The Stubborn Survival of the *Central Hudson* Test for Commercial Speech

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INTRODUCTION

In 1980, the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[1] announced a four-part test to determine the constitutionality of restrictions on commercial speech.

> 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.[2]

Since then, the test has been scorned by scholars from divergent perspectives,[3] questioned by individual Justices,[4] and applied by the Court with fluctuating degrees of stringency and laxity.[5] However, despite such criticism and volatility, *Central Hudson* remains widely recognized as the standard governing limitation[6] on commercial speech.

This Article examines the persistence of the *Central Hudson* standard in the face of multiple challenges as well as larger implications of its survival. Part I provides a brief overview of the Court's commercial speech doctrine and the spectrum of criticism of *Central Hudson* for its allegedly excessive or inadequate protection of expression. Part II surveys a series of developments, especially in the last decade, that threaten to supersede *Central Hudson*'s "intermediate" standard of scrutiny[7] for commercial speech restrictions. In response, Part III explains how none of these phenomena have resulted in the abandonment of the *Central Hudson* regime. Notably, lower courts have devised a variety of strategies for avoiding constructions of Supreme Court decisions that would overthrow *Central Hudson*. The Article concludes that *Central Hudson*'s longevity represents more than judicial inertia, a doctrinal quirk, or a meaningless framework. Rather, the standard has served to maintain a degree of stability in an area that has witnessed shifting ideological predilections. In this respect, it is like other important criteria and concepts whose evolving interpretations have not defeated their legitimacy.

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

2. *Id.* at 566.

3. *See infra* Section I.B.

4. *See infra* note 259 and accompanying text.

5. *See infra* Section I.A.

6. This Article does not analyze the Court's treatment of compelled commercial speech except insofar as the decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), may have implications for restraints on commercial speech under *Central Hudson*.

7. *See infra* note 106 and accompanying text.

I. THE SUPREME COURT AND COMMERCIAL SPEECH

The *Central Hudson* framework was articulated early in commercial speech jurisprudence that dawned with the Court's ruling in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*.[8] The course of that jurisprudence can hardly be characterized as unwavering. Still, it has been the scope of the Court's protection, rather than its inconsistency, that has most aroused the skepticism of critics.

A. Modern Doctrine: From Virginia State Board *to* Sorrell[9]

1. Pre-*Central Hudson* Jurisprudence

Virginia State Board marked the Court's formal acknowledgement of commercial speech as a class of expression worthy of First Amendment protection.[10] There, the Court struck down a Virginia law banning pharmaceutical price advertising as unprofessional conduct.[11] Far from lying outside the purview of the First Amendment, speech that does "no more than propose a commercial transaction"[12] was found to implicate a number of rationales for safeguarding expression. In this instance, the ability of those with sparse resources to reduce expenses on prescription drug prices would promote self-realization[13] through "the alleviation of

8. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 428 U.S. 748 (1976).

9. Sorrell v. IMS Health Inc., 564 U.S. 552 (2011); *see infra* notes 101–13 and accompanying text.

10. In *Valentine v. Chrestensen*, 316 U.S. 52 (1942), the Court declared "purely commercial advertising" beyond the aegis of the First Amendment. *Id.* at 54. A year before *Virginia State Board*, the Court retreated somewhat from this principle by denying that *Chrestensen* reflected "any sweeping proposition that advertising is unprotected per se." Bigelow v. Virginia, 421 U.S. 809, 820 (1975). However, the Court's emphasis on noncommercial interests touched by the advertisement in question, *see id.* at 822, left the opinion far from full-throated championship of robust constitutional protection for commercial speech.

11. *Va. State Bd.*, 428 U.S. at 749–50, 773.

12. *Id.* at 762 (internal quotation and citation omitted). The question of defining commercial speech for constitutional purposes is discussed at *infra* notes 316–24 and accompanying text.

13. Promotion of self-realization or autonomy is often cited as one of the principal goals of the First Amendment's protection of freedom of speech. *E.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 991–92 (1978) ("To justify legal obligation, the community must respect individuals as equal, rational[,] and autonomous moral beings . . . . This requires that people's choices, their definition and development of *themselves*, must be respected . . . . This respect for defining, developing[,] or expressing one's self is . . . self-realization."); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963) ("The achievement of self-realization commences with development of the mind . . . . From this it follows that every [person]—in the development of [their] own personality—has the right to form [their] own beliefs and opinions. And, it also follows, that [they have] the right to express these beliefs and opinions."); Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 244–45 (1998) ("[T]he fundamental, positive value of the constitutional free speech guarantee is furtherance of individual self-realization, a broad value that includes (1) the individual's development of [their]

physical pain or the enjoyment of basic necessities."[14] Moreover, communication of prices and other commercial information—ostensibly a mere pecuniary matter—advances the First Amendment's paramount aim of protecting speech relevant to self-government by helping citizens make informed decisions about regulation of the nation's predominantly free-market economy.[15] Finally, the Court invoked the First Amendment's fundamental premise that unfettered expression is the most effective means of pursuing truth.[16] Virginia had feared that open advertising would degrade the pharmaceutical profession: consumers would choose pharmacists based on price rather than quality, ruin the pharmacist-customer relationship in their constant pursuit of discounts, and lose respect for a profession they would now regard as "that of a mere retailer."[17] Though not wholly discrediting these fears, the Court deemed such justifications for suppression as rooted in the "advantages of [citizens] being kept in ignorance."[18] The First Amendment forbade "this highly paternalistic approach";[19] instead, it enforced the belief that "the dangers of suppressing information" exceed "the dangers of its misuse if it is freely available."[20]

The theme of antipaternalism is featured prominently in the Court's treatment of commercial speech regulation in the wake of *Virginia State*

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personal powers and abilities and (2) the individual's ability and opportunity to make all levels of life-affecting decisions, thereby controlling and determining [their] life's course.").

14. *Va. State Bd.*, 428 U.S. at 764.

15. *Id.* at 765 (citing ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)). Meiklejohn's thesis that expression pertaining to self-government lies at the heart of the First Amendment has been repeatedly endorsed by the Court. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (stating that the First Amendment gives broadest protection to "[d]iscussion of public issues and debate on the qualifications of candidates[, which] are integral to the operation of the system of government established by our Constitution"); Nat'l Rev., Inc. v. Mann, 140 S. Ct. 344, 347 (2019) (Alito, J., dissenting) ("To ensure that our democracy is preserved and is permitted to flourish, this Court must closely scrutinize any restrictions on the statements that can be made on important public policy issues."). *See generally* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011) (contending that theories of participatory democracy best explain the Court's contemporary free speech doctrine).

16. *See Va. State Bd.*, 425 U.S. at 765. This rationale is famously associated with Justice Holmes's dissent in *Abrams v. United States*, 250 U.S. 616 (1919). *See id.* at 630 (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market."); *see also* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

17. *Va. State Bd.*, 425 U.S. at 768–70.

18. *Id.* at 769.

19. *Id.* at 770.

20. *Id.*

Board. A year later, the Court struck down two bans on commercial speech that authorities feared would trigger harmful conduct by its recipients. In *Linmark Associates, Inc. v. Township of Willingboro*, the Court invalidated an ordinance barring display of "For Sale" or "Sold" signs.[21] The ban was adopted to "stem . . . the flight of white homeowners from a racially integrated community."[22] As in *Virginia State Board*, it was not the goal—here, the "important governmental objective" of maintaining residential integration—to which the Court objected.[23] Rather, the town had impermissibly proscribed specific content in signs out of fear that such signs would "cause those receiving the information to act upon it."[24] Additionally, in *Bates v. State Bar of Arizona*,[25] the Court rejected a state's attempt to suppress lawyers' advertising of the price of routine legal services.[26] Like the state in *Virginia State Board*, the State Bar of Arizona contended that individuals seeking services were incapable of properly assessing and acting upon the information being offered.[27] Pointing to its reasoning in *Virginia State Board*, the Court expressed wariness of justifications "based on the benefits of public ignorance."[28] Rather, the First Amendment contemplates a citizenry with sufficient intelligence and judgment to be trusted with truthful information.[29]

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21. Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 96–97 (1977).

22. *Id.* at 86.

23. *Id.* at 95.

24. *Id.* at 94.

25. Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

26. *Id.* at 384.

27. *See id.* at 372–75. As an example, the State Bar argued that advertising would distract clients from attorneys' skill by "highlight[ing] irrelevant factors," and variations in providing services precluded accurate comparisons based on advertisements. *Id.* at 372.

28. *Id.* at 375 (citing *Va. State Bd.*, 425 U.S. at 769–70).

29. *See id.* at 374–75. *Bates* unleashed a wave of successful challenges to various state restrictions on lawyer advertising. *See, e.g.*, Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626 (1985) (striking down categorical prohibition of illustrations in advertisements and self-recommendation to persons who had not sought a lawyer's legal advice); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988) (overturning a blanket ban on targeted direct-mail solicitation); In re R.M.J., 455 U.S. 191 (1982) (invalidating bans on description of attorneys' areas of practice other than in officially prescribed verbiage and on mailing professional announcement cards to anyone outside certain categories); Ibanez v. Fla. Dep't. of Bus. & Prof'l Regul., Bd. of Acct., 512 U.S. 136 (1994) (invalidating the State's sanction against an attorney for advertising herself as a Certified Public Accountant (CPA) when she was licensed as such by the State and as a Certified Financial Planner where a national organization authorized her to use this designation); Peel v. Att'y Registration & Disciplinary Comm'n, 496 U.S. 91 (1990) (majority of Justices expressing approval of First Amendment protection for letterhead stating attorney's certification by well-known organization where accompanied by an appropriate disclaimer); *cf.* Edenfield v. Fane, 507 U.S. 761, 765 (1993) (striking down a ban on in-person solicitations by CPAs). *But see* Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (sustaining ban on targeted direct-mail solicitations by personal injury lawyers within thirty days of an accident); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449 (1978) (upholding enforcement of prohibition on in-person solicitation of clients "for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."). Both *Ohralik* and *Went*

Alternatively, the Court upheld two restrictions on commercial advertisement or solicitation in the years leading up to *Central Hudson*. In these cases, however, the government sought to prevent overbearing methods[30] or potential misrepresentation, rather than to shield presumably naïve consumers from accurate information.[31]

2. *Central Hudson*

In *Central Hudson* itself, the context of the Court's promulgation of its enduring test was a challenge to a state's complete ban on promotional advertising by a utility.[32] There, the Court systematically applied its newly minted standard requiring that the speech at issue is protected by the First Amendment, the regulation seeks to promote a substantial interest, the regulation in fact "directly advances" that issue, and the restriction does not impinge on more expression than is necessary to serve the interest.[33] As a threshold matter under the first prong, the Court determined that the advertising at issue was entitled to First Amendment recognition because it was neither misleading nor related to illegal activity.[34] Under the standard's second and third prongs , the Court was satisfied that the Public Service Commission's policy "directly advanced" the state's "substantial" interest in energy conservation.[35] However, the "complete suppression" of the utility's advertising foundered on the final step, as it was held "more extensive than necessary" to further this interest.[36] The wholesale ban prevented the utility from advertising more energy-efficient devices, and the state had failed to show that less intrusive measures—e.g., requiring that advertisements note the relative efficiency of services they promote—would not serve the state's interest.[37] At the same time, the Court cautioned that its ruling did not represent the elevation of commercial speech to the realm of fully protected expression; on the

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For It can be viewed as recognizing state authority to curb attorneys' exercise of undue influence and other abusive behavior rather than repudiating the antipaternalistic thrust of the Court's decisions in this area. *See Went For It*, 515 U.S. at 630 (emphasizing the State's goal of protecting "bereaved or injured individuals" from a "willful or knowing affront to or invasion of [their] tranquility"); *Ohralik*, 436 U.S. at 464 (finding circumstances present—where attorney had personally solicited two young accident victims, including one in traction in a hospital bed, and sought to use secret recordings of conversations with them to enforce representation agreement—"inherently conducive to overreaching and other forms of misconduct").

30. *See Ohralik*, 436 U.S. at 447, discussed in *supra* note 29.

31. *See* Friedman v. Rogers, 440 U.S. 1, 12–15 (1979) (upholding ban on practice of optometry under a trade name as means of preventing misleading impression of practice's character).

32. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 558 (1980).

33. *Id.* at 566.

34. *See id.* at 566–68.

35. *Id.* at 568–69.

36. *Id.* at 569–71.

37. *Id.* at 570–71.

contrary, commercial speech was entitled to "lesser protection" under the Constitution.[38] The Court later explained that commercial speakers' familiarity with their markets and products, as well as commercial speech's hardiness born of economic self-interest, allowed regulation of content forbidden in other types of expression.[39]

3. Post-*Central Hudson* Jurisprudence

In the fifteen years following *Central Hudson*, the Court's approach fluctuated between searching inspection of restrictions on commercial speech and deference to regulation in light of the "subordinate position of commercial speech in the scale of First Amendment values."[40] In two cases, the Court refused to sustain restrictions based on justifications unrelated to reasons for affording the government greater latitude to regulate commercial speech. In *Bolger v. Youngs Drug Products Corp.*, the Court struck down a ban on mailing unsolicited advertisements for contraceptives.[41] The Court found the state's argument that recipients would find such material offensive as unavailing here as in a noncommercial setting.[42] Similarly rejected was the putative "low value" of commercial speech as grounds for discriminatory restrictions on newsracks distributing "commercial" publications in *City of Cincinnati v. Discovery Network, Inc.*[43] Because Cincinnati asserted interests in safety and aesthetics applied identically—and on a greater scale—to the City's numerous newsracks purveying non-commercial publications, the City had failed to cite distinctly "commercial harms" that would justify the disparate treatment.[44]

Other rulings underscored the vigor with which the Court could infuse *Central Hudson*'s requirement that limitations on commercial speech be no "more extensive than is necessary to serve [the government's] interest."[45] For example, in *Rubin v. Coors Brewing Co.*, the Court invalidated a federal ban on the disclosure of alcohol content of

38. *Id.* at 562–63.

39. *Id.* at 564 n.6.

40. United States v. Edge Broad. Co., 509 U.S. 418, 430 (1993).

41. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73–75 (1983).

42. *Id.* at 71–72.

43. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428 (1993).

44. *See id.* at 417–18, 425–26. The Court distinguished its earlier holding in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), sustaining a ban on advertising billboards except those on the premises of the billboard's sponsor. *Discovery Network*, 507 U.S. at 425 n.20. Unlike Cincinnati's restriction of newsracks dispensing "commercial handbills," *id.* at 428, San Diego's prohibition was deemed to involve different treatment of two kinds of commercial speech rather than categorical discrimination against commercial speech. *Id.* at 425 n.20.

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

beer on labels or in advertising.[46] The government justified the restriction as a means of discouraging "strength wars" that spurred beer companies to raise the alcoholic content of their products.[47] Even assuming that the ban directly advanced this interest as required by *Central Hudson*'s third prong,[48] it failed the test's fourth prong—that a regulation be "[no] more extensive than is necessary"—because the government could apparently promote its interest through methods less invasive on speech.[49] As one alternative, the government might directly limit the alcohol content of beer.[50]

During this same period, however, the Court also sustained a number of restrictions that may well not have survived the relatively exacting scrutiny in *Rubin*. Granted, some of these rulings might be construed as presenting special circumstances rather than intimating a more permissive review. One example is when the Court in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*[51] upheld the Olympic Committee's enforcement of its exclusive statutory right to use the word "Olympic" to prevent promotion of an athletic competition called the "Gay Olympic Games."[52] Though curtailing speech, the ruling can be characterized as the protection of intellectual property.[53] The Court's decision in *Florida Bar v. Went For It, Inc.*[54] presented an even narrower situation and approved a ban on targeted direct-mail solicitations by personal injury lawyers within thirty days of an accident.[55] The Court viewed the prohibition as mainly aimed to guard the fragile emotional wellbeing of "bereaved or injured individuals."[56] In noting the limitation of its holding to "the circumstances presented here,"[57] the Court appeared to confirm that it intended no departure from the antipaternalistic impulse

46. Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995).

47. *Id.* at 479.

48. The Court expressed doubt that the prohibition actually met this third prong of *Central Hudson*. *See id.* at 491.

49. *Id.* at 490–91.

50. *Id.* at 490. An insistence that regulations not excessively limit commercial speech also marked decisions invalidating restrictions on lawyer advertising. See discussion at *supra* note 29.

51. S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987).

52. *Id.* at 525–27, 548.

53. *See* Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401, 417–18 (1998) (citing *S.F. Arts*, 483 U.S. at 541) ("[T]he First Amendment does not protect any right to misappropriate valuable commercial property, even if the property can be characterized as speech.").

54. Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995).

55. *Id.* at 620.

56. *Id.* at 630.

57. *Id.* at 620.

behind its previous rulings on state attempts to restrict truthful solicitation.[58]

However, in other cases, the Court articulated a broader approach reflecting a less potent version of *Central Hudson*'s final step. Most explicit on this score was the *Central Hudson* Court's reformulation of the requirement that restrictions on commercial speech be "no[] more extensive than is necessary to serve [the state's] interest."[59] Restraints on noncommercial speech subjected to this kind of standard must typically endure a stringent level of scrutiny.[60] And yet, in *Board of Trustees of the State University of New York v. Fox*,[61] the Court dismissed the notion that *Central Hudson* had imposed a "least-restrictive-means" test.[62] Rather, the *Fox* Court interpreted *Central Hudson*'s fourth prong as requiring a less demanding "'fit between the legislature's ends and . . . means' . . . that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'"[63]

Even more corrosive to the *Central Hudson* test was the Court's reasoning in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, which produced a relatively lenient interpretation of this requirement. [64] There, the Court allowed Puerto Rico to forbid advertising for casino gambling directed at Puerto Rican residents even as the territory declined to outlaw such gambling.[65] In part, the Court undermined *Central Hudson*'s antipaternalistic premise by approving the ban's rationale that though residents were "already aware of the risks of casino gambling," they would "nevertheless be induced by widespread advertising to engage in such potentially harmful conduct."[66]

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58. *See supra* notes 21–31 and accompanying text.

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

60. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (citation omitted) ("In past cases evaluating injunctions restricting speech, we have . . . [sought] to ensure that the injunction was no broader than necessary to achieve its desired goals."); Kusper v. Pontikes, 414 U.S. 51, 58–59 (1973) (citations omitted) ("[A] significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest . . . . If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.").

61. Bd. of Trs. v. Fox, 492 U.S. 469 (1989).

62. *Id.* at 476–81.

63. *Id.* at 480 (citations omitted).

64. Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986), *abrogated by* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

65. *See id.* at 331–32 (noting Puerto Rico's legalization of some forms of casino gambling).

66. *Id.* at 344.

Still more threatening to protection of commercial speech, however, was the Court's assertion that the government's "greater power to . . . ban casino gambling" altogether must entail the "less intrusive step" of confining its prohibition to advertising of the activity.[67] Writ large, this logic would license the government to restrict advertising of any activity or product that did not enjoy constitutional immunity.[68]

The more permissive stance toward limits on commercial speech signaled by *Fox* and *Posadas* appeared to gain purchase in *United States v. Edge Broadcasting Co.*[69] *Edge* sustained a federal ban on lottery advertisements by broadcasters licensed in states that did not conduct lotteries.[70] For the Court, enforcement qualified as a reasonable fit under *Fox* between the restriction and the goal of bolstering non-lottery states' efforts to discourage participation in lotteries.[71] The pliability of the required relationship between means and end was underlined by the fact that the vast majority of Edge's audience resided in a neighboring state that sponsored a lottery.[72] Likewise, the Court found *Posadas* apposite.[73] Here, as in *Posadas*, the Court acknowledged the government's rationale that advertising of gambling stimulates the demand for it.[74] Moreover, the Court reaffirmed *Posadas*'s greater-includes-the-lesser assumption that gambling's lack of constitutional protection afforded the government ample latitude to restrict advertising about it.[75]

In retrospect, the tolerance of restraints on commercial speech found in rulings like *Edge* represents detours rather than harbingers of a wider deferential approach. Indeed, a majority of Justices in *44 Liquormart, Inc. v. Rhode Island*[76] either questioned[77] or disavowed[78] *Posadas*'s continued vitality.[79] Though no opinion spoke for the Court, all endorsed invalidation of Rhode Island's ban on advertising retail liquor prices except at the place of sale.[80] Writing for four Justices, Justice Stevens believed that this

67. *Id.* at 345–46.

68. *See id.* at 345 (distinguishing Carey v. Population Servs. Int'l, 431 U.S. 678, 700–02 (1977) (contraceptives); Bigelow v. Virginia, 421 U.S. 809, 818–29 (1975) (abortions)).

69. United States v. Edge Broad. Co., 509 U.S. 418, 429 (1993).

70. *Id.* at 418, 436.

71. *Id.* at 429–30.

72. *See id.* at 423–24.

73. *Id.* at 434.

74. *Id.*

75. *See id.* at 426.

76. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

77. *See id.* at 531–32 (O'Connor, J., concurring in judgment).

78. *See id.* at 509–11 (Stevens, J., plurality).

79. *See* Arlen W. Langvardt & Eric L. Richards, *The Death of* Posadas *and the Birth of Change in Commercial Speech Doctrine: Implications of* 44 Liquormart, 34 AM. BUS. L.J. 483, 485 (1997) (*44 Liquormart* "sound[ed] . . . the death knell for *Posadas* and its modes of analysis").

80. *See 44 Liquormart, Inc.*, 517 U.S. at 484–85.

"wholesale suppression of truthful, nonmisleading information" did not even meet *Central Hudson*'s third criterion that it "significantly advance the [s]tate's interest in promoting temperance."[81] Arguably, in dicta, Justice Stevens went on to determine that the restriction also failed *Central Hudson*'s fourth requirement that the government action be no more extensive than necessary.[82] Four other Justices pointed to "less burdensome alternatives" to serve this interest to establish that the ban failed *Central Hudson*'s fourth requirement that the government not unnecessarily limit speech.[83] The remaining member of the Court, Justice Thomas, asserted that the *Central Hudson* test represented a regrettable departure from what he described as *Virginia State Board*'s principle that "all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible."[84]

However diverse the Justices' perspectives in *44 Liquormart* were, the succession of rulings that followed vigorously enforced *Central Hudson*'s injunction against restrictions on speech "more extensive than is necessary"[85] to advance the restriction's purpose. In *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, the Court blocked application of a federal ban on broadcasting promotions of casino gambling to a broadcaster located in a state where such gambling was legal.[86] The Court expressed skepticism that the ban directly advanced the government's interest in "alleviating the societal ills"[87] arising from gambling in light of various "exemptions and inconsistencies" in the regulatory scheme governing broadcasts of gambling advertisements.[88] However, the availability of effective "practical and nonspeech-related" regulation decisively felled this enforcement action by showing that the government had gratuitously limited speech.[89] A similar analysis thwarted a state's ban on outdoor advertising of smokeless tobacco or cigar advertising within 1,000 feet of a school or playground in *Lorillard Tobacco Co. v. Reilly*.[90] However powerful the interest in curbing

81. *Id.* at 505 (Stevens, J., plurality).

82. *Id.* at 507–08.

83. *Id.* at 529–30 (O'Connor, J., concurring in judgment) (noting as examples the imposition of minimum prices for, and increasing sales taxes on, alcoholic beverages).

84. *Id.* at 525–28. (Thomas, J., concurring in judgment).

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

86. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 176 (1999).

87. *Id.* at 186.

88. *See id.* at 190–91.

89. *See id.* at 192 (noting, among other examples, restrictions on gambling on credit, controls on admissions, and limitations on betting).

90. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). A separate prohibition on indoor, point-of-sale advertising of smokeless tobacco and cigars "lower than five feet from the floor of [a] retail establishment" located within one thousand feet of a school or playground was found to fail both the third and fourth steps of *Central Hudson*. *Id.* at 566–67.

underage use of tobacco, the burdens imposed by the ban did not justify its "broad sweep."[91] Citing *Greater New Orleans*, the Court concluded that the state failed to show that its restrictions were sufficiently tailored to its interest as required by *Central Hudson*'s fourth step.[92]

In *Thompson v. Western States Medical Center*, the Court further demonstrated that even protection of health did not justify suppression of speech where less speech-restrictive alternatives existed.[93] Pursuant to statutory authority, the Food and Drug Administration (FDA) had imposed a tradeoff on pharmacists who wished to engage in drug compounding, a process by which they combine ingredients to create medication specifically tailored to a particular patient.[94] To preserve their exemption from the FDA's burdensome safety and efficacy testing, pharmacists refrained from advertising or promoting prescriptions for the compounding of a specific drug or type of drug.[95] As in *Lorillard*,[96] the *Western States* Court refused to condone a prohibition of truthful speech about a legal product.[97] The FDA justified the ban as one of several restrictions on compounding designed to prevent pharmacists' exploitation of compounding as a means of circumventing the FDA approval process to which large-scale drug manufacturing was subject.[98] Reciting *Central Hudson*'s fourth prong, the Court reminded the FDA that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."[99] The Court then proceeded to reel off multiple measures the government had not pursued that might have accomplished its aim of distinguishing between small-scale compounding and large-scale drug manufacturing without drastically limiting speech.[100]

A decade after *Western States*, in *Sorrell v. IMS Health Inc.*, the Court struck down another limit on communication about pharmaceutical products. [101] Without committing to *Central Hudson* as the pertinent standard, the Court deemed its requirements sufficient to invalidate the

91. *Id.* at 561.

92. *Id.* at 565 (citing *Greater New Orleans*, 527 U.S. at 189 n.6).

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

94. *Id.* at 360–63.

95. *See id.* at 370.

96. *Lorillard*, 533 U.S. at 525.

97. *W. States Med. Ctr.*, 535 U.S. at 374.

98. *Id.* at 362–63.

99. *Id.* at 371.

100. *Id.* at 372–73. These included banning the use of commercial-scale equipment for compounding drugs, capping the amount of a certain compounded drug that a pharmacy could sell in a given period, and barring pharmacists from compounding drugs beyond those needed to fill prescriptions already received. *Id.* at 372.

101. Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

disputed statute.[102] Vermont barred pharmacies' sale of "prescriber-identifiable information" to data-mining companies (unless a prescriber consented), as well as data-mining companies' sale of reports gleaned from this information to pharmaceutical companies, "for marketing or promoting a prescription drug."[103] The law sought to prevent "detailers"—marketing representatives of pharmaceutical companies—from tailoring their approaches to individual physicians by drawing on knowledge of a physician's prescribing practices.[104] According to legislative findings, typically ill-informed doctors were unduly susceptible to tendentious marketing presentations.[105] Their decisions based on "incomplete and biased information" often resulted in unnecessarily prescribing brand-name drugs rather than generic alternatives and, thus, raising health care costs.[106]

Whatever the merits of Vermont's law as policy, or the constitutional status of a wholesale ban on the dissemination of prescriber-identifiable information, the statute was defeated by the selectivity of its prohibitions.[107] While pharmacies could not sell the information for use in marketing, they could do so for other purposes such as "health care research."[108] Moreover, many other groups beyond marketing were authorized to access to the same information: e.g., "insurers, researchers, journalists, and [the] state."[109] To the Court, this regulatory scheme constituted a content-based and speaker-based burden on speech.[110] By its own admission, the State had confirmed that "the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs."[111] The State had thus impermissibly sought to skew debate about pharmaceuticals by silencing a segment of its participants.[112] Even profit-driven marketers were entitled to the protection of First Amendment principles: "If pharmaceutical marketing

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102. *See id.* at 571("[T]he outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied."). The implications of *Sorrell*'s holding for the *Central Hudson* test are discussed at *infra* Section II.A. and Section III.A.

103. *Id.* at 558–59 (citing VT. STAT. ANN. tit. 18, § 4631(d) (2011)).

104. *Id.* at 558; *see id.* at 560–61.

105. *Id.* at 560–61.

106. *See id.*

107. As a threshold matter, the Court first rejected Vermont's argument that principles governing discrimination in speech did not apply because the statute regulated a "commodity." *Id.* at 570. In response, the Court invoked the established principle that "the creation and dissemination of information are speech within the meaning of the First Amendment." *Id.* (citations omitted).

108. *Id.* at 572–73.

109. *Id.* at 573.

110. *Id.* at 571.

111. *Id.* at 565.

112. *See id.* at 578–79 ("The State may not burden the speech of others in order to tilt public debate in a preferred direction.").

affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it."[113]

B. Criticism of Central Hudson *Doctrine*

The *Central Hudson* opinion holds itself out as fashioning an appropriate balance between the expressive and commercial aspects of commercial speech. In a sense, the characterization of the Court's scrutiny as an "intermediate" level of review[114] reflects its acknowledgement of both these dimensions. Critics of this approach, both within and outside the Court, effectively argue that it assigns excessive weight to one or the other of these elements.

1. Intermediate Level of Review is Overly Protective

For the Court, the values and premises that prompted First Amendment recognition of commercial speech[115] did not demand full constitutional protection of this class of expression. In *Central Hudson*, the Court recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation," and other kinds of speech.[116] In particular, the Court further identified two features of commercial speech that render it subject to regulation of its content. First, commercial speakers' familiarity with their products and markets enables them to assess the accuracy of their representations.[117] Second, the economic motives that animate commercial speech ensure its hardiness in the face of extensive regulation.[118] Thus, the Court could accord less intense scrutiny to restrictions on commercial speech than to those on political

113. *Id.* at 576.

114. Edenfield v. Fane, 507 U.S. 761, 767 (1993) (referring to "intermediate standard of review" for commercial speech under *Central Hudson*); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring in judgment) (describing the Court's four-part test in this way). *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (some internal citation and quotation marks omitted) (citing Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989)) ("In recognition of the distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech, we developed a framework for analyzing regulations of commercial speech that is 'substantially similar' to the test for time, place, and manner restrictions."). The question of whether this description is apt is discussed at *infra* Section II.C.

115. *See supra* note 15 and accompanying text.

116. *Cent. Hudson*, 447 U.S. at 562 (citation omitted).

117. *Id.* at 564 n.6 (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977)).

118. *Id. But see* Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 385–86 (1979) (disputing the proposition that commercial speech is especially hardy). Criticism of commercial speech's putative hardihood as grounds for limiting its protection is discussed at *infra* notes 168–72 and accompanying text.

expression and other fully protected speech. Indeed, the vibrancy of noncommercial speech was bolstered by withholding heightened scrutiny from regulation of commercial speech. As the Court later observed in *Florida Bar v. Went For It, Inc.*,[119] "to require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech."[120]

Notwithstanding this relegation to lesser status, numerous commentators have criticized the Court for extending too much rather than too little protection to commercial speech. Like Justice Rehnquist dissenting in *Virginia State Board*, they believe that "a seller hawking [their] wares" falls more in the realm of commercial regulation than of constitutional freedom of expression.[121] This kind of communication, they argue, is far removed from the principal justifications for protecting speech. In the immediate aftermath of *Virginia State Board*, C. Edwin Baker asserted that commercial speech lacks "crucial connections" to the "individual liberty and self-realization" that are central to the First Amendment.[122] He concluded, "a complete denial of [F]irst [A]mendment protection for commercial speech is not only consistent with, but is required by, [F]irst [A]mendment theory."[123] In a similar vein, Victor Brudney later denied that commercial speech is "expression that serves any person's autonomy interest that the First Amendment's special protection can be said to reach."[124] Thomas Jackson and John Jeffries, too, drew in part on this strand of First Amendment theory in their scathing and oft-cited critique of *Virginia State Board*.[125] They famously dismissed the ruling as "economic due process . . . resurrected, clothed in the ill-fitting garb of the [F]irst [A]mendment."[126]

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119. Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995).

120. *Id.* at 623 (citation omitted).

121. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting).

122. C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976).

123. *Id.*

124. Victor Brudney, *The First Amendment and Commercial Speech,* 53 B.C. L. REV. 1153, 1199 (2012); *see id.* at 1185–86 (**"**Commercial speech, except as it contains expression engaging matters of societal interest, is narrowly focused on personal benefit or fulfillment—a focus that suggests it has no greater claim to special protection of the First Amendment on grounds of autonomy than does a person's sale, acquisition, or consumption of the goods or services that the speech proposes to sell.").

125. *See* Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 13 (1979) ("Whatever else it[, the idea of individual self-fulfillment,] may mean, the concept of a [F]irst [A]mendment right of personal autonomy in matters of belief and expression stops short of a seller hawking [their] wares.").

126. *Id.* at 30.

Jackson and Jeffries also asserted the disjunction between commercial speech and another fundamental rationale for freedom of expression: promotion of self-government.[127] The belief that commercial speech does not contribute to the democratic process has loomed large among advocates for reduced protection of commercial speech.[128] After the Court began routinely enforcing a stringent conception of *Central Hudson*'s fourth requirement,[129] Robert Post emerged as the leading champion of such a "Meiklejohnian perspective."[130] In an influential article, Post argued that commercial speech's lack of contribution to public discourse significantly limited its protection under the First Amendment.[131] Public discourse, he explained, consists of the "processes of communication that must remain open to the participation of citizens if democratic legitimacy is to be maintained."[132] Commercial speech generally falls outside this domain because "we most naturally understand persons who are advertising products for sale as seeking to advance their commercial interests rather than as participating in the public life of the

127. *See id.* at 17 ("[I]n terms of relevance to political decisionmaking, advertising is neither more nor less significant than a host of other market activities that legislatures concededly may regulate."). The centrality of self-governance to the First Amendment is discussed at *supra* note 15 and accompanying text.

128. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 428 U.S. 748, 787 (1976) (Rehnquist, J., dissenting) (disputing position, ascribed to majority opinion, that rationale for First Amendment's protection of "public decision making as to political, social, and other public issues" applies to "the decision of a particular individual as to whether to purchase one or another kind of shampoo"); Lillian BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance of and Limits of Principle*, 30 STAN. L. REV. 299, 355 (1978) ("Political speech, by contrast [with commercial speech], deals with public decisionmaking, or at least private decisionmaking that has a noticeable impact on the democratic process . . . . The Court's extension of [F]irst [A]mendment protection to the commercial speech situations that have arisen so far . . . must be characterized as illegitimate."); Brudney, *supra* note 124, at 1192 ("[C]ommercial speech is not the speech that the First Amendment protects unless it contains expression on matters relating to public policy decisions, or to the public interest."); *id.* at 1199 n.149 ("Regulation of [urging a buy-sell transaction], even if driven by a desire to discourage the conduct it urges, does not obscure or interfere with the self-government or the truth-seeking process any more than would regulation of the transaction, because the speech's function is simply to communicate to individuals about private buy-sell decisions, not about matters of societal import."); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2663 (2008) ("Protection for either democracy or the democratic process seems to offer little support for the proposition that for-profit corporations should enjoy the same rights to speech as human beings. To the contrary, an examination of the reality of the accumulation of resources, access to media, and corporate influence on government suggests that it is properly restrained in support of the goal of the preservation of democracy.").

129. *See supra* notes 76–113 and accompanying text.

130. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 56 (2000).

131. *See generally id.*

132. *Id.* at 7.

nation."[133] Accordingly, constitutional protection for commercial speech should be made commensurate with the value of its informational function.[134] Such a project would not necessarily entail elimination of the *Central Hudson* regime but rather its "principled revision."[135] For example, Post rejected what he viewed as the simplistic antipaternalism of the Court's commercial speech jurisprudence.[136]

In a later article, Post and Amanda Shanor concluded that *Central Hudson*'s declaration that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising"[137] means commercial speech derives its constitutional position from "the rights of *listeners* to receive information so that they might make intelligent and informed decisions."[138] Others have also argued that protection of commercial speech should be calibrated to the interests of listeners rather than those of speakers.[139] To such observers, this more limited scope of protection would align the Court more faithfully with its original emphasis in *Virginia State Board* on the value of the "free flow of commercial information" to both consumers and society.[140] It is also seen as reflecting a fundamental divide between commercial speech and core expression, the latter of which "the First Amendment guards against government interference for the benefit of both the listener and the speaker."[141] Finally, a recipient-focused model helps to account for the far greater latitude permitted to government to regulate false commercial speech than false expression in most other spheres.[142]

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133. *Id.* at 12. *See* Brudney, *supra* note 124, at 1185 (Commercial speech "focuses only on individuals' private or personal good, not on matters of public interest or the societal values or attitudes with which the First Amendment is concerned").

134. *See* Post, *supra* note 130, at 53.

135. *Id.* at 56.

136. *See id.* at 50–54.

137. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980).

138. Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 170 (2015).

139. *See, e.g.*, Felix T. Wu, *Commercial Speech Protection as Consumer Protection*, 90 U. COLO. L. REV. 631, 631 (2019) (proposing that level of scrutiny of commercial speech regulation should be viewed through the lens of informing consumers).

140. Felix T. Wu, *The Commercial Difference*, 8 WM. & MARY L. REV. 2005, 2023 (2017) (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 428 U.S. 748, 763–64 (1976)); *see* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985) ("[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.").

141. Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 400 (2012).

142. *Compare* Rubin v. Coors Brewing Co., 514 U.S. 476, 496 (1995) (Stevens, J., concurring) ("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."), *with* United States v. Alvarez, 567 U.S. 709, 726 (2012) (Kennedy, J., plurality) (finding that harms

Some scholars have highlighted their concern that inadequate consumer orientation spawns excessive protection of commercial speech and thereby enables inordinate corporate power.[143] For example, Tamara Piety has warned that vigorous protection for commercial speech gives businesses—through the vehicle of corporate personhood—a potent cudgel to wield against government regulation.[144] Indeed, she fears that continued expansion of such protection will ultimately lead to the abolition of the distinction between commercial speech and fully protected speech under the First Amendment.[145] Shielded in this way, corporations may defeat regulation widely thought to promote the public's health, safety, and welfare.[146]

2. Intermediate Level of Review is Insufficiently Protective

By contrast, other scholars have urged erasing what they perceive as artificial distinctions between commercial speech and other forms of expression. Preeminent in this school of thought has been Martin Redish, whose pioneering advancement of this thesis[147] preceded *Virginia State Board* by several years and appears to have strongly influenced the Court's opinion.[148] Arguing that much commercial speech fosters the First Amendment value of "rational self-fulfillment,"[149] Redish advocated "afford[ing] substantial [F]irst [A]mendment protection to all truthful, non-misleading commercial speech."[150] In later work, Redish asserted that speech concerning commercial goods and services shares "identical normative concerns about self-development and self-determination"[151] with political speech; lamented that the Court's increasing protection of

caused by defendant's misrepresentation that he held Congressional Medal of Honor did not justify conviction for engaging in "protected speech").

143. *See generally, e.g.*, TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2012).

144. *See* Tamara R. Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. BUS. & TECH. L. 1, 4 (2016); *see also* Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 550 (2010).

145. *See* Piety, *supra* note 128, at 2584.

146. *See id.* at 2587–88. *See also* Brudney, *supra* note 124, at 1195 ("In the universe of retail mass marketing, the billions of dollars spent by sellers in the aggregate to acculturate consumers to desire products or services . . . [may] create unspecified long-term health or safety problems, or other costs.")

147. Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 431–32 (1971).

148. *See* Piety, *supra* note 128, at 2601 ("One cannot read [Redish's article and the *Virginia State Board* decision] without concluding that Redish persuaded the Court to adopt his theory.").

149. Redish, *supra* note 147, at 443–47.

150. *Id.* at 447.

151. Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 81 (2007).

commercial speech had not reached the level of full protection;[152] declared that rationales for withholding protection "come[] dangerously close to a constitutionally destructive form of viewpoint-based regulation";[153] and—with Kyle Voils—argued against categorical denial of constitutional protection for commercial speech.[154]

Other proponents of enhanced First Amendment stature for commercial speech have echoed and expanded on Redish's reasoning. Such observers agree that "[c]ommercial speech, as speech, should presumptively enter the debate with full First Amendment protection."[155] A salient theme has been that commercial speech, far from being of inferior value, promotes central aims of the First Amendment. One of these aims is preservation of an untrammeled "marketplace of ideas"[156] to ensure the dissemination of diverse ideas and information necessary to sound inquiry and decisionmaking.[157] In a sense, advocates of equal status for commercial speech seek what they regard as the logical extension of the Court's own acknowledgement that "[t]he commercial market-place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish . . . . [E]ven a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment."[158] At any rate, champions of full constitutional recognition of commercial speech reject diminished protection premised on its inadequate contribution to the circulation of ideas and information.[159]

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152. Martin H. Redish, *Commercial Speech and the Values of Free Expression*, CATO INST. (June 19, 2017), https://www.cato.org/publications/policy-analysis/commercial-speech-values-free-expression [https://perma.cc/6PAS-4BM3].

153. Redish, *supra* note 151, at 69.

154. Martin H. Redish & Kyle Voils, *False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle*, 25 WM. & MARY BILL RTS. J. 765, 769 (2017).

155. Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993).

156. *See supra* note 16.

157. *See* Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 50–51 (1988) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503–04 (1984)) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. '[T]he freedom to speak one's mind . . . is essential to the common quest for truth and the vitality of society as a whole.'"); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2375 (2018) (quoting McCullen v. Coakley, 573 U.S. 464, 476 (2014) ("[W]hen the government polices the content of professional speech it can fail to 'preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail.' . . . [T]he people lose when the government is the one deciding which ideas should prevail."); United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945) ("[R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.").

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

159. *See, e.g.*, Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 YALE J. ON REGUL. 85, 100 (1999) ("In light of the importance of advertising to colonial Americans, attempts by modern

Advocates for parity of commercial speech have also elaborated on and enlarged the implications of *Virginia State Board*'s acknowledgement that commercial speech can advance the First Amendment's central aim of enabling self-government.[160] For example, Daniel Farber has disputed the contention that "speech on commercial topics is 'so far removed from the context of political debate that the public's keen interest in the messages is totally irrelevant to [F]irst [A]mendment values.'"[161] He points out that information about a product may implicate important political issues[162] and observes that an advertisement contains the same kind of content as a presumably protected consumer magazine.[163] In a similar vein, it has been argued that commercial speech promotes values of self-government because it "transmits information and values that contribute to the public's formation of political opinions."[164] Conversely, others have warned of the danger to democratic self-government from permitting government suppression of truthful information even when that information is communicated by commercial speech.[165] Moreover, some have generalized *Virginia State Board*'s specific remark on the capacity of advertised drug prices to facilitate self-realization[166] into a broader assertion that commercial speech's promotion of autonomy warrants full-blown First Amendment protection.[167]

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constitutional scholars to treat commercial speech as 'low value' seem peculiar. Advertisements were necessary to the colonial press not only because the revenue they generated was required for newspapers to exist; they were also thought to have independent value in educating and informing the reading public."); Smolla, *supra* note 155, at 792 ("[M]ass advertising is in many respects more like other forms of speech in the American marketplace than unlike them. The 'negative byproducts' that must be listed next to any honest ingredient description of commercial speech make it look more like the other genres of speech protected by the First Amendment, not less.").

160. *See supra* note 15 and accompanying text.

161. Farber, *supra* note 118, at 382 (quoting BeVier, *supra* note 128, at 353).

162. *Id.* ("For example, a belief that American cars are overpriced influences views on foreign car import restrictions, on inflationary price increases for domestic cars, and on the effects of oligopoly.").

163. *See id.* at 382 n.43.

164. Jonathan Weinberg, Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 745 (1982).

165. *See, e.g.*, Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 490 (1992) (criticizing "such tenuous an excuse as feared harm to citizens" as inadequate justification for suppression).

166. *See supra* notes 13–14 and accompanying text.

167. *See* Eberle, *supra* note 165, at 448 ("Possession of commercial information allows 'self-realization' because, among other functions, it enables us to assert some measure of control over our lives, aiding in the decisionmaking process through which we may fulfill our aspirations."); David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78. CALIF. L. REV. 359, 429 (1990) ("[A]dvertising implicates rationality and self-realization interests in at least four ways: advertising allows consumers to make rational choices among goods and services, it allows consumers to make decisions regarding the propriety of regulating certain activities, it presents ideas to consumers regarding the nature and potential of the subject of the advertisement, and it may help create portions of each individual's self-perception."); Brian J. Waters, *A Doctrine in Disarray: Why the First*

Finally, critics of commercial speech's secondary status have challenged the factual predicates on which it is based. In *Virginia State Board*, the Court cited commercial speech's relative "objectivity and hardiness" as "commonsense differences" between commercial and noncommercial speech that justify greater regulation of the former.[168] In a notable critique, Alex Kozinski and Stuart Banner disputed that either of these qualities characterize actual commercial speech in comparison to fully protected speech.[169] As to objectivity, they observed that modern advertising makes claims—for example, the impact a product can have on a consumer's social life—whose truth is impossible to ascertain.[170] Conversely, some forms of noncommercial speech are fully protected notwithstanding their objectively demonstrable falsity.[171] Thus, "[t]he idea that commercial speech is more objective than other forms of speech does not survive the most rudimentary reality-check."[172] Additionally, Kozinski and Banner found the assumption of commercial speech's hardiness an even more tenuous ground for distinguishing commercial and noncommercial speech under the First Amendment.[173] They rejected the notion that the profit motive animating commercial speech renders it exceptionally durable and, therefore, susceptible to greater regulation.[174] To them, this rationale is amply refuted by the fully protected expression produced for profit by a variety of media.[175] Moreover, they noted that the durability of speech can stem from "other interests . . . just as strong as economics, sometimes stronger."[176] For example, speech motivated by religious beliefs or artistic impulses may persist in hostile conditions that could deter expression motivated solely by profit.[177] Following Kozinski

Amendment Demands the Abandonment of the Central Hudson *Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1646 (1997) ("In the commercial speech context, the Court fails to recognize that consumer choices are made for a myriad of reasons, not dictated solely by prices or product attributes. Quite often, the choices that consumers make help them to define themselves as individuals and play a significant role in their pursuit of self-fulfillment.").

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

169. *See generally* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).

170. *Id.* at 635.

171. *Id.* at 635–36 (offering, *inter alia*, as examples claims of the sun revolving around the earth and of the existence of four-year-old grandmothers).

172. *Id.* at 636.

173. *Id.* at 637.

174. *Id.*

175. *See id.*

176. *Id.*

177. *Id.*

and Banner, other commentators have similarly questioned these empirical underpinnings of commercial speech's subordinate status.[178]

II. REASONS TO DOUBT *CENTRAL HUDSON*'S DURABILITY

On the Supreme Court, skepticism, if not hostility, to the intermediate scrutiny ascribed to *Central Hudson* appears to be in the ascendancy. Three decisions in the past decade can be construed as elevating the constitutional standing of commercial speech. In addition, a quarter-century of muscular enforcement of *Central Hudson*'s fourth prong might have wrenched the test from its original moorings. More broadly, the deregulatory impulses discernible in the Court's recent First Amendment jurisprudence support a dilution of government's ability to restrain commercial activity through limitations on commercial speech.

A. Sorrell*'s "Heightened Scrutiny"*

As previously discussed, the Court in *Sorrell v. IMS Health Inc.*[179] struck down Vermont's ban on the sale and use of information about the prescribing practices of individual physicians.[180] On its face, the *Sorrell* opinion did not purport to discard the *Central Hudson* standard for commercial speech; rather, the Court more ambiguously observed that the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied."[181] Nevertheless, the Court's rigorous application of First Amendment principles transcending commercial speech might be construed as markedly contracting the scope of permissible commercial speech regulation.

At a minimum, *Sorrell*'s reasoning blurred the line separating the treatment of commercial and noncommercial speech. The Court explained its application of "heightened judicial scrutiny" by Vermont's imposition

178. *See, e.g.*, Jef I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U. L. REV. 1147, 1194 (1996) ("While the reference to commonsense differences has been repeated so often that it has achieved a sheen of fact and has served as a basis for several restrictions on commercial expression, no evidence of superior verifiability or durability ever has surfaced."); McGowan, *supra* note 167, at 406 (internal citation omitted) ("The Court asserted that '[s]ince advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation.' This reasoning, however, is not grounded in any type of [F]irst [A]mendment analysis at all. Rather, it is an empirical prediction about the behavior of potential speakers when faced with overbroad regulations."); Scott Wellikoff, Note, *Mixed Speech: Inequities that Result from an Ambiguous Doctrine*, 19 ST. JOHN'S J. LEGAL COMMENT. 159, 183 (2004) ("Proponents of the distinction argue that the profit motive of the commercial speaker leads to the inability to chill it. However[,] . . . book publishers and authors, as well as painters and lobbyist[s] engage in their profession to seek a profit, yet are fully protected.").

179. Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

180. *See supra* notes 101–06 and accompanying text.

181. *Sorrell*, 564 U.S. at 571.

of a "specific, content-based burden on protected expression."[182] The Court relied on the implied conflation of commercial and noncommercial speech as the authority to support its searching review. Two decisions invalidating commercial speech restrictions[183] bookend the recitation of a series of cases involving noncommercial speech.[184] Noting passages in some of these cases affirming the importance of content neutrality, the Court pointedly declared that "[c]ommercial speech is no exception."[185]

Sorrell's repeated condemnation of Vermont's statute as a content-based restriction might be viewed as a portent for the abandonment of *Central Hudson* as a standard calibrated to the peculiar features of commercial speech. As Amanda Shanor has noted, "the very category of commercial speech is a content-based category."[186] Starting with *Virginia State Board*, this aspect of commercial speech had not been thought to preclude subjecting it to special limitations any more than with prohibitions on such traditionally lesser protected categories as defamation, obscenity, and fighting words. Rather, content-based restrictions for which the Court reserved its skepticism were generally considered those aimed at a particular message or kind of message.[187] By the time *Sorrell* was decided, it had long been established that content-based restrictions in this traditional sense triggered strict scrutiny.[188] *Sorrell* did not expressly extend this principle to commercial speech. Still,

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182. *Id.* at 565.

183. *See generally* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993); Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

184. *See Sorrell*, 564 U.S. at 565–66. These cases include United States v. Playboy Ent. Grp., Inc., 529 U.S. 803 (2000); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991); Ward v. Rock Against Racism, 491 U.S. 781 (1989); Renton v. Playtime Theatres, Inc., 475 U.S. 41(1986); Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983).

185. *Sorrell*, 564 U.S. at 566.

186. Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 151 (2016); *accord* Daniel J. Croxall, *Cheers to* Central Hudson*: How Traditional Intermediate Scrutiny Helps Keep Independent Craft Beer Viable*, 113 NW. U. L. REV. ONLINE 1, 10 (2018) ("[A]ll commercial speech regulations are inherently content-based.").

187. *See* Leslie Kendrick, *Content Discrimination Revisited*, 98 Va. L. Rev. 231, 244 (2012); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987).

188. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011) ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest."); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); Texas v. Johnson, 491 U.S. 397, 412 (1989) (citing Boos v. Barry, 487 U.S. 312, 321 (1988)) ("Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.'").

the Court's treatment of Vermont's law as a content-based regulation warranting "heightened scrutiny"—however ill-defined—is difficult to reconcile with the less demanding review described in *Central Hudson*.[189]

The Court further narrowed the gap between commercial and noncommercial speech by framing Vermont's First Amendment offense as viewpoint discrimination against detailers. That is, the State was suppressing marketing representatives' message of the value of brand-name drugs over generic ones.[190] Thus, the law burdened "disfavored speech by disfavored speakers."[191] This characterization implicitly equated the First Amendment stake in marketers' right to present their sales pitch with that in political speakers' ability to argue their views. In so doing, *Sorrell* marked a departure from *Virginia State Board*'s emphasis on consumers' interests[192] when recognizing a significant but limited right of commercial speech.[193] A more listener-oriented approach might have produced a different result. Felix Wu has stated that in *Sorrell* "the real First Amendment interests were not those of the companies marketing to doctors, but those of the doctors interested in receiving information about brand-name drugs from the companies."[194] On that premise, the ability of physicians to opt into the marketing practice at issue,[195] along with doctors' groups having urged adoption of the law,[196] could have justified the conclusion that no First Amendment values were significantly infringed.

Moreover, *Sorrell* can be seen as containing the seeds of a broader deregulatory project.[197] Justice Breyer in dissent voiced exactly this concern: "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

189. *See* Megan M. La Belle, *Influencing Juries in Litigation "Hot Spots"*, 94 IND. L.J. 901, 919 (2019) ("*Sorrell* indicates that content-based restrictions on commercial speech will be subject to a more demanding level of scrutiny than previously understood.").

190. *See Sorrell*, 564 U.S. at 563–65.

191. *Id.* at 564.

192. *See supra* notes 13–14 and accompanying text.

193. Tamara Piety has described the shift from *Virginia State Board*'s focus on the public interest to gain a First Amendment foothold for commercial speech to *Sorrell*'s vigorous protection of speaker autonomy as a "bait-and-switch." Tamara R. Piety, *"A Necessary Cost of Freedom"? The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1, 5 (2012).

194. Wu, *supra* note 140, at 2058–59.

195. *Sorrell*, 564 U.S. at 573.

196. *See* Brief for the Vermont Medical Society et al. as Amici Curiae Supporting Petitioners at *1–3, Sorrell v. IMS Health Inc., 564 U.S. 52 (2011) (No. 10-779), 2011 WL 757417 (noting support for the law by Vermont Medical Society, Maine Medical Association, New Hampshire Medical Society, Medical Association of Georgia, American Academy of Family Physicians, and American Academy of Pediatrics).

197. The arguable existence of such a project is discussed at *infra* Section II.D.

reawakens *Lochner*'s pre-New Deal threat of substituting judicial for democratic decision-making where ordinary economic regulation is at issue."[198] In reaching this conclusion, Justice Breyer pointed to regulations whose validity could be thrown into doubt by the Court's approach: e.g., forbidding a cosmetic company to make a claim about a product that has not been substantiated by sufficient backup testing.[199] Given the ubiquity of such "content- and speaker-based"[200] regulations, the specter of a significant dismantling of the modern administrative state cannot be dismissed as far-fetched.

Even if Justice Breyer's fear of a First Amendment assault on commercial regulation is not realized, his perception that the *Sorrell* Court ratcheted up the ordinary level of scrutiny[201] has been shared by others. A year after *Sorrell*, a lower court described the ruling as having "refined the *Central Hudson* test, holding that if a ban on commercial speech is content-based, 'heightened judicial scrutiny is warranted.'"[202] Dispelling any ambiguity about the nature of this "refinement," the court later mentioned matter-of-factly that *Sorrell* had "*tightened* the test for content-based bans on commercial speech."[203] Some commentators have also construed *Sorrell* as having increased the stringency of *Central Hudson* even if the holding did not supplant it.[204]

B. Reed*'s Capacious View of Content-Based Restrictions*

The Court has repeatedly affirmed that content-based restrictions on expression receive strict scrutiny.[205] Less definite from the Court's proclamations of this principle has been the means by which content-based and content-neutral limitations are to be distinguished.[206] The distinction

198. *Sorrell*, 564 U.S. at 602–03 (Breyer, J., dissenting) (citations omitted).

199. *See id.* at 589–90; *see also* Richard Samp, Sorrell v. IMS Health: *Protecting Free Speech or Resurrecting* Lochner*?*, 2011 CATO SUP. CT. REV. 129, 142–43 (noting that extensive regulation of content securities offerings under the Securities Act of 1933 may be subject to heightened scrutiny after *Sorrell*).

200. *Sorrell*, 564 U.S. at 564.

201. *See id.* at 582 (Breyer, J., dissenting) (asserting that the Court applied a "far stricter, specially 'heightened' First Amendment standard").

202. Friendly House v. Whiting, 846 F. Supp. 2d 1053, 1057 (D. Ariz. 2012) (quoting *Sorrell*, 564 U.S. at 565).

203. *Id.* at 1060 (emphasis added).

204. *See, e.g.*, Piety, *supra* note 193, at 4 ("*Sorrell* may mean that henceforth, in practice, if not formally, commercial speech will be treated as fully protected."); Aaron S. Kesselheim & Michelle M. Mello, *Prospects for Regulation of Off-Label Drug Promotion in an Era of Expanding Commercial Speech Protection*, 92 N.C. L. REV. 1539, 1560 (2014) ("[T]he *Sorrell* decision signaled that judicial unwillingness to countenance government restrictions on commercial speech had reached a new level.").

205. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011).

206. *See* Kendrick, *supra* note 187.

is typically critical because, as Leslie Kendrick has observed, "almost all laws fail strict scrutiny and almost all laws pass intermediate scrutiny."[207] In *Reed v. Town of Gilbert*,[208] the Court set forth an expansive definition of what constitutes content-based regulation of speech as "a law [that] applies to particular speech because of the topic discussed or the idea or message expressed."[209] Under this conception, a court determines whether a regulation "'on its face' draws distinctions based on the message a speaker conveys."[210] If it does, strict scrutiny applies irrespective of the government's permissible motive or nondiscriminatory justification.[211] Moreover, even a facially neutral restriction will be considered content-based if it cannot be "justified without reference to the content of the regulated speech."[212] Taken at face value, *Reed* can be understood as vastly enlarging the sphere of speech regulation deemed content-based and, thus, subject to strict scrutiny. More specifically, this language can be read as sweeping aside the *Central Hudson* framework of intermediate scrutiny for commercial speech.

The case itself seemed an unlikely setting for such a potentially momentous holding. A church and its pastor challenged a provision of the town's sign code restricting "Temporary Directional Signs Relating to a Qualifying Event."[213] Because the church held weekly meetings at various locations, it posted multiple temporary signs announcing the location of that week's meeting.[214] While the church had violated some requirements for this category of sign, other classes of signs—particularly "Ideological" and "Political" signs—enjoyed more generous limitations on size and

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207. *Id.* at 238; *see* McCullen v. Coakley, 573 U.S. 464, 478 (2014) (describing strict scrutiny as "exacting standard" requiring that restriction on speech be "the least restrictive means of achieving a compelling state interest"). Gerald Gunther famously remarked that strict scrutiny was "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972). Adam Winkler's research led him to conclude that this phrase exaggerates the actual survival rate of laws subjected to strict scrutiny. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 869 (2006). *Accord* Matthew D. Bunker, Clay Calvert &William C. Nevin, *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMMC'N L. & POL'Y 349, 351 (2011) (discerning "cracks in [strict scrutiny's] structure"). However, Winkler acknowledged that in the realm of free speech this rate was only 22%. Winkler, *supra* note 207, at 844. Even this low figure may understate the lethality of strict scrutiny in this area. His research was confined to lower court rulings, and it is not evident that these decisions reflect any modification of the Court's severe version of the doctrine.

208. Reed v. Town of Gilbert, 576 U.S. 155 (2015).

209. *Id.* at 163.

210. *Id.* (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011)).

211. *See id.* at 165.

212. *Id.* at 164 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

213. *Id.* at 160–61.

214. *Id.* at 161.

duration.[215] The Court's invalidation of the ordinance based on these disparities was hardly contentious; the result was unanimous. Rather, three Justices took issue with the Court's analysis described above.[216] The Court reasoned that because the restrictions applicable to a sign "depend entirely on the communicative content of the sign,"[217] the code must be subjected to strict scrutiny.[218] Predictably, the ordinance did not survive this most demanding standard.[219]

Reed's reconceptualization of content-based regulation poses an obvious challenge to intermediate scrutiny under *Central Hudson*. While the Court's opinion in *Sorrell* had somewhat finessed the issue,[220] *Reed*'s more explicit and comprehensive standard would appear incompatible with the *Central Hudson* regime. After all, commercial speech regulation intrinsically selects its objects by their content; it "definitionally target[s] *commercial* speech and normally certain forms of commercial expression."[221] Distilled to their essence in this way, commercial speech restrictions readily qualify as government restraints "applie[d] to particular speech because of the topic discussed or the idea or message expressed."[222] Understandably, then, some observers have concluded that a natural reading of *Reed* spells the dissolution of existing commercial speech doctrine.[223]

The prospect of sweeping application of strict scrutiny to commercial speech regulation has occasioned considerable criticism and alarm. According to one commentator, the breadth of *Reed*'s formulation of content neutrality as applied to commercial speech "does nothing to

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215. *Id.* at 159–61.

216. *See id.* at 175–79 (Breyer, J., concurring in judgment); *id.* at 179–85 (Kagan, J., joined by Breyer and Ginsburg, JJ., concurring in judgment).

217. *Id.* at 164.

218. *Id.* at 171.

219. *See id.* at 171–72.

220. *See supra* notes 179–81 and accompanying text.

221. Shanor, *supra* note 186, at 146.

222. *Reed*, 576 U.S. at 163; *see* Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073, 1080 (2017) (quoting *Police Dep't of Chi. v. Mosley,* 408 U.S. 92, 95 (1972)) ("Applying the less stringent *Central Hudson* test to truthful non-misleading commercial speech . . . 'restrict[s]' expression because of its (commercial) subject matter, relative to speech, the regulation of which is tested by a more stringent standard.").

223. *See, e.g.*, Lee Mason, Comment, *Content Neutrality and Commercial Speech Doctrine After* Reed v. Town of Gilbert, 84 U. CHI. L. REV. 955, 983 (2017) ("[C]omplete application of *Reed* to commercial speech would essentially overrule all existing commercial speech doctrine."); *see also* David L. Hudson, Jr., *The Content-Discrimination Principle and the Impact of* Reed v. Town of Gilbert, 70 CASE W. RES. L. REV. 259, 276 (2019) ("It is quite difficult . . . to square the commercial-speech doctrine with numerous statements in *Reed*, including the Court's take on content-based laws.").

further its underlying purposes."[224] Another commentator asserted that the subjection to strict scrutiny of all regulations aimed at specific topics placed in jeopardy "countless legitimate regulations on expression."[225] Robert Post contended that taking *Reed*'s logic at its word would "[e]ffectively . . . roll consumer protection back to the 19th century."[226]

Widespread invalidation of commercial speech regulation under *Reed*, while far from inevitable,[227] is hardly a fanciful prospect. For example, a New Jersey federal district court relied on *Reed* to apply strict scrutiny to an Atlantic City ordinance forbidding a business to advertise its lawful practice of allowing customers to bring their own beer and wine (BYOB) to consume on the premises.[228] Striking down this quintessential commercial speech restriction, the court determined that this "content-based restriction on speech . . . is not supported by a compelling government interest nor is it the least restrictive means of achieving the government's stated purpose."[229] Unlike *Sorrell*'s equivocation on the pertinent standard of scrutiny,[230] the centrality of strict scrutiny to the district court's reasoning left little doubt that it viewed *Reed*, rather than *Central Hudson*, as furnishing the decision's governing principle. Though the court did note that the ordinance would have failed even *Central Hudson*'s intermediate scrutiny,[231] this portion of the opinion appears simply to provide a reviewing court separate grounds for sustaining the ruling should it take issue with the district court's primary rationale under *Reed*.[232]

The Supreme Court recently issued a ruling that can plausibly be construed as assuming that commercial speech falls under the principle promulgated in *Reed*. In *Barr v. American Ass'n of Political Consultants,*

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224. Mason, *supra* note 223, at 990.

225. Minch Minchin, *A Doctrine at Risk: Content Neutrality in a Post*-Reed *Landscape*, 22 COMMC'N L. & POL'Y 123, 124 (2017); *see* Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981, 1986 (2016) (quoting *Reed*, 576 U.S. at 164 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))) ("Finding a regulation to be content based whenever it cannot be 'justified without reference to the content of the regulated speech' could be read to include any regulation that even incidentally distinguishes between activities or industries.").

226. Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html [https://perma.cc/842V-N88V].

227. *See infra* Section III.D.

228. GJJM Enters., LLC. v. City of Atl. City, 352 F. Supp. 3d 402, 405–06 (D.N.J. 2018).

229. *Id.* at 405.

230. *See supra* notes 179–81 and accompanying text.

231. *GJJM Enters.*, 352 F. Supp. 3d at 407–08.

232. *See id.* at 407 (presenting the analysis under *Central Hudson* "[a]lternatively"); *see also* McGlothian v. Fralin, No. 3:18CV507(REP), 2019 WL 1087156, at *9 (E.D. Va. Jan. 23, 2019) ("*Reed* provides the controlling analysis for evaluating the content neutrality of a law regulating the certification of postsecondary schools.").

Inc., the Court struck down an exception from a general prohibition on robocalls made solely to collect a debt owed to or guaranteed by the United States. [233] The holding could not have occasioned much surprise. It was anticipated by a slew of lower court decisions reaching the same conclusion,[234] and Justice Sotomayor, concurring in the judgment, believed that the exception failed even intermediate scrutiny.[235] Moreover, the plaintiffs' complaint that the law discriminated against their political expression[236] made it especially ripe for challenge. Nevertheless, two aspects of the ruling offer substantial grist for an assertion that *Reed*'s mandate of strict scrutiny for content-based restrictions encompasses commercial speech regulation. First, a majority of Justices recited *Reed*'s standard in unqualified terms,[237] suggesting that the nature of the "content" restricted would not affect the rule's application. Additionally, Justice Kavanaugh's plurality opinion appeared to place commercial speech—or at least its most common type—in parity with political and other protected expression under *Reed*: "Although collecting government debt is no doubt a worthy goal, the Government concedes that it has not sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, *commercial advertising*, and the like."[238]

C. Central Hudson *as Functionally Strict Scrutiny*

It may seem curious to suggest that the *Central Hudson* standard has been undermined by one of its own provisions. If *Central Hudson* is assumed to signify an intermediate level of scrutiny, however, the potential for such dissonance inheres in the language of the *Central Hudson* test's fourth prong. To require that a restriction on commercial speech be "not more extensive than is necessary to serve [the

233. Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335 (2020).

234. *E.g.*, Am. Ass'n of Pol. Consultants v. FCC, 923 F.3d 159, 165–70 (4th Cir. 2019); Perrong v. Liberty Power Corp., 411 F. Supp. 3d 258, 263–68 (D. Del. 2019); Gallion v. Charter Commc'ns, Inc., 287 F. Supp. 3d 920, 926–31 (C.D. Cal. 2018); Greenley v. Laborers' Int'l Union, 271 F. Supp. 3d 1128, 1145–51 (D. Minn. 2017); Katz v. Liberty Power Corp., No. 18-CV-10506-ADB, slip op. at 12–16 (D. Mass. Sept. 24, 2019); Taylor v. KC VIN, LLC, No. 4:19-CV-00110-NKL, slip op. at 10–15 (W.D. Mo. Dec. 3, 2019).

235. *Barr*, 140 S. Ct. at 2356–57 (Sotomayor, J., concurring in judgment).

236. *See id.* at 2345 (Kavanaugh, J., plurality opinion).

237. *See id.* at 2347 (quoting Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015)) ("[A] 'law that is content based' is 'subject to strict scrutiny.'"); *id.* at 2364 (Gorsuch, J., concurring in the judgment in part and dissenting in part) ("[T]he . . . rule against cellphone robocalls is a content-based restriction that fails strict scrutiny.") Justice Gorsuch dissented in part because he objected to the Court's remedy of severing the invalid provision while leaving the broad ban on robocalls intact. *See id.* at 2365–67.

238. *Id.* at 2347 (Kavanaugh, J., plurality opinion) (emphasis added).

government's] interest"[239] bears more than a passing resemblance to other formulations that the Court has invoked to apply a heightened level of review.[240] Moreover, the Court's robust enforcement of this criterion over the past quarter-century[241] supports an interpretation of its imposition of exacting scrutiny. Thus, the traditional perception of *Central Hudson* has been tacitly supplanted by the actual operation of the test.

As previously noted, *Central Hudson* has long been viewed as imposing an intermediate level of scrutiny to restrictions of commercial speech.[242] Indeed, the Court stated as much in *Florida Bar v. Went For It, Inc.*[243] Moreover, this assessment is consonant with the Court's description in *Board of Trustees of the State University of New York v. Fox*[244] of *Central Hudson*'s fourth part requiring only "a 'fit' between the legislature's ends and . . . means . . . that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served'"[245]—a characterization affirmed in *Went For It*[246] and several other decisions.[247] Scholars have also routinely affixed the "intermediate" label to *Central Hudson*,[248] and as recently as 2015, Robert Post could report that "[a] consensus seems to have formed that the *Central Hudson* test should be applied in a manner that exemplifies 'intermediate scrutiny.'"[249]

Nevertheless, the Court's continued vigorous application of *Central Hudson*'s fourth requirement[250] could be seen as transmuting the test into a form of review more akin to strict scrutiny.[251] The Court's profession

239. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980).

240. *See supra* note 60.

241. *See supra* notes 76–113.

242. *See supra* note 114 and accompanying text.

243. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) ("[W]e engage in 'intermediate' scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in [*Central Hudson*].").

244. Bd. of Trs. v. Fox, 492 US 469 (1989).

245. *Id.* at 480 (citations omitted).

246. *Went For It*, 515 U.S. at 623.

247. *E.g.*, Brown v. Plata, 563 U.S. 493, 531 (2011); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001).

248. *See, e.g.*, Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 793–94 (2007); Nicole B. Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929, 947 (1998); Antony Page & Katy Yang, *Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?*, 39 U.C. DAVIS L. REV. 1, 49–50 (2005); Allen Rostron, *Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech*, 37 VT. L. REV. 527, 537 (2013).

249. Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 881 (2015) (citation omitted).

250. *See supra* notes 41–50, 76–100 and accompanying text.

251. *See* Post, *supra* note 130, at 42 (stating, in 2000, that "the *Central Hudson* test ha[d] [recently] been applied with a severity that borders on strict scrutiny"); Redish & Voils, *supra* note

that *Central Hudson*'s final step does not impose a "least restrictive means" standard[252] is belied by its decision to point to less restrictive alternatives as grounds for invalidating commercial speech restrictions. As early as 1993, the Court in *City of Cincinnati v. Discovery Network, Inc.*[253] noted its consideration of "less drastic measures" than the invalidated restriction on commercial speech.[254] Later, in *Rubin v. Coors Brewing Co.*,[255] the availability of other, less speech-restrictive options than forbidding beer companies from disclosing alcohol content on labels or in advertising—limiting the alcohol content of beers, prohibiting marketing that stresses high alcohol strength, confining the labeling ban to malt liquors—showed that the blanket prohibition was "more extensive than necessary" to serve the government's interest in curbing "strength wars."[256] In *Thompson v. Western States Medical Center*,[257] the Court named no fewer than a half-dozen alternatives through which the government might achieve its goals without resorting to banning advertising of compounded drugs.[258] The Court thus matched the number of alternative measures that it had called to the government's attention two years earlier in *Greater New Orleans Broadcasting Ass'n v. United States*.[259]

The possible immateriality of the formal gap between *Central Hudson* and strict scrutiny was also intimated in the Court's 2017 decision in *Matal v. Tam*.[260] There, the Court struck down the Lanham Act's "disparagement clause" prohibiting registration of trademarks "which may disparage . . . persons, living or dead, institutions, beliefs, or national

154, at 765 ("[C]ommercial speech went from being outside the First Amendment looking in to a status almost equivalent to that of the most protected forms of expression.").

252. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995); *cf.* Daniel D. Bracciano, Comment, *Commercial Speech Doctrine and Virginia's "Thirsty Thursday" Ban,* 27 GEO. MASON U. C.R.L.J. 207, 236 (2017) ("A least restrictive means test for all commercial speech restrictions would require that legislatures essentially abstain from all advertising regulation, regardless of the breadth of the regulation, so long as it could be shown that some other avenue existed to achieve the legislature's desired end.").

253. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

254. *Id.* at 417 n.13.

255. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

256. *Id.* at 490–91.

257. Thompson v. W. States Med. Ctr., 535 U.S. 357 (2001).

258. *See id.* at 372; *see also* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999) (placing burden on government to show "narrow tailoring" of the regulation to the stated interest); Ibanez v. Fla. Dep't of Bus. & Prof'l Regul., Bd. of Acct., 512 U.S. 136, 142 (1994) (requiring State to show that a restriction on commercial speech "directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest").

259. Greater New Orleans, 527 U.S. 173, 192 (1999). *Greater New Orleans* is discussed at *supra* notes 86–89 and accompanying text.

260. Matal v. Tam, 137 S. Ct. 1744 (2017).

symbols, or bring them into contempt, or disrepute."[261] Though the eight-member Court unanimously found the provision unconstitutional, the ruling's implications for commercial speech doctrine were more ambiguous. Justice Alito's four-member plurality opinion declined to resolve whether trademarks constitute commercial speech but concluded that the disparagement clause failed even the *Central Hudson* test.[262] However, rather than systematically apply the standard's four parts, Justice Alito highlighted language from a different portion of the *Central Hudson* opinion observing that "the First Amendment mandates that speech restrictions be 'narrowly drawn.'"[263] This phrase has been associated with stringent scrutiny,[264] suggesting that the plurality assumed a more searching conception of *Central Hudson* than intermediate review.[265] Justice Thomas, concurring in part and concurring in the judgment, found the question of whether trademarks should be considered commercial speech irrelevant under a more sweeping principle: "[W]hen the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as commercial."[266] Though Justice Thomas's terse opinion did not spell out the breadth of what he considered suppression of ideas, his previous assertions that truthful, nonmisleading commercial speech warrants full-blown First Amendment protection[267]

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261. *Id.* at 1753; 15 U.S.C. § 1052(a). The clause had been invoked to deny registration to the name of a dance-rock band, "The Slants," a derogatory term for Asian-Americans. *Tam*, 137 S. Ct. at 1751. The band's members themselves were Asian-American. *Id.*

262. *Id.* at 1764 (Alito, J., plurality opinion). Justice Kennedy, speaking for four Justices, concluded that the disparagement clause should be invalidated as impermissible viewpoint discrimination irrespective of whether trademarks are deemed commercial speech. *Id.* at 1765–69 (Kennedy, J., concurring in part and concurring in the judgment).

263. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 565 (1980) (internal citation omitted); *Tam*, 137 S. Ct. at 1764–65 ("[T]he disparagement clause is not 'narrowly drawn' to drive out trademarks that support invidious discrimination.").

264. *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992)) ("[T]he Act . . . is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest."); Burson v. Freeman, 504 U.S. 191, 198 (1992) (internal citation omitted) ("[A] facially content-based restriction on political speech in a public forum . . . must be subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'"); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) ("In order to justify such [content-based] differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.").

265. *See The Supreme Court,* 2016 Term—Leading Cases, 131 HARV. L. REV. 243, 250–51 (2017) [hereinafter *Leading Cases*] (After *Tam*, "[o]ne strains to imagine a law that would survive the Court's modern view of *Central Hudson*'s narrow tailoring but fail strict scrutiny on those grounds").

266. *Tam*, 137 S. Ct. at 1769 (Thomas, J., concurring in part and concurring in the judgment).

267. *E.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in judgment) ("I continue to believe that when the government seeks to restrict

indicates a relatively expansive concept. Thus, at least five Justices signaled a willingness to subject restrictions on commercial speech to a demanding level of justification.

Taking their cue from the Court, many lower courts have applied a version of *Central Hudson*'s fourth prong that is not readily distinguishable from strict scrutiny. The Sixth Circuit, for example, refused to dismiss a challenge by a general dentist with training in endodontics to the state's prohibition on identifying himself as an "endodontist."[268] Though not reaching a startling result, the court's opinion directed the lower court on remand to examine skeptically under *Central Hudson* the government's justification for this ban:

> [W]hen First Amendment rights are at stake, the government's assertions cannot be taken at face value . . . . It is only through active judicial scrutiny of regulations that commercial speech can continue "to inform the public of the availability, nature, and prices of products and services, and thus perfor[m] an indispensable role in the allocation of resources in a free enterprise system."[269]

The Eighth Circuit similarly expressed a formulation that conveyed a probing level of review: "The fourth prong of *Central Hudson* is not satisfied if there are alternatives to the regulations that directly advance the asserted interest in a manner less intrusive to plaintiffs' First Amendment rights."[270] In some instances, courts have disavowed reliance on heightened scrutiny even as they pointed to alternative measures as grounds for striking down restrictions[271] or simply declared restrictions excessive without identifying more palatable regulations.[272] Where bans

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truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'"); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in judgment) (quoting 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in judgment)) ("I continue to adhere to my view that '[i]n cases such as this, in which the government's asserted interest it to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace,' the *Central Hudson* test should not be applied because 'such an "interest" is *per se* illegitimate and can no more justify regulation of "commercial speech" than it can justify regulations of "noncommercial" speech.'").

268. Kiser v. Kamdar, 831 F.3d 784, 788 (6th Cir. 2016).

269. *Id.* at 789 (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977)).

270. Mo. Broad. Ass'n v. Lacy, 846 F.3d 295, 302 (8th Cir. 2017) (allowing challenge to state regulations restricting pricing information in advertisements for liquor); *see also* Steiner v. Superior Ct., 164 Cal.Rptr.3d 155 (Ct. App. 2013).

271. *See, e.g.*, Valle Del Sol Inc. v. Whiting, 709 F.3d 808, 821, 826–27 (9th Cir. 2013) (granting preliminary injunction against enforcement of restriction on solicitation by day laborers); State Farm Mut. Auto. Ins. Co. v. Conway, No. 3:13–CV–00229–CRS, 2014 WL 2618579, at *12–13 (W.D. Ky. June 12, 2014).

272. *See, e.g.*, Educ. Media Co. at Va. Tech, Inc. v. Insley, 731 F.3d 291, 298, 301 (4th Cir. 2013).

on commercial speech are justified by the danger of misleading consumers, a vigorous conception of *Central Hudson*'s final part typically assures that courts will insist on disclaimers or disclosures as less speech-restrictive substitutes.[273]

Indeed, the rigor of courts' review under *Central Hudson*'s fourth prong appears to have seeped into judicial application of the standard's third prong: "whether the regulation directly advances the governmental interest asserted."[274] Though the requirement is ostensibly not difficult to meet,[275] some courts have invoked it to overturn the government's judgment as to the efficacy of restrictions. Certain limitations on sexually oriented advertisements, for example, have left courts unpersuaded that they would appreciably advance their aims. One court rejected the possibility that a state's prohibition on sexually oriented businesses' display of all images other than trademarks could "aid[] in the protection of minors or any other governmental interest."[276] In the case of a Tennessee ban on the sale of certain sexually themed advertisements, the court determined that the state had "shown no evidence" that the statute "would have any effect on child sex trafficking in Tennessee."[277] In another illustration of judicial willingness to second-guess states' judgment about commercial speech concerning "vice," a court barred enforcement of a law restricting an alcoholic beverage distributor's discretion to use the terms "beer," "ale," or "malt beverage" on its labels or in its advertising.[278] Though acknowledging that the state's regulations were "better than nothing" in advancing the state's asserted interests, meeting this low threshold fell short of the requirement that they "directly

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273. Lamar Advantage GP Co., LLC v. City of Cincinnati, 155 N.E.3d 245, 257–58 (Ohio Ct. App. 2020); *see, e.g.*, Mass. Ass'n of Priv. Career Schs. v. Healey, 159 F. Supp. 3d 173, 205 (D. Mass. 2016); Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 641–42 (D. Vt. 2015) (denying motion to dismiss challenge to state's ban on use of term "natural" in advertising, labeling, and signage for genetically engineered foods).

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

275. *See* Fla. Bar v. Went for It, Inc., 515 U.S. 618, 628 (1995) ("[W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information."); Shannon M. Hinegardner, Note, *Abrogating the Supreme Court's De Facto Rational Basis Standard for Commercial Speech: A Survey and Proposed Revision of the Third* Central Hudson *Prong*, 43 NEW ENG. L. REV. 523, 528 (2009) ("The Supreme Court and lower courts have diluted the protection of commercial speech under *Central Hudson* in their application of the 'direct advancement' prong."); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 583 (2001) (Thomas, J., concurring) (questioning the Court's determination that restrictions on cigar and smokeless tobacco outdoor advertising met the third prong of *Central Hudson* because there was "considerable reason to doubt that the restrictions on cigar and smokeless tobacco outdoor advertising promote any state interest").

276. ABCDE Operating, LLC v. Snyder, No. 11–11426, 2011 WL 3113797, at *4 (E.D. Mich. July 26, 2011).

277. Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805, 839 (M.D. Tenn. 2013).

278. Authentic Beverages Co., Inc. v. Tex. Alcoholic Beverage Comm'n, 835 F. Supp. 2d 227, 246–47 (W.D. Tex. 2011).

advance" those interests.[279] In cases involving other subjects, courts have repudiated the state's premise that its limitation on commercial speech adequately serves its stated interest.[280]

D. First Amendment Deregulation in Perspective

The view of *Central Hudson* as effecting exacting scrutiny is reinforced by the broader deregulatory thrust of much recent First Amendment jurisprudence. More than a few observers have echoed Justice Breyer's lament in *Sorrell*[281] that the Court's treatment of economic regulation in free speech doctrine has become reminiscent of the *Lochner* era.[282] As early as *Central Hudson*, Justice Rehnquist in dissent had warned against this possibility when he accused the Court of "return[ing] to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a [s]tate based on the Court's own notions of the most appropriate means for the [s]tate to implement its considered policies."[283] Amanda Shanor has warned that a literalist approach to the Free Speech Clause supplies

279. *Id.* at 244.

280. *See, e.g.*, Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 641 (D. Vt. 2015) (concluding that the State failed to show that its ban on use of term "natural" in advertising, labeling, and signage for genetically engineered foods "directly advances a substantial state interest"); State Farm Mut. Auto. Ins. Co. v. Conway, No. 3:13–CV–00229–CRS, 2014 WL 2618579, at *11 (W.D. Ky. June 12, 2014) (finding failure by insurance company to establish that a blanket ban on solicitation within thirty days of a motor vehicle accident of individuals involved in accidents "directly advances" the State's interest in privacy); People v. Martinez, 273 Cal.Rptr.3d 505, 531 (Ct. App. 2020) (holding under assumption that challenged statute indirectly advanced State's interest that "an indirect effect is not enough to survive judicial scrutiny"); Manship v. T.D. Bank, N.A., 1:20-CV-0329 (GTS/DJS), 2021 WL 981587, at *10 (N.D.N.Y. Mar. 16, 2021) (determining that "*de minimis* effect on consumer choice" caused by the State's prohibition on businesses' imposing charges on consumers choosing paper statements while permitting "incentives" or "credits" to those choosing electronic billing was insufficient to advance State's interest under *Central Hudson*).

281. *See supra* notes 198–99 and accompanying text.

282. *See generally* Lochner v. New York, 198 U.S. 45 (1905). This thesis is captured bluntly in the title of Amanda Shanor's *The New* Lochner, *supra* note 186. Other examples include Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 2007 (2018) (asserting existence and anticipating spread of "First Amendment Lochnerism"); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1472 (2017) ("[T]he doctrinal expansion of the neo-*Lochner* moment . . . risks undermining the theoretical foundation of the First Amendment itself."); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1212 (2015) (asserting "striking parallels between the traditional understanding of Lochnerism and the First Amendment critique" of regulation of data privacy); Rebecca Tushnet, *Cool Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 26 (2015) (describing First Amendment challenges to country-of-origin labeling requirements as "perhaps the clearest example of the way in which the First Amendment has become the new *Lochner*, used by profit-seeking actors to interfere with the regulatory state in a way that substantive due process no longer allows").

283. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting) (citation omitted).

abundant basis for Justices to dismantle regulation they dislike; because "nearly all human action operates through communication or expression, the First Amendment possesses near total deregulatory potential."[284] From a skeptical standpoint, then, aggressive review under *Central Hudson* is of a piece with parallel hostility toward disfavored regulation in other First Amendment doctrine.

One area to which critics can point in support of this thesis is employment law. In *Janus v. American Federation of State, County, and Municipal Employees*, the Court held that public-sector employers could no longer collect agency fees from nonconsenting employees.[285] The decision overturned its ruling forty-one years earlier in *Abood v. Detroit Board of Education*,[286] which upheld laws compelling employees to contribute a portion of the fee supporting the union's duty to represent employees.[287] Declaring "[f]undamental free speech rights . . . at stake,"[288] the Court abandoned *Abood*'s deferential standard as incompatible with its larger First Amendment jurisprudence.[289] The state's "compelled subsidization of private speech"[290] could not survive a more demanding scrutiny because agency fees were not necessary to preserve labor peace.[291] Speaking for *Janus*'s four dissenters, Justice Kagan voiced an objection transcending her specific critique of the case's outcome. After defending the soundness of *Abood*'s discarded logic,[292] she all but accused the majority of seizing upon the Free Speech Clause as an instrument to advance a conservative ideological agenda. Justice Kagan asserted the Court had "weaponize[ed] the First Amendment, in a way that unleashes judges . . . to intervene in economic and regulatory policy."[293]

Having previously wielded the First Amendment as such a "sword," the Court was poised to continue to override legislative economic and

284. Shanor, *supra* note 186, at 135; *see* Janus *v.* Am. Fed'n of State, Cty., & Mun. Emps.*,* 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting) ("Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech.").

285. *Janus*, 138 S. Ct. at 2486.

286. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

287. *Id.* at 225–26. The Court allowed dissenting employees to deduct the part of the fee allocated to advancing political or "other ideological causes." *Id.* at 235–36.

288. *Janus*, 138 S. Ct. at 2460.

289. *See id.* at 2479–80.

290. *Id.* at 2464.

291. *See id.* at 2465–66. The Court went on to explain that compulsory fees also could not be justified by the goal of preventing nonmember "free riders" who received the benefits of union representation without bearing its costs. *See id.* at 2466–69.

292. *See id.* at 2488–2502 (Kagan, J., dissenting).

293. *Id.* at 2501.

regulatory decisions by this means.[294] Should the Court embark on the path feared by Justice Kagan, it would not lack for free speech theories in the workplace setting championed by business groups and sometimes receiving a sympathetic hearing in lower courts. Two years before *Janus*, Charlotte Garden traced salient themes in this movement.[295] Indeed, she highlighted the later-successful effort to overturn *Abood*'s approval of compulsory agency fees.[296] Another focus, on efforts to secure heightened scrutiny of occupational speech,[297] may be said to anticipate the Court's decision the same term as *Janus* invalidating required notices for crisis pregnancy centers.[298]

The ubiquity of communication in enterprises affords vast potential for invalidating regulation that would presumably be upheld if considered only as restrictions on conduct. One kind that has already shown itself vulnerable to such attacks is business licensing schemes.[299] In at least two instances, courts have struck down licensing requirements for tour guides as unduly interfering with their freedom of expression. The D.C. Circuit's opinion in *Edwards v. District of Columbia*, in particular, furnishes frank evidence for the view that the decision resulted from "Lochnerizing" the First Amendment.[300] The court not only dismissively rejected the value of the exam at issue testing "knowledge of buildings and points of historical and general interest in the District";[301] the opinion also invoked the authority of Adam Smith to support the assumption that guides' stake in their reputation would prompt them to perform their service well.[302] A district court in Georgia did not go quite so far in espousing economic theory when overturning Savannah's requirements that tour guide

294. *See id.* at 2501–02; Kate Andrias, Janus*'s Two Faces*, 2018 SUP. CT. REV. 21, 49 ("*Janus* raises the possibility that exclusive representation could itself be deemed unconstitutional . . . . After all, if compelled union fees in the public sector constitute an incurable First Amendment harm, why doesn't compelling a dissenter to be bound by the agreement of a union with which it disagrees?").

295. *See generally* Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323 (2016).

296. *See id.* at 340–48.

297. *See id.* at 351–53.

298. *See generally* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018). The case is discussed at *infra* Section II.E.

299. *See* Shanor, *supra* note 186, at 181 ("Because most, if not all, commercial services operate at least in part through the use of words, all business licensing schemes are in principle susceptible to First Amendment challenge.").

300. Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014).

301. *Id.* at 1005 ("Even if we indulged the District's apparently active imagination [as to harm caused by inadequately informed tour guides], the record is equally wanting of evidence the exam regulation actually furthers the District's interest in preventing the stated harms."); *see id.* at 999–1007.

302. *See id.* at 1006–07 (citing ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 12 (Digireads.com Publishing 2004) (1776)).

applicants pass a test on the city's history and architecture as well as a criminal background check.[303] Still, the court similarly concluded that neither provision was shown to foster the city's interests sufficiently to justify their infringement on free speech.[304] Admittedly, tour-conducting's essential nature as an expressive activity renders it especially susceptible to this kind of analysis. An emphasis on the communicative aspect of commercial transactions, however, could call into question a whole array of government attempts to place limits on commercial activity.[305]

One realm in which the disputed line between speech and conduct has conspicuously tilted toward speech-based deregulation is campaign finance. Of course, the seismic event in this development was the Court's ruling in *Citizens United v. Federal Election Commission*.[306] There, the Court struck down a federal law prohibiting corporations and unions from using their general treasury funds to make independent expenditures for speech intended to affect the outcome of an election.[307] The large impact of *Citizens United* on the past decade's sharp rise in campaign spending is well-known and well-documented.[308]

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303. *See* Freenor v. Mayor of Savannah, No. CV414-247, 2019 WL 3315274 (S.D. Ga. July 22, 2019).

304. *See id.* at *10–12.

305. The Ninth Circuit's reasoning in *Nordyke v. Santa Clara Cnty.*, 110 F.3d 707 (9th Cir. 1997), illustrates the far-reaching potential of this approach. There, the court enjoined enforcement of a county lease addendum intended to "prohibit any person from selling, offering for sale, supplying, delivering, or giving possession or control of firearms or ammunition to any other person at a gun show at the [county] fairgrounds." *Id.* at 708–09. The Court applied a First Amendment standard that the restriction did not meet because the provision represented an intrusion on free speech by entailing a ban on extending offers to sell firearms or ammunition. *Id.* at 710–13.

306. Citizens United v. FEC, 558 U.S. 310 (2010). The first landmark case involving First Amendment constraints on regulation of campaign finance was *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). While sustaining the Federal Election Campaign Act's limits on direct contributions to candidates, *id.* at 23–38, *Buckley* struck down the application of the Act's expenditure ban to individuals, corporations, and unions, *id.* at 39–59. To many observers, however, *Citizens United* represented a dramatic and unwarranted extension of *Buckley*. *See, e.g.*, Miriam Galston, Buckley *2.0: Would the* Buckley *Court Overturn* Citizens United*?*, 22 U. PA. J. CONST. L. 687 (2020) (arguing that proper application of principles and reasoning in *Buckley* would invalidate *Citizens United*).

307. *Citizens United*, 558 U.S. at 318–19.

308. *See* Nicholas O. Stephanopoulos, *Quasi Campaign Finance*, 70 DUKE L.J. 333, 359–60 (2020) (stating that "entire cottage industries of scholarly commentary" have been devoted to the sharp increase in campaign spending since *Citizens United*); Bob Biersack, *Eight Years Later: How Citizens United Changed Campaign Finance*, OPEN SECRETS (Feb. 7, 2018), https://www.opensecrets.org/news/2018/02/how-citizens-united-changed-campaign-finance/ [https://perma.cc/V955-EVE7]; Brian Schwartz & Lauren Hirsch, *Presidential Elections Have Turned into Money Wars — Thanks to a Supreme Court Decision in 2010*, CNBC (Dec. 20, 2019), https://www.cnbc.com/2019/12/19/presidential-elections-are-now-money-battlesthanks-to-supreme-court.html [https://perma.cc/YLS2-2G5D]. Subsequent decisions struck down provisions of state schemes for regulating campaign finance. *See* Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516, 516–17 (2012) (per curiam) (striking down Montana's prohibition on corporations' making "an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party"); Ariz. Free Enter.

The intense scrutiny that overthrew restrictions on campaign contributions in *Citizens United* derived much of its potency from the premise of constitutional corporate personhood. Applying the principle that government may not "impose restrictions on certain disfavored [political] speakers," the Court began by noting that "First Amendment protection extends to corporations."[309] To underscore the solidity of this principle, the Court offered a long compendium of cases in which it had recognized such protection.[310] Thus, "political speech does not lose First Amendment protection simply because its source is a corporation."[311] To critics, the Court's "very robust conception of corporate personhood"[312] has overstretched the extent to which corporations should enjoy rights of speech. For them, the Court has drawn a false equivalence between corporations deploying the First Amendment to resist unwelcome regulation and suppressed individuals seeking to vindicate the truth-seeking and democratic values underpinning free expression.[313] One critic has asserted that decisions assuming this convergence ignore the reality that "corporations do not act like human beings because they cannot and because they are fundamentally unlike the human stockholders."[314] Another particularly harsh appraisal has denounced "[t]he predatory attempt by corporations to appropriate" core values of freedom of speech as "conceptual and normative fraud."[315] Whatever the merits of these critiques, their force and frequency reflect the success of corporations' efforts to utilize the First Amendment to defeat unwelcome regulation.

Another means of enabling profit-seeking actors to benefit from free expression's loftier themes is to shrink the conception of commercial speech itself. Insofar as commercial speech might retain heightened susceptibility to regulation, designating more speech outside this category advances deregulatory aims. In this area, the Court has considerable latitude to write on a slate that is, though not blank, rather sketchy. The Court's occasional gestures at a definition for commercial speech have

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Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 727–28 (2011) (invalidating law providing matching funds to political candidates relying on public financing whose privately financed opponents spent above a certain amount). *But see* Williams-*Yulee* v. Fla. Bar, 575 U.S. 433, 433 (2015) (upholding Florida law "provid[ing] that judicial candidates 'shall not personally solicit campaign funds . . . but may establish committees of responsible persons' to raise money for election campaigns").

309. *Citizens United*, 558 U.S. at 341–42.

310. *See id.* at 342 (citing twenty cases).

311. *Id.* at 343 (internal citations and quotation marks omitted).

312. Piety, *supra* note 144, at 2.

313. *See generally id.*

314. Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding 'We the People's' Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. 423, 439 (2016).

315. ROGER A. SHINER, FREEDOM OF COMMERCIAL EXPRESSION 3 (2003).

been notoriously inexact.[316] In different opinions, the Court has variously described commercial speech as "communication that does no more than propose a commercial transaction,"[317] "expression related solely to the economic interests of the speaker and its audience,"[318] and a "common-sense" matter of "speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation."[319] In *Bolger v. Youngs Drug Products Corp.*,[320] the Court did identify salient features to be considered when determining the character of debated expression: an advertising message, a reference to a specific product, and an economic motive for the communication.[321] These factors, however, fall well short of supplying definitional guidance in a disputed case.[322] Complicating the inquiry is the challenge of determining when speech with a commercial character is "inextricably intertwined with otherwise fully protected speech" so as to heighten the scrutiny applied.[323] Moreover,

316. *See* Piety, *supra* note 128, at 2592 ("There is not a very clear working definition of what commercial speech is."); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1184–85 (1988) ("[T]he Supreme Court, for all it *has* said about commercial speech, has conspicuously avoided saying just what it is.").

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

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

319. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978) (internal quotation marks omitted).

320. Bolger v. Younds Drug Prods. Corp., 463 U.S. 60 (1983).

321. *Id.* at 66–67; Alexander Tsesis, *Marketplace of Ideas, Privacy, and the Digital Audience*, 94 NOTRE DAME L. REV. 1585, 1597 (2019) ("The commercial nature of advertisements to gain profits distinguishes it from protected explorations of ideas, facts, philosophies, and tastes.").

322. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1190 (2019) ("[*Bolger*'s] definition, while seemingly specific, leaves many questions unanswered."); Todd F. Simon, *Defining Commercial Speech: A Focus on Process Rather than Content*, 20 NEW ENG. L. REV. 215, 237 (1984–1985) ("The greatest difficulty with "[*Bolger*'s] attempted test and the definitional factors on which it rests, is that it is both too broad and too narrow."); Glenn C. Smith, *Avoiding Awkward Alchemy in the Off-Label Drug Context and Beyond: Fully-Protected Independent Research Should Not Transmogrify into Mere Commercial Speech Just Because Product Manufacturers Distribute It*, 34 WAKE FOREST L. REV. 963, 1012–16 (2000) (objecting to *Bolger* test's reliance on speakers' motives to determine characterization of speech). The Court was presented with the opportunity to clarify the application of *Bolger*'s indicia in *Nike v. Kasky*, 539 U.S. 654 (2003) (per curiam), but dismissed the writ of certiorari as having been improvidently granted. *Id.* at 655. The case involved a private suit under California law for public statements by Nike that allegedly misrepresented its labor practices in southeast Asia. Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002). For the view that Nike's assertions qualified as commercial speech under all three of the factors described in *Kasky*, see Erwin Chemerinsky & Catherine Fisk, *What Is Commercial Speech? The Issue Not Decided in* Nike v. Kasky, 54 CASE W. RES. L. REV. 1143, 1145–56 (2004).

323. *See* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795–96 (1988); *see also* Andrew J. Wolf, Note, *Detailing Commercial Speech: What Pharmaceutical Marketing Reveals About Bans on Commercial Speech*, 21 WM. & MARY BILL RTS. J. 1291, 1294 (2013) ("[M]ost commercial speech contains forms of both commercial and noncommercial speech."). *Compare Riley*, 487 U.S. at 781 (applying strict scrutiny to invalidate the State's regulation of charitable solicitation practices that determined reasonableness of fees charged by professional fund raisers by using percentages of receipts collected), *with* Bd. of Trs. v. Fox, 492 U.S. 469 (1989)

critics who favor broader government authority to regulate commercial speech have criticized the Court's conception of its range as simplistic and underinclusive.[324]

Traditionally, the absence of a distinct line between commercial and noncommercial speech has presented little problem in practice,[325] but the issue may loom larger as the Court withdraws expression from the arguably commercial realm. One indication of such a tendency appears in *Sorrell v. IMS Health, Inc.*[326] There, the Court assumed—but refused to hold—that the information being sold on doctors' prescribing practices constituted commercial speech subject to the *Central Hudson* test.[327] Similarly, in *Matal v. Tam*,[328] the Court declined to resolve whether trademarks constitute commercial speech[329] because the "disparagement clause" violated the First Amendment even on the premise that they do.[330] Even under this analysis, however, Justices invoked First Amendment ideals more associated with fully protected speech. Justice Alito observed:

> The Government [in this case] has an interest in preventing speech expressing ideas that offend . . . . [T]hat idea strikes at the heart of the First Amendment . . . . [T]he proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate."[331]

Justice Kennedy in turn quoted Justice Holmes's classic exposition on "the 'free trade in ideas' and the 'power of . . . thought to get itself accepted in the competition of the market.'"[332] The discussion of these core First Amendment principles suggests that if any gap persists between

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(applying *Central Hudson* standard upholding the university's restriction on "Tupperware parties" with primary purpose of selling housewares that included discussion of other topics such as home economics).

324. *See, e.g.*, Post, *supra* note 130, at 18 ("The evaluations of 'commonsense' are complex, contextual, and ultimately inarticulate . . . . [T]he judgments of common sense ultimately revolve around questions of social meaning; they turn on whether the utterance of a particular speaker should be understood as an effort to engage public opinion or instead simply to sell products.").

325. *See* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 94–101 (1999) (arguing that the nature of the speech in question is typically evident).

326. Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

327. *See supra* notes 102–03 and accompanying text.

328. Matal v. Tam, 137 S. Ct. 1744 (2017).

329. *See supra* notes 262–64 and accompanying text.

330. *See supra* notes 262–63 and accompanying text.

331. *Tam*, 137 S. Ct. at 1764 (Alito, J., plurality opinion) (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929*)* (Holmes, J., dissenting)).

332. *Id.* at 1767–68 (Kennedy, J., concurring in part and concurring in the judgment) (quoting Abrams v. United States*,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

commercial and noncommercial speech,[333] it may be rendered substantially irrelevant by deeming classes of commerce-related expression to be the latter.

Whatever the Court's specific strategy, the deregulatory potential of a "loaded" First Amendment is nearly limitless. After all, "virtually all government regulations will, in one way or another, 'burden' speech, if by speech we mean the use of human language."[334] Robert Post and Amanda Shanor argue that systematic application of this proposition will mean that "[w]e must . . . turn back our democracy to the juristocracy that controlled society in the days of *Lochner*."[335] Whatever the prospects for such a system, it is only realistic to expect that Justice Ginsburg's replacement by Justice Barrett will amplify the trend they lament.[336] That movement's ramifications for *Central Hudson* remain to be seen.

E. Implications of NIFLA

One recent ruling both furthers the Court's deregulatory tilt and specifically—if indirectly—bears on the *Central Hudson* test. In *National Institute of Family and Life Advocates v. Becerra*[337] (*NIFLA*), the Court departed from the lenient approach to compelled commercial speech it had taken in earlier cases.[338] The decision may imply a willingness to further

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333. *See Leading Cases*, *supra* note 265, at 252 ("It remains to be seen [after *Tam*] . . . if the Court will place commercial speech on equal constitutional footing with noncommercial speech or whether that potential decision will recede in importance as *Central Hudson* intensifies.").

334. Post & Shanor, *supra* note 138, at 179 (citation omitted).

335. *Id.*

336. *See* Charley Moore, *Is Amy Coney Barrett Really the Next Clarence Thomas (for Business)?*, LINKEDIN (Oct. 5, 2020), https://www.linkedin.com/pulse/amy-coney-barrett-really-next-clarence-thomas-business-charley-moore/ [https://perma.cc/2UK5-4WAH] (pointing to study covering period of October 2018 to October 2020 indicating that 21% of Justice Ginsburg's opinions in cases implicating business interests favored business interests while 83% of Judge Barrett's opinions favored business interests); Becca Damante, *Will Supreme Court Nominee Amy Coney Barrett Be a Reliable Vote for Big Business?*, CONST. ACCOUNTABILITY CTR. 7 (Oct. 2020) https://www.theusconstitution.org/wp-content/uploads/2020/10/Issue-Brief-Will-Supreme-Court-Nominee-Amy-Coney-Barrett-Be-A-Reliable-Vote-for-Big-Business-1.pdf [https://perma.cc/9W8R-2764] (cataloging Judge Barrett's rulings on issues relevant to corporate interests and stating "time and again Judge Barrett has sided with corporate and employer interests.").

337. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).

338. An arguable exception to this characterization is *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). There, the Court struck down a federal law authorizing assessments on handlers of fresh mushrooms as applied to a grower that objected to the content of advertisements funded by such assessments. *See id.* at 411. The holding, however, stood at the midpoint between two rulings in which the Court upheld compelled subsidies for similar advertising campaigns. *See generally* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) (campaign promoting consumption of beef); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) (promotion of "California Summer Fruits"). Thus, the precedential significance of *United Foods* was clouded when *NIFLA* was decided. *See* Robert Post, *Compelled Subsidization of Speech:* Johanns v. Livestock Marketing Association, 2005 SUP. CT.

intensify scrutiny of government restrictions on commercial speech as well.

Prior to *NIFLA*, the government's burden to justify compulsions of commercial speech—mainly disclosures and disclaimers—was widely thought to be much lighter than the demonstration required to uphold restrictions.[339] In this area, the Court had recognized "material differences between disclosure requirements and outright prohibitions on speech."[340] It is true that Justice Jackson's iconic opinion in *West Virginia State Board of Education v. Barnette*[341] established a fundamental right not to serve as a mouthpiece for government-prescribed messages. The ideological cast of the mandated expression[342] and principle promulgated there,[343] however, were far removed from government's typical directive to provide factual information in commercial settings.[344]

In *Zauderer v. Office of Disciplinary Counsel*, the Court appeared to act on such a distinction between expression of opinion and communication of commercial information when it described the criteria for permissible compelled commercial speech.[345] There, the Court allowed the State to require attorneys to note in advertisements of certain

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REV. 195, 218 (referring to "the painful uncertainty evinced by . . . [the] *Glickman-United Foods-Johanns* trilogy"). At any rate, the Court's opinion in *NIFLA* did not mention *United Foods*.

339. *See* Laura Murphy, Jillian Bernstein & Adam Fryska, *More Than Curiosity: The Constitutionality of State Labeling Requirements for Genetically Engineered Foods*, 38 VT. L. REV. 477, 486 (2013) ("For factual disclosure requirements, the Court generally applies a lesser standard of review [than *Central Hudson*] and evaluates the requirement under *Zauderer*'s rational basis-type standard."); Andrew C. Budzinski, Note, *A Disclosure-Focused Approach to Compelled Commercial Speech*, 112 MICH. L. REV. 1305, 1313 (2014) ("[S]o long as the disclosure does not hamper the advertiser's right to distribute other information, compelled speech is far easier to justify under *Zauderer*'s 'reasonably relates' standard than are restrictions under *Central Hudson*."); Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 556–57 (2012) ("The [*Zauderer*] Court's lack of any extensive discussion of *Central Hudson*'s more restrictive test suggests that its rationale for applying lesser scrutiny to compelled commercial speech lay in the difference between compelling additional factual speech and restricting speech, not on the particular state interest motivating the disclosure under consideration."); Wu, *supra* note 139, at 2039–40 ("What [*Zauderer*] says is that if a disclosure is of 'purely factual and uncontroversial information,' then it can be required of an advertisement without unduly chilling that advertisement, and thus, the government needs only a sufficient interest to support such a requirement, rather than needing to satisfy the full *Central Hudson* test.").

340. Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 650 (1985).

341. W.V. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

342. The Court upheld schoolchildren's right to refrain from participating in ceremony of saluting the flag and reciting the Pledge of Allegiance. *Id.* at 642.

343. *See id.* ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."), *see also* Wooley v. Maynard, 430 U.S. 705, 715 (1977) (rejecting governmental power to require individuals to "be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable").

344. *See* Zauderer, 471 U.S. at 651.

345. *Id.*

contingent-fee rates that clients would be liable for costs in any event and particularly that clients would be responsible for court costs and expenses.[346] Disclosures of this nature were valid if they were "reasonably related to the State's interest in preventing deception of consumers" and not "unjustified or unduly burdensome."[347] Also significant to the Court in *Zauderer*—and presumably future cases—was that the State had done no more than instruct attorneys to "include in [their] advertising purely factual and uncontroversial information about the terms under which [their] services will be available."[348]

The latitude afforded to the government under *Zauderer* was reinforced twenty-five years later in *Milavetz, Gallop & Milavetz, P.A. v. United States*.[349] In *Milavetz*, the Court sustained a law requiring attorneys who provided bankruptcy-assistance services to include in advertising the statement (or its equivalent): "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."[350] Applying *Zauderer*'s "less exacting scrutiny," the Court would permit the government to require "an accurate statement identifying the advertiser's legal status and the character of the assistance provided."[351]

In striking down two compelled notices in *NIFLA*, the Court ruled that one fell outside of *Zauderer*'s test and the other failed it. Both notices covered by the California law at issue applied to crisis pregnancy centers: organizations that provide a limited range of pregnancy-related services and aim to dissuade women from seeking abortions.[352] One provision required licensed clinics to notify women visiting a clinic that California offered free or low-cost pregnancy-related services, including abortions, and to include contact information on access to these services.[353] The Court characterized this provision as a "content-based regulation of speech" directly at odds with the petitioners' mission.[354] Because that content went beyond "purely factual and uncontroversial information about the terms under which . . . services will be available," *Zauderer*'s relatively relaxed standard did not apply.[355] The Court explained that "[t]he notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information

346. *Id.* at 652.
347. *Id.* at 651.
348. *Id.*
349. Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010).
350. *Id.* at 233 (internal quotation marks omitted) (quoting 11 U.S.C. § 528(a)(4) (2006)).
351. *Id.* at 249–50.
352. Nat'l Inst. Of Fam. & Life Advocs. V. Becerra, 138 S. Ct. 2361, 2368 (2018).
353. *Id.* at 2368–69.
354. *Id.* at 2371.
355. *See id.* at 2372 (quoting Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985)).

about *state*-sponsored services—including abortion, anything but an 'uncontroversial' topic."[356] In the Court's eyes, the notice could not survive even intermediate scrutiny—much less the strict scrutiny ordinarily applied to content-based limitations.[357] The second provision, requiring clinics not licensed by the State to provide medical services to announce this status,[358] fared even more poorly. Assuming without deciding that *Zauderer* applied, the Court concluded that the notice could not survive even that less demanding standard.[359] Rather, it was held "'unjustified'" and "'unduly burdensome'" because it "impose[d] a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest."[360]

Without squarely questioning *Zauderer*, the *NIFLA* Court laid the seeds for more rigorous scrutiny of compelled commercial speech than the previously understood level of review. By excluding the notice of California's services from *Zauderer*'s scope, *NIFLA* contracted the range of mandated expression to which *Zauderer*'s presumably lenient standard would apply. Most notably, prior to *NIFLA* it was generally thought that *Zauderer*'s reference to "purely factual and uncontroversial information" had meant that the accuracy of the information the speaker must convey is not in serious dispute.[361] The withdrawal from *Zauderer*'s government-friendly ambit of mandates on topics deemed controversial potentially subjects a multitude of disclosures and disclaimers to heightened scrutiny. Still further, the Court's invalidation of the required notice of unlicensed clinics' statuses raises the possibility that a more demanding version of *Zauderer* itself now exists to which the Court can resort to gut disfavored[362] compulsions. *Zauderer*'s requirement that a compelled

356. *Id.*

357. *See id.* at 2375–76.

358. *Id.* at 2370. The notice also had to state that "the State of California has no licensed medical provider who provides or directly supervises the provision of services." *Id.*

359. *Id.* at 2377–78.

360. *Id.* (quoting *Zauderer*, 471 U. S. at 651).

361. *See* Nadia N. Sawicki, *Informed Consent as Compelled Professional Speech: Fictions, Facts, and Open Questions*, 50 WASH. U. J.L. & POL'Y 11, 29–30 (2016); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 569 (6th Cir. 2012); Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 73–74 (2016); Seana Valentina Shiffrin, *Compelled Speech and the Irrelevance of Controversy*, 47 PEPP. L. REV. 731, 739 (2020). *NIFLA*, of course, augmented rather than supplanted the requirement that a compelled statement be factually uncontroversial. *See* Cal. Chamber of Com. V. Becerra, No. 2:19-cv-02019-KJM-EFB, 2021 WL 1193829, at *13–14 (E.D. Cal. Mar. 30, 2021) (finding that the State's required statement that acrylamide causes cancer was sufficiently disputed and that it was not uncontroversial under *Zauderer*).

362. Critics have charged that the *NIFLA* majority was largely animated by a desire to shield the anti-abortion mission of crisis pregnancy centers. *See, e.g.*, Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 66 (2019) ("[W]e believe [*NIFLA*] is primarily about five conservative Justices' hostility to abortion

disclosure be "reasonably related to the State's interest"[363] had been perceived as indicating the traditionally permissive[364] rational relationship standard.[365] In *NIFLA*, however, it was the State that had to overcome a presumption that the notice was unjustified and unduly burdensome.[366]

III. SALVAGING A ROLE FOR *CENTRAL HUDSON*

As discussed in Part II, both specific Court decisions and broader doctrinal developments suggest an ominous future for the *Central Hudson* test as affording government considerable latitude to regulate commercial speech. Nevertheless, alternative perspectives on these rulings and trends exist that do not augur the inevitable assignment of commercial speech to the realm of fully protected expression. Evidence of their plausibility appears most visibly in lower court holdings that do not embrace maximalist interpretations of the Court's safeguards against regulation.

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rights. The Court ignored legal precedent, failed to weigh the interests at stake in its decision, and applied a more demanding standard based on content of speech."); *see also* Clay Calvert, *Is Everything a Full-Blown First Amendment Case After* Becerra *and* Janus*? Sorting Out Standards of Scrutiny and Untangling "Speech as Speech" Cases from Disputes Incidentally Affecting Expression*, 2019 MICH. ST. L. REV. 73, 84 (2019) (suggesting that the outcome in *NIFLA* was shaped by effort of "the conservative justices . . . to protect pro-life organizations"). As specific evidence, they point to what they consider the artificial distinction drawn between California's invalidated notice provisions and the requirement of informed consent for abortions upheld in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992). *See NIFLA*, 138 S. Ct. at 2373–74; Helen Norton, Essay, *Pregnancy and the First Amendment*, 87 FORDHAM L. REV. 2417, 2429 n.72 (2019) ("[F]rom a listener's perspective, *Casey* and *NIFLA* cannot both be right. But even if we focus only on *speakers*' interests, *Casey* and *NIFLA* cannot both be right."); Chemerinsky & Goodwin, *supra*, at 110 ("Simply stated, the majority's justifications distinguishing *Casey* from *NIFLA v. Becerra* stretch their holding's credibility.").

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

364. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993) (internal citations and quotation marks omitted) ("On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it."); Neelum J. Wadhwani, Note, *Rational Review, Irrational Results*, 84 TEX. L. REV. 801, 802 (2006) ("Under rational basis [review] . . . statutes will nearly always be seen as legitimate, irrespective of the strength of the individual's interest and regardless of the larger constitutional regret that denying such an interest may entail.").

365. *See* Lili Levi, *A "Faustian Pact"? Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647, 680–81 (2015) ("The Court in *Zauderer* . . . subjected mandated speech disclosures . . . [to a] relaxed standard, akin to rational basis review."); Keighley, *supra* note 339, at 556 ("[A] close reading of *Zauderer* suggests that compelled commercial speech should be subject to rational basis scrutiny even if other interests motivated the state regulation."); Richard F. Lee, Note, *A Picture is Worth a Thousand Words: The Marketplace of Ideas and the Constitutionality of Graphic-Image Cigarette Warning Labels and Other Commercial Disclosure Requirements*, 84 U. COLO. L. REV. 1179, 1219–20 (2013) ("[T]he [*Zauderer*] Court required only a rational relationship between the disclosure requirement at issue and the government interest it was meant to serve.").

366. *See* Nat'l Inst. Of Fam. & Life Advocs. V. Becerra, 138 S. Ct. 2361, 2377 (2018) (internal citation omitted) ("California has the burden to prove that the unlicensed notice is neither unjustified nor unduly burdensome. It has not met its burden.").

A. A Narrower View of Sorrell

Though *Sorrell v. IMS Health, Inc.*[367] can be read to raise the scrutiny of commercial speech regulation,[368] the idiosyncrasy of its facts leaves scope for a less sweeping interpretation. The nature and salience of Vermont's discrimination against market detailers,[369] in particular, make the case susceptible to distinction from other circumstances. It is perhaps unsurprising, then—as discussed below—that many lower courts have treated *Central Hudson* as essentially unaffected by *Sorrell*'s holding.

Vermont's ban was unusual and unusually vulnerable because it singled out a specific class of speakers forbidden to employ certain information available to others to use as they saw fit. Favored speakers, such as researchers and journalists, could obtain this information for their purposes, but drug marketers could not.[370] This pinpoint prohibition was exacerbated by the State's frank avowal that it sought to bar marketers from exploiting this data in part out of fear of the communicative impact of their message.[371] For the Court, Vermont's stated aim of protecting the integrity of physicians' prescribing decisions foundered on a principal function of the First Amendment: checking speech restrictions that are premised on the "fear that people would make bad decisions if given truthful information."[372] The Court thus left open the possibility that restrictions not containing these defects would survive through a less rigorous review—in particular, intermediate scrutiny under *Central Hudson*.[373]

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367. Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

368. *See supra* Section II.A.

369. *See supra* notes 107–13, 190–91 and accompanying text.

370. *Sorrell*, 564 U.S. at 573. The Court has elsewhere expressed its disapproval of speech restrictions based on the identity of speakers. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 340 (2010) (citation omitted) ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content."); First Nat'l Bank of Bos. V. Bellotti, 435 U.S. 765, 784–85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue.").

371. *See Sorrell*, 564 U.S. at 561, 575–76.

372. *Id.* at 577.

373. Oleg Shik, Note, *The* Central Hudson *Zombie: For Better or Worse, Intermediate Tier Review Survives* Sorrell v. IMS Health, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 561, 564 (2015) ("[I]n the absence of a clear mandate for strict scrutiny, lower courts should not treat *Sorrell*'s new 'heightened judicial scrutiny' standard as dispositive, and opt instead for the traditional and familiar intermediate-tier analysis."); Thomas A. Zelante Jr., Comment, *Paper or Plastic: Speech in an Unlikely Place*, 48 SETON HALL L. REV. 931, 937 (2018) (quoting *Sorrell*, 564 U.S. at 590 (Breyer, J., dissenting)) (arguing that the Court probably did not intend for *Sorrell* to supplant the C*entral Hudson* standard for restrictions on commercial speech because requiring that content-based and speaker-based commercial speech regulations be subjected to strict scrutiny would "'threaten[] . . . widely accepted regulatory activity' in nearly all commercial sectors"); Constance E.

Thus, many courts after *Sorrell* continued to adhere to the *Central Hudson* framework when assessing limitations on commercial speech. In the course of upholding restrictions, some courts have spelled out why *Sorrell* was factually distinguishable from the case at hand.[374] One court observed the "legion" of distinctions between the Vermont statute in *Sorrell* and the regulation before it and enumerated four of them.[375] A number of courts sustaining restrictions explained why *Sorrell* did not alter the existing standard of intermediate scrutiny;[376] others have flatly asserted this to be true.[377] In many cases, courts have applied *Central Hudson* without mentioning *Sorrell* at all.[378] In some such instances, courts have

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Bagley, Joshua Mitts & Richard J. Tinsley, *Snake Oil Salesmen or Purveyors of Knowledge: Off-Label Promotions and the Commercial Speech Doctrine*, 23 CORNELL J.L. & PUB. POL'Y 337, 356 (2013) (arguing that limitations on commercial speech of a particular industry should be subjected to intermediate scrutiny where they are not based on unfounded paternalism and do not discriminate against disfavored industry participants); Marc Jonathan Blitz, *The Pandora's Box of 21st Century Commercial Speech Doctrine:* Sorrell*,* R.A.V.*, and Purpose-Constrained Scrutiny*, 19 NEXUS: CHAP. J.L. & POL'Y 19, 41–42 (2014) (arguing that *Sorrell* is consistent with precedent allowing content-based restrictions on commercial speech only for certain reasons).

374. *E.g.*, N.J. Dep't of Lab. & Workforce Dev. V. Crest Ultrasonics, 82 A.3d 258, 268 (N.J. Super. Ct. App. Div. 2014) (finding that the prohibition at issue, unlike the Vermont statute in *Sorrell*, did not disfavor a particular content or a particular kind of speaker); S.F. Apartment Ass'n v. City & Cnty. Of S.F., 142 F. Supp. 3d 910, 924 (N.D. Cal. 2015) (*Sorrell* is distinguishable . . . [because] the restriction in the present case is not an absolute prohibition on speech, but simply a condition that must be fulfilled before the speech can take place."); Nicopure Labs, LLC v. FDA, 944 F.3d 267, 289 (D.C. Cir. 2019) (describing reasons why plaintiff's reliance on *Sorrell* was "misplaced").

375. Chiropractors United for Rsch. And Educ., LLC v. Conway, No. 3:15-CV-00556-GNS, 2015 WL 5822721, at *4 (W.D. Ky. Oct. 1, 2015).

376. *See, e.g.*, King v. Gen. Info. Servs., Inc., 903 F. Supp. 2d 303, 308–09 (E.D. Pa. 2012) ("If the [*Sorrell*] Court wished to disrupt the long-established commercial speech doctrine as applying intermediate scrutiny, it would have expressly done so. Absent express affirmation, this Court will refrain from taking such a leap."); Boelter v. Hearst Commc'ns, Inc., 269 F. Supp. 3d 172, 196 n.11 (S.D.N.Y. 2017) ("Absent controlling precedent to the contrary, the Court continues to apply intermediate, rather than strict, scrutiny to content-based regulations targeting commercial speech."); Contest Promotions, LLC v. City & Cnty. Of S.F., 874 F.3d 597, 601 (9th Cir. 2017) **(**"*Sorrell* did not mark a fundamental departure from *Central Hudson*'s four-factor test, and *Central Hudson* continues to apply."); Retail Dig. Network, LLC v. Prieto (RDN), 861 F.3d 839, 846 (9th Cir. 2017) (en banc).

377. *See, e.g.*, Vugo, Inc. v. City of New York, 931 F.3d 42, 49 (2d Cir. 2019) ("We hold that [after *Sorrell*] the *Central Hudson* test still applies to commercial speech restrictions."), *cert. denied sub nom.*, 140 S. Ct. 2717 (2020); First Choice Chiropractic, LLC v. DeWine, 969 F.3d 675, 682 n. 3 (6th Cir. 2020) ("*Sorrell* neither delineated a new test nor modified the *Central Hudson* test."); 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1055 (8th Cir. 2014) ("The upshot [of *Sorrell*] is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*."); Greater Phila. Chamber of Com. V. City of Philadelphia, 949 F.3d 116, 139 (3d Cir. 2020) (internal citation and quotation marks omitted) ("*Sorrell* merely stands for the proposition that some level of scrutiny above rational basis review applied . . . *Sorrell* references a 'heightened scrutiny,' but it is just as likely that this is the same as intermediate scrutiny, which is stricter than rational basis scrutiny.").

378. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Conway, No. 3:13–CV–00229–CRS, 2014 WL 2618579, at *7–12 (W.D. Ky. June 12, 2014); Rubenstein v. Fla. Bar, 72 F. Supp. 3d 1298, 1310–18 (S.D. Fla. 2014); Moore-King v. Cnty. Of Chesterfield, 819 F. Supp. 2d 604, 619–21 (E.D. Va. 2011); Paramount Contractors and Devs., Inc. v. City of Los Angeles, 805 F. Supp. 2d 977, 988–97

essentially substituted one of *Central Hudson*'s pre-*Sorrell* progeny for *Sorrell* as a focal point of analysis.[379] A variation on this phenomenon has seen a few courts liberally sprinkle their opinions with citations drawn from this line of cases.[380] Finally, some courts have acknowledged *Sorrell* but sidestepped the question of its impact by ruling that the restriction at issue would fail even under *Central Hudson*'s intermediate regime.[381]

B. A Categorical Exemption from Reed*?*

Though the prescription in *Reed v. Town of Gilbert*[382] of strict scrutiny for content-based restrictions literally supersedes *Central*

(C.D. Cal. 2011); ABCDE Operating, LLC v. Snyder, No. 11–11426, 2011 WL 3113797, at *4 (E.D. Mich. July 26, 2011); Steiner v. Superior Ct., 164 Cal.Rptr.3d 155, 1488–90 (Ct. App. 2013); McKinley v. Abbott, No. A–09–CV–643–LY, 2013 WL 12233435, at *5 (W.D. Texas Sept. 26, 2013); Keyoni Enters., LLC v. Cnty. Of Maui, 2015 WL 1470847, at *5–6 (D. Haw. March 30, 2015); La. Cleaning Sys, Inc. v. City of Shreveport, No. 16-0014, 2016 WL 6818523, at *3 (W.D. La. Nov. 17, 2016); La. Cleaning Sys., Inc. v. City of Shreveport, No. 16-0014, 2019 WL 4780823 (W.D. La. Sept. 30, 2019); Authentic Beverages Co., Inc. v. Tex. Alcoholic Beverage Comm'n, 835 F. Supp. 2d 227, 240–41 (W.D. Tex. 2011); Rocket Learning, Inc. v. Rivera-Sanchez, 715 F.3d 1, 13–14 (1st Cir. 2013); AEP Tex. Com. & Indus. Retail Ltd. P'ship v. Pub. Util. Comm'n of Tex., 436 S.W.3d 890, 923–24 (Tex. App. 2014); Mont. Cannabis Indus. Ass'n v. State, 368 P.3d 1131, 1149–50 (Mont. 2016); Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm'n, 597 Fed. Appx. 342, 355 (6th Cir. 2015); PHN Motors, LLC v. Medina Township, 498 Fed. Appx. 540, 545 (6th Cir. 2012); Karraa v. City of Lost Angeles, No. 2:20-cv-07036-SVW-AGRx, 2020 WL 6882947 (C.D. Cal. Nov. 9, 2020).

379. Aptive Env't, LLC v. Town of Castle Rock, 959 F.3d 961, 981–82 (10th Cir. 2020) (finding outcome "dictated by" City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993)); Sharona Prop., L.L.C. v. Orange Village, 92 F. Supp. 3d 672, 682 (N.D. Ohio 2015) (describing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) as "the most informative case" on the topic at issue); City of Corona v. AMG Outdoor Advert., Inc., 197 Cal. Rptr. 3d 563, 572–73 (Ct. App. 2016) (adhering to *Metromedia*); Stardust, 3007 LLC v. City of Brookhaven, 1:14-CV-03534-ELR, 2016 WL 11544441, at *15 (N.D. Ga. Sept. 29, 2016) (stating that the issue in the case was "strikingly similar" to one addressed by the Court in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)); Lamar Tenn., LLC v. City of Knoxville, No. E2014–02055–COA–R3–CV, 2016 WL 746503, at *16 (Tenn. Ct. App. Feb. 25, 2016) (quoting passages from *Lorillard* for proper formulation of *Central Hudson*'s third and fourth steps); Second Amend. Arms v. City of Chicago, 135 F.Supp.3d 743, 757–58 (N.D. Ill. 2015) (looking to *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999), for interpretation of *Central Hudson*'s third and fourth steps); Kiser v. Kamdar, 831 F.3d 784, 789 (6th Cir. 2016) (quoting extensively from *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993)).

380. *See, e.g.*, Heffner v. Murphy, 745 F.3d 56, 92 (3d Cir. 2014); Safelite Grp., Inc. v. Rothman, 229 F. Supp. 3d 859, 880 (D. Minn. 2017).

381. Educ. Media Co. at Va. Tech, Inc. v. Insley, 731 F.3d 291, 298 (4th Cir. 2013); Valle Del Sol Inc. v. Whiting, 709 F.3d 808, 821 (9th Cir. 2013); Ocheesee Creamery LLC v. Putnam, 851 F.3d 1228, 1235 n.7 (11th Cir. 2017); 1-800-411-Pain Referral Service, LLC v. Tollefson, 915 F. Supp. 2d 1032, 1050 (D. Minn. 2012); Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805, 826, 839–40 (M.D. Tenn. 2013); *see also* United States v. Caronia, 703 F.3d 149, 164–68 (2d Cir. 2012) (finding that the prohibition failed under *Sorrell*'s heightened scrutiny and, in the alternative, under *Central Hudson*).

382. Reed v. Town of Gilbert, 576 U.S. 155 (2015).

Hudson,[383] this construction has thus far been widely rejected by courts.[384] *Reed* itself affords substantial latitude for inferring that its facially comprehensive rule of strict scrutiny for content-based restraints was not intended to eliminate intermediate scrutiny for commercial speech. The case involved a limitation on noncommercial expression,[385] and the Court's opinion did not mention *Central Hudson*—or, for that matter, commercial speech. Absent an explicit directive by the Court, lower courts have by and large assumed that *Reed* had not intended such wholesale preemption of existing commercial speech doctrine. Instead, they have generally applied the premise that commercial speech remains within *Central Hudson*'s compass.

Following *Reed*, many courts considering commercial speech regulations have acknowledged the Court's holding in *Reed* but denied that it affected *Central Hudson*. As one court succinctly put it, "The *Reed* majority did not discuss *Central Hudson*, let alone purport to overrule it."[386] Other courts have affirmed *Central Hudson*'s continued relevance in similarly direct terms.[387] Somewhat more subtly, but still

383. *See supra* notes 209–12 and accompanying text.

384. Dan V. Kozlowski & Derigan Silver, *Measuring* Reed*'s Reach: Content Discrimination in the U.S. Circuit Court of Appeals After* Reed v. Town of Gilbert, 24 COMMC'N L. & POL'Y 191, 193 (2019) ("[T]he courts of appeals have thus far declined to apply *Reed* to categories of speech that have traditionally been less protected, such as commercial speech.").

385. *See supra* notes 213–15 and accompanying text.

386. Adams Outdoor Advert. V. City of Madison, 17-cv-576-jdp, 2020 WL 1689705, at *12 (W.D. Wis. April 7, 2020); *see also Cal. Outdoor Equity Partners v. City of Corona*, No. CV 15-03172, 2015 WL 4163346, at *10 (N.D. Cal. July 9, 2015) ("*Reed* does not concern commercial speech, let alone bans on off-site billboards. The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even cite *Central Hudson*, let alone apply it.").

387. *See, e.g.*, Commonwealth v. Credit Acceptance Corp., 2084CV01954-BLS2, 2021 WL 1147444, at *6 (Mass. Super. Ct. Mar. 15, 2021) (internal citation omitted) ("'*Reed* does not disturb the Court's longstanding framework for commercial speech under *Central Hudson*.' . . . The Court may not ignore *Central Hudson* and its progeny on the theory that they were implicitly overruled by *Reed*."); Peterson v. Village of Downers Grove, 150 F. Supp. 3d 910, 928 (N.D. Ill. 2015) ("[A]bsent an express overruling of *Central Hudson*, which most certainly did not happen in *Reed*, lower courts must consider *Central Hudson* and its progeny—which are directly applicable to the commercial-based distinctions at issue in this case—binding."); Boelter v. Hearst Commc'ns, Inc., 192 F. Supp. 3d 427, 447 n.10 (S.D.N.Y. 2016) (citing *Reed*, 576 U.S. at 163–64) ("Although the Supreme Court has recently reiterated that content-based restrictions are subject to strict scrutiny review, it has not explicitly overturned the decades of jurisprudence holding that commercial speech, and speech like it—which, inherently, requires a content-based distinction—warrants less First Amendment protection."); Lamar Cent. Outdoor, LLC v. City of Los Angeles, 199 Cal. Rptr. 3d 620, 631 (Ct. App. 2016) (internal citation and quotation marks omitted) ("*Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test."); Contest Promotions, LLC v. City & Cnty. Of S.F., 874 F.3d 597, 601 (9th Cir. 2017) (citing Lone Star Sec. & Video, Inc. v. City of Los Angeles, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016)) ("We have . . . rejected the notion that *Reed* altered *Central Hudson*'s longstanding intermediate scrutiny framework."); RCP Publ'ns Inc. v. City of

unmistakably, a few courts have recited *Reed*'s ruling but then simply proceeded to apply *Central Hudson*.[388] In some instances, courts have avoided the issue of *Reed*'s impact on *Central Hudson* by finding resolution of the question unnecessary to deciding the case.[389] Perhaps most strikingly, numerous courts have omitted altogether mention of *Reed* from their analyses of commercial speech regulations.[390] A few recent

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Chicago, 204 F. Supp. 3d 1012, 1017 (N.D. Ill. 2016) ("This [c]ourt . . . does not see *Reed* as overturning the Supreme Court's consistent jurisprudence subjecting commercial speech regulations to a lesser degree of judicial scrutiny."); *CTIA–The Wireless Assoc. v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015) ("The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech, *see, e.g.*, *Central Hudson* . . . and nothing in its recent opinions, including *Reed*, even comes close to suggesting that that well-established distinction is no longer valid."); Geft Outdoor LLC v. Consol. City of Indianapolis, 187 F. Supp. 3d 1002, 1016–17 (S.D. Ind. 2016) ("Since *Reed* did not pertain to commercial speech and omitted any mention of *Central Hudson* and its progeny . . . [we] hold that . . . *Reed* does not change the controlling precedent."); Mass. Ass'n of Priv. Career Schs. V. Healey, 159 F. Supp. 3d 173, 192 (D. Mass. 2016) (indicating approval of other courts' conclusion that *Reed* "does not disturb the Court's longstanding framework for commercial speech under *Central Hudson*."); S.F. Apartment Ass'n v. City & Cnty. Of S.F., 142 F. Supp. 3d 910, 922 (N.D. Cal. 2015) ("*Reed* is inapplicable to the present case . . . [because] it does not concern commercial speech. Restrictions on commercial speech are evaluated under *Central Hudson*"); Citizens for Free Speech, LLC v. County of Alameda, 114 F. Supp. 3d 952, 968–69 (N.D. Cal. 2015) (internal quotation marks and citation omitted) ("*Reed* has no applicability to the issues before the Court . . . . [Because the statute at issue] only applies to commercial speech, the Court must examine that provision under intermediate scrutiny, not strict scrutiny."); Reagan Nat'l Advert. Of Austin, Inc. v. City of Cedar Park, 387 F. Supp. 3d 703, 712 (W.D. Tex. 2019) ("*Reed* does not require the application of strict scrutiny to content-based regulations of commercial speech.").

388. *See, e.g.*, Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay, 128 F. Supp. 3d 597, 613 (E.D.N.Y. 2015); Vugo, Inc. v. City of New York, 931 F.3d 42, 49 n.6 (2d Cir. 2019).

389. *See, e.g.*, Ocheesee Creamery LLC v. Putnam, 851 F.3d 1228, 1235 n.7 (11th Cir. 2017) ("[I]n *Reed*, the Court arguably broadened the test for determining whether a law is content based . . . . We need not wade into these troubled waters, however, because the State cannot survive *Central Hudson* scrutiny."); People v. Martinez, 273 Cal. Rptr. 3d 505, 526 (Ct. App. 2020) ("We ultimately find it unnecessary to resolve whether [the challenged law] regulates commercial speech, noncommercial speech, or both because even under the level of scrutiny applicable to commercial speech, the section does not pass constitutional muster."); Timilsina v. W. Valley City, 121 F. Supp. 3d 1205, 1215 (D. Utah 2015) ("Because the parties agree this case concerns commercial speech and . . . *Central Hudson* applies, the Court need not address how the regulation would fare under the recent Supreme Court case, *Reed v. Town of Gilbert*.").

390. *See, e.g.*, Art and Antique Dealers League of Am., Inc. v. Seggos, No. 18 Civ. 2504 (LGS), 2021 WL 848196, at *3–5 (S.D.N.Y. Mar. 5, 2021); Karraa v. City of Los Angeles, No. 2:20-cv-07036-SVW-AGRx, 2020 WL 6882947 (C.D. Cal. Nov. 9, 2020); RCP Publ'ns Inc. v. City of Chicago, 304 F. Supp. 3d 729, 736–41 (N.D. Ill. 2018); First Choice Chiropractic, LLC v. DeWine, 969 F.3d 675 (6th Cir. 2020); Mont. Cannabis Indus. Ass'n v. State, 368 P.3d 1131, 1149–50 (Mont. 2016); FTC v. Agora Fin., LLC, No. 1:19-cv-3100-SAG, 2020 WL 998734, at *6 (D. Md. Mar. 2, 2020); ACA Connects – America's Commc'ns Ass'n v. Frey, 471 F. Supp. 3d 318, 326–29 (D. Me. July 7, 2020); Kole v. Village of Norridge, No. 11 C 3871, 2017 WL 5128989, at *18 (N.D. Ill. Nov. 06, 2017); La. Cleaning Sys., Inc. v. City of Shreveport, No. 16-0014, 2016 WL 6818523, at *3 (W.D. La. Nov. 17, 2016); Tracy Rifle and Pistol LLC v. Harris, 118 F. Supp. 3d 1182, 1185 (E.D. Cal. 2015); Kiser v. Kamdar, 831 F.3d 784, 788–89 (6th Cir. 2016); Mo. Broad. Ass'n v. Schmitt, 946 F.3d 453, 462–63 (8th Cir. 2020); Bevan & Assocs., LPA, Inc. v. Yost, 929 F.3d 366, (6th Cir. 2019);

decisions have invoked *Reed* to strike down regulations affecting commercial speech, but these have occurred in a particular context reminiscent of *Reed*'s specific facts: disparate treatment of billboards applicable to both commercial and noncommercial speech.[391] At this point, they amount to a limited enclave within the general application of *Central Hudson*. Thus, whatever the theoretical or semantic case for categorically extending *Reed*'s strict scrutiny for content-based restrictions to commercial speech, this view will prevail only by the Supreme Court rejecting lower courts' overwhelming construction of *Reed*.

C. Persistence of the Gentler Central Hudson

As previously discussed, the Court's formal adherence to *Central Hudson*'s characterization as an intermediate form of scrutiny is arguably belied by the test's repeated, rigorous application to invalidate commercial speech limitations.[392] At the same time, however, the Court has not disavowed the more lenient interpretation of the test as articulated in *Board of Trustees of the State University of New York v. Fox*[393] and quoted or paraphrased in cases such as *City of Cincinnati v. Discovery Network, Inc.*,[394] *Greater New Orleans Broadcasting Ass'n v. United States*,[395] *Lorillard Tobacco Co. v. Reilly*,[396] and *Florida Bar v. Went For It, Inc.*[397] Whether the Court has deliberately reserved this less severe version of *Central Hudson* to uphold restrictions it finds benign is not known. Whatever the reason, though, lower courts have often relied on this approach in sustaining commercial speech regulations.[398]

The relatively permissive tenor of *Fox*'s articulation of the review prescribed for commercial speech restrictions is unmistakable:

Lamar Advantage GP Co., LLC v. City of Cincinnati, No. C-180675, 2020 WL 3273253, at *9–10 (Ohio Ct. App. June 18, 2020); Express Oil Change, L.L.C. v. Miss. Bd. Of Licensure for Prof'l Eng'r. & Surveyors, 916 F.3d 483, 492–93 (5th Cir. 2019); Bank of Hope v. Miye Chon, 938 F.3d 389, 396–97 (3d Cir. 2019); Strict Scrutiny Media, Co. v. City of Reno, 290 F. Supp. 3d 1149, 1157–58 (D. Nev. 2017); Garey v. James S. Farrin, P.C., 1:16cv542, 2019 WL 7037606, at *2 (M.D.N.C. Dec. 20, 2019); City of Corona v. AMG Outdoor Advert., Inc., 197 Cal. Rptr. 3d 563, 572–73 (Ct. App. 2016); Greater Phila. Chamber of Com. V. City of Philadelphia, 949 F.3d 116, 137–38 (3d Cir. 2020); Second Amend. Arms v. City of Chicago, 135 F. Supp. 3d 743, 755–58 (N.D. Ill. 2015).

391. *See* Int'l Outdoor, Inc. v. City of Troy, 974 F.3d 690, 707–08 (6th Cir. 2020); Reagan Nat'l Advert., Inc. v. City of Austin, 972 F.3d 696, 702–09 (5th Cir. 2020); GEFT Outdoor, L.L.C. v. City of Westfield, 491 F. Supp. 3d 387, 404 (S.D. Ind. 2020).

392. *See supra* Section II.C.

393. Bd. Of Trs. v. Fox, 492 U.S. 469, 480 (1989)*; see supra* notes 61–63.

394. Cincinati v. Discovery Network, Inc., 507 U.S. 410, 416 n.12 (1993).

395. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999).

396. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001).

397. Fla. Bar v. Went for It, Inc., 515 U.S. 618, 632 (1995).

398. *See supra* notes 389–94.

> What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.[399]

The Court's ruling in *Fox*—allowing a state university's ban on the operation of private commercial enterprises on campus—flowed naturally if not inevitably from this forgiving standard.

Portions of this passage have been a mainstay of lower court opinions determining that the regulation in question passes muster under *Central Hudson*.[400] Adaptations of *Fox*'s formulation in *Greater New Orleans Broadcasting*,[401] *Discovery Network*,[402] *Lorillard*,[403] and *Went For It*[404] have likewise been invoked to sustain restrictions that might not have met more demanding interpretations of *Central Hudson*. Some courts have also pointed to a separate portion of the *Went For It* opinion to relieve the government of an onerous burden of proof:

> [W]e do not read our [First Amendment] case law to require that empirical data come to us accompanied by a surfeit of background information . . . . [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict

399. Bd. Of Trs. V. Fox, 492 U.S. 469, 480 (1989) (internal citation and some quotation marks omitted).

400. *See, e.g.*, Greater Phila. Chamber of Com. V. City of Philadelphia, 949 F.3d 116, 154 n.283 (3d Cir. 2020); Bellion Spirits, LLC v. United States, 393 F. Supp. 3d 5, 26 (D.D.C 2019); McKinley v. Abbott, No. A–09–CV–643–LY, 2013 WL 12233435, at *7 (W.D. Tex., Sept. 26, 2013); Bulldog Invs. Gen. P'ship. V. Sec. of the Commonwealth, 953 N.E.2d 691, 711 (Mass. 2011).

401. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999); *see also* Adams Outdoor Advert. V. City of Madison, 17-cv-576-jdp, 2020 WL 1689705, at *16 (W.D. Wis. April 7, 2020); Second Amend. Arms v. City of Chi, 135 F. Supp. 3d 743, 758 (N.D. Ill. 2015); *Bulldog Invs. Gen. P'ship*., 953 N.E.2d at 711.

402. *See* Cincinati v. Discovery Network, Inc., 507 U.S. 410, 417 n.3 (1993); *see also* Sharona Prop., L.L.C. v. Orange Village, 92 F. Supp. 3d 672, 682 (N.D. Ohio 2015).

403. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001); *see also Greater Phila. Chamber of Com.*, 949 F.3d at 154 n.282.

404. *See* Fla. Bar v. Went for It, Inc., 515 U.S. 618, 632 (1995); *see also* Vivint La. V. City of Shreveport, 213 F. Supp. 3d 821, 824–25, 828–29 (W.D. La. 2016); RCP Publ'ns Inc. v. City of Chi, 304 F. Supp. 3d 729, 735–36 (N.D. Ill. 2018).

> scrutiny, to justify restrictions based solely on history, consensus, and simple common sense.[405]

Moreover, a substantial number of arguably flawed restraints on commercial speech have been upheld under *Central Hudson* even without relying on these government-friendly pronouncements.[406]

Until the Supreme Court expressly repudiates its more flexible rendition of *Central Hudson*, many courts appear willing to employ it to uphold commercial speech restrictions that strike them as reasonable. Nor does the Court seem inexorably on course to wholly discard the more indulgent review represented by *Fox*. Practical reasons exist for even a Court bent on dismantling much commercial regulation to retain the option of applying this version of the test.[407] Whether it does so, of course, remains to be seen.

D. Restraints on Deregulation

As earlier discussed, the potential for harsh First Amendment scrutiny of content-based regulation broadly defined has raised the specter of resurrecting the *Lochner* era.[408] However, even a Court with a decidedly pro-business tilt[409] might refrain from taking this approach to its logical extreme. Concerns about the Court's institutional legitimacy may dampen an impulse to pursue the wholesale overthrow of settled expectations regarding the reach of the regulatory state. Moreover, such an agenda would not invariably be favored by the interests on whose behalf it was conducted, for some business interests prefer the stability and protection provided by government regulation.[410]

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405. *Went For It*, 515 U.S. at 628 (internal citations and quotation marks omitted); *see also Greater Phila. Chamber of Com.*, 949 F.3d at 143 (3d Cir. 2020); S.F. Apartment Ass'n v. City & Cnty. Of S.F., 142 F. Supp. 3d 910, 924 (N.D. Cal. 2015).

406. *See, e.g.*, City of Corona v. AMG Outdoor Advert., Inc., E068313, 2019 WL 643474, at *8–10 (Feb. 15, 2019 Cal. Ct. App.); N.J. Dep't of Labor & Workforce Dev. V. Crest Ultrasonics, 82 A.3d 258, 267–72 (N.J. Super. Ct. App. Div. 2014); Paramount Contractors and Devs., Inc. v. City of L.A., 805 F. Supp. 2d 977, 988–1001 (C.D. Cal. 2011); Kansas City Premier Apartments, Inc. v. Mo. Real Est. Comm'n, 344 S.W.3d 160, 168–69 (Mo. 2011); Demarest v. City of Leavenworth, 876 F. Supp. 2d 1186, 1199–1202 (E.D. Wash. 2012); Art & Antique Dealers League of Am., Inc. v. Seggos, No. 18 Civ. 2504 (LGS), 2021 WL 848196, at *3–5 (S.D.N.Y. Mar. 5, 2021).

407. *See infra Section* III.D.

408. *See supra* Section II.D.

409. *See* Lee Epstein, William M. Landes & Richard A. Posner, *When It Comes to Business, the Right and Left Sides of the Court Agree*, 54 WASH. U. J.L. & POL'Y 33, 48 (2017) ("What with the left and right side of the bench favoring business at levels unprecedented in the last 70 years, it is fair to characterize the Roberts Court as 'pro-business.'"); Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 962 (2008) ("The Roberts Court is the most pro-business Court of any since the mid-1930s.").

410. *See infra* notes 415–16 and accompanying text.

The scale of disruption unleashed by far-ranging skeptical review of government constraints on communication in commercial relations[411] might well give pause to even the most ardent judicial champion of a deregulatory First Amendment. Even a limited sampling of presumed targets of strict scrutiny offers a glimpse of massive upheaval of the regulatory landscape, such as "[laws] that require nutritional labels, disclosure of information related to securities, Truth in Lending Act disclosures, disclosures in prescription drug advertisements, warnings for pregnant women on alcoholic beverages, airplane safety information, and required exit signs."[412] And these examples involve only disclosures. Requiring the government to demonstrate that a restriction on commercial speech is necessary to achieve a compelling interest could place under a cloud a whole other multitude of laws designed to protect consumers from harm or fraud. The impact of such a First Amendment sword on widely accepted requirements and prohibitions would vastly exceed the "far-reaching" consequences Justice Rehnquist warned of in his *Virginia State Board* dissent.[413] The magnitude of these effects could provoke a backlash that includes proposals to alter the role or composition of the Court. Even in the absence of pervasive invalidation of regulation through the First Amendment, measures to offset the more conservative direction of the Court arising from recent changes in personnel have been seriously advanced.[414]

Further, even assuming the Court is inclined to serve business interests, some may doubt whether a comprehensive deregulatory project best advances this agenda. Industries often find that the stability and predictability of a definite regulatory framework outweigh the costs that it imposes.[415] History furnishes examples of regulation that ostensibly reins

411. *See supra* note 284 and accompanying text.

412. Shanor, *supra* note 186, at 192.

413. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 781 (Rehnquist, J., dissenting) ("Under the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage.").

414. *See* Jeannie Suk Gersen, *What the Democrats Achieve by Threatening to Pack the Supreme Court*, NEW YORKER (Oct. 28, 2020), https://www.newyorker.com/news/our-columnists/what-democrats-achieve-by-threatening-to-pack-the-supreme-court [https://perma.cc/V6US-US2P] ("Democrats certainly can't undo Barrett's appointment to the Court, but with the expectation of being able to wield power soon, they have stepped up a discussion of 'court-packing,' in order to undermine a 6–3 conservative majority that otherwise may be entrenched for a generation."); Amber Phillips, *What Is Court Packing, and Why Are Some Democrats Seriously Considering It?*, WASH. POST (Oct. 7, 2020), https://www.washingtonpost.com/politics/2020/09/22/packing-supreme-court/ [https://perma.cc/4DNX-E4N2].

415. *See, e.g.*, The Times Editorial Board, *Editorial: Even Car Companies Aren't Going Along with Trump's Rollback of Mileage and Emissions Standards*, L.A. TIMES (July 26, 2019),

in corporate abuse but is actually thought congenial by the affected business.[416] In *Janus*, Justice Kagan voiced the apprehension that the Court's path of deploying the First Amendment to dismantle what it considered noxious regulation "runs long."[417] It could, but pragmatism may limit its theoretical reach. Even the original *Lochner* era did not come close to an all-out assault on regulation of business, as the Court left most challenged laws intact.[418] It would be premature to assume that today's Justices will wield the First Amendment to indiscriminately reject any regulation they would not have supported as lawmakers.

E. NIFLA*'s Limited Impact*

As previously described, the Court's ruling in *NIFLA*[419] infused the test for compelled commercial speech with unprecedented teeth.[420] It is too soon to know whether the decision signaled a wider attack on disclosure requirements as part of the Court's deregulatory application of the First Amendment. If it did, then it is possible this development would osmotically tighten the Court's scrutiny of restrictions on commercial speech under *Central Hudson*. After all, the Court's review of commercial speech limitations has long been considered more stringent than that of required disclaimers and disclosures.[421]

As evidenced by the lower courts' responses to *NIFLA* thus far, broad-scale erosion of government power to compel commercial speech has not yet materialized. Rather, the predominant approach has been to acknowledge *NIFLA*'s bearing on the doctrine of compelled speech while

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https://www.latimes.com/opinion/story/2019-07-25/california-carmakers-fuel-economy-trump [https://perma.cc/TVT4-4YC3] ("Car companies want the certainty of one national standard.").

416. *See, e.g.*, GABRIEL KOLKO, RAILROADS AND REGULATION 1877–1916, at 34–39 (Greenwood Press 1976) (1965) (describing eagerness of railroads for federal regulation to relieve the instability and financial losses resulting from unrestrained competition); JAMES WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE, 1900–1918, at 47 (1968) (reporting that 95% of employers surveyed by National Association of Manufacturers' 1910 questionnaire favored worker compensation).

417. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting).

418. *See* DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 2 (2001) ("Lochnerism was never consistently practiced. Even at the height of the *Lochner* era, from 1923 to 1934, federal and state courts upheld the vast majority of challenged regulations."); Charles Warren, *The Progressivesness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294–95 (1913) (finding that of more than 560 decisions based on the Due Process or Equal Protection Clause between 1887 and 1911, the Court struck down a state law "involving a social or economic question of the kind included under the phrase 'social justice' legislation" only twice other than in *Lochner v. New York*).

419. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).

420. *See supra* Section II.E.

421. *See* Murphy, Bernstein & Fryska, *supra* note 339 and accompanying text.

still applying the test of *Zauderer*[422] in its traditionally permissive[423] version. Perhaps the most notable example is the Ninth Circuit's disposition of a Berkeley ordinance requiring cell phone companies to inform potential buyers that carrying a cell phone could cause them to exceed FCC guidelines for exposure to radio-frequency radiation.[424] Two years earlier, the court had denied a trade association's request for a preliminary injunction against enforcement of the ordinance.[425] On appeal, the Supreme Court vacated the Ninth Circuit's opinion and remanded the case for consideration in light of *NIFLA*.[426] Undissuaded by this instruction, the Ninth Circuit upheld the requirement again under *Zauderer*.[427] While recognizing "*NIFLA*'s clarification of the *Zauderer* framework,"[428] the Ninth Circuit concluded that the features of California's law that proved fatal in *NIFLA* were absent from Berkeley's ordinance.[429]

While the Ninth Circuit has been the most conspicuous advocate of *Zauderer*'s post-*NIFLA* relevance, it has not been an outlier. An Oklahoma federal district court pointed to *NIFLA* only to lift a portion of that opinion that could be read to support application of *Zauderer*'s more lenient scrutiny.[430] Likewise, the D.C. District Court upheld an agency's rule requiring that hospitals publish their standard charges and found nothing in *NIFLA* precluding analysis of the requirement under *Zauderer*.[431] A West Virginia federal district court did discuss *NIFLA* in the course of striking down a restriction on lawyer advertising, but it ultimately found the disclosure invalid under both *Zauderer* and *NIFLA*.[432]

422. Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985).

423. *See supra* notes 339–51 and accompanying text.

424. CTIA–The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 837–38 (9th Cir. 2019).

425. CTIA–The Wireless Ass'n v. City of Berkeley, 854 F.3d 1105, 1124 (9th Cir. 2017).

426. CTIA–The Wireless Ass'n v. City of Berkeley, 138 S. Ct. 2708 (2018) (mem.).

427. CTIA, 928 F.3d at 841–49.

428. *Id.* at 837.

429. *See id.* at 844–45.

430. *See* Upton's Nats. Co. v. Stitt, No. CIV-20-938-F, 2020 WL 6808784, at *2 (W.D. Okla. Nov. 19, 2020) (citing Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2372 (2018)) ("While the First Amendment's protection is broad, the Supreme Court has recognized that it has 'applied a lower level of scrutiny to laws that compel disclosures in certain contexts,' including cases analyzing the disclosure of 'factual, noncontroversial information in . . . commercial speech.'" (some internal quotation marks omitted)); *id.* at *5 ("[T]he court finds[, applying *Zauderer*,] that the disclosure requirement is reasonably related to the state's interest in preventing confusion or deception of consumers.").

431. *See* Am. Hosp. Ass'n v. Azar, 468 F. Supp. 3d 372, 391–92 (D.D.C. 2020).

432. Recht v. Justice, No. 5:20-CV-90, 2020 WL 6109430, at *6 (N.D. W. Va. June 26, 2020).

CONCLUSION

It is tempting to dismiss the *Central Hudson* test as a relic made obsolete by the Court's steady dismantling of commercial regulation through the First Amendment. Developments of the past decade support the impression that it is only a matter of time before the Court formally abandons this standard. Nevertheless, *Central Hudson*'s persistence—especially its pervasive application by lower courts—suggests that it serves a valuable function even as its interpretation has varied and its relevance questioned. However imperfect, it provides a framework to mediate the tension between government's far-reaching power to regulate economic activity and recognition that, as communication, commercial speech implicates the First Amendment.[433]

Central Hudson's lack of precision and predictability hardly renders it unique—or even distinctive—in First Amendment jurisprudence. Free speech doctrine is replete with standards and concepts that are not susceptible to mechanical application—limited public figure,[434] incitement,[435] overbreadth,[436] public forum,[437] and symbolic speech,[438] to name a few. However sound or coherent their theoretical foundations, these too can be applied with varying solicitude to expression according to courts' judgment and predilections. Still, each provides an enduring construct whose flexibility accommodates changing conditions and shifting majorities without having to overturn the underlying structure. In a jurisprudence that prizes stare decisis, such stability has much to recommend it.

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433. Even a prominent critic who finds the test overly protective of commercial speech has stated that it can "be subject to principled revision." Post, *supra* note 130, at 56.

434. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (describing plaintiffs deemed limited public figures in defamation suits as "hav[ing] thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved").

435. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (States may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

436. *See* Zwickler v. Koota, 389 U.S. 241, 250 (1967) (internal citation and quotation marks omitted) ("[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.").

437. *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983) (prescribing different standards for public property "which the state has opened for use by the public as a place for expressive activity" and that "which is not by tradition or designation a forum for public communication").

438. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct . . . a government regulation is sufficiently justified . . . if the governmental interest is unrelated to the suppression of free expression[] and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

That the *Central Hudson* test has perhaps been applied with greater stringency than was originally envisioned does not demand its abolition. The Court's current deregulatory bent may prompt it to further limit government's ability to constrain commercial speech. *Central Hudson*'s proven receptivity to more generous conceptions of power, however, affords a safety net should the present experiment produce disturbing unintended consequences. Meanwhile, lower courts "on the ground" can continue to strike a balance between the imperatives of practical governance and a baseline protection of commercial speech from which even liberal Justices have shown no sign of retreating. Ultimately, a future Court of different orientation may draw from this experience to assign greater weight to regulatory priorities. Should this change in philosophy occur, *Central Hudson* ensures that it will require no drastic upheaval in the law.