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THIS MEDICATION MAY KILL YOU: COGNITIVE OVERLOAD AND FORCED COMMERCIAL SPEECH

DEVIN S. SCHINDLER*

AND

TRACEY BRAME**

“Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”

—Supreme Court Justice Louis Brandeis, *Olmstead v. United States* (1928)¹

I. INTRODUCTION

Pick up a copy of your favorite lifestyle magazine. Turn to the first advertisement you can find for a prescription medication. Typically, you will find the picture of a well-heeled model with a sunny disposition extolling how the particular medication being advertised changed

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his/her/their lives. This is followed by two pages of densely packed script, required by the federal government\textsuperscript{2} and paid for by the advertiser, telling you of all the terrible things that could theoretically happen if you took the medication.\textsuperscript{3}

Pharmaceutical advertisements are only but one example of the government forcing advertisers to speak. In recent years, various government entities have added or attempted to add cell phones,\textsuperscript{4}

\begin{itemize}
\item \textsuperscript{2}The format of those advertisements, down to the font and placement of the wording, is mandated by government regulation. \textit{See} 21 C.F.R. § 202.1 (2013).
\item \textsuperscript{3}Consider, by way of example, the April 2013 issue of \textit{Woman's Day} magazine. This issue contains ten advertisements for prescription medicines. \textit{Woman's Day}, Apr. 2013, at 22-24, 49-51, 61-62, 67-69, 75-76, 103-04, 119-20, 125-26, 134-36, 143-44. Of those, six pages are dedicated to pure advertisement, such as pictures, logos, tag lines, and text extolling the virtues of the product. \textit{Id.} at 75, 103, 119, 125, 134, 143. Over twice as many pages—fifteen and a half—are dedicated to government mandated warning labels. \textit{Id.} at 22-24, 50-51, 61-62, 67-69, 76, 104, 120, 126, 136, 144. One of the products advertised, “Pradaxa,” is used to prevent stroke and blood clots in individuals with atrial fibrillation. \textit{Id.} at 49. Strokes are among the most serious health risks facing our nation. According to the Centers for Disease Control, 795,000 individuals in the United States suffered a stroke in 2011. \textit{Stroke Facts}, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/stroke/facts.htm (last visited Nov. 7, 2013). Of those, approximately 130,000 died. \textit{Id.} Medications like Pradaxa have been shown to be effective in preventing strokes. \textit{Woman's Day}, supra, at 49. This fact would be quickly lost on a consumer reading the advertisement, who would learn that the side effects of the medication include uncontrolled bleeding, coughing up blood, chest pain, trouble breathing, and indigestion. \textit{Id.} at 49-51. Other important information, like the fact that the incidences of such side effects are exceedingly rare and the medication is safer than its nearest competitor, is not disclosed in the government mandated warnings. \textit{Pradaxa Side Effects Center}, RXLIST, http://www.rxlist.com/pradaxa-side-effects-drug-center.htm (last visited Nov. 7, 2013).
\item San Francisco passed an ordinance requiring cell phone carriers to distribute a “fact sheet” with all products sold, warning consumers of the possible connection between cell phone usage and cancer. CTIA–Wireless Ass’n v. City of San Francisco, 494 Fed. App’x 752, 753-54 (9th Cir. 2012). CTIA moved to enjoin the enforcement of the ordinance, arguing that under \textit{Zauderer}, the ordinance, by compelling speech that was not factual and uncontroversial, violated retailers’ First Amendment rights. \textit{Id.} at 753 (citing \textit{Zauderer} v. Office of Disciplinary Counsel S. Ct. of Ohio, 471 U.S. 626 (1984). The Ninth Circuit agreed with CTIA, noting that while the statements in the fact sheet were accurate and not misleading, the revised fact sheet also contained information about recommendations regarding what consumers could do to reduce frequency emissions. \textit{Id.} The court held that the language could be interpreted by consumers as linking frequency emissions to cancer, a subject of considerable scientific debate. \textit{Id.} at 753-54.
\end{itemize}
genetically engineered foods, fast food, and hundreds of commonly used household chemicals to the list of products that cannot be sold without government mandated messages. These kinds of mandated messages sit at the crossroads of two seemingly divergent legal doctrines. The first is the forced speech doctrine. In a series of cases dating back seventy years, the United States Supreme Court concluded that the government cannot compel individuals to communicate messages, with which they disagree except for the most compelling of reasons. The second is the commercial speech doctrine, in which the Court applies intermediate scrutiny to regulations that restrict commercial speech.

These two lines of cases, one focused on laws compelling speech and the other on laws restricting, potentially conflict in situations where the government seeks to compel advertisers to convey a message that is contrary to their interests. Historically, forced speech that implicates “protected speech” is generally subject to strict scrutiny review. However, in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, the first case that considered forced speech in the commercial context, the Court’s ruling allowed the government to mandate disclosures by commercial advertisers to the extent such disclosures were “reasonably related to the State’s interest in preventing deception of consumers.” On its face, Zauderer only applied in the narrow situation where the commercial speech was somehow deceptive or misleading. In dicta, however, the Court also suggested “purely

5. See, e.g., Genetically Engineered Food Right-to-Know Act, H.R. 1699, 113th Cong. §2(a) (2013).
6. See, e.g., N.Y.C., N.Y., R. & REGS., tit. 24, HEALTH CODE § 81.50 (2012) (requiring New York food establishments to include the calories next to each food item on their menu board).
7. See, e.g., CAL. HEALTH & SAFETY CODE § 25249.6 (West 2006); CURRENT PROPOSITION 65 LIST, OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, http://www.oehha.org/prop65/prop65_list/Newlist.html (last visited Nov. 8, 2013) (requiring merchants to notify customers of different chemicals that may be present in the products they sell).
8. See discussion infra Part II.A.
9. See discussion infra Part II.B.
10. E.g., Wooley, 430 U.S. at 713, 715-17 (Supreme Court applied strict scrutiny to invalidate a State statute which forced speech through requiring an ideological state motto to be displayed on all license plates).
12. Id. at 638.
factual and uncontroversial” speech might also be compelled.\textsuperscript{13} Despite this dicta, \textit{Zauderer} left open the question of the government’s authority to compel commercial speech where deception is not an issue.\textsuperscript{14}

The law governing restrictions on commercial speech, in contrast, was first set forth in the cases \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (“Virginia Pharmacy”)}\textsuperscript{15} and \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission of New York (“Central Hudson”).}\textsuperscript{16} In \textit{Virginia Pharmacy}, the Court held that commercial speech was worthy of constitutional protection, despite having lesser value than other forms of protected speech.\textsuperscript{17} The level of protection enjoyed by commercial speech was set forth in \textit{Central Hudson}, where the Court ruled that restrictions on such speech were subject to what is essentially intermediate scrutiny.\textsuperscript{18}

The intersecting principles of the forced speech and commercial speech doctrines have led to confusion and inconsistent holdings among the circuits. In a recent D.C. Circuit case, \textit{R.J. Reynolds Tobacco Co. v. Food & Drug Administration}, the court ruled that compelled disclosures not strictly designed to prevent deception were subject to the intermediate scrutiny standard first applied in \textit{Central Hudson}.\textsuperscript{19} Some jurists, however, have suggested that compelled commercial speech, at least to the extent that it is tied to criminal penalties, is a content-based restriction subject to strict scrutiny.\textsuperscript{20} Yet other courts have ruled that \textit{Zauderer}’s permissive rational basis standard applies to all forced commercial speech, irrespective of whether the underlying advertisement is deceptive or misleading.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{13} \textit{Id.} at 651.
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{17} \textit{Va. State Bd. of Pharmacy}, 425 U.S. at 758, 770.
\item \textsuperscript{18} \textit{Cent. Hudson Gas & Elec. Corp.}, 447 U.S. at 566.
\item \textsuperscript{19} \textit{R.J. Reynolds Tobacco Co. v. Food & Drug Admin.}, 696 F.3d 1205, 1214-17 (D.C. Cir. 2012).
\item \textsuperscript{20} \textit{See Entm’t Software Ass’n v. Blagojevich}, 469 F.3d 641, 652 (7th Cir. 2006) (holding that compelled placement of labels warning consumers that a video game is “sexually explicit” is subject to strict scrutiny because the warning is controversial and “opinion based”). \textit{Cf. Brown v. Entm’t Merchs. Ass’n}, 131 S. Ct. 2729, 2732, 2738 (2011) (holding that the video game rating system that penalized the sale of games rated “violent” or “sexually explicit” to minors was subject to strict scrutiny).
\item \textsuperscript{21} \textit{See, e.g., Disc. Tobacco City & Lottery Inc. v. United States}, 674 F.3d 509, 558-
Decisions expanding the government’s authority to compel commercial speech suffer from three interrelated flaws. First, some courts have been too quick to engraft *Central Hudson’s* intermediate scrutiny rule onto the only peripherally related field of forced speech.\(^{22}\) Simply put, a doctrine designed to evaluate restrictions on the time, place, and manner of commercial speech has no place in the world of forced expression. Second, courts that have shown a willingness to expand the government’s authority to compel commercial speech inappropriately discount the anti-paternalistic sentiment which animates much of First Amendment jurisprudence.\(^{23}\) Simply stated again, absent fraud, the government’s ability to turn unwilling advertisers into government mouthpieces creates an undue burden on the First Amendment’s emphasis on free speech and the marketplace in which it operates. Finally, the rationale used most often to justify forced commercial speech, i.e. the more information that is given to consumers, the more rational their decisions, is likely not true for most commercial advertising. Recent studies of brain pathology suggest that cognitive decision making skills actually degrade when consumers are overwhelmed with too much information.\(^{24}\)

This article argues that First Amendment theory, when analyzed in light of the best currently available scientific evidence regarding cognitive decision making, requires courts to be highly skeptical of efforts by the government to force advertisers to make statements that are contrary to their interests. At the risk of drawing the metaphor to its breaking point, government appropriation of private speech is justified only when structural deficiencies in the so-called “marketplace of ideas” raise a substantial risk of informational monopoly. Such defects most often occur when the speaker is essentially lying and the information necessary to “check” the claims being made is not readily available. Outside of this narrow category, however, compelled disclosure serves only the government’s paternalistic interest in controlling the marketplace and compelling purchasers to make decisions favored by the government, irrespective of the choices these individuals may feel are appropriate. The forced commercial speech doctrine should be re-

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\(^{23}\) See, e.g., *Disc. Tobacco City & Lottery Inc.*, 674 F.3d at 558.

\(^{24}\) See discussion *infra* Part III.C.3 and notes 155-69.
evaluated in light of the principles that underlie First Amendment jurisprudence and the current science of cognitive decision making. Such a re-evaluation dictates a severe restriction on the government’s authority to compel advertisers to convey unwanted messages.

II. THE INTERSECTION OF THE COMMERCIAL SPEECH AND COMPELLED SPEECH DOCTRINES

Forced commercial speech sits at the crossroads of two distinct bodies of law. The first is the forced speech doctrine, which traces back to a 1943 case involving compulsory flag salutes.

A. THE FORCED SPEECH DOCTRINE

In West Virginia State Board of Education v. Barnette, the Court struck down a state rule that required all public school students to “participate in the salute honoring the Nation” by reciting the pledge of allegiance. For the first time, the Court recognized that the corollary to the freedom of speech was the freedom to not be coerced to express messages with which one disagrees. As stated by the Court, forced speech is problematic because it “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” The Court suggested that compelled speech was among the most egregious violations of the First Amendment and could only be justified “on even more immediate and urgent grounds than silence.”

The relationship between the “freedom of speech” and the “freedom of silence” was made manifest in Wooley v. Maynard, in which the Court upheld a challenge brought by a Jehovah’s Witness, who objected to the phrase “Live Free or Die” appearing on his New Hampshire license plate. According to the Court, the “right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of [the] mind’” protected by

25. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943). The plaintiffs in Barnette were two young school children, Jehovah’s Witnesses, who believed that the forced flag salute violated the Bible’s prohibition against bowing down to graven images. Ironically, the salute mandated by the Board had a disturbing resemblance to the Nazi salute. Id. at 627-28.
26. Id. at 642.
27. Id. at 633.
the First Amendment.29 This protection extends to both “opinion[s]” one would rather not express and to “statements of fact the speaker would rather avoid.”30

**B. THE COMMERCIAL SPEECH DOCTRINE**

Constitutional protection for commercial speech, in contrast, came of age in the Court’s 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (“*Virginia Pharmacy*”).31 The Court in *Virginia Pharmacy* was called upon to evaluate a state law that prohibited licensed pharmacists from advertising prices.32 The Court engaged in a wide-ranging balancing approach, determining that commercial speech served important First Amendment interests of both the listeners and speakers.33 As to the former, the Court found that commercial speech served First Amendment values by providing information important to individuals making economic decisions.34 As stated by the Court, the “consumer’s interest in the free flow of commercial information . . . may be . . . keener . . . than his interest in the day’s most urgent political debate.”35 Commercial speech further served a general societal interest in the free flow of information and “enlighten[ed] public decisionmaking [sic] in a democracy.”36 Commercial speakers also have an obvious interest in the information they are disseminating, rooted in the profit motive.37

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29. *Id.* at 714. See also Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 258 (1974), in which the Court struck down a Florida statute that required newspapers to publish rebuttals from political candidates criticized by the newspaper.


32. *Id.* at 749-50. The Court found advertisements for abortion services constitutionally protected in *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975), a case decided one year before *Virginia Pharmacy*. That decision came on the heels of *Roe v. Wade*, 410 U.S. 113 (1973), and was arguably limited to the nature of the constitutionally protected services being advertised. *Virginia Pharmacy* was the first case in which the Court specifically ruled that all commercial speech was visible to the First Amendment.


34. *Id.*

35. *Id.* at 763.

36. *Id.* at 765.

37. *Id.* at 771 n.24. The distinction between lesser protected commercial speech and
Despite these values, the Court noted that commercial speech had a number of attributes which distinguished it from “political” speech. According to the Court, commercial speech is “more easily verifiable” than political speech and, because it is motivated by profit, would likely be “more durable” than other forms of speech. In a subsequent case, *Ohralik v. Ohio State Bar Association*, the Court ruled that “common sense” distinctions between commercial speech and other forms of speech justified only limited protection of the former, “commensurate with its subordinate position in the scale of First Amendment values.”

The Court refrained from announcing a single overarching test in *Virginia Pharmacy*. Four years later, however, in *Central Hudson*, the Court adopted a four-part test for evaluating 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.

**C. ZAUNDERER AND THE INTERSECTION OF THE TWO DOCTRINES**

A marriage of sorts between the forced speech and commercial speech doctrines took place in *Zauderer*. The defendant in *Zauderer* was an attorney who published a now-typical “no fees unless you win” advertisement. He was censured under a state disciplinary rule that required contingent fee ads to include a disclosure that clients would be responsible for court costs irrespective of how the case was ultimately decided. **See Bigelow**, 421 U.S. at 822 (stating that advertisements for abortion services contain elements of both commercial and political speech). **See discussion infra** Part III and note 93.

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39. *Id.* at 772.  
In its simplest terms, the case turned on resolution of the conflict between the presumption against forced speech and the “lesser protected” status accorded to commercial speech. Historically, the Court had ruled that “forced speech” was perhaps more problematic under the First Amendment than outright prohibitions of speech. The Court reversed this presumption in the context of commercial speech, characterizing Zauderer’s “interest in not providing any particular factual information” as “minimal.” Based on this reordering of the presumption, the Court concluded that speech could be compelled in the commercial context so long as the disclosure requirements were “reasonably related to the State’s interest in preventing deception of consumers.” Zauderer left the First Amendment as applied to commercial speech in curious dichotomy: laws suppressing commercial speech were subject to intermediate scrutiny; laws compelling speech, at least speech necessary to prevent “deception”, however, were subject to what is in effect rational basis review.

Zauderer’s focus on “preventing deception” left the law of forced commercial speech unsettled. On its face, the opinion is relatively straightforward: the government can compel commercial speech reasonably related to preventing deception. But government has an incentive, and perhaps reasonable justifications, to compel commercial speech to advance interests other than preventing deception, such as “consumer education” and ensuring informed decision making. Zauderer left open the question of what standard should apply when compelled speech was intended to serve some other purpose, such as “education.” Is compelled commercial speech as constitutionally problematic as compelled political speech, which would mandate review

43. Id. at 634-36.
44. Id. at 650.
45. Id. at 651. See also Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010) (“[B]ecause the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech, the Government contends that the less exacting scrutiny described in Zauderer governs our review. We agree.”).
46. Zauderer, 471 U.S. at 651.
47. Id. at 647.
48. As stated by the Court, “the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed . . . .” Id. at 651-52 n.14.
49. Id. at 651.
50. See R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1213 (D.C. Cir. 2012); see also Zauderer, 471 U.S. at 651 (formulating the standard under which commercial speech can be reviewed).
under the “default” strict scrutiny standard that applies to content based restrictions? Or should the default rule be *Central Hudson*’s intermediate scrutiny test? Or should it be something completely different?

D. THE SPLIT AMONG COURTS AND ITS EFFECT

This debate, and the split among courts it has engendered, has arisen most prominently in challenges to government-mandated warnings on tobacco products. In one form or another, the federal government has required such labels since 1965. In 2011, the Food and Drug Administration ("FDA") issued final rules, which greatly upped the ante. Among other things, the new rules required cigarette manufacturers to place on their packaging one of nine graphic images, including pictures of diseased lungs, an autopsied corpse, and a man smoking a cigarette with a tracheotomy. The images were to be accompanied by both a 1-800 number operated by the National Cancer Institute’s tobacco cessation program and certain factual statements, such as "smoking can kill you." Tobacco companies were required to reserve the top half of their cigarette packaging, both front and back, for the new graphic images.

1. The D.C. Circuit Approach

Challenges to the new law have resulted in a split between the D.C. Circuit and the Sixth Circuit on the appropriate level of scrutiny to be applied when considering such challenges. In the D.C. Circuit case, *R.J. Reynolds Tobacco Co. v. FDA*, the court recognized that existing Supreme Court precedent left it with three possible choices. The government argued, inter alia, that *Zauderer* applied, reading that case to stand for the proposition that government could compel commercial

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advertisers to include any kind of “purely factual” information deemed relevant by the government irrespective of whether it was tied to any deception by the advertiser. This expansion of Zauderer was justified, according to the government, from a statement in the majority opinion that a plaintiff’s interest in not disclosing “purely factual and uncontroversial” information was “minimal.” Essentially the government wanted to divorce this statement from the ultimate holding of the case, which was that the government could only compel disclosures “reasonably related to the State’s interest in preventing deception.”

The tobacco company plaintiffs, in contrast, argued that the absence of “deception” in its advertising placed the case completely outside of Zauderer, and squarely back into the rule of “strict scrutiny” that applies generally to compelled speech. The district court agreed, ruling that the graphics went beyond a mere regulation of commercial speech into the world of opinion and political speech. Alternatively, the government argued that compelled commercial speech unrelated to deception should be subject to Central Hudson’s intermediate scrutiny standard.

The Court rejected the FDA’s argument that Zauderer applied. In doing so, the court narrowed the application of Zauderer to situations where the compelled speech was tied to the government’s interest in preventing deception, thereby rejecting the argument that Zauderer applied anytime the government required disclosure of “purely factual” information divorced from any claim of deception. This connection between the proposed disclosures and deception was absent here, the majority concluded, because the new warnings were ostensibly designed

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57. See id. at 1213, 1215-16.
58. Id. at 1213-16 (quoting Zauderer v. Office of Disciplinary Counsel S. Ct. of Ohio, 471 U.S. 626, 651 (1985)).
59. Id.
63. Id.
64. See id. at 1213-16 (citing Zauderer, 471 U.S. at 651).
to “discourage consumers from buying the Companies’ products” and not as a “measure designed to combat specific deceptive claims.”65

The lower court likewise rejected the Zauderer standard, but went on to rule that strict scrutiny, the default rule for most compelled speech claims, applied.66 The circuit court disagreed, finding that previous D.C. Circuit precedent mandated application of Central Hudson’s intermediate scrutiny standard to compelled speech claims falling outside of the Zauderer rule.67 The court assumed that the government’s purported interest, to “discourage consumption of tobacco products,” was substantial, but found that the purported fit was absent.68 According to the court, the government failed to provide a “shred of evidence” that the graphic warning would in fact “directly advance” the government’s interest in encouraging more people to quit smoking.69 In fact, the FDA’s Regulatory Impact Analysis concluded that the graphic warnings would reduce U.S. smoking rates by .088%, a figure characterized by the FDA as “not statistically distinguishable from zero.”70

The dissent, in contrast, believed that a decade’s long history by tobacco companies of deceiving consumers mandated application of

65. Id. at 1216. The court went on to rule that even if Zauderer was interpreted as covering “purely factual and uncontroversial information,” that lower standard could not be met because the required images could not be “rationally be viewed . . . to convey [objective] information to consumers” but rather should be viewed as an “unabashed attempt[] to evoke emotion.” Id. at 1216-17. See generally Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,649 (June 22, 2011) (codified in 21 C.F.R. §1141 (2012)) (showing the new warning rules in question).


67. R.J. Reynolds Tobacco Co., 696 F.3d at 1217 (citing United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1138, 1142-43 (D.C. Cir. 2009)). The court also argued in the alternative that the compelled disclosure would still be impermissible under the “purely factual and uncontroversial information” standard because the proposed images were in themselves not “factual” and did not necessarily make an accurate statement regarding cigarettes. Id. at 1216. The graphic nature of the images, the court ruled, were “primarily intended to evoke an emotional response” and not to convey factual information. Id. at 1216-17.


69. Id. at 1219.

70. Id. at 1220 (quoting Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,721). Ultimately, the court remanded the case back to the FDA for further consideration. Id. at 1222.
Zauderer’s less exacting “consumer deception” standard. This conclusion, in turn, required the court to engage in a three-step inquiry. First, the court had to determine whether the cigarette manufacturers’ commercial speech presented the “possibility of deception” or had a “tendency to mislead.” The court then had to determine whether the graphics and accompanying text presented “factually accurate” information. If so, the court would then determine whether mandated inclusion of the information was “reasonably related” to the government’s interest in effectively conveying the negative health consequences of smoking.

The dissent adopted the “possibility of deception” rationale, finding that existing warnings on cigarette packages were insufficient to fully warn consumers of the inherent risks of smoking. Even if they were sufficient, the dissent continued, further warnings were justified in light of “decades of deception” by manufacturers regarding the utility of their product.

The majority and dissenting opinions parted company on the question of whether the images and accompanying textual information was “factual” or “purely emotive.” The majority essentially viewed the images in isolation, finding them to be non-factual. The dissent, in contrast, argued that the images had to be considered in light of the

71. Id. at 1222-23 (Rogers, C.J., dissenting) (citing Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,633); see also Zauderer v. Office of Disciplinary Counsel S. Ct. of Ohio, 471 U.S. 626, 652 (1985) (where the court discusses the public being deceived).

72. Id. at 1227 (Rogers, C.J., dissenting) (quoting Milavetz 559 U.S. at 251) (internal quotation marks omitted).

73. Id. at 1230 (Rogers, C.J., dissenting).

74. Id. at 1233 (Rogers, C.J., dissenting) (citing Zauderer 471 U.S. at 651). A veneer of administrative law colored both the majority opinion and the dissent. The images and accompanying text were formulated in the context of the administrative rulemaking process. Hence, the ultimate question more precisely phrased was whether the government had “substantial evidence” to conclude that the communication was “reasonably related” to preventing deception. See id.

75. See id. at 1227-28 (Rogers, C.J., dissenting) (citing Milavetz, 559 U.S. at 251) (internal quotation marks omitted).


77. See id. at 1216-17, 1222, 1230-31 n.9 (citing Entm’t Software Ass’n v. Blagojevich, 469 F.3d 641 (7th Cir. 2006)).

78. See id. at 1217.
accompanying textual warnings.\textsuperscript{79} The factual nature of the textual language, i.e. “Smoking can kill you” and “Cigarettes are addictive,” was not in dispute. Smoking is obviously hazardous to one’s health and is addictive. But in an admirable piece of legal sophistry, the dissent concluded that the graphic images, although emotive in intent, were acceptable because they were designed primarily to draw attention to the associated factual statements, and ultimately allowed for those factual statements to be better “processed” by the viewer.\textsuperscript{80} Having decided that the overall impact of the mandated communication was “factual” and “noncontroversial,” the dissent concluded that the images and accompanying text were reasonably related to the government’s interest in preventing deception.\textsuperscript{81}

2. The 6th Circuit Approach

The Sixth Circuit took a different tact in its opinion in \textit{Discount Tobacco City & Lottery, Inc. v. United States (“Discount Tobacco”).}\textsuperscript{82} In \textit{Discount Tobacco}, like the D.C. Circuit in \textit{R.J. Reynolds Tobacco Co.}, the Sixth Circuit was called upon to evaluate the constitutionality of the FDA’s new disclosure regime for tobacco products.\textsuperscript{83} Like the D.C. Circuit, the court recognized, at least implicitly, that the outcome of the case turned on the nature of the forced disclosure and the appropriate level of scrutiny.\textsuperscript{84} As to the former, the court ruled that the textual warnings were essentially factual, and therefore subject to Zauderer’s exception for such “non-controversial, factual” information.\textsuperscript{85}

The court characterized the graphics, however, as not neutral, but “subjective.”\textsuperscript{86} For that reason, the Plaintiffs argued for strict scrutiny.\textsuperscript{87} The court found the argument to not be “wholly unpersuasive,” but ultimately rejected it on the grounds that the United States Supreme Court had never explicitly applied strict scrutiny to purely commercial

\textsuperscript{79} \textit{Id.} at 1230 (Rogers, C.J., dissenting).
\textsuperscript{80} \textit{See id.} at 1230 (citing Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,642); \textit{see also id.} at 1233.
\textsuperscript{81} \textit{Id.} at 1233. In an abundance of caution, the dissent also argued in the alternative that the warnings also passed \textit{Central Hudson}’s intermediate scrutiny test. \textit{Id.} at 1235.
\textsuperscript{82} \textit{Discount Tobacco City & Lottery, Inc. v. United States}, 674 F.3d 509 (6th Cir. 2012).
\textsuperscript{83} \textit{Id.} at 520.
\textsuperscript{84} \textit{Id.} at 522.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.} at 526.
\textsuperscript{87} \textit{Id.} at 525.
At this point, however, the Sixth Circuit and the D.C. Circuit parted company. Unlike the D.C. Circuit, the Sixth Circuit upheld the graphics requirement in a single sentence, which appears to extend Zauderer to even controverted disclosures: “[l]ike other disclosures governed by the Zauderer standard, these tobacco disclosures may ‘appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.’”

The court’s opinion can be interpreted in one of two ways. The court may be saying that all advertisements for tobacco products are inherently misleading because many people do not fully appreciate the risk, despite years of being warned of those risks by the government and the health care industry. Alternatively, the opinion could be interpreted as extending Zauderer’s rational basis test to cover even “controversial” and non-factual forced speech so long as it is tied to a “non-controversial” statement (here, the warning labels). In either case, the FDA’s graphic warnings were upheld.

Similar distinctions have been drawn by courts evaluating statutory schemes that mandate the labeling of “sexually explicit” or “violent” video games. In Entertainment Software Association v. Blagojevich, to cite one example, the Seventh Circuit distinguished between mandated disclosure of “purely factual” and “subjective and highly controversial” information, ruling that the former was subject to rational basis review, the latter strict scrutiny. The Supreme Court in Brown v. Entertainment Merchants took a different approach in evaluating a video game labeling law, ruling that strict scrutiny applied, because video games were similar to protected “books, plays, and movies” and not purely “commercial” in nature.

Hence, the battle is joined. The fault lines among the various circuits lay at the distinction among (1) forced speech necessary to prevent deception; (2) forced disclosure of “factual” and/or “noncontroversial” matters; and (3) forced disclosure of “controversial” information or “emotive” speech. As for category one, courts have

88. Id. at 526-27.
90. Id. at 551. The dissent sheds little light on the nature of the majority’s decision. The dissent applied Zauderer, but suggested that the government could not show that the graphics were “reasonably tailored” to achieve the government’s goal of warning individuals of the dangers of smoking. Id. at 528.
91. Entm’t Software Ass’n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006).
consistently followed Zauderer’s rule that the government can require advertisers to include warnings, and the like, as necessary to prevent deception. This is relatively non-controversial. Category two, forced disclosure of “factual” or non-controversial matters is either subject to Zauderer’s rational basis approach or Central Hudson’s intermediate test.93 Court’s evaluating category three speech have split between Central Hudson’s intermediate scrutiny test and the default “strict scrutiny” standard for content based regulations, although the Sixth Circuit’s opinion could be interpreted as applying Zauderer even in this situation.94

III. FIRST PRINCIPLES AND UNTANGLING THE THREADS OF FORCED SPEECH AND COMMERCIAL SPEECH

As should be evident from the myriad of opinions that have been authored in the world of forced commercial speech, the marriage between Central Hudson and the forced speech doctrine has been uneasy. At its bottom, courts that have given the government greater leeway to compel statements by commercial advertisers have conflated the justifications for giving commercial speech less protection with arguments against forced speech in general. In R.J. Reynolds Tobacco, for example, the court noted that:

Whereas in the context of noncommercial speech, “compulsion to speak may be as violative of the First Amendment as prohibitions on speech” and thus trigger [strict scrutiny], in the context of commercial speech, compulsion to speak may be less violative of the First Amendment than prohibitions on speech and thus trigger a lower level of scrutiny.95

The problem with this statement is that applying principles

93. See e.g., Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (applying rational basis review to state statute that required manufacturers to provide informational text regarding the mercury content of their products and discussing how the Central Hudson test should apply to statutes that restrict commercial speech).

94. Professor Dayna B. Royal, in the article Resolving the Compelled-Commercial-Speech Conundrum, 19 VA. J. SOC. POL’Y & L. 205 (2011), took a slightly different approach. Professor Royal argues that courts have applied a slightly different three tier approach: compelled disclosure of “uncontroverted factual information” is subject to a “reasonable relationship” test, compelled disclosure of controverted factual information is subject to intermediate scrutiny, and compelled disclosure of “ideology” warrants strict scrutiny. Id. at 235.

developed in the context of government prohibiting commercial speech are both qualitatively, and quantitatively, different when applied to situations where the government is requiring commercial speech. Conversely, the fact that laws prohibiting commercial speech are subject to a lower level of scrutiny does not mean that laws compelling commercial speech ipso facto should reflexively be subject to the same lower standard. To understand this distinction requires a further discussion of the different constitutional principles that animate the two.

At bottom, the issue distills to the question of whether laws compelling advertisers to speak are more, less or as problematic as laws which prohibit certain forms of commercial speech. In the realm of political speech, the court has suggested that forced speech is at least as problematic, and perhaps more so, than regulatory limits. That

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96. See, e.g., Riley v. Nat’l Fed’n of the Blind of N.C., Inc., 487 U.S. 781, 796-97 (1988) (asserting that the freedom to speak and the freedom to remain silent are co-equal under the First Amendment). The court’s analysis in R.J. Reynolds assumes that there is a clear demarcation between “political” and “commercial speech.” See J.R. Reynolds Tobacco Co., 696 F.3d at 1226-27. As the Court suggests in Bigelow v. Virginia, 421 U.S. 809, 819-20 (1975), a case involving advertisements for abortion services, the distinction between “commercial” and “political” speech is not always evident. This point was made explicit in Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 764-65 (1976), where the Court noted that a pharmacist seeking to advertise his or her prices could avoid the “commercial speech” label by “cast[ing] himself as a commentator on store-to-store disparities in drug prices.” The recent decision in Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010) has further blurred the distinction between “political” and “commercial” speech. The Court in Citizens United ruled that a categorical ban of independent “issue” speech by for-profit corporations was subject to the strict scrutiny standard applicable to content based restrictions. Id. at 340. Logic suggests that corporations which choose to speak on electoral issues are ultimately motivated by profit. Gas companies do not run ads in favor of new pipelines because of a benign interest in more pipelines. They do so because there is profit to be had by opening up new gas markets. By definition, “pure” commercial speech is likewise motivated by profit. Outside of the realm of deception, for-profit corporate commercial speech and for-profit corporate political speech serve the same master.

Part of the confusion in distinguishing the two stems from the somewhat inconsistent manner in which the Supreme Court has defined commercial speech. Compare Va. State Bd. of Pharmacy, 425 U.S. at 762 (“[Commercial speech] does no more than propose a commercial transaction.”) with Cent. Hudson Gas & Elec. Corp., v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 561 (1980) (defining commercial speech as “expression related solely to the economic interests of the speaker and its audience”); see also Riley, 487 U.S. at 796 (1988) (ruling that solicitations by professional fundraisers are not commercial speech because, inter alia, their commercial aspects are “inextricably intertwined with otherwise fully protected speech”); see also Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (finding that the District Court held that proposed mailings are all commercial speech). See generally, Kathryn E. Gilbert,
presumption has been flipped in the area of commercial speech, where a number of courts have ruled that forced commercial speech is less problematic than restrictions on what speakers can say to sell their goods and services.

A. THE DICHTOMY AND JUSTIFICATION FOR LIMITING SPEECH

The dichotomy drawn by some courts between forced commercial speech and forced “political” speech fails to appreciate the constitutional values that animate the forced speech doctrine, as compared to the values that underlie the analysis of government action which prevents speech from being uttered in the first instance. Broadly stated, constitutional restrictions on laws that limit speech are justified by two principles. First, legal restrictions on speech raise the specter of government censorship of unpopular ideas. The danger of government censorship scarcely needs to be repeated here. As stated by Justice Douglas, “[r]estricion of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us.” Our constitutional condemnation of censorship is also justified by the analogy to the marketplace: more speech is better than less and a cacophony in the marketplace is the sign of a healthy democracy. Although volumes have been written on the “marketplace”


97. The concept of whether a particular statement is “non-controversial” is in itself problematic, depending on whether the statement being compelled is analyzed at the cognitive or the emotive level. In the context of cigarette packaging, the statement “smoking harms your health” is cognitively non-controversial. Smoking is bad for your physical health. But analyzed at the emotive level, a different answer is possible. The message being propounded by cigarette manufacturers—that smoking can be enjoyable and is a matter of choice—is being subtly (and not so subtly) undermined by the forced disclosure. In essence, the warning that smoking is hazardous for your health is little different from the government stating that, “rational people would not choose to smoke because smoking is physically harmful.” In defense of the thousands of presumably rational people who choose to smoke, the contrary message, i.e. that they are being irrational, is controversial. At the granular level, the notice is uncontroversial because it is factually true. The same is not true at the macro level, where emotion and bias plays on rational decision making. For a general discussion of the effect of bias on decision making, see Nate Silver, The Signal and the Noise: Why So Many Predictions Fail—But Some Don’t 58-59 (2012).


99. See, e.g., United States v. Caldwell, 408 U.S. 665, 715 (1972) (Douglas, J.,
concept, at the bottom, government restrictions on speech are bad because they raise the specter of the government using its power to squelch messages propounded by the politically disfavored.\textsuperscript{100} A market dominated by one speaker is a monopoly, with all of its attendant inefficiencies and corruption.

B. The Application of the Principles That Justify Limiting Speech

Applying these principles to laws restricting commercial speech justifies the application of intermediate scrutiny. Censorship and the chilling effect that arises from it are less of a concern in the realm of commercial speech because self-expression is only part of the speaker’s motivation. As recognized by the court in \textit{Virginia Pharmacy}, the profit motive is a powerful antidote to the chilling effect that can result from censorship of political speech.\textsuperscript{101} Conversely, concerns over censorship do not arise in the world of forced commercial speech because the government in such a case is not, strictly speaking, censoring the advertisers’ message. The advertiser remains free to speak so long as she includes the message favored by the government.

The marketplace of commercial ideas, similarly, is not likely to be seriously damaged by the occasional government restriction. According to a Price Waterhouse Cooper study, internet advertising alone grew from $6 billion in 2002 to over $36 billion ten years later.\textsuperscript{102} By some estimates, the total spent on advertising in the United States exceeded $140 billion in 2012.\textsuperscript{103} Common sense and experience suggests that a regulation prohibiting advertisers from lying about their product is unlikely to substantially impair the vibrancy of the advertising

\begin{thebibliography}{9}
\bibitem{VirginiaPharmacy} \textit{Va. State Bd. of Pharmacy}, 425 U.S. at 771 n.24.
\end{thebibliography}
marketplace.

C. CONCERNS WITH FORCED SPEECH

The concern with forced speech is premised on different value judgments, however, which apply with equal force to commercial and non-commercial speakers. Foremost, forced speech is problematic because it results in the government invading the “sphere of intellect and spirit which . . . is the purpose of the First Amendment to our Constitution to reserve from all official control.” The term self-expression, when used in the context of the forced speech doctrine is very telling. As recognized by Professor Nimmer, “freedom of expression is an end in itself.” Or, as Justice Brandeis suggested in his seminal concurrence in Whitney v. California, self-expression is necessary for self-fulfillment, which in turn is the “secret of happiness.” Forced expression of a government dictated message with which one disagrees is by definition antithetical to the “self” in the phrase “self-expression.”

1. The Interests of the Speaker and Listener

The Court, as well as common sense, recognizes that the First Amendment’s concern with the “sphere of intellect” in the context of forced speech implicates the interests of both “speakers” and “listeners.” This is particularly true for commercial speech. Successful advertisers sell a life style. Hence, Nike’s “Just Do It” or

104. For a detailed description of the dichotomy between the interests of the speaker and those of the listener, see Laurent Sacharoff, Listener Interests in Compelled Speech Cases, 44 Cal. W. L. Rev. 329, 332-33 (2011).
108. For an insightful discussion of the values served by the forced speech doctrine, See Royal, supra note 94, at 209; see also Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) (“at the heart of the First Amendment is the notion . . . that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State”).
DeBeers “A Diamond is Forever” ad campaigns were successful in part because they convinced individuals that use of their products would result in the purchaser expressing a message of “high performing” or “adventurous,”110 in the case of Nike, or “sophisticated” in the case of DeBeers.111 Nike’s efforts to express its favorite message, and the transference to the consumer of the favored attributes, would have been rendered ineffectual had the government required the “truthful” disclosure that “doing it” too much or “doing it” without proper training can result in bad knees, sore backs and myriad of aches and pains. The speaker has an interest in fostering a certain brand image through advertisement.

The interest of the speaker in selling an image is self-evident. Less obvious, but equally important, is the listener’s interest in adopting as part of their own self-image the conveyed message. People don’t wear Nike logo shirts because they are inexpensive. They wear them because the Nike message has become part of their identity and self-expression. People who wear Nike brand apparel are communicating a message to the world: “I am active,” “I am a ‘doer,’” “I am an athlete,” and “I am competitive.”112 Nike has spent hundreds of millions of dollars to foster that message and it has been adopted by scores of individuals who want to share in its attributes. Forcing Nike to change the message in the interest of full disclosure risks destroys the message, a message that individual consumers may find important to their own self-fulfillment.113

Forced speech is also contrary to the interests of listeners to obtain information free from government distortion. The problem of distortion exists at two levels. First, forced speech can increase listener confusion


113. The concept of brand imaging is endemic to the world of advertising, i.e. Air Jordan tennis shoes, Calvin Klein apparel, Victoria’s Secret Lingerie, The Marlboro Man. In each case, and thousands of others too lengthy to list, the goal of the advertiser is to transfer to the user an image that comes with the use of their product.
because the identity of the speaker is not always evident. As stated by Justice Souter in his dissent in Johanns v. Livestock Marketing Association, no one who reads an advertisement advertising “Beef, it’s What’s for Dinner” attributed to “America’s Beef Producers” would “suspect that the message comes from the National Government.”

Absent a “warning label” (i.e., “this warning is brought to you by the federal government”) on a “warning label,” someone reading a tobacco package or a pharmaceutical advertisement has no way of knowing who is actually speaking when they are being informed about the risks of the product. The forced speech doctrine recognizes that listeners have an interest in being able to identify the actual speaker, which can become muddled when individuals are compelled to add information they would otherwise prefer to exclude.

In other words, the listener has a First Amendment right to hear “pure” speech that has not been obscured by the government.

Second, tying government speech to the advertiser’s preferred message can amplify, and therefore distort, the value of the government message. Weighing the relative value of any message is tricky business, but one does not need a Ph.D. in Cognitive Studies to understand how a listener might overvalue the message “this medicine may cause death” when it is tied to the favored (and presumably accurate) message that “taking this product may save your life.”

Related to distortion is the concept of “dilution.” Forceful speech without caveat is effective speech. “F*** the Draft” conveys a more powerful message than “F*** the Draft, Although it May be Necessary to Maintain Military Preparedness.”

Although the latter may be more accurate, the former more clearly and effectively conveys the speaker’s message. In the context of commercial speech, saying “Cialis will


116. Sacharoff, supra note 104, at 333 (arguing that the First Amendment right in commercial speech cases belongs to the listener, and that the listener’s right to pure speech is infringed when the government forces private companies to tout its message through disclosures).

117. Id.

improve your love life” is more powerful than “Cialis will give you an erection, if it doesn’t kill you or increase your blood pressure.” Again, the latter may be more accurate, but the former leaves no doubt as to the speaker’s message. Commercial speakers, no less than political speakers, have both an incentive and a right to convey their messages forcefully. Indeed, the more forceful the speech, the more likely that it will engender an equally forceful response. This, of course, is the basis for the entire “marketplace of ideas” theory of speech.119 Forcing an advertiser to publicize the “other side” dilutes the advertiser’s preferred message.120

2. Paternalism and Autonomy

Forced speech is also paternalistic. At the core of the First Amendment lies the principle of autonomy, i.e., the notion that each individual should have the autonomy to make decisions free from undue outside influence.121 The concept of paternalism and related concept of autonomy are notoriously difficult to define. As defined by the Stanford Encyclopedia of Philosophy, paternalism “is the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm.”122 Professor Lowenstein similarly defines paternalism as “speech restrictions intended to protect the consumer against his or her own imprudent action.”123 In either case,

119. Consider the flag burner in Texas v. Johnson, 491 U.S. 397 (1989). Burning a flag is among the most forceful and emotive way to express dissatisfaction with government policy. Had Johnson merely stood on a corner denouncing American foreign policy, he would have been quickly forgotten. By burning the flag, Johnson’s protest continues to reverberate. But the force of his speech was ultimately met with an equally powerful response. An onlooker, outraged by Johnson’s speech, took the burned flag and accorded it a respectful burial. Id. at 420.

120. As stated by the Supreme Court in Riley v. Nat’l Fed’n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988), “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech.”

121. As stated by John Stuart Mill, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. . . . Over himself, over his own body and mind, the individual is sovereign.” JOHN STUART MILL, ON LIBERTY 22 (4th ed. 1869)


“paternalism” is problematic because it posits that individuals are less-than-rational in their decision making, and therefore, need an outside agent to guide them towards making a logical decision.124 This in turn raises two philosophical concerns. First, the very concept of liberty is rooted at some level on the notion of individual autonomy. The freedom to make choices posits the freedom to make decisions free from undue influence. Hence, wills may be voided if the “consent” of the deceased was obtained through undue influence.125 Contracts of adhesion, where one party to the contract did not have the autonomy to make a true choice, are similarly invalid.126 Fraud is both a tort and crime in part because the defrauded party made a decision that was not truly autonomous, but obtained through artifice.127

In a related fashion, paternalism posits that the speaker is wiser, more knowledgeable and simply “knows better” than the person receiving the information; but no person, much less a government, can truly make wholly objective decisions. The decision the government is attempting to coerce by placing unwanted messages in the mouths of advertisers may—or may not—be the best decision for the person receiving the information. Individuals can logically consent to harm. People can logically decide the utility of eating a greasy hamburger is greater than losing that extra five pounds. A decision made by any individual free from coercion may be better, for that individual, than the decision favored by the government.128

The freedom of autonomy also presupposes the freedom to choose disclosure, Professor Lowenstein disagrees with the argument that the Virginia statute was paternalistic, arguing instead that overall consumer utility would be served by not allowing low-cost, low-quality pharmacists to “free ride” on the overall reputation of the profession. Id. at 1239-40. Professor Dworkin sets a slightly different tone, defining paternalism as “roughly the interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.” Gerald Dworkin, Paternalism, in MORALITY AND THE LAW 107-08 (Richard A. Wasserstrom ed., 1971).

124. Lowenstein, supra note 123, at 1238.
125. 36 AM. JUR. 2D Proof of Facts § 1 (1983).
127. C.f. Smith v. Richards, 38 U.S. 26, 39 (1839) (discussing how materially untrue statements deprive listeners of information they need to make a wise decision).
128. Although still in its infancy, recent scholarship suggest that a lesser informed decision, that is to say an instinctual decision, may often times end up better than a decision made after ample reflection. See E-mail from Angelika Dimoka, Dir., Ctr. for Neural Decision Making, Temple Univ., to Devine Schindler, Professor of Law, Thomas M. Cooley Law School (Feb. 19, 2013, 09:53 EST) (on file with author).
what sources to consider when making a decision. As stated by Professor Lowenstein, “the decision of what information to acquire is itself one of the self-determining choices humans make.”129 Hence, a person can rationally decide to forgo internet research regarding which television is the best or which car gets the best mileage, knowing full well that they have chosen to make a lesser-informed decision. Forcing an advertiser to relay the government’s contrary message takes that autonomy away from the consumer who makes a conscience choice to not seek additional information before making a decision.

The political community should be particularly vigilant when the coerced message is the governments. As argued by Stephen Gardbaum:

With respect specifically to authority, the state is special because it cannot purport to act nonauthoritatively. A way of life that the state endorses and promotes, even through symbolic or persuasive means, is an “authorized” way of life. The concern is that individuals may defer to the state’s authority, just as we normally wish them to do in the case of general obedience to the law. Yet, adopting a valuable way of life out of deference to authority is counterproductive from the perspective of autonomy.130

This is particularly true when the government is one step removed from listener. A listener to speech attributed to the government at least has the benefit of being able to evaluate the idea being advanced knowing that the government is the proponent. When government requires others to speak on its behalf, however, the listener’s ability to consider the speaker is undermined.131

The Supreme Court has identified “autonomy,” the inverse of paternalism, as a value embodied in the First Amendment. In Virginia Pharmacy, to cite one example, the Court rejected the state’s argument that allowing pharmacists to advertise price information would result in “unwitting customers” utilizing the services of “low quality” pharmacists.132 Finding this approach to be “highly paternalistic,” the

129. Lowenstein, supra note 123, at 1244.
131. See infra note 137 and accompanying text (discussing the problem of listener confusion).
Court concluded that opening the channels of communication would serve the value of autonomy by allowing individuals to make informed decisions on what is in “their own best interests.”

A similar approach was employed by the Court in *Riley v. National Federation of the Blind of North Carolina, Inc.*, in which the Court struck down a North Carolina law that required professional fundraisers to disclose the actual amount they passed onto charities before making a solicitation. The Court rejected the state’s argument that the law was necessary to protect the charities for their own benefit on the grounds that such a highly “paternalistic” justification was contrary to the First Amendment presumption “that speakers, not the government, know best both what they want to say and how to say it.” As perhaps best stated by Justice Jackson, “[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.”

Granted, the Court has not been entirely consistent in its approach to paternalistic restrictions on speech. Hence, in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, the Court upheld a prohibition on advertisements for casino gambling which was largely justified by the government’s paternalistic belief that gambling harms the individual. In the context of the regulation of commercial speech, the Court recognized paternalism as a legitimate justification under the

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133. *Id.; see also* Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002) (“We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions . . .”).


135. *Id.* at 790-91. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) (rejecting the State’s argument that a closed primary law was justified as protecting a political party from “from undertaking a course of conduct destructive of its own interests”); *Linmark Ass’n v. Willingboro*, 431 U.S. 85, 96-97 (1977) (rejecting as paternalistic the States’ argument that limits on signs in yards was necessary to maintain the quality of neighborhoods by restricting speech to residents).


137. *Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 348 (1986). Given the rise of state sponsored lotteries, and the ample government-sponsored advertising that comes with them, *Posadas* highlights the danger that government compelled speech can have the paradoxical effect of increasing consumer confusion. On the one hand, states that sponsor and advertise lotteries are communicating the message that gambling is a fun, potentially remunerative activity. Prohibiting advertisements of private casinos, on the other hand, communicates the exact opposite message. Governments, like people, do not always communicate a consistent message.
Constitution that may ultimately be unavoidable.\footnote{138}

Perhaps ironically, paternalism as a normative value has been justified as expanding the freedom of autonomy. Autonomous decision making presupposes that individuals are armed with all information necessary to make a rational decision.\footnote{139} Under this doctrine “paternalism”, and by extension, “forced speech”, is acceptable when necessary to insure fully informed decision making.\footnote{140} John Stuart Mill, in his work,\textit{On Liberty}, illuminates this point through the example of the damaged bridge.\footnote{141} Assume that you are observing a person who does not speak your language approaching a damaged bridge that is likely to collapse if he or she treads upon it. Paternalism—say stopping the individual before they cross the bridge to ensure they are aware of the danger—is appropriate in this context, according to Mill, because the decision to cross without this knowledge is not truly autonomous.\footnote{142} To extend the analogy, the government in the cigarette labeling cases is essentially arguing that the coerced labeling is necessary because individuals who are choosing whether to smoke, like the fictional bridge-crosser, lack enough information to make a truly rational decision.

Mill’s argument should be rejected in the context of forced commercial speech. First, the analogy is premised on the idea that the relevant information, i.e., the condition of the bridge, is only readily available from the bystander observing the bridge. But that is certainly not true in society awash in web pages, twitter accounts, 250 cable stations and traditional publications. With rare exceptions\footnote{143} the information necessary to make fully informed decisions is available, irrespective of whether the government forces the advertiser to include it in their message. The message that cigarettes are addictive and harmful

\footnote{138}{\textit{Id.} at 339-40; see, e.g., James Weinstein, \textit{Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky}, 54 CASE W. RES. L. REV. 1091, 1105-06 (2004); Post, \textit{supra} note 109, at 37.}

\footnote{139}{See, e.g., Abner S. Greene, \textit{Government of the Good}, 53 VAND. L. REV. 1, 28 (2000) (“Citizen autonomy involves elements of both knowledge and voluntariness: one should know the full set of arguments and options before making a choice, and one should be able to make a choice free of coercion.”).}

\footnote{140}{\textit{Id.} at 54 (citing David Cole, \textit{Beyond Unconstitutional Conditions: Charting Spheres of Neutrality In Government-Funded Speech}, 67 N.Y.U. L. REV. 675, 716 (1992)).}

\footnote{141}{\textit{Mill, supra} note 121, at 172-73.}

\footnote{142}{\textit{Id.}}

\footnote{143}{Such as national security or trade secrets.}
to one’s health has been—and continues to be—amply disseminated. 144
Simply put, anyone who first learns from reading a cigarette package
that cigarettes can be dangerous has lived far too long under a rock.

Second, the concept of autonomy presupposes the right to ignore
information others may find relevant. The decision whether to seek
additional information, given a finite period of time and cognitive
ability, is as much an exercise of autonomy as the ultimate decision
whether to purchase a particular product. 145 To draw the bridge analogy
to beyond its breaking point, the “bridge” (here, the decision to be made
by the consumer) has a sign in front of it that says “important information
below—proceed at your own risk” followed by a detailed description of
the condition of the bridge. At that point, the decision to proceed without
reading the information is made autonomously. The bridge crosser who
ignores the sign has made an autonomous decision, no different than the
crosser who reads the sign and goes forward despite the potential danger.
The decision to purchase cigarettes without bothering first to research
their possible effects is likewise an exercise of autonomy.

3. More Information is Not Always Better Than Less

Perhaps the biggest concern with compelled commercial speech,
however, is that its fundamental precept, the commonsense notion that
“more” information is always better than “less,” 146 is likely wrong. The
idea that more speech leads to better decision making is deeply rooted in
First Amendment jurisprudence. 147 If true, this principle would support

144. Typing in the phrase “tobacco” and “health risks” into the Google search engine results in over 3 million “hits.”
information requires them to “to find an approximate model of manageable
proportions”). In the language of social science, people faced with complex decisions
generally choose to “satisfice”, i.e., make an “adequate” decision, instead of spending
the time necessary to make the “optimal” decision. Id. at 108.
U.S. 748, 770 (1976) (“[P]eople will perceive their own best interests if only they are
well enough informed, and that the best means to that end is to open the channels of
communication rather than to close them.”); Thompson v. Western States Med. Ctr., 535
U.S. 357, 375 (2002). For a concise criticism of the “more is better” principal, see Jeremy
D. Fraiberg & Michael J. Trebilcock, Risk Regulation: Technocratic and Democratic
not always easily remedied merely through the provision of additional information”).
147. In the words of Justice Douglas, “effective self-government cannot succeed
unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of
different rules for government restrictions on speech and compelled speech. Government restrictions on speech, the argument goes, are more problematic than forced speech because they tend to restrict information from reaching the marketplace. Compelled speech, in contrast, serves the purpose of expanding the amount of information available to consumers. In practical terms, devotion to the theory that “more is better” would result in a less burdensome standard of review of statutes and regulations that forced disclosures, at least to the extent that such disclosures are factual and non-controversial.148

But recent scholarship suggests otherwise. In his popularizing book Blink, former science reporter Malcolm Gladwell makes a compelling case for the argument that decisions made “very quickly”, i.e. with a minimal amount of deliberation, can be as good or even better than decisions made after an extended period of reflection and information gathering.149 Citing studies and anecdotes from the military, medicine, science, sports, and even dating, Gladwell and the researchers he cites come to the counterintuitive conclusion that too much information can lead to less optimal decision making.150

Consider the story told by Gladwell of the creation of a flow chart now in common use for determining whether an individual presenting in an emergency room is suffering a coronary infarction.151 In 1996, Cook County Hospital in Chicago was the facility of last choice. A combination of dilapidated facilities and budget woes had resulted in the Hospital’s emergency department being overwhelmed.152 In an effort to clear the quagmire, the Chairman of the Hospital’s Department of Medicine, Brendan Reilly, began studying how the emergency department could better manage patients presenting with chest pain.153 Historically, the decision whether to admit someone with chest pain was

opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination.” United States v. Caldwell, 408 U.S. 665, 715 (1972) (Douglas, J., dissenting).

148. In Thompson v. Western States Medical Center, the Court noted that failure to disclose potential side effect of compounded medications did not necessarily render advertisements for the drugs misleading. Thompson, 535 U.S. at 376.
150. Id. at 107, 136.
151. Id. at 136.
152. Id. at 132.
153. Id. at 126.
made by individual physicians. Consistent with common sense, physicians employed the “more is better” rule, ordering multiple tests and doing extensive examinations.

Reilly concluded that much of the information being collected and reviewed was unnecessary. He then developed a flow chart algorithm that required only four inputs. A two-year follow up study comparing the “less information” method of diagnosing coronary infarctions with the traditional “more is better” method revealed that the algorithm method was 95% accurate, compared with an accuracy rate between 75% to 89% for the traditional method. Not only was the “less is more” approach more accurate, but by limiting the amount of information being considered, the algorithm helped to clear the Emergency Department so it could give better and more timely service to more patients. Gladwell concludes that in terms of diagnosing heart problems, “extra information is more than useless; it’s harmful and it confuses the issues.”

Gladwell’s conclusion is well-grounded in science. A number of studies have concluded that information overload, or at least perceived information overload, is a real phenomenon that results in individuals ultimately making less than ideal choices.

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154. *Id.* at 128-29.
155. *Id.* at 136.
156. *Id.* at 133-34.
157. The four inputs are the ECG results, unstable angina, fluid in the lungs and systolic blood pressure below 100. *Id.* at 134.
158. *Id.* at 136.
159. *Id.* at 137.
160. *Id.* Concerns about information overload are not new. In his famous work, *Future Shock*, the futurist Alvin Toffler argued that the human mind has only a finite ability to receive and process information. *Alvin Toffler, Future Shock* 305 (1970). Toffler feared that the dramatic increase of information and its widespread dissemination would result in listlessness, flawed decision making and even mental or physical disabilities. *Id.* at 318-19. He called this condition “Future Shock Syndrome.” *Id.* at 366. Recent MRI studies support the idea that too much information can cause problems with memory, emotion control and anxiety. *Id.* at 308-09; *See also* Sharon Begley, *I Can’t Think!*, *The Daily Beast/News Week* (Feb. 27, 2011, 10:00 AM), http://www.thedailybeast.com/newsweek/2011/02/27/i-can-t-think.print.html.
when our mammalian brains honed for survival in the bush collide with an increasingly complex world.\textsuperscript{162} The perfectly rational individual capable of absorbing and effectively processing all relevant information before making a decision is a myth. In his seminal work on the limits of rationality, social scientist Herbert Simon argued that at best people are “boundedly rational”; the boundary being the limits of our cognitive ability.\textsuperscript{163} Or, as stated by one set of authors, “[i]n short, even with technology, there is only so much we humans can know, learn, mentally absorb, and incorporate into a broader Weltanschauung.”\textsuperscript{164}

The limits in our cognitive ability to absorb information results, Simon argues, in rational people “satisficing” as opposed to “optimizing” in making decisions. Hence, an individual faced with too much information will choose the first option that meets whatever aspirational level has been set by that person, as opposed to absorbing and processing the additional information necessary to make the optimal decision.\textsuperscript{165}

A number of studies have suggested that too much information can interfere with bounded rational decision making. First, the brain confronted with too much information can essentially decide, subconsciously, to “surrender” and ignore rationality in favor of emotion.\textsuperscript{166} Consider the plight of the average investor deciding whether to purchase a CD, the stock of an established blue chip company, the

\textsuperscript{162} See Jacoby et al., supra note 161, at 33-34.


\textsuperscript{166} Jacoby et al., supra note 161, at 40.
stock of a high-flying tech company or a mutual fund. The buyer initially considers two variables—price and risk. But then comes the 100+ page prospectus (in the case of the mutual fund) or the annual report (in the case of the blue-chip company). The information available to the investor compounds geometrically. P/E ratios, five year trends, inflation risks, litigation risk and the like begin to crowd into the equation. At some point, too many investors throw up their hands and make the choice based on what their broker told them last. The broker, however, is not necessarily any better capable or processing the information available and his or her decision making may easily be influenced by their own self-interest (i.e. the commission is higher on the mutual fund.). The onslaught of information may result in a worse decision than one that considered only price and risk, just as a physician confronted with dozens of variables may choose a worse course of treatment than one who considers the four data points described in Gladwell’s book.167

Cognitive overload can also result in placing too much emphasis on the wrong or less relevant information. To use a colloquialism, too much information can result in the decision maker losing sight of the proverbial forest for the trees. The idea that people tend to remember, and, therefore, overvalue the first information they receive (“primacy”) and the last information (recency) is well established.168 This cognitive truism, however, can result in less optimal decision making when the information received first or last is in reality of little importance. Hence, if by statute the message “this medication can help you” is buried among a flurry of government mandated negative messages (“this medication may cause bleeding”), an otherwise rational decision maker may make the “wrong” decision for the wrong reasons.

Although the specifics differ, most studies of information overload have concluded that at some point, usually between the introduction of the fifth through tenth variable, concentration wanes and individuals’ decision making ability degrades.169 The physiology of this

169. See, e.g., Peter Wright, Consumer Choice Strategies: Simplifying vs. Optimizing, 12 J. MARKETING RES. 60, 63 (1975) (stating that six variables is optimal; ten variables results in information overload); BETTMAN, supra note 161, at 226 (consumers will adopt simplifying strategies that result in less than optimal choices when the number of
phenomenon was observed for the first time in a study recently completed by Angelika Dimoka, director of the Center for Neural Decision Making at Temple University. Doctor Dimoka used a “functional magnetic resonance imaging” (fMRI) scanner to observe the brain activity of individuals who were participating in an exercise known as “combinatorial auctions.” In a combinatorial auction, participants are asked to make optimal bids on a number of items being offered either individually or in combination. As the auction progresses, bidders are required to process a steadily increasing amount of information. Brain activity in the dorsolateral prefrontal cortex, a part of the brain responsible for higher cognitive functions, increases as the volume of information increases. At some point, however, the brain becomes overwhelmed and starts to act less rationally. As described by Dr. Dimoka, “[t]he bidders reach cognitive and information overload.” Ultimately, too much information results in “people’s decisions making less and less sense.”

D. COGNITIVE OVERLOAD, COMMERCIAL SPEECH AND “REAL WORLD” DECISION MAKING

The concept of information overload has not been lost on the court. In Ford Motor Credit Co. v. Milhollin the Court ruled that the Truth in Lending Act did not require lenders to include a detailed description on the first page of the loan of the lender’s right to accelerate payment of the debt. The Court’s reasoning was based in part on recognition that “too much” disclosure could have a paradoxical effect:

The concept of “meaningful disclosure” that animates TILA . . . cannot be applied in the abstract. Meaningful disclosure does not mean more disclosure. Rather, it describes a balance between “competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload.]” . . . And striking the appropriate balance is an empirical process that entails investigation.
into consumer psychology.\footnote{177} The concept of “informational overload,” recognized by the Court in \textit{Ford Motor Credit}, and the poor decisions it can lead to, is particularly problematic in the world of advertising.\footnote{178} Consider the world of pharmaceutical advertisements, which are heavily regulated by federal law. Manufacturers who wish to advertise their medications, for example, are told: (1) where and how the ingredients must be listed;\footnote{179} (2) what the drug can be called;\footnote{180} and (3) the font that must be used in print advertisements.\footnote{181} Most importantly, advertisers of pharmaceutical products are required to include a “brief summary” of every possible side effect that might potentially arise from use of the medication:

All advertisements for any prescription drug . . . shall present a true statement of information in brief summary relating to side effects, contraindications . . . and effectiveness. Advertisements broadcast through media such as radio, television, or telephone communications systems shall include information relating to the major side effects and contraindications of the advertised drugs in the audio or audio and visual parts of the presentation and unless adequate provision is made for dissemination of the approved or permitted package labeling in connection with the broadcast.

\footnote{177} \textit{Id.} at 568.  
\footnote{178} \textit{See, e.g.,} John D. Hanson & Douglas A. Kysar, \textit{Taking Behavioralism Seriously: Some Evidence of Market Manipulation}, 112 \textit{Harv. L. Rev.} 1420, 1454 (1999) (“[I]t is naive to presume that consumers can rationally process all the information necessary to optimize their purchases.”). Professor Hanson and Kysar are highly critical of advertisers and pharmaceutical advertisers in particular, accusing them of market manipulation bordering on fraud. \textit{Id.} at 1455-57. Their solution is to expand the concept of “enterprise liability” to encompass “egregious” “market manipulation” by advertisers. \textit{Id.} at 1556. Consistent with the views of the authors of this essay, Professors Hanson and Kysar agree that government “command and control” regimes whereby market manipulation is regulated by the government are ineffective. \textit{Id.}

\footnote{179} “The ingredient information required by section 502(n) of the Federal Food, Drug, and Cosmetic Act shall appear together, without any intervening written, printed, or graphic matter, except the proprietary names of ingredients, which may be included with the listing of established names.” 21 C.F.R § 202(a)(1) (2013).

\footnote{180} “The advertisement shall not employ a fanciful proprietary name for the drug or any ingredient in such a manner as to imply that the drug or ingredient has some unique effectiveness or composition, when, in fact, the drug or ingredient is a common substance, the limitations of which are readily recognized when the drug or ingredient is listed by its established name. §202(a)(3).

\footnote{181} “The established name shall be printed in letters that are at least half as large as the letters comprising the proprietary name or designation with which it is joined . . . .” §202(a)(5)(b)(1).
presentation shall contain a brief summary of all necessary information related to side effects and contraindications.\textsuperscript{182}

In addition to the required disclosures, the regulations also explain twenty ways in which an advertisement is false, lacking in fair balance or otherwise misleading,\textsuperscript{183} as well as thirteen ways in which an advertisement may be false, lacking in fair balance, or otherwise misleading.\textsuperscript{184} As a result, the average pharmaceutical advertisement contains over twice as much “disclosure” as it does “advertisement.”\textsuperscript{185}

The upshot of this regulatory system is that pharmaceutical advertisers are obligated to disclose what are essentially non-existent risks. This mandated “over disclosure” likely has detrimental real world consequences. As it turns out, people are generally terrible at assessing risk, particularly when an activity poses an infinitesimal, but highly consequential risk. In plain language, people overreact to miniscule risk. This form of decision bias, known as probability neglect, results in people overestimating risk and making irrational decision to avoid it.\textsuperscript{186}

Consider a study done by Professor Cass Sunstein of the University of Chicago in which he presented law students—presumably a cognitively advanced group—with four different scenarios involving cancer from

\begin{itemize}
  \item \textsuperscript{182} § 202(e)(1).
  \item \textsuperscript{183} § 202(e)(6)(i-xx).
  \item \textsuperscript{184} §202(e)(7)(i-xiii).
  \item \textsuperscript{185} See supra note 3 and accompanying text.
  \item \textsuperscript{186} See, e.g., Peter M. Sandman et al., \textit{Communications to Reduce Risk Underestimation and Overestimation}, 3 \textit{RISK DECISION & POL’Y} 93, 93 (1998), available at http://www.petersandman.com/articles/underest.htm. In this study, 1,402 test subjects were given three hypothetical news stories involving radiation threats in the home. \textit{Id.} at 95. In one of the stories, the radioactive threat came from natural occurring radon. \textit{Id.} at 97. In the latter two, the risk came from sands used by a nearby nuclear waste facility that had been used to cover spent nuclear power fuel rods. \textit{Id.} In one case, the sand had been illegally used to make concrete for the home’s foundations. \textit{Id.} In the other, the radioactive threat from the concrete was not discovered until after the fact. \textit{Id.} Critically, in all three cases, the risk of danger was identical, one in one million. \textit{Id.} Notwithstanding that the risk in all three cases was identical, test subjects perceived a much greater threat, and a higher willingness to take actions to reduce that threat, when considering the nuclear power story. \textit{Id.}; Peter M. Sandman et al., \textit{Agency Communication, Community Outrage, and Perception of Risk: Three Simulation Experiments}, 13 \textit{RISK ANALYSIS} 585, 585-98 (1993), available at: http://www.psandman.com/articles/simulate.htm. See also Paul Slovic et al., \textit{Risk as Analysis and Risk as Feelings: Some Thoughts About Affect, Reason, Risk, and Rationality} 21 (Nat’l Cancer Inst. Workshop on Conceptualizing and Measuring Risk Perceptions, Decision Research Paper, 2003), available at http://dccps.nci.nih.gov/BRP/presentations/slovic.pdf.
\end{itemize}
arsenic poisoning.187 The first group was asked how much they would pay to eliminate a 1/1,000,000 risk of contracting cancer from arsenic poisoning from water. The second group was asked the same question, but the risk was reduced to 1/100,000.188 The third group was presented with 1/1,000,000 risk, but the cancer was described in excruciating detail.189 The final group was given the same detailed description, with the risk again reduced to 1/100,000.190 Commonsense would suggest that a person should be willing to pay ten times more to eliminate a risk that is ten times more likely. In fact, Sunstein found that students were only willing to pay just over twice as much to avoid the much higher risk.191 From this, and his review of dozens of other studies, Sunstein concludes:

[W]hen intense emotions are engaged, people tend to focus on the adverse outcome, not on its likelihood. That is, they are not closely attuned to the probability that harm will occur. At the individual level, this phenomenon, which I shall call “probability neglect,” produces serious difficulties of various sorts, including excessive worry and unjustified behavioral changes.192

The work done by Sunstein and others illustrate the potential problem with government mandated “over” disclosure. Consider an advertisement for the medication, Orencia, which has appeared recently in a number of lifestyle magazines.193 Orencia has been shown to successfully treat moderate to severe rheumatoid arthritis.194 Rheumatoid arthritis is an autoimmune disease that causes progressive destruction of joints, the circulatory system and the lungs.195 The Centers for Disease Control and Prevention reports that over 1.5 million Americans suffer from this disabling disease.196

188. Id. at 78.
189. Id.
190. Id.
191. Id. at 79.
192. Id. at 62-63.
194. Id. at 136.
Although this medication has proven to be effective and safe, the federal government nonetheless requires the advertiser to disclose rare and potentially idiosyncratic side effects. In fact, although “cancer” is listed as a potential risk in the Orencia ad,197 there is no evidence that the medication exacerbates or causes cancer. Pneumonia, also a listed potential risk, occurred in only 0.4% of the patients.198 If Sunstein is correct, this forced speech will have the paradoxical effect of convincing some patients to not take the medication, even though a purely rational decision maker would.

This suggestion is supported by a number of studies on the effectiveness of pharmaceutical advertisements. In a 1995 study, for example, researchers found that disclosure statements which contained too much information left consumers confused, doubtful and even overwhelmed about the efficacy of advertised medication.199 A 2005 study of television advertisements similarly reported that increasing the number of risk statements in an advertisement increased the likelihood that the drug would not be adopted by the consumer.200 This forced disclosure also undoubtedly causes some users unwarranted anxiety, which comes with a price of its own.201

197. Bristol-Myers Squibb Co., supra note 193, at 136 (listing other important information about possible side effects with Orencia).
201. See Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 321(n), 352(a), 352(n), (2006) (authorizes the Food and Drug Administration (“FDA”) to review and censor pharmaceutical advertisements). Last year, the FDA issued over twenty-eight warning letters citing pharmaceutical companies for allegedly misleading advertising. See Warning Letters of 2012, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetters/PharmaceuticalCompanies/ucm289143.htm (last updated May 17, 2013) (containing a list of FDA letters). One would think that the power to censor would be exercised in situations where an advertiser has grossly exaggerated the benefits of a medication, or otherwise made a statement that borders on the fraudulent. One would be wrong. Valeant Pharmaceuticals of North
Information overload may also cause consumers to ignore or minimize important information. Consider, for example, California’s Proposition 65, which “requires the State to publish a list of chemicals known to cause cancer or birth defects or other reproductive harm.”\(^\text{202}\) The list contains over 800 chemicals.\(^\text{203}\) In addition, the Act provides that: “[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual . . . .”\(^\text{204}\) The warning must “clearly communicate that the chemical in question is known to the state

\textbf{America, LLC} was cited by the FDA for an advertisement which advised users that the dosing for its medication to treat Huntington’s disease, Xenazine, “should be individualized by starting low and going slow by 12.5 mg increments weekly until a patient experiences clinical effect without intolerable adverse events.” Letter from Quynh-Van Tran, FDA Regulatory Review Officer, & Mathilda Fienkeng, Team Leader, Office of Prescription Drug Promotion, Dep’t of Health & Human Servs., to Madhu Anant, Sr. Dir. Regulatory Affairs, Valeant Pharm. N. Am., LLC (June 20, 2012), available at http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/UCM310539.pdf. The FDA found this warning to be misleading because it did not include the recommended starting and maximum dose for the medication. \textbf{Id.} Arbor Pharmaceuticals was cited for saying that its nitroglycerin spray product, used to treat angina, was “patient friendly” and “easy to use” because, according to the FDA, there was a lack of controlled studies to establish that a spray bottle was in fact “easy to use.” Letter from, Zarna Patel & Emily Baker, Regulatory Review Officers, Div. of Drug Mktg., Adver., and Comm'n, Dep’t of Health & Human Servs., to Allison Lowry, Dir. of Quality & Regulatory Affairs, Arbor Pharmaceuticals, Inc. (Apr. 26, 2011), available at http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/UCM253623.pdf. Proctor and Gamble was cited for advertising a cold and flu product, “VICKS DayQuil Plus Vitamin C” and “VICKS NyQuil Plus Vitamin C” because “their respective labeling fail[ed] to identify vitamin C (ascorbic acid) as an active drug ingredient.” Letter from Deborah M. Autor, Dir., Ctr. For Drug Evaluation & Research, Dep’t of Health & Human Servs., to Robert McDonald, President & Chief Exec., Proctor & Gamble (Oct. 29, 2009), available at http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2009/ucm188361.htm.


\(^\text{203}\) \textit{Chemicals Known to the State to Cause Cancer or Reproductive Toxicity, OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, CAL. ENVTL. PROT. AGENCY} (July 26, 2013), http://oehha.ca.gov/Prop65_list/files/P65single072613.pdf.

\(^\text{204}\) \textit{CAL. HEALTH & SAFETY CODE § 25249.6 (West 1992) (codifying Proposition 65).}
to cause cancer, or birth defects or other reproductive harm.” The warning labels can be found on a wide range of consumer products sold in California and across the nation such as luggage, jewelry, and cosmetics. In his article *Proposition 65: When Government Cries Wolf*, David Henderson points out that while the warnings may make citizens of other states nervous, Californians, used to a barrage of warnings, dismiss them as white noise. Henderson noted that “warnings about low-probability threats drown out, rather than drive out, warnings about high-probability threats.” As an example, he points out that now that we are all used to the ominous Transportation Security Administration (“TSA”) warnings about terrorism, we tend to dismiss high-probability threats from the government as well. “Good information,” he notes, “is just too important for us to allow government to drive it out with bad information.” Indeed, who will take the same government that warns residents not to eat licorice seriously when a high-probability threat needs to be conveyed? Not surprisingly, Proposition 65 is a subject of controversy in California. Its critics charge, among other things, that the warning signs generated by the law “have become so ubiquitous they are virtually meaningless.”

207. Id.
208. Id.
209. Id.
211. Stephanie M. Lee, *Prop. 65 Hazard Signs Arouse Controversy*, SFGATE (Jan. 16, 2013, 3:49 PM), http://www.sfgate.com/health/article/Prop-65-hazard-signs-arouse-controversy-4196557.php#page-2. The ubiquitous warnings that flow from Proposition 65 also led to an increasing number of specious lawsuits in which plaintiffs claim that companies or business owners fail to adequately warn of danger. See Governor Brown Proposes to Reform Proposition 65, OFFICE OF GOVERNOR EDMUND G. BROWN JR. (May 7, 2013), http://gov.ca.gov/news.php?id=18026.ca.gov. California Governor Jerry Brown is leading an effort to curb what he views as an abuse of a well-intentioned policy. Id. Matt Rodriguez, secretary of California Environmental Protection Agency, stated that, “[u]nfortunately, [Proposition 65] has been abused in the past sometimes by those who have essentially used it to shake down small businesses and generate fees by bringing cases with little or no benefit to public health.” Lee, supra note 212 (internal quotation marks omitted). He cited a recent case in which Southern California residents claimed that some banks had run afoul of Proposition 65 by failing to adequately warn customers of second-hand smoke from smokers standing near entrances or ATMs. Id.
As with most emerging scientific principles, there are contrarians. Several studies have challenged the concept of information overload, essentially arguing a variation on the theme that consumers are capable of quickly filtering information irrelevant to their decision making process or otherwise adopt simplifying strategies designed to satisfice instead of optimizing. Ultimately, however, this debate takes on a different hue in the light of the First Amendment. Irrespective of which way the science ultimately leans, the First Amendment would seem to require that the tie should go to those who would wish to remain silent.

As suggested above, forced commercial speech regimes are at least as problematic, if not more so, than simple restrictions on commercial speech. Unlike the latter, forced commercial speech is paternalistic, undermines autonomy, and interferes with the speaker’s interest in forceful, emotive expression, while at the same time interfering with the listener’s interest in self-fulfillment. The primary justification for imperative commercial speech, expanding the amount of information available to the consumer, can have the perverse effect of impairing the decision making process.

E. Does Commercial Speech Truly Have Less Worth?

Decisions treating forced commercial speech differently than other kinds of speech are further rooted in the notion advanced in Virginia Pharmacy that commercial speech is simply less worthy of protection than other kinds of protected speech; but this conclusion is also open to debate, particularly in light of recent history. According to the Supreme Court, commercial speech is worthy of less respect for three reasons: (1) it is more capable of being verified than other forms of speech; (2) it

212. See, e.g., David M. Grether et al., The Irrelevance of Information Overload: An Analysis of Search and Disclosure, 59 S. CAL. L. REV. 277, 287 (1986); see also Naresh K. Malhotra, Information Load and Consumer Decision Making, 8 J. CONSUMER RES. 419, 419 (1982). The studies contesting the notion of information overload are particularly suspect in light of Dr. Dimoka’s research, which shows the brain’s cognitive functions undergoing observable degradation when faced with too much information. See supra note 128.

213. But cf., Paul Horwitz, Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment, 76 TEMPLE L. REV. 1, 6-7 (2003) (expanding of the work done by Professors Hanson and Kysar on market manipulation); see also supra note 178 and accompanying text. Professor Horowitz argues that the standard for regulating commercial speech should be more solicitous of the government. See Horwitz, supra note 214, at 67-68.

214. This conclusion is not uniformly held. For a criticism of the “verifiability” justification, see Daniel A. Farber, Commercial Speech and First Amendment Theory,
2013    THIS MEDICATION MAY KILL YOU    65

has less value than other kinds of speech; and (3) it is more “durable” and less likely to be “chilled” than political speech because the advertiser is motivated by profit.215

The first justification is essentially irrelevant to the debate because no court (nor this essay) has suggested that the government does not have the authority to regulate commercial speech that is objectively misleading. The government has a long-standing and compelling interest in preventing fraud, no matter the context.

The continued validity of the “less value” justification, however, is brought into question, at least implicitly, in the Court’s recent decision in Entertainment Merchants,216 which struck down a California statute that (1) required video games which had violent conduct to display a warning label, and (2) restricted the sale of such games to individuals over the age of eighteen. The Court, following a long trend of cases which ruled that the mere fact a communication is offered for sale does not make it commercial speech, ruled that video games are a form of “art” worthy of First Amendment protection.217 Applying strict scrutiny, the Court ruled that the labeling and underlying ban could not be justified

74 NW. U. L. REV. 372, 385-86 (1979). (“[c]ommercial speech is not necessarily more verifiable than other speech. There may well be uncertainty about some quality of a product, such as the health effects of eggs. . . . On the other hand, political speech is often quite verifiable by the speaker.”) (citations omitted).


216. Brown v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729, 2742 (2011); see also Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977) (A “consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.”). That reality has great relevance in the fields of medicine and public health, where information can save lives. A third justification is offered by Professor Baker, who argues that the profit motive “breaks the connection between speech and any vision, or attitude, or value of the individual or group engaged in advocacy.” C. Edwin Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 IOWA L. REV. 1, 17 (1976). From this starting point, Baker concludes that commercial speech is worthy of less protection because it is not strictly tied to the concept of “self-expression”; which is obviously a foundational value animating the First Amendment. Id. at 3. Karl Marx, in contrast, argued in his theory of alienation of the proletariat class that work and the products of our labor are the ultimate form of self-expression. KARL MARX & FREDERICK ENGELS, Economic and Philosophic Manuscripts of 1844, in 3 COLLECTED WORKS 270, 276-77 (Jack Cohen et al. eds., 1975). Taking the argument one step further, (and far beyond what Marx would allow) if we are what we produce, we are also what we sell. A craftsman advertising his home-made bird houses is very much expressing something about himself.

217. Brown, 131 S. Ct. at 2733.
under the strict scrutiny standard.\footnote{Id. at 2742.}

This decision raises the difficulty, if not impossibility, of drawing a firm line between “art” (fully protected) and “commercial speech” (subject to a lower standard of scrutiny). Consider advertisements that are run during the Super Bowl, which are among the most expressive, and expensive, form of commercial speech on the market. At one level, such ads are pure commercial speech in that they are designed and intended to sell a product. At another, however, they are treated much like art. The ads are scrutinized before and after the Super Bowl, much like art. They engender debate, scrutiny and invite controversy.\footnote{See, e.g., Dani Blum, \textit{Enough is Enough: The Message the Super Bowl Sends to Teenage Girls}, HUFFINGTON POST (Feb. 13, 2013, 3:22 PM), http://www.huffingtonpost.com/dani-blum/ (criticizing recent Super Bowl ads for objectifying women); Steven Kurlander, \textit{Smart Discrimination: GoDaddy Super Bowl Commercial’s Sloppy Kiss Disres Nerds and Promotes Bigoted, Anti-Intellectual Stereotype}, HUFFINGTON POST (Feb. 12, 2013, 12:09 PM), http://www.huffingtonpost.com/steven-kurlander/smart-discrimination-godaddy-sloppy-kiss_n_2646718.html?utm_hp_ref=super-bowl-commercials (criticizing Super Bowl Ads for its portrayal of nerds).}

Advertisements tell stories, evoke emotions and can be both serious and whimsical, much like art.\footnote{See, e.g., Mae Anderson, \textit{Oh the Drama! Super Ads Go Epic}, ASSOCIATED PRESS (Feb. 4, 2013, 11:01 AM), http://bigstory.ap.org/article/celebs-babies-and-beer-its-super-bowl-ad-time-1.} The paradigm set forth in \textit{Virginia Pharmacy} of commercial advertisement being nothing more than an offer to sell “x” product at “y” price is long over. As stated by Justice Thomas, “there is no ‘philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial speech’ . . . Indeed, I doubt whether it is even possible to draw a coherent distinction between the commercial and noncommercial speech.”\footnote{Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 575 (2001) (Thomas, J., concurring) (quoting 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522, 523 n.4 (1996)); \textit{see also supra} Part III.C (arguing that advertisements are intended, in part, to facilitate self expression by the user of products).}

Given the difficulty of drawing a distinction between “art” and “advertisement” a fair question can be asked: which is really more likely to be chilled by intrusive restrictions on speech, the professional artist who relies upon the sale of his works to live or the advertiser who relies on creating a “lifestyle” image to sell product? The artist faced with a government restriction has the choice of either changing the nature of her art to remove the offending element or to relegate herself to another
line of work. The advertiser faces a similar choice: continue to advertise and face the consequences, or change the message. In either case, the compulsion is the same.

IV. LESS FORCED SPEECH DOES NOT NECESSARILY LEAD TO LESS INFORMATION

Courts and commentators have struggled mightily to reconcile the forced speech and commercial speech doctrines. As discussed above, the D.C. Circuit in *R.J. Reynolds Tobacco Co.* created a two tier structure: disclosures (1) necessary to prevent outright deception or (2) that communicate factual, non-controversial information are subject to rational basis review; otherwise *Central Hudson’s* intermediate scrutiny standard applies.\(^\text{222}\) Other courts would apply strict scrutiny, unless the disclosure is necessary to prevent outright fraud.\(^\text{223}\) The Sixth Circuit has gone to the other extreme, suggesting that all commercial forced speech regimes need only satisfy rational basis.\(^\text{224}\)

The distinction recognized by many courts between compelled political speech and forced commercial speech cannot stand. Justice Jackson’s ringing endorsement of the First Amendment, and the values that underlie it, apply with particular resonance here: “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”\(^\text{225}\) Government-imposed obligations on commercial speakers require them to mimic the “orthodox” view held by the bureaucrats and politicians that a particular product is good, bad or indifferent. Such government-imposed obligations are paternalistic, dilute the message favored by the speaker, and undermine the autonomy and self-expressive goals of the users of the particular product. Further, if current research on cognitive decision making is correct, in many cases, the forced speech likely has the paradoxical effect of interfering with rational decision making. In light of this, there would appear to be no legitimate justification for not extending the default “strict scrutiny” rule to government regulations which force commercial advertisers to speak, at least to the extent their speech is not deceptive.

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\(^{222}\) R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1212 (D.C. Cir. 2012); see also supra Part II.D.1.

\(^{223}\) See *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1217-18.

\(^{224}\) See supra Part II.D.2 (discussing the Sixth Circuit Approach).

A. ADVERTISERS HAVE MARKET INCENTIVES TO DISCLOSE PERTINENT INFORMATION

Applying an elevated standard of review to regulations compelling advertisers to speak messages contrary to their interests would not inexorably lead to less information being available to consumers who wish, in their exercise of autonomy, to obtain such information. While the government certainly has an interest in arming the public with the information necessary to make healthy choices, a First Amendment analysis of whether the government is overreaching by compelling speech should include a review of other methods available to achieve the same goals. Whether the public should be warned of the dangers of eating too much fast food is a different question than that of who should provide the warning.

The government’s interest in an informed public is addressed in myriad ways, most of which do not involve literally putting words in the commercial speaker’s mouth. Despite an apparent governmental distrust of commercial speech, many companies recognize that full disclosure is good for business. For example, some baby formula companies go beyond FDA regulations to list nutrients to espouse the virtues of breastfeeding. Though an increase in breastfeeding moms means a decrease in lucrative formula sales, Gerber states in many of its print and television advertisements that “Gerber recommends breastfeeding as the best start for babies.” Gerber, on its own, responded to pressure from lactation advocates in the United States, and international concerns about aggressive marketing to mothers in third world countries whose babies suffered for lack of breastfeeding or misuse of formula.


228. See, e.g., Roni Rabin, Breast-Feed or Else, N.Y. TIMES (June 13, 2006), http://www.nytimes.com/2006/06/13/health/13brea.html?pagewanted=all&_r=0 (illustrating arguments of lactation advocates explaining why breast-feeding is more beneficial for the infant than formula).

Notably, when the World Health Organization adopted a non-binding code restricting the promotion of infant formula products, the United States was the lone dissenter.\textsuperscript{230} Elliott Abrams, then Assistant Secretary of State for International Organization Affairs stated that: “\textquote{despite our governmental interest in encouragement of breast-feeding,} . . . the W.H.O. recommendations for a complete ban on advertising to the general public of infant formula and the proposed restrictions on the flow of information between manufacturers and consumers ‘run counter to our constitutional guarantees of free speech and freedom of information.’”\textsuperscript{231} The United States, despite an admitted interest in encouraging breastfeeding, decided, based upon First Amendment concerns, to neither restrict manufacturer’s free speech, nor compel advertisers to disclose accepted facts about the detriments of choosing formula over breast milk.\textsuperscript{232} Companies selling baby formula, however, may make a public relations and business decision to disclose information that could affect the bottom line.

Even powerhouses like Coca-Cola respond to market pressure, recently pledging to make lower calorie drinks and provide clearer nutritional information.\textsuperscript{233} The move was a response to increased consumer and political criticism over the link between sugary soft drinks and myriad chronic health problems.\textsuperscript{234} New television advertisements, while reminding us that Coca-Cola alone is not responsible for the country’s health problems (“all calories count”), note Coca-Cola’s voluntary contributions to efforts to lower the sugar content in our diet, and list its wide-ranging “healthier” options.\textsuperscript{235} In a press release published on the company’s website, Muhtar Kent, company Chairman and Chief Executive Officer states: “[o]besity is today’s most challenging health issue, affecting nearly every family and community across the globe. It is a global societal problem which will take all of us

\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{234} Id.
working together and doing our part.”\textsuperscript{236} Coca-Cola has made a commitment to: (1) “offer low or no calorie beverage options in every market;” (2) “provide transparent nutritional information;” (3) “help to get people moving by supporting physical activity programs in every country where they do business;” and (4) “market responsibly, including no advertising to children under [twelve] anywhere in the world.”\textsuperscript{237} In addition to these promises, the company launched a web initiative called “Coming Together”; the website contains information about fitness, health and nutrition.\textsuperscript{238}

While not everyone trusts Coca-Cola to mitigate the negative health effects of its products,\textsuperscript{239} the company’s substantial use of resources in an effort to educate the public about its products and about health in general demonstrates the strong disclosure incentives provided by the marketplace.

B. \textbf{TORT LAW AND INDEPENDENT SPEECH WILL ACT AS A CHECK ON ADVERTISERS}

Community organizations and advocacy groups also contribute the flow of information to consumers, and often present the “other side” of an advertisers rosy picture of its product. For example, as concerns about childhood obesity grew stronger, so did the voices seeking to get the word out to parents and children about the importance of eating right and exercising. In 2012, Children’s Healthcare of Atlanta made waves with its ad campaign to fight childhood obesity.\textsuperscript{240} Its controversial

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\item \textsuperscript{237} Id.
\item \textsuperscript{238} Coming Together, COCA-COLA Co., http://www.coca-colacompany.com/coming-together-home/ (last visited Nov. 12, 2013).
\item \textsuperscript{239} See, e.g., “Honest Coca-Cola Obesity Commercial” Depicts Depressing Version of Reality (VIDEO), HUFFINGTON POST (Jan. 17, 2013, 6:04 PM), http://www.huffingtonpost.com/2013/01/17/honest-coca-cola-obesity-commercial_n_2499221.html (Two videos: one promoting Coca-Cola’s “healthier” approach, another, which does not accept Coca-Cola’s claim that all calories are equal, clearly states, “Don’t drink Coke. It is killing you and your family.”); see also Ruth Faden, Coke’s Unconscionable New Ad, ATLANTIC.COM (Jan. 15, 2013, 1:25 PM), http://www.theatlantic.com/health/archive/2013/01/cokes-unconscionable-new-ad/267185/ (“Advertising is inherently self-serving -- that’s its job. No one expects a corporate ad, or a political one for that matter, to be a public service announcement or deliver a health education message.”).
\item \textsuperscript{240} Lara Salahi, “Stop Sugarcoating” Child Obesity Ads Draw Controversy, ABC
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Strong4Life campaign featured overweight children relaying, in their own words, their struggles with obesity.\textsuperscript{241} A separate ad played back the life of a thirty-four year old heart attack victim, tracing his problems back to his French fry diet as a toddler.\textsuperscript{242} These efforts help citizens make real choices, and force the market to conform to the needs of the better informed public. The proliferation of “healthy choices” at fast food restaurants and grocery stores is indicative of industry response to consumer demand. It may be helpful to consumers to know the calorie count in can of soda, but to “warn” consumers of the dangers of drinking too much of it should not to be the mandated role of the manufacturer.

The legal system also provides a strong incentive for companies to fully disclose information relevant to the public’s safe consumption of its products. American tort law imposes upon manufacturers a duty to warn consumers of any danger that could flow from the intended, or unintended, but reasonably foreseeable use of its product.\textsuperscript{243} Even if the manufacturer provides a warning, it may still be held liable for harm done by its product if the warning was not “adequate.”\textsuperscript{244} Thus, for example, if research eventually shows that radiation from cell phones is harmful, cell phone manufacturers must relay that potential harm, or face liability for any damages caused to consumers.

Finally, and perhaps most importantly, government is always free to express its own message in response to the messages promulgated by commercial advertisers. The government is a powerful conduit of the very information that it wants conveyed to the public.\textsuperscript{245} Public service announcements produced by the federal government, and intended to educate the citizenry, have covered wide-ranging topics such as

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241. \textit{Id.}
244. \textit{Stahl}, 283 F.3d at 261.
245. A recent example is that of the first lady, Michele Obama, who has been instrumental in leading the most recent government campaign encouraging fitness and health for children and adults. Her “Let’s Move Campaign” provides resources to help families “learn the facts” and take action. \textit{See Learn Facts, Let’s Move}, http://www.letsmove.gov/learn-facts/epidemic-childhood-obesity (last visited Nov. 12, 2013).
\end{footnotes}
The government also speaks to the public through the promulgation of campaigns such as “Got Milk” and “Beef; it’s What’s for Dinner.” Concerns that consumers will not be educated if marketers are not required to disclose every perceived danger of their product are unfounded considering the market forces and government resources that lead to conveyance of information to the public. When the government itself provides information to the public, at least we know who is speaking, and there is less need to question motive, sincerity or accuracy.

Through these various channels, market incentives, education by government and community groups, and the legally imposed duty to warn, consumers receive a wealth of information to help them make rational decisions. Forcing marketers to go beyond the duty imposed by tort law to spread the government’s message unfairly impinges on the right of commercial speakers to promote their products, and could lead to confusion and misinformation.

V. CONCLUSION

The distinction between regulations compelling commercial speech and direct regulation of artistic or political speech recognized by many courts is ultimately artificial and disrespects the values embodied by the First Amendment. If, as the Court suggested in Virginia Pharmacy, the value to the average citizen of commercial speech “may be as keen, if not keener by far” as political speech is true, the same rules should apply to both. Forced commercial speech, no less than other kinds of forced speech, should be subject to strict scrutiny. In the


249. In some cases, such as the “Beef, It’s What’s for Dinner” slogan, it is not at all clear that the government, as opposed a private entity, is speaking. However, the Supreme Court insulated the compelled subsidy in that case, a mandated assessment charged to beef producers, from the usual scrutiny applied when the government requires an individual to subsidize private speech because the speech being subsidized was that of the government itself. See Johanns v. Livestock Mktg Ass’n, 544 U.S. 550, 562, 565 n.8 (2005).

marketplace of ideas, the market should win, and not the market regulator.