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# No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine

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**NO NEED TO BREAK NEW GROUND:  
A RESPONSE TO THE SUPREME  
COURT’S THREAT TO OVERHAUL THE  
COMMERCIAL SPEECH DOCTRINE**

*Jennifer L. Pomeranz\**

*Commercial speech and core speech are fundamentally different, and the basis for their current First Amendment protections reflects this understanding. The purpose for protecting each type of speech is unique, and the ability of the government to compel or restrict such speech differs. Two distinct analytical frameworks and two different tiers of protection have emerged.*

*The U.S. Supreme Court has afforded protection against unwarranted restriction of commercial speech by applying intermediate scrutiny under the test that it established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*. On the other hand, the Court has subjected regulations of core speech to strict scrutiny. However, in 2011, the Court conflated the two analyses and relied on core-speech precedent when it analyzed a commercial-speech issue in *Sorrell v. IMS Health Inc.**

*This Article argues that the Court must uphold the distinction between commercial speech and core speech and that it must reject all future opportunities to overhaul the commercial-speech doctrine. The Court should continue using the *Central Hudson* test to apply intermediate scrutiny to challenged regulations of commercial speech. Further, this Article encourages the Court to better define the intermediate scrutiny standard that *Central Hudson* set forth by clarifying the second, third, and fourth prongs of the *Central Hudson* test. Such clarification will encourage more consistency in lower courts’ opinions in the realm of commercial speech.*

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## I. INTRODUCTION

The U.S. Supreme Court has not upheld a commercial speech restriction since 1995.<sup>1</sup> In its most recent opportunity, the Court found that the statute at issue in *Sorrell v. IMS Health Inc.*<sup>2</sup> “hampered” at least some commercial speech, and it struck down the law as violating the First Amendment.<sup>3</sup> The majority threatened stricter review but subjected the law to “a commercial speech inquiry” because “the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.”<sup>4</sup> However, even accepting the majority’s view that the law implicated the First Amendment,<sup>5</sup> the majority departed from precedent establishing the commercial speech doctrine and confusingly infused core speech cases within its proposed commercial speech analysis.

*IMS Health* did not present the Court with a typical commercial speech restriction, and the majority did not employ a traditional commercial speech analysis. The dissent would have subjected the regulation to rational basis review but alternatively found that it should have passed First Amendment scrutiny.<sup>6</sup> Prior to *IMS Health*, the Court had not granted certiorari on a case assessing the constitutionality of a commercial speech restriction since

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1. Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding a state bar rule that imposed a thirty-day ban on targeted direct mail solicitations of persons involved in personal injury or wrongful death actions).

2. 131 S. Ct. 2653 (2011) (describing a Vermont law that restricted the sale, disclosure, and use of pharmacy records containing prescriber-identifiable information for purposes of marketing or promoting a prescription drug unless the prescriber consented).

3. *Id.* at 2659, 2667.

4. *Id.* at 2664, 2667 (explaining that “heightened judicial scrutiny is warranted” and citing both core and commercial speech cases, but then stating: “As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied. For the same reason there is no need to determine whether all speech hampered by § 4631(d) is commercial, as our cases have used that term” (citations omitted)); see also Michelle M. Mello & Noah A. Messing, *Restrictions on the Use of Prescribing Data for Drug Promotion*, 365 NEW ENG. J. MED. 1248, 1250 (2011) (“The term ‘heightened scrutiny’ is critical and pointedly ambiguous. It might be a mere synonym for the midlevel scrutiny applied under the *Central Hudson* test—but it might mean far more.”).

5. *IMS Health*, 131 S. Ct. at 2673–75 (Breyer, J., dissenting) (stating that the majority deviated from precedential standards and that commercial speech is held to a more lenient standard than core speech).

6. *Id.* at 2674–77.

*Thompson v. Western States Medical Center*,<sup>7</sup> decided in 2002. In *Thompson*, the majority struck down the regulation under the intermediate test developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission*<sup>8</sup> for restrictions on commercial speech.<sup>9</sup> The dissent would have upheld the restriction under the same test.<sup>10</sup> Justice Thomas concurred separately to express his long-held view that restrictions on commercial speech “should not be analyzed under the *Central Hudson* test.”<sup>11</sup> He has and continues to be the biggest proponent of applying strict scrutiny to all regulations of speech.<sup>12</sup>

In *Thompson*, as in *Lorillard Tobacco Co. v. Reilly*,<sup>13</sup> decided one year earlier, the Court acknowledged that not all the Justices have embraced the *Central Hudson* test and its application to commercial speech restrictions as a whole.<sup>14</sup> Parties challenging

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7. 535 U.S. 357 (2002).

8. 447 U.S. 557 (1980).

9. *Thompson*, 535 U.S. at 368. In the same year that the Court decided *Thompson*, it denied certiorari for a case assessing the constitutionality of a commercial disclosure requirement; Justice Thomas, joined by Justice Ginsburg, dissented from the denial of certiorari. *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002). They opined that the case would have provided “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.” *Id.* (Thomas, J., dissenting). But in 2010, the Court accepted and decided a commercial disclosure case, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1341 (2010), where the full court upheld the disclosure requirements as constitutional based on precedent established in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Justice Thomas concurred separately to question the commercial speech doctrine in general and as applied in that case. *Milavetz*, 130 S. Ct. at 1342–45 (Thomas, J., concurring).

10. *Thompson*, 535 U.S. at 378–89 (Breyer, J., dissenting) (joining in the dissent were Chief Justice Rehnquist, Justice Stevens, and Justice Ginsburg).

11. *Id.* at 377 (Thomas, J., concurring).

12. Justice Thomas has been the most outspoken about his disagreement with the commercial speech doctrine. Ironically, he wrote the majority opinion, applying the *Central Hudson* test, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), and joined the majority in one of the very few cases where the Court upheld a commercial speech restriction under the *Central Hudson* test, *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620 (1995). Justice Stevens, who expressed anti-*Central Hudson* views, joined the dissent. *Went For It*, 515 U.S. at 635 (Kennedy, J., dissenting) (joining in the dissent were Justices Stevens, Souter, and Ginsburg). Justice Scalia has since tempered his anti-*Central Hudson* views. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Scalia, J., concurring) (“Since I do not believe we have before us the wherewithal to declare *Central Hudson* wrong—or at least the wherewithal to say what ought to replace it—I must resolve this case in accord with our existing jurisprudence . . .”).

13. 533 U.S. 525 (2001).

14. *Thompson*, 535 U.S. at 367–68; *Lorillard*, 533 U.S. at 554 (“Petitioners urge us to reject the *Central Hudson* analysis and apply strict scrutiny. They are not the first litigants to do so. Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases.” (citing Greater New Orleans Broad.

commercial speech restrictions on First Amendment grounds often urge the Court to reject *Central Hudson* in favor of strict scrutiny based on this disagreement.<sup>15</sup> Thus far, however, the Court has not explicitly found any case to require it to depart from *Central Hudson* and “break new ground.”<sup>16</sup> *IMS Health* followed this pattern.

In *IMS Health*, the respondents cited the “collection of opinions” questioning *Central Hudson* for the proposition that a “majority of current justices have suggested that *all* laws suppressing the content of speech should be subjected to strict scrutiny, even when the speech could be classified as ‘commercial.’”<sup>17</sup> Commercial entities seek strict scrutiny application to restrictions and compulsions of commercial communication in order to have wider ability to communicate without government interference. However, the impact of such a radical transformation of the commercial speech doctrine would be detrimental to consumers and directly contravenes the Court’s original purpose for finding that the First Amendment protects commercial speech. Further, applying strict scrutiny to commercial speech is not a straightforward proposition. There are a wide range of implications that would result from the Court retreating from intermediate scrutiny.

This Article argues that the Court should never find it appropriate to “break new ground” and overhaul the commercial speech doctrine to provide commercial speech with enhanced First Amendment protection. The outcome of judicial interpretation should not always be “the same whether” commercial speech is involved “or a stricter form of judicial scrutiny is” necessary because core speech is implicated.<sup>18</sup> There are fundamental differences

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Ass’n v. United States, 527 U.S. 173, 184 (1999); *id.* at 197 (Thomas, J., concurring); 44 *Liquormart*, 517 U.S. at 501, 510–14; *id.* at 517 (Scalia, J., concurring); *id.* at 518 (Thomas, J., concurring)).

15. See e.g., Brief for Plaintiffs-Appellants at 23, *IMS Health Inc. v. Sorrell*, 630 F.3d 263 (2d Cir. 2010) (Nos. 09-1913cv(L), 09-2056cv(CON)), 2009 WL 8379444, at \*23.

16. *Lorillard*, 533 U.S. at 554–55 (“But here, as in *Greater New Orleans*, we see ‘no need to break new ground.’ *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.” (quoting *Greater New Orleans*, 527 U.S. at 184)).

17. Brief for Plaintiffs-Appellants, *supra* note 15, at 23 (“Justice Thomas repeatedly has called for abandonment of intermediate scrutiny ‘[i]n cases such as this, in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace.’ Publishers agree with this reasoning . . .” (alteration in original) (citations omitted)).

18. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011).

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between core and commercial speech, and First Amendment analysis should reflect this.

This Article continues in Part II by distinguishing between core and commercial speech. Part II also discusses the importance of retaining these distinctions in order to enable the government to both protect and inform consumers. If the Court altered the current commercial speech doctrine, serious implications would result.<sup>19</sup> Part III discusses such consequences in the context of commercial disclosure requirements. Part IV addresses the need to maintain intermediate scrutiny for restrictions on commercial speech based on the values underlying the First Amendment. This is necessary in order to protect consumers from false, misleading, and deceptive commercial speech.

Part IV further argues that the *Central Hudson* test has proven to protect commercial speech against unwarranted government restrictions for decades despite the fact that its application has not been straightforward. Because it would be dangerous to depart from well-established precedent applying intermediate protection to commercial speech, the Court should explain this standard in future cases. Rather than corrupting the distinction between core and commercial speech, the Court should provide expanded explanation through future commercial speech cases to clarify the boundaries of the doctrine.

## II. THERE IS A FUNDAMENTAL DIFFERENCE BETWEEN CORE AND COMMERCIAL SPEECH

### A. *Core and Commercial Speech Have Their Own Intricacies*

Parties and Justices who argue that it is possible to have one test (strict scrutiny) to determine if restrictions on core and commercial speech are constitutional, and one test (intermediate scrutiny) to determine if

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19. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 56 (2000) (“The alternative vision implies, for example, that the First Amendment could no longer countenance compelled disclosures within the realm of commercial speech. . . . Nor could the Court any longer tolerate regulations of commercial speech that were significantly more overinclusive than those accepted within public discourse. The same precision of regulation would be applicable to both. Nor could the misleading requirement any longer be employed . . .”).

compulsions of core and commercial speech are constitutional, fail to appreciate the different needs, protections, and values underlying both types of speech.<sup>20</sup> The freedom of speech under the First Amendment embodies the Constitution's "commitment to the free exchange of ideas,"<sup>21</sup> which reflects the national commitment to open debate of "public issues" and "governmental affairs."<sup>22</sup> Thus, at the core of the First Amendment is the protection of ideas and most often takes the form of political and religious speech.<sup>23</sup> On the other hand, commercial speech is a recent construction that has been defined as "speech that *proposes* a commercial transaction."<sup>24</sup> The majority of commercial speech cases involve government restrictions on advertisements for products and services.<sup>25</sup>

In his dissenting opinion in *Garcetti v. Ceballos*,<sup>26</sup> Justice Breyer stated:

I begin with what I believe is common ground: . . . Because virtually all human interaction takes place through speech, the First Amendment cannot offer all speech the same degree of protection. Rather, judges must apply different protective presumptions in different contexts, scrutinizing government's speech-related restrictions differently depending upon the general category of activity.<sup>27</sup>

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20. *Id.* ("The Court thus seems to be working its way toward a fundamental choice. It can either continue the task of fashioning doctrine on the assumption that the First Amendment safeguards the informational function of commercial speech, or it can overturn its prior doctrinal structure and remake commercial speech doctrine as though it were protecting participation within the process of self-government. I do not think that the Court has thoroughly canvassed the enormous implications of the latter alternative.").

21. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002).

22. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

23. *See id.* ("[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *see also* *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (explaining that religious speech is protected under the First Amendment).

24. *Bd. of Trs. v. Fox*, 492 U.S. 469, 482 (1989).

25. *Post, supra* note 19, at 5.

26. 547 U.S. 410 (2006).

27. *Id.* at 444 (Breyer, J., dissenting) (internal numbering omitted) (majority holding that the First Amendment does not prohibit managerial discipline of public employees for making statements pursuant to employees' official duties).

Justice Breyer went on to contrast a political speech case with cases addressing commercial and government speech.<sup>28</sup> Justice Thomas disagrees that this is common ground and has offered opinions on the other end of the spectrum. Justice Thomas believes that restrictions and compulsions of core and commercial speech should garner the same strict scrutiny.<sup>29</sup> But Justice Thomas's view fails to consider that there is not one single strict scrutiny test for restrictions and compulsions of core speech. In fact, the Court has established two different tiered degrees of protection in both the core and commercial speech areas.<sup>30</sup>

Core speech has many intricacies. Normally, core speech receives the highest level of First Amendment protection, but this is not always the case. The Court upheld the Federal Communication Commission's ability to regulate offensive words in broadcast radio,<sup>31</sup> a state's ability to ban the sale of indecent material to youth under age seventeen,<sup>32</sup> a school's ability to regulate student expression in a school newspaper,<sup>33</sup> a school district's ability to regulate union communication in teachers' school mailboxes,<sup>34</sup> and a city's ability to limit political speech on its transit system vehicles.<sup>35</sup> Strict scrutiny was not used to analyze any of these restrictions on core speech; therefore, they represent a reduced level of protection for core speech in limited circumstances. Specifically, based on the

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28. *Id.* at 444–45 (citing *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality opinion) (political speech); *Rust v. Sullivan*, 500 U.S. 173 (1991) (government speech); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, (1980) (commercial speech)).

29. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575–76 (2001) (Thomas, J., concurring); *see also* *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1343 n.1 (2001) (Thomas, J., concurring) (stating that he doubts “an entirely different standard of review for regulations that compel, rather than suppress, commercial speech” is justified); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496–97 (1995) (Stevens, J., concurring) (“[T]he statute at issue here should be subjected to the same stringent review as any other content-based abridgment of protected speech.”).

30. *Garcetti*, 547 U.S. at 410.

31. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *see also* *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 325–26 (2d Cir. 2010) (“And the Supreme Court has continuously reaffirmed the distinction between broadcasting and other forms of media since *Pacifica*. . . . While *Pacifica* did not specify what level of scrutiny applies to restrictions on broadcast speech, subsequent cases have applied something akin to intermediate scrutiny.” (citing *Reno v. ACLU*, 521 U.S. 844, 866–67 (1997); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989); *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984))).

32. *Ginsberg v. New York*, 390 U.S. 629 (1968).

33. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

34. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

35. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

mode of transmission (broadcast media), or the different levels of protection granted to children, or the occurrence of speech on the government's own property, core speech can sometimes be restricted without implicating or resorting to strict scrutiny.<sup>36</sup>

Commercial speech, likewise, has various facets to it.<sup>37</sup> The commercial speech doctrine has developed over the years, starting in 1976 with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>38</sup> (which confirmed that commercial speech is protected by the First Amendment to a different degree than core speech is) and continuing to the 1980 *Central Hudson* case<sup>39</sup> (which defined the intermediate test for restrictions on commercial speech and confirmed that false, deceptive, and misleading commercial speech is not protected by the First Amendment). These cases were followed by *Zauderer v. Office of Disciplinary Counsel*<sup>40</sup> in 1985 (which found that commercial disclosure requirements are subject to "reasonable" basis review) and then *Lorillard*<sup>41</sup> in 2001 (which applied *United States v. O'Brien*<sup>42</sup> to regulations of conduct that may implicate commercial expression). In 2002, the Court took up the

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36. *Cf. Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2984 n.11 (2010) ("First, in traditional public forums, such as public streets and parks, 'any restriction based on the content of . . . speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest.' Second, governmental entities create designated public forums when 'government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose'; speech restrictions in such a forum 'are subject to the same strict scrutiny as restrictions in a traditional public forum.' Third, governmental entities establish limited public forums by opening property 'limited to use by certain groups or dedicated solely to the discussion of certain subjects.' As noted in text, '[i]n such a forum, a governmental entity may impose restrictions on speech that are reasonable and viewpoint-neutral.'" (citations omitted)). The Supreme Court originally used the term "nonpublic forum," *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998), but recently changed the term to "limited public forum." *See Martinez*, 130 S. Ct. at 2984 n.11. The dissent in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, used "limited public forum" to indicate "designated public forum." 473 U.S. 788, 817 (1985). The Ninth Circuit uses the term "limited public forum" as a "sub-category of a designated public forum." *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008). Understandably, there has been some confusion regarding the designation of "limited public forum." *See, e.g., Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76 n.4 (1st Cir. 2004).

37. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) ("As our review of the case law reveals, Rhode Island errs in concluding that *all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them.").

38. 425 U.S. 748 (1976).

39. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

40. 471 U.S. 626 (1985).

41. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

42. 391 U.S. 367 (1968).

issue again in *Thompson*<sup>43</sup> (which emphasized that regulating speech must be a last, not first, resort), and again, in 2011, in *IMS Health*<sup>44</sup> (which subjected a regulatory program that affects commercial speech to First Amendment scrutiny and brought content- and speaker-based concerns into the commercial speech context).<sup>45</sup> The Court has generally become more hostile to commercial speech restrictions along the way.

In both the core and commercial speech contexts, some speech remains unprotected by the First Amendment. Some seemingly core speech garners no protection under the First Amendment, including obscene speech,<sup>46</sup> defamation,<sup>47</sup> and inciting—or fighting—words.<sup>48</sup> But the First Amendment does protect the related sexually oriented depictions,<sup>49</sup> false and erroneous political and religious statements,<sup>50</sup>

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43. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

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

45. *Id.* at 2677 (Breyer, J., dissenting) (“Thus, it is not surprising that, until today, this Court has *never* found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate—whether the information rests in government files or has remained in the hands of the private firms that gathered it.”); *see also* Kevin Outterson, *Higher First Amendment Hurdles for Public Health Regulation*, NEW ENG. J. MED., Aug. 18, 2011, at e13(1), e13(1) (originally published Aug. 3, 2011) (“Instead of dealing with this statute under existing precedent, Kennedy seized the opportunity to expand the First Amendment’s reach and power to strike down government regulation of health care information.”).

46. *Miller v. California*, 413 U.S. 15 (1973); *see also* *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2734 (2011) (“[T]he obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of ‘sexual conduct.’”).

47. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

48. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *see also* *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (“Other distinctions based on content have been approved in the years since [*Schenck v. United States*, 249 U.S. 47 (1919)]. The government may forbid speech calculated to provoke a fight. . . . It may treat libels against private citizens more severely than libels against public officials. Obscenity may be wholly prohibited. And only two Terms ago [in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 52 (1976),] we refused to hold that a ‘statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment.’” (citations omitted)); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”).

49. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803 (2000).

50. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964).

and “misguided, or even hurtful” speech.<sup>51</sup> Restrictions on protected core speech receive strict scrutiny, and courts must determine whether the speech is protected prior to applying the appropriate test. Similarly, in the commercial context, false, deceptive, and misleading commercial speech are not protected by the First Amendment.<sup>52</sup> But *potentially* misleading commercial speech *is* protected to an intermediate degree, like other commercial speech.<sup>53</sup>

And then there is false speech—the one area that is more straightforward in the context of commercial speech than it is in the context of core speech. False commercial speech is not protected,<sup>54</sup> but when it comes to core speech, this category is unclear.<sup>55</sup> The Court famously explained in *Gertz v. Robert Welch, Inc.*<sup>56</sup> that erroneous statements of fact are “inevitable in free debate”; thus, in the area of core speech, the First Amendment requires the protection of “some falsehood in order to protect speech that matters.”<sup>57</sup> Hence, false statements have been tolerated, but it is unclear how far this allowance reaches. For example, the Ninth and Tenth Circuits came to opposite conclusions regarding the constitutionality of the Stolen Valor Act, which proscribes lying about military achievements and permits punishment thereof as a criminal offense.<sup>58</sup> Both courts relied on *Gertz* as the basis for their holdings.<sup>59</sup>

The Ninth Circuit found the Act to be a content-based speech restriction subject to strict scrutiny, under which it failed, and noted that finding otherwise would create a slippery slope of criminalizing lying in general, such as about one’s height, weight, and age.<sup>60</sup> The

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51. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (finding that the First Amendment protects racist political speech by a Ku Klux Klan group leader)).

52. *In re R.M.J.*, 455 U.S. 191, 203 (1982).

53. *Id.*

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

55. *Rickhoff v. Willing*, No. SA-10-CA-140-XR, 2010 U.S. Dist. LEXIS 96557, at \*17 n.4 (W.D. Tex. Sept. 14, 2010).

56. 418 U.S. 323 (1974).

57. *Id.* at 340–41.

58. *Compare* *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010) (holding the Stolen Valor Act unconstitutional in violation of the First Amendment), *cert. granted*, 132 S. Ct. 457 (2011), *with* *United States v. Strandlof*, 2012 U.S. App. LEXIS 1494 (10th Cir. Jan. 27, 2012) (upholding the Stolen Valor Act as constitutional and not offending the First Amendment).

59. *Alvarez*, 617 F.3d at 1202–11; *Strandlof*, 2012 U.S. App. LEXIS 1494, at \*9–10, \*25–42.

60. *Alvarez*, 617 F.3d at 1200.

Tenth Circuit rejected the Ninth Circuit's reasoning, reading the Act to include a scienter requirement, and finding the Act constitutional since it "does not encroach on any protected speech."<sup>61</sup> The Supreme Court has granted certiorari on the Ninth Circuit case.<sup>62</sup> Whatever ultimately happens to the constitutionality of the Stolen Valor Act, these cases highlight the uncertainty surrounding protection of false statements in the core speech realm.

Conversely, there is no question that false statements of commercial speech are not protected.<sup>63</sup> For example, if a car company falsely claimed to win an award by *Car and Driver* in its television advertisements, there would be no question that this would not be protected as commercial speech. This distinction is not based on the speaker but on the speech. To the extent that people can make "erroneous statement[s] of fact"<sup>64</sup> on political matters, so can corporations.<sup>65</sup> However, it would undermine the very value of commercial speech to make similar allowances when the same corporations seek to propose a commercial transaction to an unassuming party.

### *B. Core and Commercial Speech Benefit Society Differently*

The purpose and constitutional values at stake for protecting core speech are fundamentally different from those underlying the protection for commercial speech. For core speech, the First Amendment guards against government interference for the benefit of both the listener and the speaker. Justice Marshall aptly observed

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61. *Strandlof*, 2012 U.S. App. LEXIS 1494, at \*14–15, \*52–53; see also *United States v. Robbins*, 759 F. Supp. 2d 815, 819 (W.D. Va. 2011) (finding the speech at issue "is not 'speech that matters,'" so it falls outside First Amendment protection (quoting *Gertz*, 418 U.S. at 341)).

62. *Alvarez*, 132 S. Ct. 457.

63. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring) ("Not only does regulation of inaccurate commercial speech exclude little truthful speech from the market, but false or misleading speech in the commercial realm also lacks the value that sometimes inheres in false or misleading political speech. [T]he consequences of false commercial speech can be particularly severe: Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised. [T]he evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech." (citation omitted)).

64. *Gertz*, 418 U.S. at 340.

65. *Citizens United v. FEC*, 130 S. Ct. 876, 906–07, 917 (2010).

that “the First Amendment protects . . . the freedom to hear as well as the freedom to speak. . . . The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the ‘means indispensable to the discovery and spread of political truth.’”<sup>66</sup> This type of exchange only occurs in the realm of core speech.

In *Virginia Pharmacy*, the Court explained that the primary purpose for protecting commercial speech is to ensure the free flow of commercial information to benefit the listener to support intelligent and well-informed consumer decisions.<sup>67</sup> The Court consistently emphasized that the “extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”<sup>68</sup> In *Virginia Pharmacy*, the Court also identified several reasons justifying the “different degree of protection” for commercial and core speech: commercial speech is more durable and easily verifiable by the speaker, there is less likelihood of it being chilled, and the audience often receives its sole source of information from the commercial actor itself who alone can verify its accuracy.<sup>69</sup> Upon this strong foundation the commercial speech doctrine emerged. This rationale has guided courts, regulators, and commercial actors since 1976 and is at the foundation of the government’s ability to effectively protect consumers from corrupted or incomplete speech.<sup>70</sup>

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66. *Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927)); *see, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (finding that the First Amendment protects racist political speech by a leader of a Ku Klux Klan group).

67. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764–65 (1976).

68. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *see also* *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 432 (1993) (Blackmun, J., concurring) (noting the “Court’s emphasis on the First Amendment interests of the listener in the commercial speech context”).

69. *Va. Pharmacy*, 425 U.S. at 771–72 n.24; *cf.* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring) (“I have observed previously that there is no ‘philosophical or historical basis for asserting that “commercial” speech is of “lower value” than “noncommercial” speech.’” (quoting *44 Liquormart v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring))).

70. *See, e.g.*, *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001) (“Innumerable federal and state regulatory programs require the disclosure of product and other commercial information.” (citing 2 U.S.C. § 434 (reporting of federal election campaign contributions); 15 U.S.C. § 78f (securities disclosures); 15 U.S.C. § 1333 (tobacco labeling); 21 U.S.C. § 343(q)(1) (nutritional labeling); 33 U.S.C. § 1318 (reporting of pollutant concentrations in discharges to water); 42 U.S.C. § 11023 (reporting of releases of toxic substances); 21 C.F.R.

In order to uphold these principles, the Court must maintain the First Amendment's reduced protection for commercial speech. Interestingly, the Court has made the opposite argument for maintaining a reduced protection for commercial speech in that "parity . . . could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to [core] speech."<sup>71</sup> Parity of constitutional protection for core and commercial speech would also have the opposite outcome of creating an unfair and inefficient market where the government could not adequately inform and protect consumers. Since commercial speech is "the offspring of economic self-interest," only by maintaining intermediate protection for commercial speech can we ensure that the bargaining process is fair and consumers are protected.<sup>72</sup>

The government must be permitted to compel factual commercial disclosure requirements,<sup>73</sup> effectively deal with misleading and deceptive commercial speech,<sup>74</sup> and protect consumers from overreaching by commercial speakers.<sup>75</sup> Commercial actors are guarded against "unwarranted government regulation" through the intermediate test created in *Central Hudson*. These essential aspects of the commercial speech doctrine serve society's "strong interest in the free flow of commercial information" in order to protect and maintain transparent and efficient markets based on "intelligent and well informed" consumers.<sup>76</sup> In the absence of intermediate-level protection, this system could not be maintained. Consumers would be unprotected and the U.S. markets would cease to be efficient.

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§ 202.1 (disclosures in prescription drug advertisements); 29 C.F.R. § 1910.1200 (posting notification of workplace hazards); CAL. HEALTH & SAFETY CODE § 25249.6 ("Proposition 65"; warning of potential exposure to certain hazardous substances); N.Y. ENVTL. CONSERV. LAW § 33-0707 (disclosure of pesticide formulas)).

71. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

72. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 n.6 (1980) (citations omitted).

73. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

74. *Va. Pharmacy*, 425 U.S. at 771-72.

75. *Went For It*, 515 U.S. at 634; *cf. Bd. of Trs. of State Univ. v. Fox*, 492 U.S. 469, 475 (1989) ("The Court of Appeals also held, and we agree, that the governmental interests asserted in support of the resolution are substantial: promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility.").

76. *Va. Pharmacy*, 425 U.S. at 764-65.

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### III. THE COMPULSION OF CORE AND COMMERCIAL SPEECH

#### *A. Commercial Disclosure Requirements Are Necessary to Protect and Inform Consumers*

The divergent constitutional value of protecting commercial speech supports the government's ability to require factual disclosures, without which commercial speech would only benefit the speaker and his economic interests. This would be in direct contradiction to the initial purpose of protecting commercial speech in the first place.

The Court consistently confirms its preference for transparency in commercial transactions and consumer access to truthful commercial information to make informed decisions.<sup>77</sup> This predates *Virginia Pharmacy*. As early as 1919, the Court found that “it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold.”<sup>78</sup> As a result, the U.S. regulatory landscape includes commercial disclosure requirements so consumers have truthful information relevant to the products and services available in the commercial marketplace.

To this end, the Court has found that commercial disclosure requirements are constitutional if they are reasonably related to a valid government interest. The Court has decided two cases on this issue, *Milavetz, Gallop & Milavetz, P.A. v. United States*<sup>79</sup> in 2010 and *Zauderer* in 1985, both expressly recognizing and upholding a commercial disclosure requirement as “reasonably related” to the government's interest.<sup>80</sup> In both cases, the government's interest was “in preventing deception of consumers.”<sup>81</sup> It has been argued that preventing deception is the only appropriate government interest to uphold disclosure requirements,<sup>82</sup> but this is not the case. First,

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77. See, e.g., *id.* at 765.

78. *Corn Prods. Ref. Co. v. Eddy*, 249 U.S. 427, 431 (1919).

79. 130 S. Ct. 1324 (2010).

80. *Id.* at 1341; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

81. *Milavetz*, 130 S. Ct. at 1341 (quoting *Zauderer*, 471 U.S. at 651) (unanimously upholding a requirement that professionals must disclose that their services are for debt relief under the Bankruptcy Code).

82. See, e.g., *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 132–34 (2d Cir. 2009) (describing how Appellant argued that *Zauderer's* “rational basis test” is limited “to those

several Justices have also identified the danger of incomplete information to justify disclosure requirements;<sup>83</sup> and, second, all circuit courts to consider that argument have disagreed.<sup>84</sup> Circuit courts have expressly found that compelled disclosures are constitutionally valid if they are instituted simply to “better inform consumers about the products they purchase.”<sup>85</sup> There are hundreds of requirements currently in the commercial marketplace that primarily function to provide consumers with factual information to promote informed decision-making, and sometimes nothing more. It is true that many prevent deception or correct the dangers of incomplete information, but many are implemented to promote informed decision-making by providing information.<sup>86</sup>

In *Zauderer*, the Court confirmed that “the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [so commercial actors’] constitutionally protected interest in *not* providing any particular factual information in his advertising is

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situations in which the law at issue furthers the State’s interest in preventing deception of consumers”); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005) (“PCMA states that the holding in *Zauderer* is ‘limited to potentially deceptive advertising directed at consumers.’ . . . [W]e have found no cases limiting *Zauderer* in such a way.”).

83. For example, Justice Stevens in *Rubin v. Coors Brewing Co.* recognized the interest in protecting “consumers from the dangers of incomplete information.” 514 U.S. 476, 492 (1995) (Stevens, J., concurring). The dissent in *Glickman v. Wileman Bros. & Elliott, Inc.*, found that disclosure requirements could be implemented to avoid misleading or incomplete commercial messages. 521 U.S. 457, 490–91 (1997) (Souter, J., joined by Rehnquist, C.J., Scalia, J., and Thomas, J., dissenting) (“*Zauderer* thereby reaffirmed a longstanding preference for disclosure requirements over outright bans, as more narrowly tailored cures for the potential of commercial messages to mislead by saying too little. But however long the pedigree of such mandates may be, and however broad the government’s authority to impose them, *Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.” (citations omitted)).

84. See *N.Y. State Rest. Ass’n*, 556 F.3d at 132–34; *Pharm. Care Mgmt. Ass’n*, 429 F.3d at 310 n.8; *Env’tl. Def. Ctr. v. EPA*, 344 F.3d 832, 851 (9th Cir. 2003); see also *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (holding that a statute requiring the disclosure of information related to mercury contained in light bulbs was valid in order to inform consumers about such dangers of the product).

85. See *Sorrell*, 272 F.3d at 115 (“To be sure, the compelled disclosure at issue here was not intended to prevent ‘consumer confusion or deception’ per se, but rather to better inform consumers about the products they purchase. . . . Accordingly, we cannot say that the statute’s goal is inconsistent with the policies underlying First Amendment protection of commercial speech, described above, and the reasons supporting the distinction between compelled and restricted commercial speech. We therefore find that it is governed by the reasonable-relationship rule in *Zauderer*.” (quoting *Zauderer*, 471 U.S. at 651)); accord *Pharm. Care Mgmt. Ass’n*, 429 F.3d at 310 n.8.

86. See Post, *supra* note 19, at 4.

minimal.”<sup>87</sup> Disclosure requirements are based on the “informational function” of commercial speech and the accepted understanding that it would be impossible for consumers to verify such information on their own.<sup>88</sup> As a result, the U.S. regulatory landscape is replete with commercial disclosure requirements—“that the speaker might not make voluntarily”—both to give consumers truthful information about products and services and to protect consumers from economic and physical harm.<sup>89</sup>

The Securities Exchange Act of 1934, for example, imposes mandatory disclosure requirements on publicly traded companies.<sup>90</sup> The Nutrition Labeling and Education Act of 1990 requires the disclosure of ingredient and nutrition information on food and beverage products.<sup>91</sup> The Food Allergen Labeling and Consumer Protection Act of 2004 requires the disclosure of the presence of eight common food allergens.<sup>92</sup> The Federal Hazardous Substances

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87. *Zauderer*, 471 U.S. at 651 (citation omitted); *see also id.* at 651 n.14 (“The right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right.”).

88. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563–64 & n.6 (1980).

89. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 & n.1 (1995) (Stevens, J., concurring) (“In the commercial context . . . government . . . often requires affirmative disclosures that the speaker might not make voluntarily.” (citing 15 U.S.C. § 77e (requiring a registration statement before selling securities); 15 U.S.C. § 1333 (requiring “Surgeon General’s Warning” labels on cigarettes); 21 U.S.C. § 343 (1988 ed. & Supp. V) (setting labeling requirements for food products); 21 U.S.C. § 352 (1988 ed. & Supp. V) (setting labeling requirements for drug products))); *see also Sorrell*, 272 F.3d at 116 (“Innumerable federal and state regulatory programs require the disclosure of product and other commercial information. To hold that the Vermont statute [requiring disclosures for mercury-containing products] is insufficiently related to the state’s interest in reducing mercury pollution would expose these long-established programs to searching scrutiny by unelected courts. Such a result is neither wise nor constitutionally required.” (citing 2 U.S.C. § 434 (reporting of federal election campaign contributions); 15 U.S.C. § 78l (securities disclosures); 15 U.S.C. § 1333 (tobacco labeling); 21 U.S.C. § 343(q)(1) (nutritional labeling); 33 U.S.C. § 1318 (reporting of pollutant concentrations in discharges to water); 42 U.S.C. § 11023 (reporting of releases of toxic substances); 21 C.F.R. § 202.1 (disclosures in prescription drug advertisements); 29 C.F.R. § 1910.1200 (posting notification of workplace hazards); CAL. HEALTH & SAFETY CODE § 25249.6 (“Proposition 65”; warning of potential exposure to certain hazardous substances); N.Y. ENVTL. CONSERV. LAW § 33-0707 (disclosure of pesticide formulas))).

90. 15 U.S.C. § 78a (2006).

91. 21 U.S.C. § 343 (2006).

92. Food Allergen Labeling and Consumer Protection Act of 2004, Pub. L. No. 108-282, 118 Stat. 891, 905–11 (2004). This Act provides a good example of a law that could arguably be related to preventing deception, but clearly was passed to simply inform consumers of information that only *may* be relevant to their health and safety. Peanut allergies are the most common cause of fatal food-induced anaphylaxis in the U.S. Fred D. Finkelman, *Peanut Allergy and Anaphylaxis*, 22 CURRENT OPINION IN IMMUNOLOGY 783 (2010). In the absence of

Act requires that labels disclose whether a product is toxic, corrosive, flammable, or combustible.<sup>93</sup> Federal law also requires the Surgeon General's Warning to be posted on tobacco products to inform consumers of the health hazards associated with using tobacco,<sup>94</sup> and it requires alcohol-content disclosures to be listed on beverage packaging and labels.<sup>95</sup> States have their own sets of disclosure requirements in areas ranging from credit card applications to lotteries and time-share proposals.<sup>96</sup> There are innumerable federal and state laws requiring the disclosure of factual information that promote transparency, fairness, informed decision-making, and fair and efficient commercial markets.<sup>97</sup>

In his concurring opinion in *Milavetz*, Justice Thomas acknowledged that the "Court's longstanding assumption" was correct: "that a consumer-fraud regulation that compels the disclosure of certain factual information in advertisements may intrude less significantly on First Amendment interests than an outright prohibition on all advertisements that have the potential to mislead."<sup>98</sup> However, he simultaneously "doubt[ed] that it justify[ed] an entirely different standard of review for regulations that compel, rather than suppress, commercial speech."<sup>99</sup> There are several problems with this perspective. First, if consumer-fraud regulations that compel factual information disclosures tread less significantly on the First Amendment than commercial speech restrictions do, it is

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disclosure requirements, accidental ingestion is common; for example, 75 percent of those surveyed in Canada with peanut allergies ingested peanuts accidentally. Saleh Al-Muhsen et al., *Peanut Allergy: An Overview*, 168 CANADIAN MED. ASS'N J. 1279, 1282 (2003).

93. 15 U.S.C. § 1261 (1958); *see also* 42 U.S.C. § 4852d (1992) (requiring information on lead-based paint hazards to be disclosed before the sale or lease of residential housing built prior to 1978).

94. 15 U.S.C. § 1333 (1964).

95. 27 U.S.C. § 205(e) (1934).

96. Texas law requires advertisements for timeshare interests to disclose the purpose of the solicitation, how the recipients' information will be used, and the marketers' company information. TEX. PROP. CODE ANN. § 221.031 (Vernon 2007). Minnesota law requires credit card applications to disclose rates, fees, and conditions, among other information, to protect consumers. MINN. STAT. § 325G.42 (2011). Florida law requires that brochures, advertisements, notices, tickets, and entry forms used by charities for a "drawing by chance" disclose the rules, source of funds, and information about the organization, among other things. FLA. STAT. § 849.0935 (2011).

97. *See Post, supra* note 19, at 27–28.

98. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1343 n.1 (2010) (Thomas, J., concurring).

99. *Id.*

unclear how this appreciation should take practical form if the constitutional tests on their validity do not reflect this difference. The former necessarily requires reduced constitutional protection. Second, under Justice Thomas's view, both regulations that compel and restrict commercial speech would be subject to strict scrutiny; under the Court's precedent this is often fatal to a speech regulation.<sup>100</sup> This would defeat consumer fraud regulations, which are universally regarded as necessary and constitutional. Finally, Justice Thomas believes the First Amendment should protect core and commercial speech the same.<sup>101</sup> However, core speech cannot similarly be compelled. And in Justice Thomas's view, basic disclaimers cannot be compelled in the core speech category either, which further undermines the validity and practicality of his perspective.<sup>102</sup> Accepting this viewpoint of commercial speech would mean the demise of the current commercial disclosure system supporting an informed and efficient marketplace.

The government's ability to require factual commercial disclosures is necessarily based on the reduced constitutional protection supporting commercial speech.<sup>103</sup> The same allowance does not exist in the realm of core speech. If commercial speech were strictly protected, it would logically follow that such disclosures would be subject to stricter scrutiny, under which they would not likely survive. The result would be a failure of the current regulatory environment. The Court could not intend for this to occur since it unanimously upheld a commercial disclosure requirement under the reasonable relationship test in 2010.<sup>104</sup> Blanket increased protection for commercial speech cannot coexist with the need for and constitutionality of commercial disclosure requirements.

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100. The application of strict scrutiny to restrictions on core speech is almost always fatal. *But see* *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding, in a plurality opinion, a statute prohibiting campaigning within one hundred feet of the entrance to a polling place under the strict scrutiny test under the First Amendment).

101. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring) ("I have observed previously that there is no 'philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech.'" (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996))).

102. *Citizens United v. FEC*, 130 S. Ct. 876, 980–82 (2010) (Thomas, J., concurring in part and dissenting in part).

103. See Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL'Y 159 (2009).

104. *Milavetz*, 130 S. Ct. at 1339–40.

*B. Core Speech Cannot  
Be Similarly Compelled*

In direct contrast with regulations that compel factual disclosures in the commercial market, core speech cannot be similarly compelled.<sup>105</sup> In the realm of fully protected speech, requiring substantive disclosures is untenable under the First Amendment. Speakers are protected from being compelled to utter beliefs and facts against their will in all facets of core speech, ranging from newsletters<sup>106</sup> to parades<sup>107</sup> to automobile license plates.<sup>108</sup> The First Amendment recognizes a “constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression.”<sup>109</sup> Thus, the freedom applicable to core speech necessarily comprises “the decision of both what to say and what *not* to say.”<sup>110</sup>

Although most core speech cases protect citizens from compelled statements of belief,<sup>111</sup> in *Riley v. National Federation of the Blind of North Carolina, Inc.*,<sup>112</sup> the Court explained that these other “cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of ‘fact’: either form of compulsion burdens protected speech.”<sup>113</sup> The Court struck down a provision that required the yearly disclosure of the average percentage of gross receipts turned over to charities by a fundraiser for all charitable solicitations that it conducted in the state.<sup>114</sup> Government-mandated substantive factual disclosures, like beliefs, are subject to strict scrutiny in the realm of fully protected speech.<sup>115</sup>

The Court has permitted minimal disclaimers in the realm of core speech. These are often minor mandates to disclose the source

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105. See Pomeranz, *supra* note 103, at 171–73.

106. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1 (1986).

107. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995).

108. *Wooley v. Maynard*, 430 U.S. 705 (1977).

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

110. *Id.*

111. See, e.g., *Wooley*, 430 U.S. at 714 (holding unconstitutional a state law that required New Hampshire motorists to display the state motto—“Live Free or Die”—on their license plates); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding unconstitutional a state law requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag).

112. 487 U.S. 781 (1988).

113. *Id.* at 797–98.

114. *Id.* at 798.

115. *Id.* at 795–801.

of the speech rather than factual information, as in the commercial disclosure area.<sup>116</sup> The Justices have had mixed opinions regarding even these minor directives. In *Citizens United v. FEC*,<sup>117</sup> the majority upheld disclosure requirements consisting of the name and address of the person or group that funds electioneering communications and a disclaimer statement showing whether the communication was authorized by the candidate.<sup>118</sup> Similarly, in *Riley*, the Act's provisions requiring a professional fundraiser to disclose to potential donors his or her name and employer, including the address, were not challenged.<sup>119</sup> However, in a footnote, the majority explicitly found these provisions to be constitutionally acceptable, stating: "[N]othing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny."<sup>120</sup> The majority also distinguished between the disclaimers it found permissible and more substantive ones it would have found problematic: "[W]e would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget."<sup>121</sup>

In *McIntyre v. Ohio Elections Commission*,<sup>122</sup> the majority struck down, under strict scrutiny, Ohio's law requiring all written documents designed to influence voters in an election (including leaflets—at issue in the case) to state "the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor."<sup>123</sup> Unlike *Riley* and *Citizens United*, *McIntyre* involved a private citizen whose personal information was not found

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116. Minimal disclaimers are common in the commercial realm. See, e.g., 21 CFR § 101.5 (2011) (requiring packaged food labels to specify the name and place of business of the manufacturer, packer, or distributor).

117. 130 S. Ct. 876 (2010).

118. *Id.* at 913–16.

119. *Riley*, 487 U.S. at 786.

120. *Id.* at 799 n.11.

121. *Id.* at 798.

122. 514 U.S. 334 (1995).

123. *Id.* at 345 (quoting OHIO REV. CODE ANN. § 3599.09(A) (West 1988)).

to be relevant to the political message.<sup>124</sup> The Court found that the law served the state's interest in deterring false statements,<sup>125</sup> even though the First Amendment *does* allow false statements in political speech.<sup>126</sup>

Justice Scalia dissented in *McIntyre*, which was inconsistent with his First Amendment position in *Riley*. Justice Scalia joined the majority in *Riley* with the exception of its footnote stating that the state may require a fundraiser to disclose his or her professional status.<sup>127</sup> Justice Scalia found that the forced disclosure by the professional solicitor of his professional status should be subject to strict scrutiny because it involves core First Amendment speech.<sup>128</sup> Conversely, Justice Scalia dissented from the majority opinion in *McIntyre*, stating that the "law at issue here, by contrast, forbids the expression of no idea, but merely requires identification of the speaker when the idea is uttered in the electoral context. It is at the periphery of the First Amendment . . . ."<sup>129</sup>

Justice Thomas concurred with the result in *McIntyre*<sup>130</sup> and dissented from the portion of the opinion in *Citizens United* upholding the disclaimer and disclosure requirements.<sup>131</sup> Justice Thomas found that corporate disclosure, disclaimer, and reporting requirements are unconstitutional compulsions of fact.<sup>132</sup> In his opinion, any compulsions in the core realm should be subject to strict scrutiny.<sup>133</sup> Under this rationale, no disclaimer or disclosure requirements could ever be considered constitutionally permissible unless they were commercial in nature and tied only to preventing deception.<sup>134</sup> Yet Justice Thomas would still subject them to strict scrutiny, which is untenable under the Court's precedent and in the

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124. *Id.* at 348–49.

125. *Id.* at 350–51.

126. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

127. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 803–04 (1988) (Scalia, J., concurring).

128. *See id.*

129. *McIntyre*, 514 U.S. at 378 (Scalia, J., dissenting).

130. *Id.* at 358 (Thomas, J., concurring).

131. *Citizens United v. FEC*, 130 S. Ct. 876, 980 (2010) (Thomas, J., concurring).

132. *Id.* at 980–81.

133. *See id.* at 980.

134. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1342–45 (2010) (Thomas, J., concurring).

context of the current consumer protection regulatory structure described above.

If the Court found a constitutional equivalence for core and commercial speech, the result would be that only minimal disclaimers would be permitted in the commercial context. Such simple disclaimers would be insufficient to inform and protect the public and rectify potential abuses that the government currently has the authority to address in the commercial marketplace. This is not a minor point. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,<sup>135</sup> the Court explained why regulations compelling fully protected speech could not survive strict scrutiny:

The compelled-speech violations in *Tornillo* and *Pacific Gas* also resulted from interference with a speaker's desired message. In *Tornillo*, we recognized that "the compelled printing of a reply . . . tak[es] up space that could be devoted to other material the newspaper may have preferred to print," and therefore concluded that this right-of-reply statute infringed the newspaper editors' freedom of speech by altering the message the paper wished to express. The same is true in *Pacific Gas*. There, . . . when the state agency ordered the utility to send a third-party newsletter four times a year, it interfered with the utility's ability to communicate its own message in its newsletter.<sup>136</sup>

If commercial speech regulations were subject to strict scrutiny, commercial actors would have this argument available to them and the current regulatory system would become constitutionally suspect. Under this scenario, companies could still be required to disclose the names and addresses of their businesses, but they would have a strong argument that the required disclosure of any other information (e.g., investor-related information under the Securities Exchange Act or ingredients and allergen information under the Nutrition Labeling and Education Act) violates their First Amendment rights not to speak, interferes with their "ability to communicate [their] own message," and "takes up space that could be devoted to other material."<sup>137</sup>

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135. 547 U.S. 47 (2006).

136. *Id.* at 64 (citations omitted).

137. *Id.*

This is not a hypothetical concern. Upon passage of New York City's menu-labeling ordinance,<sup>138</sup> the New York State Restaurant Association challenged the factual disclosure ordinance based on the very same First Amendment grounds described above in *Rumsfeld*.<sup>139</sup> They unsuccessfully made the exact same arguments about covered food service establishments' menu boards, but since the ordinance required only factual commercial disclosures, subject to less exacting review, the reviewing courts upheld the ordinance under *Zauderer*.<sup>140</sup> In the commercial context, substantive disclosures are often required to protect and inform consumers in a way that they could not be protected or informed absent the divergent constitutional values and protections underlying the commercial speech doctrine.<sup>141</sup>

The very fact that the Court was able to decide *Milavetz* and *Zauderer* under reasonable basis review is necessarily due to the reduced protection for commercial speech under the First Amendment. Commercial disclosures are based on the constitutional values underlying the protection of commercial speech: its information function and value to consumers. The Court upheld the disclosure requirements at issue in *Milavetz* and *Zauderer* precisely because it recognized that commercial speech garners a different level of constitutional protection than core speech.

#### IV. INTERMEDIATE SCRUTINY FOR RESTRICTIONS ON COMMERCIAL SPEECH IS NECESSARY

Intermediate scrutiny for restrictions on commercial speech is appropriate in light of the different values underlying its protection.<sup>142</sup> Because commercial speech is protected to ensure the "free flow of commercial information,"<sup>143</sup> the Court has guarded commercial speech against "unwarranted governmental regulation"

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138. N.Y.C., N.Y., HEALTH CODE § 81.50.

139. See N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, No. 08 Civ. 1000 (RJH), 2008 U.S. Dist. LEXIS 31451 (S.D.N.Y. Apr. 16, 2008), *aff'd*, 556 F.3d 114 (2d Cir. 2009).

140. *Id.*

141. See Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115–16 (2d Cir. 2001).

142. Akhil Reed Amar, *How America's Constitution Affirmed Freedom of Speech Even Before the First Amendment*, 38 CAP. U. L. REV. 503, 507 (2010).

143. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

through the four-part intermediate test created in *Central Hudson*, which states:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>144</sup>

The Court's commercial speech cases have primarily involved government restrictions on advertising itself and focused on society's interest in, and consumers' right to receive, commercial information.<sup>145</sup> Intermediate scrutiny reflects the values inherent in the First Amendment's protection of commercial speech, while it simultaneously recognizes the government's legitimate and substantial interest in regulating overreaching commercial communication.<sup>146</sup> Although it has been argued that the *Central Hudson* test is not appropriate to determine whether government restrictions on commercial speech are constitutional because it is not strict enough,<sup>147</sup> the Court frequently strikes down commercial speech restrictions after comparing the government's interests to those underlying the First Amendment.<sup>148</sup> In very rare instances, the

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144. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561, 566 (1980).

145. *See, e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (discussing solicitation and advertisement of compounded drugs); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (discussing tobacco billboards and retail advertisements); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999) (discussing broadcast advertising of lotteries and casino gambling); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (discussing retail liquor price advertising); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (discussing labeling and advertising of beer alcohol content); *Cent. Hudson*, 447 U.S. 557 (discussing advertising by an electrical utility); *Va. Pharmacy*, 425 U.S. 748 (discussing advertisement and promotion of prescription drug prices). The basis for the First Amendment protection for "commercial advertising," as it has been called, *see, e.g.*, *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993), is society's interest in the free flow of commercial information. *Va. Pharmacy*, 425 U.S. at 764.

146. *Cent. Hudson*, 447 U.S. at 561–66.

147. *See, e.g.*, *Lorillard*, 533 U.S. at 572 (Thomas, J., concurring). However, Justice Thomas has used the *Central Hudson* test to examine commercial speech regulations in *Coors Brewing*, 514 U.S. 476.

148. *See, e.g.*, *Thompson*, 535 U.S. 357; *Lorillard*, 533 U.S. 525; *Greater New Orleans Broad. Ass'n*, 527 U.S. 173; *44 Liquormart*, 517 U.S. 484; *Coors Brewing*, 514 U.S. 476.

Court has found that the commercial speech at issue was subject to abuse and overreaching, thus warranting restraint.<sup>149</sup> In light of the fact that commercial speech restrictions rarely withstand *Central Hudson* review, stricter scrutiny is not required in order to protect commercial speakers from government infringement of their First Amendment rights.

The full *Central Hudson* test has proven difficult for courts to apply and difficult for the government to meet.<sup>150</sup> Justices' and lower courts' divergent understandings of how to apply the test is not a reason to retreat from intermediate scrutiny. Rather, the confusion counsels in favor of the Court developing the framework more clearly in future cases.

The four prongs of *Central Hudson* do not seem to capture the true test of the constitutionality of commercial speech regulations. The only aspect that all Justices have agreed on is that the First Amendment does not protect false,<sup>151</sup> deceptive, and misleading commercial speech, which falls under the first inquiry of *Central Hudson*. The ability of government to restrict misleading and deceptive commercial speech is also one of the most important aspects of First Amendment jurisprudence that separates commercial from core speech and further counsels in favor of maintaining intermediate protection for the former.

*A. Misleading and Deceptive  
Commercial and Core Speech Are  
Vastly Different from Each Other*

In the commercial realm, deceptive and misleading speech is not protected. This has been ratified in prong one of *Central Hudson*<sup>152</sup> and embraced by all Justices, including those who expressly reject

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149. *E.g.*, *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *see also* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (finding legal solicitation improper, but decided prior to the creation of the *Central Hudson* test).

150. *See, e.g.*, *Thompson*, 535 U.S. at 360 (affirming the Ninth Circuit's finding that the commercial speech restrictions violated the First Amendment); *Lorillard*, 533 U.S. at 539 (reversing the First Circuit's finding that commercial speech restrictions did not violate the First Amendment); *Greater New Orleans Broad. Ass'n*, 527 U.S. at 182–83 (reversing the Fifth Circuit's finding that the commercial speech restrictions did not violate the First Amendment); *44 Liquormart*, 517 U.S. at 489–95 (reversing the First Circuit's finding that the commercial speech restrictions did not violate the First Amendment); *Coors Brewing*, 514 U.S. at 478 (affirming the Tenth Circuit's finding that the commercial speech restrictions violated the First Amendment).

151. *See* discussion *supra* Part II for a comparison of false commercial and core speech.

152. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980).

the *Central Hudson* test or intermediate scrutiny for commercial speech in general.<sup>153</sup> The most important point that emerges from categorical rejection of First Amendment protection for deceptive and misleading commercial speech is that this is, and only can be, true in the commercial realm.

On the other hand, in the realm of core speech, misleading and deceptive speech are strictly protected. The freedom of political and religious speakers to state beliefs, ideas, and their version of the facts is the underpinning of the First Amendment protection for speech.<sup>154</sup> The First Amendment guards against government interference in this realm for the benefit of both the listener and the speaker, and this “vital interchange of thought” is “indispensable to the discovery and spread of political truth.”<sup>155</sup> Strict protection is warranted to “maximize the speaker’s freedom of participation within public discourse,”<sup>156</sup> to get his or her opinion “accepted in the competition of the market.”<sup>157</sup> This is true without consideration of the “truth, popularity, or social utility” of the core “ideas and beliefs which are offered.”<sup>158</sup> Thus, both the speaker and the listener can decide which

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153. *E.g., Coors Brewing*, 514 U.S. at 476. In an opinion by Justice Thomas, the Court struck down the commercial speech restriction under the *Central Hudson* test. Although the full court agreed that the commercial actor had a “constitutional right to give the public accurate information about the alcoholic content of the malt beverages that it produces,” Justice Stevens concurred, stating that strict scrutiny was necessary:

If Congress had sought to regulate all statements of alcohol content . . . in order to prevent brewers from misleading consumers as to the true alcohol content of their beverages, then this would be a different case. But absent that concern, . . . the statute at issue here should be subjected to the same stringent review as any other content-based abridgment of protected speech.

*Id.* at 496–97 (Stevens, J., concurring). Note that Stevens began his argument by expressing that the case “would be different” if the statute at issue intended to protect consumers from misleading speech. This inquiry is only relevant within the context of commercial speech. *See also* *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1343 n.1 (2010) (Thomas, J., concurring) (“I have no quarrel with the principle that advertisements that are false or misleading, or that propose an illegal transaction, may be proscribed.”); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (“Advertising that is false, deceptive, or misleading of course is subject to restraint.”).

154. *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010) (“[Such] speech is central to the meaning and purpose of the First Amendment.”).

155. *Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting).

156. *Post*, *supra* note 19, at 40.

157. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

158. *NAACP v. Button*, 371 U.S. 415, 444–45 (1963).

opinions and beliefs form the truth for themselves and their participation in politics and religion.<sup>159</sup>

Conversely, there is no value to consumers or society for misleading or deceptive commercial speech.<sup>160</sup> The crux of why commercial speech is and should be treated differently from fully protected expression is that “the public and private benefits from commercial speech derive from confidence in its accuracy and reliability.”<sup>161</sup> Since the First Amendment’s concern for commercial speech is based on its information function, the listener only benefits from accurate commercial information.<sup>162</sup> To this end, the Court has recognized that the First Amendment is not an obstacle to the government dealing effectively with deceptive and misleading commercial speech.<sup>163</sup>

A mislabeled product or misleading advertisement undermines a well-functioning free market economy and has the potential to hurt consumers financially or physically.<sup>164</sup> Consumers need valid commercial information to properly allocate their resources. They do not have the time or financial ability to verify all commercial speech in order to discover deficiencies in speech made for profit.<sup>165</sup> As there is no outside tool for immediate verification to correct such deception, consumers would be left to purchase at their own peril if

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159. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 777 (1976) (Stewart, J., concurring) (stating that, in terms of the press, journalists “must often attempt to assemble the true facts from sketchy and sometimes conflicting sources”).

160. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens J., concurring) (“[F]alse or misleading speech in the commercial realm also lacks the value that sometimes inheres in false or misleading political speech.”).

161. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977).

162. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 432 (1993) (Blackmun, J., concurring) (finding that government regulation of misleading and deceptive speech “is consistent with [the] Court’s emphasis on the First Amendment interests of the listener in the commercial speech context”); *Va. Pharmacy*, 425 U.S. at 772 (finding that the government has an interest in ensuring the “stream of commercial information flow cleanly as well as freely”).

163. *Va. Pharmacy*, 425 U.S. at 771; *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1343 n.1 (2010) (Thomas, J., concurring) (“I have no quarrel with the principle that advertisements that are false or misleading, or that propose an illegal transaction, may be proscribed.”); *Bates*, 433 U.S. at 383 (“Advertising that is false, deceptive, or misleading of course is subject to restraint.”).

164. *See Va. Pharmacy*, 425 U.S. at 765; *see also Post, supra* note 19, at 41 (stating that a court should regard consumers as “free and equal citizens” when determining the boundaries of a public communicative sphere).

165. *See Va. Pharmacy*, 425 U.S. at 765; *see also Cent. Hudson*, 447 U.S. at 563 (“The First Amendment’s concern for commercial speech is based on the informational function of advertising.”).

the First Amendment did not allow for government intervention on their behalf.<sup>166</sup> Therefore, the distinction between commercial and core speech is crucial in the context of misleading and deceptive speech.

The federal regulatory system relies on these distinctions. For example, the Federal Trade Commission (FTC) protects consumers from a diverse range of misleading and deceptive commercial speech that could otherwise be financially or physically harmful.<sup>167</sup> For instance, the FTC has protected vulnerable consumers from a marketer's misleading claims that an herbal product could cure cancer,<sup>168</sup> a scam promising "cash" for envelope-stuffing,<sup>169</sup> and a cereal manufacturer's false claims that its cereal was "clinically shown to improve children's attentiveness."<sup>170</sup> Similarly, the Securities and Exchange Commission prohibits a registered investment company from using a materially deceptive or misleading name to incorrectly suggest investment in government securities,<sup>171</sup> and it also prohibits false and misleading statements in proxy solicitation materials.<sup>172</sup> These restrictions protect investors who have less complete information than the companies seeking their investments.<sup>173</sup>

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166. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring) ("[T]he consequences of false commercial speech can be particularly severe: Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised. . . . The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech.").

167. *About the Bureau of Consumer Protection*, FED. TRADE COMM'N, <http://ftc.gov/bcp/about.shtm> (last visited Nov. 4, 2011).

168. Daniel Chapter One, No. 9329, 2009 FTC LEXIS 157 (F.T.C. Aug. 5, 2009); *see also* Default Judgment and Order for Permanent Injunction, Global Web Promotions, No. 04C-3022 (N.D. Ill. June 16, 2005), *available at* <http://www.ftc.gov/os/caselist/0423086/050920defjudg0423086.pdf> (granting injunctive relief for deceptive diet and human growth hormone products).

169. Stipulated Final Judgment and Order for Permanent Injunction, Stuffingforcash.com Corp., No. 02-C-5022 (N.D. Ill. Jan. 30, 2003), *available at* <http://www.ftc.gov/os/2003/07/stuffingforcashstip.pdf>.

170. Order to Show Cause and Order Modifying Order, Kellogg Co., 149 FTC No. C-4262 (F.T.C. May 28, 2010), *available at* <http://www.ftc.gov/os/caselist/0823145/100602kelloggorder.pdf>.

171. SEC Investment Company Act of 1940, 17 C.F.R. § 270.35d-1(a) (2011).

172. SEC Securities Exchange Act of 1934, 17 C.F.R. § 240.14a-9 (2011).

173. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) ("Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 777 (1976) (Stewart, J., concurring) ("The [commercial]

The government must be able to regulate misleading and deceptive commercial speech, and such regulation is only possible because a different level of protection exists for commercial and core speech. The Court has distinguished among three types of commercial speech that have a tendency to mislead or deceive and that are consequently amenable to regulation by the government: inherently misleading, actually misleading (proven to be so), and potentially misleading commercial speech.<sup>174</sup> The government may ban or otherwise restrict inherently and actually misleading commercial speech, but it can only order correction, revision, or increased factual disclosures for potentially misleading commercial speech.<sup>175</sup> If strict protection was applied in this context, courts would have to differentiate between inherently and actually misleading speech that would not be protected by the First Amendment and potentially misleading speech that would be strictly prohibited. Granting potentially misleading speech strict protection would prohibit the government from requiring corrections or disclosures to rectify any potential for deception. This is nonsensical.

If the Court were to rule that commercial speech is subject to strict protection, it would undermine the government's ability to effectively address misleading and deceptive commercial speech.<sup>176</sup> Justice Thomas does not consider these to be mutually exclusive. In *Milavetz*, Thomas stated that he has "no quarrel with the principle that advertisements that are false or misleading, or that propose an

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advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression.").

174. See *In re R.M.J.*, 455 U.S. 191, 203 (1982).

175. See *id.*

176. See, e.g., *Joe Conte Toyota, Inc. v. La. Motor Vehicle Comm'n*, 24 F.3d 754, 757 (5th Cir. 1994) (finding the term "invoice" to be inherently misleading in automobile advertisements); *Adams Ford Belton, Inc. v. Mo. Motor Vehicle Comm'n*, 946 S.W.2d 199, 204 (Mo. 1997) (finding the term "invoice" to be inherently misleading); see also *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1113 (9th Cir. 2004) (finding a physician's use of the term "board certified" to be inherently misleading because he did not meet the statutory requirements for using the term); *N.C. State Bar v. Culbertson*, 627 S.E.2d 644, 650 (N.C. Ct. App. 2006) (finding an attorney advertisement that he was "published" in the Federal Law Reports to be inherently misleading); *Barry v. Arrow Pontiac, Inc.*, 494 A.2d 804, 812 (N.J. 1985) (finding the terms "dealer invoice," "cost," "inventory," and "invoice" misleading in automobile advertisements); cf. *Piazza's Seafood World, L.L.C. v. Odom*, No. 04-690, 2004 U.S. Dist. LEXIS 25991, at \*16-22 (E.D. La. Dec. 27, 2004) (applying *Central Hudson* and striking down the speech restriction after finding the term "Cajun" to be only potentially misleading because plaintiff's customers were seafood wholesalers and presumably sophisticated buyers).

illegal transaction, may be proscribed.”<sup>177</sup> However, in *Lorillard*, Justice Thomas “doubt[ed] whether it is even possible to draw a coherent distinction between commercial and noncommercial speech.”<sup>178</sup> Thus, it is unclear how Justice Thomas would propose to separate the type of misleading and deceptive speech that may be proscribed from that which is constitutionally protected. Given that there is already concern about distinguishing commercial from noncommercial speech, it would be extremely difficult, and unnecessary, to come up with a new test that distinguishes truthful, non-misleading commercial speech from any other commercial speech deserving the highest level of First Amendment protection.

Subjecting all speech restrictions to the same strict review would collapse the distinction between commercial and core speech. This would be improper, however, because misleading and deceptive commercial speech needs to remain unprotected, while misleading and deceptive core speech must remain protected in order to advance the values underlying the First Amendment. The government must retain its ability to restrict false, deceptive, and misleading commercial speech in the marketplace. Providing equivalent protection to both would decidedly convolute future First Amendment analysis.

If the Court were to upset this precedent, future inquiries would be complicated. Courts would have to determine (1) whether the speech at issue was formerly considered commercial or core speech; (2) whether it was part of a public debate; (3) whether it was misleading and deceptive; and (4) whether a restriction would, thus, be subject to strict scrutiny or no scrutiny at all.<sup>179</sup> Such a revised constitutional understanding would not only be unwise but the task of line-drawing would be rendered significantly more demanding and complicated than simply distinguishing commercial from core

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177. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1343 n.1 (2010) (Thomas, J., concurring).

178. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring).

179. Such an outcome would perhaps produce future opinions that resemble the dissent to the dismissal of certiorari in *Nike, Inc. v. Kasky*. 539 U.S. 654, 665 (2003) (Breyer, J., dissenting). Justice Breyer would have decided the First Amendment claims based on whether the speech at issue in *Nike, Inc. v. Kasky* was considered commercial or core. *Id.* at 667. He opined that Nike’s false statements were “about public matters in public debate” and not commercial speech as the California Supreme Court found. *Id.* Breyer would have thus subjected any restrictions on the speech to heightened scrutiny. *Id.* at 681. If commercial and core speech were subject to the same test, cases touching on deceptive or misleading speech would be as convoluted as this opinion.

speech. The Constitution does not call for such a restructuring or revised understanding of the First Amendment. The significant difference between core and commercial speech cannot be negated by haphazardly applying an identical constitutional analysis to both.

*B. Intermediate Scrutiny  
Needs Further Explanation*

As discussed extensively above, strict protection is not appropriate for commercial speech, and thus intermediate protection must be maintained. Therefore, the Court should clarify the commercial speech doctrine to maintain this standard. The remaining three prongs of *Central Hudson* do not seem to capture the entire inquiry. Even in cases where the Court agrees that the restriction at issue directly addresses commercial speech, Justices come to different conclusions as to the application of the test.<sup>180</sup>

*IMS Health* addressed a Vermont statute that prohibited the sale, disclosure, and use of pharmacy records containing “prescriber-identifying information” for purposes of marketing.<sup>181</sup> Through this method, the pharmaceutical manufacturers used the prescribers’ own information for “detailing” by their representatives as a marketing tactic in an effort to increase sales of brand-name prescription drugs.<sup>182</sup> The state enacted the law to stop this practice out of concern that it was a violation of physicians’ privacy interests and that it would lead to the over-prescription of brand-name drugs (as opposed to generics), which would in turn drive up medical costs for the state.<sup>183</sup> The Second Circuit found that the law violated the First Amendment rights of the pharmaceutical marketers and data miners.<sup>184</sup> However, the First Circuit found that similar laws in Maine and New Hampshire were valid regulations of commercial conduct and characterized the data at issue as no different than any other commodity subject to commercial regulation.<sup>185</sup>

In *IMS Health*, the Court said it was applying *Central Hudson*, but to the extent that it did, it actually mentioned the prongs in

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

181. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659–60 (2011).

182. *Id.* at 2660.

183. *Id.* at 2681.

184. *Id.* at 2662.

185. *Id.* at 2666–67.

reverse order.<sup>186</sup> Because the majority found that the law was an unconstitutional content- and speaker-based restriction and unconventionally cited core speech cases throughout its analysis, *IMS Health* is not a reliable vehicle to analyze the Court's most recent view on the application of the *Central Hudson* test.<sup>187</sup> It could be that the majority's position on *Central Hudson* is that the test is no longer relevant, but the case did not present an opportunity to adequately overrule the test. The dissent found the law to be an economic regulation that affected speech in an indirect way and thought it should be analyzed under the rational basis standard.<sup>188</sup> Both perspectives are supported by the case law.<sup>189</sup> At best, the case could be an outlier due to the poorly drafted legislative findings<sup>190</sup> and the disagreement over whether this was a speech case at all. Nonetheless, the case does bring to the forefront outstanding issues that the Court needs to resolve if it plans to maintain intermediate scrutiny for commercial speech restrictions.

The different perspectives of the majority and dissenting opinions in *IMS Health* are not simply subjective differences of opinion on how the application of intermediate scrutiny determines the constitutionality of the law at issue in that case. Rather, the opinions raise issues relevant to intermediate review that are either

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186. *Id.* at 2653, 2669–72.

187. *Id.* at 2664, 2667 (finding “heightened judicial scrutiny” to be warranted, stating that it was subjecting the restriction to *Central Hudson* analysis but not undertaking traditional *Central Hudson* analysis, and referencing core speech cases throughout); see also Mello & Messing, *supra* note 4, at 1250 (“The term ‘heightened scrutiny’ is critical and pointedly ambiguous. It might be a mere synonym for the midlevel scrutiny applied under the *Central Hudson* test—but it might mean far more.”).

188. *IMS Health*, 131 S. Ct. at 2673–75 (Breyer, J., dissenting).

189. See *supra* note 4. Compare *IMS Health*, 131 S. Ct. at 2653 (holding that a Vermont statute involving commercial speech violated the First Amendment by applying the intermediate scrutiny test developed in *Central Hudson*, but also mentioning core speech cases throughout the majority opinion), with 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 528–34 (1996) (O'Connor, J., concurring) (arguing that the *Central Hudson* test should have been applied in the majority's First Amendment analysis); compare *IMS Health*, 131 S. Ct. at 2673–85 (Breyer, J., dissenting) (arguing that the Vermont statute should have been analyzed using the rational basis test or otherwise upheld under intermediate scrutiny), with *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 469–70 (1997) (holding that state requirements that California fruit growers contribute to advertising expenses were an economic regulation that could not be afforded intermediate scrutiny under the *Central Hudson* test).

190. Outterson, *supra* note 45, at e31(1) (“Vermont’s statute had a fatal self-inflicted wound. By prominently announcing that the state intended to tip the balance in the ‘marketplace for ideas’ against drug companies, the law dug itself into a constitutional hole: state interference with that marketplace was likely to provoke the ire of a majority of the Supreme Court.”).

missing from the *Central Hudson* test or need further explanation to clarify the test going forward.<sup>191</sup> Outstanding issues remain regarding how content-based and speaker-based distinctions factor into the commercial speech doctrine and how and whether the commercial speech doctrine will be regarded in the future.

### 1. How Do Content-Based Distinctions Factor into the Analysis?

Several Justices have stated that all content-based restrictions of speech, including commercial speech, should be subject to strict scrutiny.<sup>192</sup> The majority in *IMS Health* found that the law was content-based because it forbade the sale of information “subject to exceptions based in large part on the content of a purchaser’s speech. For example, those who wish to engage in certain ‘educational communications’ may purchase the information. The measure then bars any disclosure when recipient speakers will use the information for marketing.”<sup>193</sup> The law did restrict the use of information for commercial speech purposes, but this is not necessarily an outstanding fact.<sup>194</sup> The dissent found that regulatory programs, such as the one at issue, “necessarily draw distinctions on the basis of content” and used as an example electricity regulators who “oversee company statements, pronouncements, and proposals, but only about electricity.”<sup>195</sup>

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191. Post, *supra* note 19, at 54–55 (“By settling quickly and easily into a test whose bland provisions were indifferent to a disciplined account of the constitutional value of commercial speech, the doctrine has allowed fundamental differences of perspective to fester and increase. These differences now threaten to explode the doctrine entirely.”).

192. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 577 (2001) (Thomas, J., concurring) (“Whatever power the [s]tate may have to regulate commercial speech, it may not use that power to limit the content of commercial speech . . . ‘for reasons unrelated to the preservation of a fair bargaining process.’ Such content-discriminatory regulation—like all other content-based regulation of speech—must be subjected to strict scrutiny.” (partially quoting *44 Liquormart*, 517 U.S. at 501)); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496–97 (1995) (Stevens, J., concurring) (“I see no reason why the fact that such information is disseminated on the labels of respondent’s products should diminish that constitutional protection. On the contrary, the statute at issue here should be subjected to the same stringent review as any other content-based abridgment of protected speech.”).

193. *IMS Health*, 131 S. Ct. at 2663 (citation omitted).

194. *Id.* at 2677 (Breyer, J., dissenting).

195. *Id.* (“If there is a kind of commercial speech that lacks all First Amendment protection, . . . it must be distinguished by its content.” (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976))).

The majority's problem with the content-based regulation was that the government failed to present a "neutral justification" for its content-based restriction.<sup>196</sup> However, concerns over content neutrality are traditionally relevant in core speech cases only<sup>197</sup> and have not seriously been questioned in the commercial speech context because "most regulations of commercial speech are content based."<sup>198</sup>

Commercial speech is and has historically been identified by and regulated according to its content. Commercial speech is by its very definition content-based: speech that "propose[s] a commercial transaction"<sup>199</sup> and "expression related solely to the economic interests of the speaker and its audience."<sup>200</sup> In *Central Hudson*, the Court explained that outside the commercial speech context, "the First Amendment prohibits regulation based on the content of the message" but that the features that distinguish commercial speech "permit regulation of its content."<sup>201</sup>

The Court upheld a commercial speech restriction in *Florida Bar v. Went For It, Inc.*<sup>202</sup> that was decidedly content- (and speaker-) based.<sup>203</sup> The law at issue restricted communication based on the

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196. *IMS Health*, 131 S. Ct. at 2672 ("The Court has noted, for example, that 'a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there' . . . Here, however, Vermont has not shown that its law has a neutral justification." (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388–89 (1992))).

197. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733, 2738 (2011); *IMS Health*, 131 S. Ct. at 2685 (Breyer, J., dissenting) ("The Court reaches its conclusion through the use of important First Amendment categories—'content-based,' 'speaker-based,' and 'neutral'—but without taking full account of the regulatory context, the nature of the speech effects, the values these First Amendment categories seek to promote, and prior precedent."); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811–13 (2000).

198. *Post, supra* note 19, at 49 n.222, 56 n.243 ("[T]he distinction between content-neutral and content-based regulations is best interpreted as expressing understandings of specific government purposes deemed impermissible within public discourse. It is therefore of no small significance that the distinction has virtually no application within the domain of commercial speech, where most regulation is content based." "[M]ost regulations of commercial speech are content based. The constitutionality of such regulations would present significant problems if commercial speech were conceptualized as a form of public discourse." (citation omitted)).

199. *Va. Pharmacy*, 425 U.S. at 762.

200. *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980).

201. *Id.* at 564 n.6.

202. 515 U.S. 618 (1995).

203. *Id.* at 620 (1995) (upholding a rule that a "lawyer shall not send, or knowingly permit to be sent, . . . a written communication to a prospective client for the purpose of obtaining professional employment if: (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to

subject matter, or content, of the speaker's letter.<sup>204</sup> In *IMS Health* the Court conflated core and commercial speech concepts, forging a dangerous path for the commercial speech doctrine. Content-based core speech distinctions are subject to strict scrutiny,<sup>205</sup> so it should follow that content-based commercial speech distinctions are subject to intermediate scrutiny. Such was the case in *Went For It*. However, *IMS Health* makes it unclear whether this distinction remains, threatening the future of the commercial speech doctrine in general and the application of intermediate scrutiny specifically.

## 2. How Do Speaker-Based Distinctions Factor into the Analysis?

In *IMS Health*, the majority also found improper the Vermont law's speaker-based distinction because it "disfavor[ed] specific speakers, namely pharmaceutical manufacturers."<sup>206</sup> Conversely, the dissent explained that, in the context of regulatory programs, it is not "unusual for particular rules to be 'speaker-based,' affecting only a class of entities, namely, the regulated firms."<sup>207</sup> Relying on energy regulators as an example, the dissent went on to explain that the regulator "might require the manufacturers of home appliances to publicize ways to reduce energy consumption, while exempting producers of industrial equipment."<sup>208</sup>

Previously the Court had found that commercial speech-based regulations may deliberately address only problematic speakers. In *Ohralik v. Ohio State Bar Ass'n*, decided prior to *Central Hudson*, the Court analyzed a state-authorized prohibition on lawyers who engage in direct, in-person solicitation of prospective clients and found that such a restriction on commercial speech survived First Amendment scrutiny.<sup>209</sup> Conversely, in *Edenfield v. Fane*,<sup>210</sup> the

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whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication").

204. Compare *Went For It*, 515 U.S. 618 (upholding a content-based commercial speech restriction prohibiting attorneys from soliciting accident and disaster victims), with *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (striking down a content-based commercial speech restriction applied to attorneys regarding advertising prices for services).

205. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011).

206. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011).

207. *Id.* at 2678 (Breyer, J., dissenting).

208. *Id.*

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

210. 507 U.S. 761 (1993).

Court analyzed a state law prohibiting certified public accountants from in-person, direct solicitation of prospective clients and found that the restriction on commercial speech violated the First Amendment.<sup>211</sup> The primary difference between the two cases was the identity of the speaker: “Because ‘the distinctions, historical and functional, between professions, may require consideration of quite different factors,’ the constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation.”<sup>212</sup>

Post-*Central Hudson* cases have confirmed the holding in *Ohralik* and have made it clear that the case “depended upon certain ‘unique features of in-person solicitation by lawyers.’”<sup>213</sup> It was precisely the distinction between the speakers that made the speech at issue either problematic and amenable to restriction or constitutionally protected and not amenable to restriction. Intermediate scrutiny allows the government to narrowly tailor restrictions to address the source of the problem without implicating speech that is not part of the problem.<sup>214</sup> Such a distinction would be unconstitutional in the realm of core speech (e.g., nurses, but not chefs, can engage in political debate). It is unclear why the distinction is permissible in the context of regulating lawyers versus accountants, but not in the context of regulating pharmaceutical manufacturers versus educators. These distinctions need to be fleshed out in future commercial speech cases. The majority in *IMS Health* retreated from precedent that established the commercial speech doctrine without explicitly explaining whether it intended to amend or otherwise overhaul the doctrine.

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211. *Id.* at 763.

212. *Id.* at 774 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 n.25 (1976)).

213. *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985)); *see also Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (upholding Florida Bar Rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and relatives for thirty days after an accident or disaster); *cf. IMS Health*, 131 S. Ct. at 2663 (“Vermont’s law thus has the effect of preventing detailers—and only detailers—from communicating with physicians in an effective and informative manner.”).

214. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980).

### 3. The Pivotal Prongs of *Central Hudson*

In order to ground the majority opinion in *IMS Health* in the commercial speech doctrine, one must trust that the majority found that the law failed *Central Hudson* analysis. This would be the case because the Vermont law did not allow speakers to use the commercial information for marketing purposes, thereby unconstitutionally restricting commercial speech. According to the dissent, however, the law restricted the use of information gathered pursuant to a regulatory mandate and “threaten[ed] only modest harm to commercial speech.”<sup>215</sup> The dissent would have subjected the law to rational basis review, but found that it should have been sustained under *Central Hudson* nonetheless.<sup>216</sup>

*IMS Health*, of course, is the most recent Supreme Court case where the majority ostensibly applied *Central Hudson* to the regulation at issue. The case brings to the forefront some questions about the application of the third and fourth prongs to speech restrictions and highlights the evolution of the commercial speech doctrine since its inception.<sup>217</sup>

The second prong seems to capture the interests at stake under *Central Hudson* and has been the most straightforward part of the inquiry.<sup>218</sup> Regulated speakers rarely challenge the government’s interest, and the government has been able to successfully proffer an

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215. *IMS Health*, 131 S. Ct. at 2680 (Breyer, J., dissenting); see also *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 387–88 (2002) (Breyer, J., dissenting) (“I do not deny that the statute restricts the circulation of some truthful information. It prevents a pharmacist from including in an advertisement the information that ‘this pharmacy will compound Drug X.’ Nonetheless, this Court has not previously held that commercial advertising restrictions automatically violate the First Amendment. Rather, the Court has applied a more flexible test. It has examined the restriction’s proportionality, the relation between restriction and objective, the fit between ends and means. In doing so, the Court has asked whether the regulation of commercial speech ‘directly advances’ a ‘substantial’ governmental objective and whether it is ‘more extensive than is necessary’ to achieve those ends.”).

216. *IMS Health*, 131 S. Ct. at 2684 (Breyer, J., dissenting) (“I consequently conclude that, even if we apply an ‘intermediate’ test such as that in *Central Hudson*, this statute is constitutional.”).

217. Thank you to Tuongvy Le for her superb analysis of prongs three and four of the *Central Hudson* test in, Jennifer L. Pomeranz, Seth T. Mermin & Tuongvy Le, *Constitutional Barriers to Legislating Restrictions on Food Marketing to Children: The Aftermath of Lorillard v. Reilly* (2008) (unpublished report) (on file with Author) (report to the Robert Wood Johnson Foundation (RWJF) funded by a grant from the RWJF to National Policy and Legal Analysis Network to Prevent Childhood Obesity (NPLAN) to the Yale Rudd Center for Food Policy & Obesity).

218. *Cent. Hudson*, 447 U.S. at 561.

interest that the Court agrees is substantial.<sup>219</sup> States have satisfied the second prong by asserting interests similar to the interests at issue in *IMS Health*,<sup>220</sup> such as protecting the health, safety, and welfare of citizenry,<sup>221</sup> protecting privacy,<sup>222</sup> and preventing commercial exploitation.<sup>223</sup> In *Went For It*, the state proffered all of these interests, and the Court upheld the law.<sup>224</sup> Since *Went For It*, several Justices have stated that the government may not prohibit truthful commercial speech “for reasons unrelated to the preservation of a fair bargaining process.”<sup>225</sup> This position conflicts with the language of the second prong by holding that the state’s interest in the preservation of a fair bargaining process is the only legitimate reason to regulate commercial speech. The *Central Hudson* test imposes no such limitation;<sup>226</sup> however, it might be that this is the only interest that will ultimately survive the Court’s review in the future.

The majority’s departure from methodically applying *Central Hudson* in *IMS Health* leaves all prongs open to question. If *Central Hudson* is still relevant, the third and fourth prongs have proven the most crucial in determining the constitutionality of commercial speech restrictions. Both have evolved throughout the years, becoming increasingly difficult to pass.<sup>227</sup>

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219. *But see* *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 483–86 (1995) (rejecting the state’s asserted interest in facilitating state efforts to regulate alcohol under the Twenty-First Amendment, but accepting the alternative interest in protecting the health, safety, and welfare of its citizens).

220. The *IMS Health* Court reiterated the importance of protecting privacy and found that the government’s “stated policy goals” of lowering the costs of medical services and promoting public health “[might] be proper,” but that the law “[did] not advance them in a permissible way.” *IMS Health*, 131 S. Ct. at 2670, 2672.

221. *Coors Brewing*, 514 U.S. at 485 (finding that the Government has a significant interest in protecting the health, safety, and welfare of its citizens); *see also* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (“With respect to the second step [of *Central Hudson*], none of the petitioners contests the importance of the State’s interest in preventing the use of tobacco products by minors.”).

222. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624–25 (1995).

223. *Bd. of Trs. of the State Univ. v. Fox*, 492 U.S. 469, 475 (1989) (“The Court of Appeals also held, and we agree, that the governmental interests asserted in support of the resolution are substantial: promoting an educational rather than commercial atmosphere on SUNY’s campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility.”).

224. *Went For It*, 515 U.S. at 635.

225. *Lorillard*, 533 U.S. at 577 (Thomas, J., concurring) (quoting 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996)).

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

227. *See, e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 375–76 (2002); *Lorillard*, 533 U.S. at 564–65.

*a. Prong three*

The third inquiry under *Central Hudson* asks “whether the regulation directly advances the governmental interest asserted.”<sup>228</sup> In practice, this analysis translates into a review of the evidentiary record to determine whether the governing body compiled enough evidentiary support to show that the speech restriction directly and materially advances the proffered interest.<sup>229</sup> The dissent in *IMS Health* explicitly addressed this prong and found that “Vermont compiled a substantial legislative record” to lead the “legislature to conclude that the statute ‘directly advance[d]’ each of these objectives.”<sup>230</sup> The majority did not address the evidentiary record but rather found that because evidence existed that was contrary to the state’s purpose in passing the law, such evidence effectively nullified the weight of evidence presented.<sup>231</sup> The majority relied on the views of “some” doctors, as opposed to the dissent, which relied on the legislative record at large.<sup>232</sup>

This begs the question of how much evidence is truly required to satisfy the third prong of the analysis.<sup>233</sup> In several cases the Court asserted that it does not require the government to provide “empirical data . . . accompanied by a surfeit of background information” to prove that a commercial speech restriction will alleviate the government’s articulated harm to a material degree.<sup>234</sup> However, the Court actually does require substantial evidence to pass prong three, and the government has passed this prong only by offering empirical data and background information.<sup>235</sup>

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228. *Cent. Hudson*, 447 U.S. at 555.

229. *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999).

230. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2682 (2011) (Breyer, J., dissenting).

231. *Id.* at 2671 (majority opinion) (“The defect in Vermont’s law is made clear by the fact that many listeners find detailing instructive. Indeed the record demonstrates that some Vermont doctors view targeted detailing based on prescriber-identifying information as ‘very helpful’ because it allows detailers to shape their messages to each doctor’s practice.”).

232. *Id.*

233. The Supreme Court deferred to the legislature’s judgment of the efficacy of a given restriction on speech in *Posadas de P.R. Associates. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342–43 (1986) but overruled that aspect of its decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509 (1996), stating that the majority in *Posadas* “clearly erred in concluding that it was ‘up to the legislature’ to choose suppression over a less speech-restrictive policy.”

234. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (providing that Massachusetts must demonstrate actual harm if it seeks to sustain a restriction on the labeling of tobacco products).

235. *Lorillard*, 533 U.S. at 558 (holding that the government passed prong three by submitting studies by the Food and Drug Administration, Surgeon General, and the Institute of

It is unlikely that any amount of evidence would have swayed the majority in *IMS Health* that the statute at issue passed prong three because of the perceived deficiencies bordering on core speech concerns. But it is disconcerting for future government regulations that the opinions of “some” doctors were enough to discount the rest of the legislative record compiled by the state.<sup>236</sup> What is clear is that substantial evidence must be compiled, but whether this will matter in the long run likely depends on the other aspects of the commercial speech restriction in question.

*b. Prong four*

Prong four has proven to be the most difficult to pass. Under this inquiry, the Court seeks to determine whether the speech restriction “is not more extensive than is necessary” to serve the government’s interest.<sup>237</sup> Here, the Court analyzes whether the scope of the restriction is “in proportion to the interest served” and simultaneously requires that the government consider “less-burdensome alternatives to the restriction on commercial speech.”<sup>238</sup> The Court has said that the “‘fit’ between . . . ends and . . . means” must be “reasonable”;<sup>239</sup> however, it seems clear that more than a reasonable relationship must exist under prong four.

The majority in *IMS Health* found that the statute in question was not “coherent” enough, meaning that it was not narrowly tailored, and that the government did not adequately consider alternatives to the speech restriction.<sup>240</sup> The majority suggested that doctors could deal with the issue themselves (by closing the office door to detailers) and found that the state offered “no explanation why remedies other than content-based rules would be

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Medicine); *Went For It*, 515 U.S. at 626–27 (“The [Florida] Bar submitted a 106-page summary of its 2-year study of lawyer advertising and solicitation” including both statistical and anecdotal data, surveys, and complaints. “The anecdotal record mustered by the Bar is noteworthy for its breadth and detail.”); *cf. Edenfield v. Fane*, 507 US 761, 771 (1993) (stating that the regulation failed because the government presented “no studies that suggest personal solicitation of prospective business clients by CPA’s creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear”).

236. *See IMS Health*, 131 S. Ct. at 2669.

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

238. *Went For It*, 515 U.S. at 632 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993); *Bd. of Trs. of State Univ. v. Fox*, 492 U.S. 469, 480 (1989)).

239. *Id.*

240. *IMS Health*, 131 S. Ct. at 2668.

inadequate.”<sup>241</sup> The dissent disagreed crucially on this point, finding that there was no “similarly effective ‘more limited restriction.’”<sup>242</sup> The dissent found that the alternatives suggested by the majority and the respondents were not “equally effective” and would continue to burden public health and privacy.<sup>243</sup>

Analysis under prong four has progressively provided stricter protection for commercial speech.<sup>244</sup> The very existence of alternatives has increasingly become a determining factor under prong four, which is problematic since some alternative option to any proposed regulation will likely always exist. The question remains unclear on how effective an alternative must be to be considered a valid alternative.

In *Thompson*, the Court was divided over appropriate alternatives under prong four. The majority found that there were several non-speech-related means of accomplishing the government’s objective and the government failed to explain why the means would be “insufficient” to advance the purported interest.<sup>245</sup> The dissent contended, however, that the alternatives would not sufficiently accomplish the government’s safety objectives.<sup>246</sup> In *44 Liquormart, Inc. v. Rhode Island*,<sup>247</sup> the plurality found that the speech restriction failed prong four because the non-speech-related alternatives “would be *more* likely to achieve the State’s goal.”<sup>248</sup>

The Court has moved from debating the efficacy of the alternatives presented to simply noting the existence of alternatives. Now, the extent to which efficacy even matters is unclear. *IMS*

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241. *Id.* at 2669–70 (“Physicians can, and often do, simply decline to meet with detailers, including detailers who use prescriber-identifying information. Doctors who wish to forgo detailing altogether are free to give ‘No Solicitation’ or ‘No Detailing’ instructions to their office managers or to receptionists at their places of work.” (citation omitted)).

242. *Id.* at 2683.

243. *Id.* at 2683–84.

244. Robert Post, *Prescribing Records and the First Amendment—New Hampshire’s Data-Mining Statute*, 360 NEW ENG. J. MED. 745, 747 (2009) (“This last requirement is so arbitrary that it constitutes an open invitation for judges to bring political prejudices to bear in resolving cases. Antiregulatory judges will tend to strike down statutes on the basis of this requirement; proregulatory judges will tend to uphold them.”).

245. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

246. *Id.* at 385–86.

247. 517 U.S. 484 (1996).

248. *Id.* at 507 (stating that the regulation prohibiting advertisement of liquor prices failed prong four because “alternative forms of regulation that would not involve any restriction on speech would be *more* likely to achieve the State’s goal of promoting temperance” (emphasis added)).

*Health* followed the Court's directive in *Thompson* that if "the First Amendment means anything, it means that regulating speech must be a last—not first—resort."<sup>249</sup> One must now ask whether there will ever not be a non-speech way to fulfill the government's purpose.

#### 4. A Future for Commercial Regulations?

The ability of the government to pass *Central Hudson* may be a thing of the past. The law in *Went For It* was content- and speaker-based, but the majority found that it passed *Central Hudson*.<sup>250</sup> It is unclear whether *Went For It* represents the only type of commercial speech restriction that the government may avail or whether it is an outlier because attorney advertising generally has been subject to different standards than advertising for other products and services.<sup>251</sup>

The law at issue in *Went For It* was upheld largely because it left open a significant number of alternative channels of communication.<sup>252</sup> Disregarding the fact that the law upheld in *Went For It* was content- and speaker-based, it regulated speech in a manner akin to a time, place, and manner restriction because it allowed attorneys to undertake the prohibited communication after a short period of time. On aspect of the law at issue in *Lorillard* might be similarly considered, in that it prohibited tobacco advertising on billboards within a one-thousand-foot radius of a school or playground.<sup>253</sup> However, the Court found that this was not narrowly tailored so that the remaining locations available for billboards were not meaningful alternative channels for communication.<sup>254</sup> One has

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249. *Thompson*, 535 U.S. at 373.

250. Fla. Bar v. *Went For It, Inc.*, 515 U.S. 618 (1995). The Court upheld a restriction on in-person solicitation by attorneys in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978), but decided that case prior to *Central Hudson*.

251. *In re Felmeister & Isaacs*, 518 A.2d 188, 199 (N.J. 1986) ("We do not believe that the Constitution requires that the rules governing attorney advertising be the same as those applicable to beer, automobiles, or casino hotels."); see also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 677 (1985) (O'Connor, J., concurring and dissenting) ("The Court's commercial speech decisions have repeatedly acknowledged that the differences between professional services and other advertised products may justify distinctive state regulation.").

252. *44 Liquormart*, 517 U.S. at 502 ("[L]ast Term we upheld a 30-day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers.").

253. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561–62 (2001).

254. *Id.* at 563.

to wonder if a five-hundred-foot radius would have sufficed in 2001, or if one hundred feet would have passed in 2011.

Perhaps even more worrisome than whether a commercial speech restriction will ever survive intermediate review is that we might be seeing an erosion of the commercial speech doctrine without any serious consideration of its consequences. At first blush, one could blame the holding in *IMS Health* on a poorly drafted section of the Vermont statute's legislative findings.<sup>255</sup> However, because the case decided a circuit split and overruled the First Circuit's finding that the Maine version of the law without the problematic language was constitutional,<sup>256</sup> this case may disconcertingly mark a new line of jurisprudence whereby economic regulations that tangentially implicate speech are now subject to some "heightened" form of First Amendment scrutiny.<sup>257</sup>

Justice Breyer's dissent in *IMS Health* cautioned:

The Court reaches its conclusion through the use of important First Amendment categories—"content-based," "speaker-based," and "neutral"—but without taking full account of the regulatory context, the nature of the speech effects, the values these First Amendment categories seek to promote, and prior precedent. At best the Court opens a Pandora's Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message. At worst, it reawakens *Lochner's* pre-New Deal threat of substituting judicial for

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255. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 ("When it enacted § 4631(d), the Vermont Legislature found that the 'marketplace for ideas on medicine safety and effectiveness is frequently one-sided in that brand-name companies invest in expensive pharmaceutical marketing campaigns to doctors.' 'The goals of marketing programs,' the legislature said, 'are often in conflict with the goals of the state.' The text of § 4631(d), associated legislative findings, and the record developed in the District Court establish that Vermont enacted its law for this end." (citations omitted)).

256. *IMS Health Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010), *vacated*, *IMS Health Inc. v. Schneider*, 131 S. Ct. 3091 (2011).

257. *IMS Health*, 131 S. Ct. at 2664; *id.* at 2679 (Breyer, J., dissenting) ("Moreover, given the sheer quantity of regulatory initiatives that touch upon commercial messages, the Court's vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty. History shows that the power was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists.").

democratic decision-making where ordinary economic regulation is at issue.<sup>258</sup>

*IMS Health's* perplexing and disordered majority opinion, confusingly interspersing core and commercial speech case law, leaves unclear not only the status of *Central Hudson*, but also the state of basic regulations that may tangentially implicate speech. Since precedent seems to be of little value in the commercial speech context, one can only hope that a future Supreme Court confines the breadth of the holding to one of poorly drafted legislative intent mistakenly implicating speech in an otherwise valid commercial regulation.

## V. CONCLUSION

No valid justification for departing from intermediate scrutiny has been raised by Justices or parties in First Amendment cases. Whatever perceived difficulty there is in applying this standard can be rectified by the Court's continued clarification through subsequent cases. The significant difference between core and commercial speech cannot be negated by simply requiring an identical constitutional analysis to apply to both. There is no standard First Amendment test applied to all core speech or all commercial speech. Courts must necessarily decide many questions about the speech before they can apply the appropriate test.

Commercial speech is fundamentally different from core speech. Commercial communication is subject to abuse; the possibility of deception is always at issue because the commercial speaker always has more information about his products and services than the listener, and it would be impossible in many instances for the listener to verify the accuracy of commercial communications. The government's ability to require factual commercial disclosures and to restrict false, deceptive, and misleading commercial speech must be maintained to support a well functioning, efficient, and transparent free market economy. Requiring the same protection for commercial

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258. *Id.* at 2685 (citations omitted); *see also* Post, *supra* note 244, at 746–47 (“Commercial-speech doctrine has since evolved into a disturbingly effective vehicle for invalidating otherwise unexceptional regulations of commerce . . . . It seems apparent that if First Amendment coverage is indiscriminately applied to all channels of data transmission [such as in the case of *Sorrell v. IMS Health*], and if the *Central Hudson* test is used to determine the First Amendment protection accorded such channels, we will face an increasingly capricious constitutional regime in which regulations will be constantly challenged and frequently invalidated.”).

and core speech ignores the intricacies within First Amendment jurisprudence and the constitutional values underlying the protection of each. Even worse, subjecting commercial regulations that tangentially implicate speech to First Amendment scrutiny threatens to destroy the regulatory system firmly established in the United States. The Court should maintain the current distinctions between commercial and core speech and reject all future opportunities to overhaul the commercial speech doctrine.