacco Co. v. FDA, No. 11-5332, 2012 U.S. App. LEXIS 24978 (D.C. Cir. Dec. 5, 2012), the government decided not to seek further review of the court's ruling and withdrew the rule. *See Cigarette Health Warnings*, U.S. FOOD AND DRUG ADMINISTRATION, www.fda.gov/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels/default.htm (last visited Dec. 6, 2013).

[46] *See infra* Part III.

[47] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

[48] Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 250 (2010).

[49] *See R.J. Reynolds Tobacco Co.*, 696 F.3d at 1216.

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

preceding this summary, though, the Court repeatedly refers to the criteria for "*restrictions*" on commercial speech.[51] Most notably, the opinion anticipates the test's fourth part by declaring that "if the governmental interest could be served as well by a more limited restriction on commercial speech, the *excessive restrictions* cannot survive."[52] Understanding *Central Hudson* as contemplating limitations on commercial speech is supported by the Court's reliance on *Zauderer*'s approach in both *Zauderer* and *Milavetz*, while applying *Central Hudson* to a long line of restrictions between those two decisions.[53]

Nor is it only semantics that renders the application of *Central Hudson* to compelled commercial speech incongruous. *Central Hudson*'s requirement that a restriction not be "more extensive than is necessary to serve [the state's] interest,"[54] while useful for determining whether the government has excessively limited expression, is ill-suited to gauging the validity of mandated expression. In theory, inclusion of a required message may be said to operate as a restriction by diluting or obscuring the content of a seller's advertisement. This argument, however, proves too much; a "crowding out" rationale could transform virtually any required warning into a restriction and categorically substitute *Central Hudson*'s rigorous fourth prong for the relatively lenient standard that the Court intended for factual warnings and disclosures under *Zauderer*. Moreover, to the extent that this reasoning relies on the constraint of physical space in printed advertisements, the argument loses much of its force in Internet advertising. Finally, the compulsion-as-restriction logic does not squarely meet the core objection to carrying official viewpoints. An advertiser like R.J. Reynolds opposes not so much the diminution of its physical ability to express its message as the obligation to serve as a "billboard"[55] for a contrary one. In a sense, the *Reynolds* court evaded this problem by ruling that the FDA had failed to demonstrate that the graphic images directly advanced the government's interest in reducing the number of smokers. The happenstance of ineffectuality begged the question of the proper response to compelled subjective speech that works.

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[51] *Id.* at 564 (emphasis added) (stating, *inter alia*, that the state "must assert a substantial interest to be achieved by restrictions on commercial speech" and that "the restriction must directly advance the state interest involved").

[52] *Id.* at 564 (emphasis added).

[53] *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 367-68 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-55 (2001); Rubin v. Coors Brewing Co., 514 U.S. 476, 482 n.2 (1995).

[54] *Central Hudson*, 447 U.S at 566.

[55] *See supra* note 4 and accompanying text.

Functionally, too, an attempt to graft the question of compelled subjective speech onto *Central Hudson*'s fourth criterion would appear to be an awkward exercise. The requirement that a restriction not be "more extensive than is necessary to serve [the state's] interest"[56] and its corollary that "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive"[57] has no direct counterpart in the government's injection of nonfactual speech into an advertiser's message. Under the First Amendment, mandating that private individuals and entities serve as platforms for official opinions is intrinsically suspect.[58] An acceptable "more limited [compulsion]" would seem to generally be difficult to achieve. While *Central Hudson*'s "intermediate" test[59] allows for a less drastic restriction of speech than the one a court has struck down, invalidation of compulsory carriage of an obnoxious message does not present a similar opportunity. If forced sponsorship of government propaganda constitutes an infringement of free expression, then no true parallel to a lesser restriction on speech exists on the compulsion side; a somewhat smaller or less strident version of the official exhortation will still fail.

C.

The Court's reasoning in areas outside direct compulsion of advertisers' speech also offers limited guidance on the question of required displays of government viewpoints. The most obvious sphere to look to is the Court's treatment of compelled subsidies for generic advertising. In particular, the Court's decision in *United States v. United Foods, Inc.*[60] at first blush appears to support advertisers' right to resist officially mandated subjective content in their advertising. *United Foods* involved an assessment on handlers of fresh mushrooms for generic advertising of mushrooms levied by a federally authorized Mushroom Council.[61] Asserting the superiority of

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[56] *Central Hudson*, 447 U.S. at 566.

[57] *Id.* at 564.

[58] *See* Wooley v. Maynard, 430 U.S. 705, 715 (1977) ("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."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

[59] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2674 (Breyer, J., dissenting) (internal quotation marks omitted).

[60] 533 U.S. 405 (2001).

[61] *Id.* at 405, 408.

its own mushrooms, a grower and distributor objected to the advertising's implicit denial of meaningful differences among various kinds of mushrooms.[62] The Court agreed that the forced assessment constituted government overreaching: "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors."[63]

Reliance on *United Foods* for advertisers' right to reject debatable mandatory warnings, however, is problematic in several respects. First, just a few years earlier, in *Glickman v. Wileman Brothers & Elliott, Inc.*, the Court had dismissed a similar claim.[64] There, the Secretary of Agriculture had imposed assessments on producers of "California Summer Fruits" to fund a generic advertising campaign touting these products.[65] Disputing what they viewed as the advertising's message that "all California fruit is the same,"[66] some tree handlers challenged the use of mandatory fees to subsidize this and other messages.[67] To the Court, though, the assessment engendered no "crisis of conscience";[68] the plaintiffs' presumed acceptance of the advertising campaign's "central" message thwarted their argument that it infringed on First Amendment rights.[69]

Moreover, the Court's later decision in *Johanns v. Livestock Marketing Association*[70] apparently equips government with a ready means of circumventing restraints on compelled subsidies by branding the advertising in question as government speech. There, advertisements promoting the consumption of beef—notably, through the slogan "Beef. It's What's for Dinner" —were funded by a federal tax imposed on sales and imports of cattle.[71] The plaintiff beef producers contended that the campaign's advertising of beef as a "generic commodity" ran counter to

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[62] *See id.* at 411.

[63] *Id.* The decision rested heavily upon the Court's ruling in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which *United Foods* described as "recogniz[ing] a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" *United Foods*, 533 U.S. at 413 (quoting Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 471 (1997)) (internal quotation marks and citation omitted); *see also* Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990) ("The State Bar may . . . fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.").

[64] 521 U.S. 457, 477 (1997).

[65] The Secretary had issued the order under the Agricultural Marketing Agreement Act of 1937. 7 U.S.C. § 608c(6)(I) (2006). *See Glickman*, 521 U.S. at 461-62.

[66] *Id.* at 468 n.11.

[67] *Id.* at 467.

[68] *Id.* at 472.

[69] *Id.* at 469-70.

[70] 544 U.S. 550 (2005).

[71] *Id.* at 554.

their messages proclaiming their own beef's superiority.[72] In the Court's eyes, however, the compelled subsidy was more akin to a tax whose proceeds fund a government program and public advocacy in its support.[73] Thus, while most citizens may well have assumed that the advertising was sponsored by private beef producers,[74] the campaign was deemed the government's own speech and therefore immune from First Amendment challenge.[75]

Finally, scholarly criticism throws doubt on the precedential stability of the Court's trilogy of decisions on compelled subsidies for generic advertising. Commentators have repeatedly questioned the collective coherence and logic of these decisions.[76] In particular, *United Foods*—the most speech-protective of the three—has come under withering attack for strained distinctions from *Glickman*.[77] More broadly, the very premise that compelled subsidization of speech in and of itself warrants First Amendment review has been challenged.[78]

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[72] *Id.* at 556.

[73] *Id.* at 559.

[74] *See id.* at 577-79 (Souter, J., dissenting); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 666 (2008) ("Because most advertisements bore the tag 'Funded by America's Beef Producers,' a reasonable person would probably conclude that private cattle ranchers were speaking.").

[75] *Johanns*, 544 U.S. at 566-67. While the development of the campaign included significant private participation, *see id.* at 553-54, the Court determined that its message was "from beginning to end the message established by the Federal Government." *Id.* at 560-61.

[76] Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1291 (2010) ("This . . . set of cases illustrates how confusing and contradictory the Court's government speech decisions have been."); Colloquy, *It's What's for Lunch: Nectarines, Mushrooms, and Beef—The First Amendment and Compelled Commercial Speech*, 41 LOY. L.A. L. REV. 359, 370 (2007) ("The Court is completely lost in trying to understand this question [of compelled subsidies for commercial speech].") (statement of Robert C. Post); *id.* at 365 ("This is a trilogy of cases that I think nobody will disagree exemplifies the kind of doctrinal instability and incoherence that Bruce [Johnson] was referring to on the panel when he described them.") (statement of Kathleen M. Sullivan).

[77] *See, e.g.*, Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods, Zauderer, *and* Abood, 40 VAL. U. L. REV. 555, 573 (2006); Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 225-26 (2011); Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 366-67 (2011).

[78] Robert Post, *Compelled Subsidization of Speech:* Johanns v. Livestock Marketing Association, 2005 SUP. CT. REV. 195, 216 (2005) ("[T]he compelled subsidization of speech does not by itself trigger First Amendment scrutiny."); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV 1, 9-10 (2000); *see also* Schwartzman, *supra* note 77, at 366-67.

II.

The FDA's attempt to impose disturbing images on cigarette packages raises concerns that transcend doctrinal nuance. Rather, what seems in one light an admirable attempt to impede corporate efforts to peddle a toxic product appears in another a threat to important First Amendment values. In this instance, neither the government's strong health interest nor the commercial context should dilute application of First Amendment tenets.[79]

A.

As discussed earlier, the subjective and emotional nature of the FDA's graphic images places them outside the broad dispensation allowed by *Zauderer* for required disclosure of "purely factual and uncontroversial" information.[80] Instead, their function as an exhortation to potential purchasers not to smoke implicates First Amendment interests at stake when government conscripts individuals to promote its chosen message.[81] Admittedly, the required display of these images differs from the compulsion to speak invalidated in *West Virginia State Board of Education v. Barnette*,[82] and *Wooley v. Maynard*,[83] in that the forced inclusion of labels does not materially implicate the autonomy and dignitary interests so visible in those leading cases.[84] Nevertheless, it poses the same danger of overreach that arises when government forces speakers to express an officially favored opinion to which they object.

Nor can vivid images of a crying woman and the like be rationalized as merely graphic illustrations of the textual warnings appearing on packages. A factual message that cigarettes cause cancer does not map neatly onto

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[79] *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429-30 (1993) (rejecting the city's argument that the "'low value'" of commercial speech justified its "selective and categorical ban" on commercially-oriented news racks).

[80] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985). *See supra* note 27-29 and accompanying text.

[81] *See* Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 569 (2012) ("[W]hen the government moves beyond compelled speech that provides descriptive information about a given product or service, to compelled speech that urges the audience to take a certain course of action, the government no longer compels the provision of factual and uncontroversial information. Instead, the government compels 'normative speech,' and such compelled speech should not be subject to rational basis review.").

[82] 319 U.S. 624, 642 (1943) (overturning requirement that public school students participate in daily ceremony comprising salute of American flag and recitation of Pledge of Allegiance).

[83] 430 U.S. 705, 717 (1977) (ordering exemption for Jehovah's Witnesses plaintiffs from mandatory display of state motto, "Live Free or Die," on vehicles).

[84] *See id.* at 715 ("The First Amendment protects the right of individuals to . . . refuse to foster . . . an idea they find morally objectionable."); *Barnette*, 319 U.S. at 631 (stating that plaintiff students "stand on a right of self-determination in matters that touch individual opinion and personal attitude").

the gruesome image of a post-autopsy corpse with its lungs removed. Rather than conveying information, the graphic image amounts to shrieking at potential buyers to pass up the very product the speaker has invited them to purchase. The Supreme Court has long counseled against simplistically assuming that a particular message can be precisely replicated when converting it to a different form. On the contrary, the form of a message may be integral to its content, so that alteration of the form transforms the message itself.[85] As the Court recognized in *Cohen v. California*,[86] this transformation is especially pronounced when a message is crafted so as to have a certain emotional resonance.[87] There, the Court struck down Cohen's conviction for publicly wearing a jacket with the words "Fuck the Draft" displayed.[88] The *Cohen* Court recognized that substitution of a sentiment like "The Draft is Wrong" would strip an emotional component vital to Cohen's intended meaning.[89] In a sense, the FDA labels represent the *Cohen* scenario in reverse. California sought to make Cohen tone down the fervency of his verbal opposition to the draft; the FDA sought to amplify feelings of revulsion that it felt were inadequately instilled by purely factual warnings.[90] In both cases, the government's favored version fundamentally altered the character of the original message.

Additionally, the FDA's rationale for deterring smoking through disturbing images clashes with a First Amendment principle conspicuous in the Court's commercial speech jurisprudence: anti-paternalism. *Virginia Pharmacy*'s rejection of the paternalistic underpinnings of Virginia's ban on advertising drug prices[91] launched a course of invalidating restrictions based on fear that citizens would respond inappropriately to truthful commercial speech.[92] The required graphic labels on cigarette packages

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[85] *See* Texas v. Johnson, 491 U.S. 397, 416 (1989) (observing that the "particular mode in which one chooses to express an idea" may be vital to the expression's message).

[86] 403 U.S. 15 (1971).

[87] *See id.* at 26 ("[W]ords are often chosen as much for their emotive as their cognitive force.").

[88] *Id.* at 16-17.

[89] *See id.* at 26 ("We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.").

[90] The FDA effectively acknowledged the nonfactual character of the graphic images by drawing on research showing the value of evoking emotional responses in consumers. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216 (D.C. Cir. 2012).

[91] *See supra* notes 11-12 and accompanying text.

[92] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497 (1996) (plurality opinion) ("[A] State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it.") (striking down ban on off-site advertisement of retail liquor prices); Bates v. State Bar of Ariz., 433 U.S. 350, 374-75 (1977)

similarly run afoul of the Court's objection to paternalistic grounds for regulating speech. They reflect the government's belief that consumers will fail to adequately grasp the health consequences of tobacco use described by textual warnings.[93] In the FDA's view, dim or complacent smokers and potential smokers must be jolted into comprehension by grotesque or emotional images. However, just as the First Amendment does not condone "preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information,"[94] neither does it empower government to compel private speakers to carry frightening government editorials for the same purpose.

Moreover, the FDA cannot rely on the logic that its power to ban an unhealthy product like cigarettes entails authority to take the less drastic measure of allowing the product subject to limitations on the producer's First Amendment rights. It is true that the Court appeared at one point to embrace this principle. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[95] the Court permitted Puerto Rico to prohibit advertising for casino gambling—legal in the territory—aimed at Puerto Rican residents, reasoning that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[96] By a decade later, however, a majority of Justices had signaled that this doctrine no longer held sway.[97] At the same time, the Court in a series of cases dispelled any lingering notion left by *Posadas* that government regulation of legal vices warrants departure from normal First Amendment protections.[98]

(overturning state prohibition on advertising of prices of routine legal services based on improper assumptions "that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information").

[93] *See R.J. Reynolds Tobacco Co.*, 696 F.3d at 1209.

[94] Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002) (invalidating ban on advertising compounding of a specific drug or type of drug).

[95] 478 U.S. 328 (1986).

[96] *Id.* at 345-46.

[97] *See 44 Liquormart, Inc.*, 517 U.S. at 509-11 (1996) (plurality opinion); *id.* at 531-32 (1996) (O'Connor, J., concurring in the judgment) ("Since *Posadas* . . . this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny."); *see also* Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 193 (1999) ("[T]he power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct.").

[98] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 570-71 (2001) (striking down, *inter alia*, state's ban on indoor, point-of-sale advertising of smokeless tobacco and cigars lower than five feet from floor of retail establishment within thousand feet of school or playground); *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 195-96 (invalidating federal blanket ban on broadcast of promotional advertisements for privately operated, for-profit casinos); *44 Liquormart, Inc.*, 517 U.S. at 516 (invalidating state prohibition on advertisement of retail liquor prices except at place of sale).

Finally, the presence of a commercial setting and unsympathetic speaker should not obscure the threat posed by the FDA's attempt to compel tobacco companies to serve as mouthpiece of the government's viewpoint. Once recognized, the power to force commercial speakers to serve as purveyors of government policy is not confined to scaring potential smokers with upsetting images. By the same principle, governments impatient with the pace of progress on other fronts could commandeer containers of other products as graphic discouragement of the product's purchase. A hamburger sold at fast-food franchises might have to bear a repulsive image of a large, slovenly individual consuming this item to convey a vivid sense of the danger of obesity, while labels of liquor bottles might have to portray a prone, disheveled drunkard clutching a bottle to impress more emphatically upon buyers the dangers of excessive drinking. Perhaps a legislature wishing to promote teenage abstinence could require condom packages to display an unappealing, tabloid-style image of a pregnant woman to assure that young purchasers appreciate the potential consequences of the product's failure. While these examples may seem fanciful, "no readily ascertainable general principle"[99] imposes clear limitations on government's ability to compel commercial speakers to "alter their speech to conform with an agenda they do not set."[100] At minimum, the possibility of such compulsions raises thorny questions about government's ability to control the terms of public discourse by foisting its message on commercial speakers.[101]

In a similar vein, the protection of widely reviled speakers serves as a useful reminder that it is not the value of their expression that courts uphold in such instances. It is not a specific interest in permitting a Ku Klux Klan leader to publicly deliver a racist diatribe,[102] a Nazi group to demonstrate in a community with Holocaust survivors,[103] or a church's members to picket the funeral of a soldier with signs linking his death to America's tolerance of homosexuality[104] that justifies allowing their

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[99] Cohen v. California, 403 U.S. 15, 25 (1971).

[100] Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 9 (1986) (plurality opinion); *see also* United States v. Stevens, 559 U.S. 460, 480 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*.").

[101] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2672 (2011) (stating, while striking down a law forbidding the sale of prescribing practices of individual physicians by pharmacies and data-mining companies, that "the State cannot engage in content-based discrimination to advance its own side of a debate").

[102] *See* Brandenburg v. Ohio, 395 U.S. 444, 444-45, 449 (1969).

[103] *See* Collin v. Smith, 578 F.2d 1197, 1197 (7th Cir. 1978), *aff'g* 477 F. Supp. 676 (N.D. Ill. 1978).

[104] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1213, 1220 (2011).

speech. Rather, it is the First Amendment premise that truth is best pursued through unfettered expression of ideas[105] requiring tolerance of even the most unpopular expression.[106] Asymmetries between restricting and compelling commercial speech do not affect the application of that fundamental principle to the FDA's graphic images. Just as government cannot censor views for their contradiction of official belief, neither can it rig public discussion by forcing opponents of such beliefs to disseminate the state's position.

III.

The uncertain doctrinal niche of nonfactual compelled commercial speech suggests the need for a two-phase analysis of graphic images like the labels for cigarette packages developed by the FDA. As a threshold matter, courts would determine whether the required image essentially amounts to a factual or nonfactual statement. If the latter, the compulsion would be subject to close scrutiny to assess whether the government's interest justified encroachment on the speaker's right not to express an officially prescribed view.

A.

Since graphic warnings commonly convey usefully descriptive images—e.g., the proper way to ascend a ladder—the standard proposed here envisions the plaintiff's initial burden of showing that the required image is not factual. While no formula exists for identifying images that express viewpoint rather than fact, a number of factors can be consulted to make this distinction. A major consideration would be the extent to which the message conveyed by the graphic image is factually definite. The more imprecise the message, the more likely it is that government has ventured into the realm of seeking to impose a normative view, providing exhortation rather than information. Thus, the FDA's required image of a woman crying communicates little about the particular hazards of smoking.

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[105] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."). *See also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) ("An individual who seeks knowledge and truth must hear all sides of the question . . . .").

[106] Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) ("Racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization. . . . Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.").

Even a disturbing image of diseased lungs, while indicating a less nebulous message, is subject to a range of interpretation.[107] The vagueness of these kinds of images suggests that they are meant to be prescriptive rather than descriptive; if they contain coherent content, it is the admonition "Do not smoke." While a great majority of citizens would undoubtedly regard this advice as sound, it is nonetheless nonfactual. For example, many smokers may take the view that the satisfaction they derive from smoking outweighs the risk. Though this may strike most as a foolish or even reckless stance, widespread disapproval of an opinion does not transmute prevailing sentiment into fact.[108]

Another consideration is the degree to which the required image augments the factual verbal disclosure by enhancing the clarity of the disclosure. The FDA's labels present a mixed picture of factual and nonfactual elements. On the one hand, it can be said that the graphic images offer a more vivid sense of smoking's potential effects spelled out in the accompanying textual warnings. As suggested earlier,[109] however, it seems almost facetious to maintain that the impact of these dramatic portrayals lies primarily in imparting a meaning the viewer would not otherwise grasp. That smoking can lead to cancer and other serious harms can hardly be a revelation to a sentient person in a society saturated with anti-smoking warnings; at any rate, those who have somehow missed this message will be amply informed by the package's text. The images do not provide potential purchasers with additional facts; they attempt to evoke a level of dread or disgust sufficient to induce such individuals to react to the information provided elsewhere in an officially favored manner.

Defamation doctrine is also instructive in sorting out factual and nonfactual assertions. Under the First Amendment, libel claims fail when brought for statements "that cannot 'reasonably [be] interpreted as stating actual facts'" about the plaintiff.[110] Rather, the defendant's statement must be provably false to incur liability.[111] Compelled graphic images on

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[107] By contrast, a large symbol of a skull and crossbones on a bottle of poison or a railway car carrying toxic chemicals will be understood as signaling that the contents of the container can be fatal upon contact, even—perhaps especially—if the precise contents are not specified. These examples are examined further at text accompanying note 128 *infra*.

[108] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("Under the First Amendment there is no such thing as a false idea.").

[109] *See supra* notes 85-90 and accompanying text.

[110] Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) (quoting Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988)).

[111] *See id.* at 19-20 (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (addressing statements by media defendants on matters of public concern)). While the *Milkovich* Court declined to categorically protect any statement offered in the form of opinion—lest a crafty libeler

commercial products present the inverse inquiry to determine whether the image simply states a factual proposition: does the image express a provably true statement? While one can conceive of graphic labels for tobacco products that might meet this criterion, the FDA's proposed images fall short. It is difficult to grasp, for example, how one might go about verifying the "truth" of an image of a bare-chested male cadaver with chest staples down his torso. Moreover, courts in libel suits routinely look to the context in which disputed statements are made to determine the meaning that readers would ascribe to them.[112] Again, though it is possible to imagine contexts in which, say, a garish image of a corpse with a toe tag could be reasonably understood as stating a fact, a cigarette label under the FDA's regime is not one of them. On the contrary, the visual context reinforces the agency's hortatory intent; each graphic image was required to bear the phone number of the National Cancer Institute's "Network of Tobacco Cessation Quitlines," which uses the telephone portal "1–800–QUIT–NOW."[113]

B.

Upon concluding that a required image does not communicate a coherent factual statement, a court would then determine whether the compulsion is justified. The analysis of compelled nonfactual images would resemble the *Central Hudson* test for restrictions, but would typically not involve that test's first two parts, would operate more stringently, and would include additional elements. While *Central Hudson*'s first two prongs could theoretically be adapted to this context, it seems unlikely as a practical matter that either would come into play. The

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camouflage implied factual falsities in the garb of opinion, *see id.* at 18, 21—the decision is widely viewed as having left courts latitude to deem allegedly libelous speech protected as opinion. *See* Phantom Touring, Inc. v. Affiliated Publ'ns, 953 F.2d 724, 727 (1st Cir. 1992) ("[W]hile eschewing the fact/opinion terminology, *Milkovich* did not depart from the multi-factored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and nonactionable opinion."); Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy Under the First Amendment,"* 100 COLUM. L. REV. 294, 322 (2000) ("Most courts considering opinion since *Milkovich* have . . . reached the result that they likely would have before the Supreme Court decided the case.").

[112] *See* Ollman v. Evans, 750 F.2d 970, 979-84 (D.C. Cir. 1984) (en banc) (setting forth a four-part test relying heavily on context to identify statement as factual assertion or opinion), *cert. denied,* 471 U.S. 1127 (1985); Ashley Messenger, *The Problem with* New York Times v. Sullivan*: An Argument for Moving from a "Falsity Model" of Libel Law to a "Speech Act Model,"* 11 FIRST AMENDMENT L. REV. 172, 202 n.109 (describing the major influence of *Ollman* test prior to *Milkovich*); *id.* at 205-06 (noting continued widespread use of tests examining expression's context to decide whether it constitutes statement of fact or opinion).

[113] Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,681 (June 22, 2011).

government would hardly be seeking to place an official message on an illegal product, and nonfactual counter-speech seems a curious remedy to misleading speech. Additionally, where the government contends instead—as with the FDA's proposed labels—that its aim is to impress more forcefully on consumers hazards associated with the product, it is highly doubtful that such an interest would be dismissed as insubstantial. Rather, as with *Central Hudson*'s third criterion, the court would examine whether the government had established a direct link between its interest and the compelled image. Unlike the generally undemanding version of this inquiry under *Central Hudson*,[114] however, the government would have to convincingly document its claim that the image appreciably furthers that interest. Thus, while perhaps newer studies will offer more cogent evidence of graphic images' effect on smoking[115] than the meager data presented in *Reynolds*,[116] such evidence should still be subject to searching scrutiny.

Of course, even if a compelled image is shown to be effective, a more formidable challenge remains. The First Amendment does not authorize encroachment on rights of speech simply because the infringement can be shown to further the state's goal.[117] Thus, the court would undertake a rigorous scrutiny of the need to require the commercial speaker to display the mandated normative message. Though this review may appear parallel to *Central Hudson*'s final prong, here the government's burden would be heavier. For while the Court has often invoked *Central Hudson*'s fourth part to strike down excessive restrictions,[118] it has continued to describe the *Central Hudson* test as applying intermediate scrutiny.[119] Where the government seeks to foist tendentious expression on speakers—even corporate ones[120]—a more heightened review is appropriate.[121] Nor does

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[114] *See supra* note 44 and accompanying text.

[115] *See, e.g.*, Sherri McGinnis Gonzalez, *Graphic warning labels on cigarette packages reduce smoking rates*, UNIV. OF ILL. AT CHICAGO NEWS CTR. (Nov. 25, 2013), http://news.uic.edu/graphic-warning-labels-on-cigarette-packages-reduce-smoking-rates (describing a study indicating effectiveness of graphic warning labels on cigarette packages under Canadian law).

[116] *See supra* note 43 and accompanying text.

[117] For example, forbidding tobacco companies to advertise their products at all would presumably reduce smoking significantly, but that benefit would not justify a waiver of First Amendment principles to uphold the ban.

[118] *See supra* note 17 and accompanying text.

[119] *See supra* note 22 and accompanying text.

[120] *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986) (plurality opinion) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

[121] *See id.* at 16-17 (overturning an order requiring the utility to place in its billing envelopes a newsletter from an organization espousing views contrary to utility's).

the presence of commercial speech and factual warnings alongside compelled government editorials diminish speakers' interest in resisting the latter.[122] Moreover, while *Central Hudson* appears to contemplate as a possible remedy reducing the scope of a restriction,[123] impermissible compulsion does not readily lend itself to this type of adjustment. *Barnette*'s outcome would not have differed if the plaintiff children could have recited the Pledge of Allegiance less audibly than their classmates;[124] similarly, reducing the size of a graphic image blaring the government's message does not alter the underlying constitutional offense.

The government, then, would have to show it cannot advance its interest without commandeering a product's container to convey a preferred viewpoint. In the case of the FDA's graphic images, the agency has not proved that it must resort to converting cigarette packages into organs of official belief in order to curb smoking. As anti-smoking public service campaigns illustrate, government itself can rail against smoking without inhibition by the First Amendment.[125] If government is dissatisfied with the progress of such campaigns, other means exist that do not involve speech at all. Additional restrictions on purchase, heavier taxation, even banning the product altogether: all these would exert a more direct and dramatic effect on smoking than pasting scary images on packages. Of course, it is doubtless an imposing task to muster the political will to enact such measures. This consideration, however, has not entered into the Court's calculus when invalidating commercial speech regulation in favor of non-speech alternatives.[126] A government that declines to directly confront a serious matter of health or safety may not address it through the backdoor of invading rights of speech.

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[122] In *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), the Court rejected the idea that "speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Id.* at 796. Here, the "fully protected speech"—i.e., opinion—is the message conveyed by the graphic image. That the speaker here seeks to refrain from such speech rather than engage in it should not matter; the Court has acknowledged "[t]he constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression." *Id.* at 797.

[123] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S 557, 566 (1980) (requiring that restrictions on commercial speech not be "more extensive than is necessary to serve [the state's] interest").

[124] *See supra* note 82 and accompanying text.

[125] *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.").

[126] *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 372-73 (2002) (suggesting several nonspeech alternatives to a ban on advertising of compound drugs); Rubin v. Coors Brewing Co., 514 U.S. 476, 490-91 (1995) (noting as an alternative to a ban on displaying alcohol content on beer labels, *inter alia*, direct limitation on alcohol content).

Finally, while no formula could dictate whether the government has met its burden, a court could weigh a number of factors in assessing the validity of a compelled nonfactual image. A leading consideration is the immediacy and severity of the danger posed by failure to heed a product's factual warning. Just as the First Amendment does not protect falsely shouting fire in a theater,[127] neither should it forbid a compelled image where there is no opportunity to avert an imminent hazard. Thus, even if a symbol of skull and crossbones on a container of toxic material could somehow be construed as nonfactual,[128] the instant harm caused by exposure supports latitude in mandating warnings. Conversely, the FDA can invoke no comparable immediacy to justify making cigarette packages platforms for federal sermons. Though cigarettes can undeniably produce serious and even fatal harm, government has no overriding interest in ensuring that they are not purchased; their very legality attests to that. Meanwhile, opportunities abound to dissuade nonsmokers from starting and persuade smokers to stop.

In addition, the lawfulness of cigarette sales suggests two other considerations affecting the permissibility of imposed normative graphic labels. In judging the strength of the interest in requiring such images, the court may look to the government's own actions; contradictory policies tend to undermine the credibility of this interest. Thus, the putative need to deter potential cigarette purchasers with revulsive images seems less urgent in the context of policies that sanction the sale of cigarettes, gain revenue from their taxation, and subsidize their production.[129] By contrast, it is entirely consistent for a government that takes extensive measures to prevent contact with toxic substances—while allowing their appropriate use—to seek powerful warnings designed to assure that this calamity does not occur.

Moreover, the dissonance between simultaneously condoning and discouraging the sale of cigarettes points to another factor that weighs against the compelled image in this instance. Though the right not to speak does not hinge on disagreement with the forced message, a compulsion to express a message at odds with the speaker's beliefs or expression more deeply intrudes on that right. While the FDA's graphic labels did not compel tobacco companies to contradict a strongly held political belief or

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[127] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[128] *See supra* note 107.

[129] *See Senate rejects amendment to end tobacco farm subsidies*, THE HILL (May 23, 2013, 6:54 p.m.), http://thehill.com/blogs/floor-action/senate/301645-senate-rejects-amendment-to-end-tobacco-farm-subsidies.

moral conviction, they were intended to cancel the message of solicitation for which the companies' packaging was designed. By forcing these companies to tell customers not to purchase their product, the government sought to "require speakers to affirm in one breath that which they deny in the next."[130]

CONCLUSION

The FDA's graphic labels for cigarette packages illustrate the need for a distinctive review of compelled nonfactual commercial speech. Compulsion to spread government views, rather than disclose information, clashes with First Amendment disfavor of forcing speakers to voice official policy. This Article suggests a two-prong approach that begins with a method of ascertaining whether the image in question is properly characterized as factual or nonfactual expression. If the image is found to project opinion, the state would bear a heavy burden to show that it cannot advance its interest through means less intrusive of speech rights. Such heightened scrutiny is appropriate when government seeks to manipulate the marketplace of ideas in this way. The Supreme Court has recognized that even in a commercial setting, the state may not infringe on speech "in order to tilt public debate in a preferred direction."[131]

[130] *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986) (plurality opinion).

[131] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2671 (2011).