CULTURAL COGNITION AS A TOOL TO COMBAT THE COMPELLED-COMMERCIAL-SPEECH CONUNDRUM

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ABSTRACT

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

This paper proposes a principled means to resolve these questions by drawing on an innovative behavioral-science theory called Cultural Cognition to provide a system for categorizing forced commercial-speech regulations. By establishing which test applies to determine whether regulations violate the First Amendment, this framework should help bring consistency and predictability into a murky area of First Amendment law.

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I. INTRODUCTION

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

Prior to 2001, compelled speech and commercial speech existed in fairly separate spheres. Compelled speech generally involved situations where the government compelled speech concerning ideology, politics, or other matters of opinion—speech termed “public discourse.” An example of such speech includes compelling the recitation of the Pledge of Allegiance. Commercial speech generally was not understood to fall into this category.

The Court challenged this assumption in a string of cases in a different but related context. These three compelled-subsidy cases, the Glickman trilogy, implicitly recognized compelled-commercial speech, but failed to provide any guidance on the boundaries of this new doctrine. Compelled-commercial speech also created apparent inconsistencies with other cases governing factual-disclosure requirements.

This paper attempts to reconcile these inconsistencies and provide a principled means to determine which doctrine applies. In doing so, it draws guidance from an innovative behavioral-science theory called Cultural Cognition. Using Cultural Cognition, this paper sets forth a method that scholars, practitioners, and courts may use to ascertain what type of regulation is at issue and then determine which test to apply to scrutinize whether the regulation violates the First Amendment.

The paper proceeds by providing background on the two doctrines that form the hybrid of compelled-commercial speech. Part II discusses compelled speech and Part III examines commercial speech. Each part

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1 But see Riley v. Nat’l Fed’n of the Blind, 487 U.S. 781, 796 (1988). Riley did not involve a true hybrid of compelled and commercial speech. It involved fully protected speech that contained an arguably commercial statement, and the Court explained that the speech does not lose its full protection because it contains an arguably commercial component. See id. The Court instructed that it will not parse the protected speech to extract commercial components. As the Court acknowledged, purely commercial speech is entirely different than fully protected speech with a small, commercial component. See id. at 796 n.9. This paper addresses purely commercial speech, thus Riley is inapposite.


4 See Post, supra note 2, at 555-56, 586 (noting confusion Glickman trilogy created).
discusses the interests animating the doctrines and the frameworks used to analyze potential First Amendment violations. Part IV covers the trilogy of compelled-subsidy cases that implicitly created the category of compelled-commercial speech. Finally, Part V addresses the problems that remain in the wake of this new doctrine, and it provides a framework to solve these problems and reconcile the various doctrines that now exist. It uses a test suite to illustrate and test the framework.

II. COMPELLED SPEECH

The compelled-speech doctrine ensures that any government regulation compelling certain types of expression, such as political or ideological speech, will face strict scrutiny. The Supreme Court has relied primarily on speaker interests to support the doctrine, but listener interests also animate it. Listener interests are also central to the First Amendment.

Two Supreme Court cases form the foundation of the doctrine, Virginia State Board of Education v. Barnette and Wooley v. Maynard. A third Supreme Court case, Pacific Gas & Electric Company v. Public Utilities Commission, relied on this foundation and is also relevant here.

In 1943, the Supreme Court held in Barnette that the First Amendment protects individuals from some government-compelled expression. The West Virginia school board required students to salute the American flag while stating the Pledge of Allegiance or face expulsion. Jehovah’s Witnesses sued to enjoin this requirement because it violated their First Amendment rights.

The Court held that the school board could not constitutionally compel such expression. According to the Court, “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith

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8 319 U.S. 624 (1943).
11 See Barnette, 319 U.S. at 642.
12 Id. at 627-29.
13 Id. at 629.
14 See id. at 642.
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therein.”

The school officials’ action “transcend[ed] constitutional limitations on their power and invade[d] 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 interest the Court highlighted, protecting individual intellect and spirit, has been described as freedom of mind. Freedom of mind is an important interest animating the First Amendment.

Ensuring that speakers maintain freedom of mind means preventing the government from hijacking their minds and using them to propagate messages with which they disagree. If the government coerces private speakers to spread its message, it is forcing them to act as government mouthpieces who espouse government ideology. This is antithetical to the First Amendment, which safeguards self expression. Volitional self expression is integral to a democracy.

Though compelled speech primarily involves speaker interests, it also implicates listener interests.

An important listener interest at stake with compelled speech is exposure to authentic expression. Listeners have a right to observe genuine, robust expression that they can use for belief formation.

As Barnette explained, “[s]ymbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.” Saluting the flag is how one person communicates to another her adherence to the government that flag represents.

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15 Id.
16 Id.
17 Laurent Sacharoff, Listener Interests in Compelled Speech Cases, 44 CAL. W. L. REV. 329, 341-42 (2008). In reaching this conclusion, Sacharoff relied on language the Barnette Court used regarding the importance of freedom of mind. See id.; see also Barnette, 319 U.S. at 637; Wooley, 430 U.S. at 714.
18 See Sacharoff, supra note 17, at 341-44.
19 Cf. id. at 384-85 (maintaining that listener interests better support compelled-speech cases than speaker interests).
21 See Sacharoff, supra note 17, at 384-85.
22 See id.
23 Barnette, 319 U.S. at 632.
24 Id.
This communication has consequences. It provides listeners with a sense of public opinion.\textsuperscript{25} For public opinion to be perceived accurately, it must be \textit{freely obtained} and not coerced. “[T]he Bill of Rights denies those in power any legal opportunity to coerce [...] consent [of the governed]. Authority here is to be controlled by public opinion, not public opinion by authority.”\textsuperscript{26} As the Supreme Court has explained, “it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”\textsuperscript{27} This requires that listeners receive genuine expression. Free speech is thus much more than the right to express oneself: “it is the essence of self-government.”\textsuperscript{28}

Government-compelled expression amplifies messages in accordance with government preference not individual preferences, which skews the picture of public opinion in the marketplace of ideas.\textsuperscript{29} This may mislead listeners to adopt beliefs simply because these beliefs drown out the others.\textsuperscript{30} Though listeners may realize that the government has compelled the speech, they will not necessarily know who actually agrees with the sentiments. And the repetitive exposure to the government’s message may lead to a soft form of mind control over listeners.\textsuperscript{31} If one message is dominant in the marketplace, that sentiment has a better chance of prevailing.

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

Thirty years after \textit{Barnette}, the Court decided \textit{Wooley v. Maynard}.\textsuperscript{32} There it affirmed the importance of freedom of mind.

\begin{itemize}
  \item \textsuperscript{25} See Sacharoff, \textit{supra} note 17, at 384–85.
  \item \textsuperscript{26} \textit{Barnette}, 319 U.S. at 641.
  \item \textsuperscript{28} Id. (internal quotations omitted).
  \item \textsuperscript{29} See Sacharoff, \textit{supra} note 17, at 384–85.
  \item \textsuperscript{30} See id.
  \item \textsuperscript{31} See id.
  \item \textsuperscript{32} 430 U.S. 705 (1977).
\end{itemize}
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New Hampshire required that drivers display the State’s motto, “Live Free or Die,” on vehicle license plates, or face criminal sanctions. Jehovah’s Witnesses, who considered the motto repugnant to their beliefs, covered it up and were charged multiple times with violating state law.

The Court framed the issue as “whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.” It held that the State could not.

In finding the law unconstitutional, the Court again relied on the notion of free thought, explaining that “the right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind.”

The Court again alluded to the importance of listeners receiving genuine information about others’ beliefs. It characterized the state law as a “measure which forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”

The First Amendment “protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.” Though refusing to foster an idea one finds objectionable is concerned with protecting the speaker, it is because of the listener that this interest matters. The idea is that a speaker has a right not to persuade listeners to believe views with which the speaker disagrees. Though this concern is framed in terms of the speaker, it arises because of the interest that listeners have in receiving genuine information. An alternative formulation is that the government may not persuade listeners with insincere messaging; it may not draft speakers into spreading a government message with which they disagree.

Nearly ten years after Wooley, a plurality of the Court cited Wooley in striking a California law mandating that a utility distribute a challenger’s

33 Id. at 706-07.
34 See id. at 707-08.
35 See id. at 713.
36 See id. at 717.
37 Id. at 714 (internal quotations omitted).
38 Id. at 715.
39 Id.
40 See Sacharoff supra note 17, at 384.
41 See id.
42 See id.
views to the utility’s customers in monthly billing envelopes. The Court first recognized that the First Amendment “serves significant societal interests wholly apart from the speaker’s interest in self-expression.” It also “protects the public’s interest in receiving information.” But California’s law impermissibly compelled the utility to “use its property as a vehicle for spreading a message with which it disagree[d],” and this violated Wooley, among other cases.

Barnette, Wooley, and their progeny reveal a few things about the doctrine. First, the government will face high hurdles before it may compel speakers to express ideology. Second, the First Amendment grants a right against compelled expression, which implicates both speaker and listener interests. Third, forcing speakers to propagate false sentiments and disingenuously persuade listeners perverts public opinion, which undermines true consent of the governed.

III. COMMERCIAL SPEECH

In First Amendment jurisprudence, speech receives different treatment depending on its category. Commercial speech, though protected, typically receives less protection than the most protected speech, such as political speech. Commercial speech is defined variously, but the quintessential definition is speech that proposes an economic transaction, such as advertising.

Like the compelled-speech doctrine, the commercial-speech doctrine safeguards both speaker and listener interests. But the origins of the commercial-speech doctrine value listener interests above speaker interests.

44 Id. at 8 (internal quotations omitted).
45 Id.
46 See id. at 17-18.
48 Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985); see also Bd. of Trustees v. Fox, 492 U.S. 469, 473-74 (1989) (noting that test for whether speech is commercial is whether it proposes a commercial transaction). A combination of other factors may also suggest speech is commercial. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983). According to the Court, speech may be commercial where (1) it is an advertisement, (2) it refers to a specific product, or (3) it is motivated by an economic interest in selling product. See United States v. Wenger, 427 F.3d 840, 847 (10th Cir. 2005) (citing Bolger, 463 U.S. at 66-67). The precise contours of “commercial speech” are unsettled. See, e.g., Zauderer, 471 U.S. at 637. But getting them is beyond the scope of this paper.
A. Lesser Value Speech

The Supreme Court historically has treated commercial speech as the First Amendment’s redheaded stepchild. Initially, the Court provided no First Amendment protection to commercial speech.\(^49\) When it later afforded some protection, it did so with less than full gusto. Recently, the Court has suggested that it might change this approach and provide fuller protection for commercial speech, but thus far it has stopped short of doing so.

In 1942, the Supreme Court proclaimed that “the Constitution imposes no such restraint on government as respects purely commercial advertising.”\(^50\) First Amendment protection for purely commercial speech was virtually non-existent until the 1970s when the Court began reconsidering its approach.\(^51\)

In \textit{Bigelow v. Virginia},\(^52\) citing a string of cases supporting a new direction, the Court explained that “speech is not stripped of First Amendment protection merely because it appears in [commercial advertising].”\(^53\) Only one year later, in \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council},\(^54\) the Court disavowed the idea that commercial speech is unprotected, explaining that the notion “all but passed from the scene” the prior term in \textit{Bigelow}.\(^55\)

In \textit{Virginia State Board of Pharmacy}, a case involving a pharmaceutical advertising ban, the Court considered whether “speech which does no more than propose a commercial transaction . . . lacks all [First Amendment] protection.”\(^56\) The Court answered that question with a resounding “no.”\(^57\) This case is widely credited with formally establishing First Amendment protection for commercial speech.\(^58\)

Though commercial speech is protected, it is not as protected as some other speech.\(^59\) It is thus more susceptible to regulation.\(^60\)

\(^{49}\) See Daniel E. Troy, \textit{Do We Have a Beef with the Court? Compelled Commercial Speech Upheld, but it Could have Been Worse}, 2005 CATO SUP. CT. REV. 125, 128-29 (2004-2005).

\(^{50}\) Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

\(^{51}\) See Troy, \textit{supra} note 49, at 135.

\(^{52}\) 421 U.S. 809 (1975).

\(^{53}\) Id. at 809.

\(^{54}\) 425 U.S. 748 (1976).

\(^{55}\) Id. at 759.

\(^{56}\) Id. at 762 (internal quotations, citations, and pagination omitted).

\(^{57}\) Id.


One reason the Court deems less protection appropriate is because regulation may help further consumer protection. According to the Court, “a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.”\footnote{61} The First Amendment “does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”\footnote{62}

Another reason the Court affords commercial speech less protection is because it claims commercial speech is hardier than other forms of speech.\footnote{63} Because it is economically motivated, commercial speech is more durable and thus less likely to be chilled.\footnote{64}

Commercial speech is also more easily verifiable than other forms of speech.\footnote{65} Because commercial speakers generally disseminate information about products or services about which they know more than others, they should be held to stricter standards.\footnote{66}

Not everyone on the Court, however, agrees that commercial speech deserves less protection. Justice Clarence Thomas in particular has voiced strong opposition to this position maintaining that he “do[es] not see a philosophical or historical basis for asserting that commercial’ speech is of lower value than noncommercial speech. Indeed, some historical materials suggest to the contrary.”\footnote{67} He has repeatedly urged the Court to reconsider its position.\footnote{68}

\footnote{60 See Bd. of Trustees v. Fox, 492 U.S. 469, 477 (1989); see also Troy, supra note 49, at 128-29. The Court’s “jurisprudence has emphasized that commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.” Fox, 492 U.S. at 477 (internal quotations omitted, alteration in original).


\footnote{62} Id. at 771-72.

\footnote{63} See id. at 772 n.24.

\footnote{64} Id.

\footnote{65} See id.

\footnote{66} Id.

\footnote{67} See, e.g., 44 Liquormart v. Rhode Island, 517 U.S. 484, 522-23 & n.4 (Thomas, J., concurring) (internal quotations omitted).

\footnote{68} See, e.g., Borgner v. Fla. Bd. of Dentistry, 537 U.S. 1080 (2002) (Thomas, J., dissenting from cert. denial) (“This case presents an excellent opportunity to clarify some oft-recurring issues in the First Amendment treatment of commercial speech and to provide lower courts with guidance on the subject of state-mandated disclaimers.”); Milavetz, Gallop & Milavetz v. United States, 130 S. Ct. 1324, 1342-43 (2010) (Thomas, J., concurring) (noting that he has never been persuaded that there is a basis to treat laws restricting commercial speech with relaxed scrutiny and that he would be willing to reexamine the even-more relaxed scrutiny afforded factual-disclosure requirements).}
A majority of the Court recently appeared to accept Justice Thomas’s offer to reconsider its treatment of commercial speech in *Sorrell v. IMS Health, Inc.* There the Court considered whether a state law restricting the sale or disclosure of pharmacy records survived the First Amendment, holding that it did not.

The opinion initially suggested that the Court would start protecting commercial speech more. The Court explained that because the law at issue regulated speech based on its content, heightened scrutiny was appropriate, irrespective of whether the law involved commercial speech.

In the end, however, the Court applied the more lenient *Central Hudson* test reasoning that because the regulation could not withstand even that scrutiny, no need existed to apply heightened scrutiny. The Court missed an opportunity to clarify the law further by declining to decide whether the law at issue even regulated pure commercial speech. The Court’s pre-*Sorrell* position on commercial speech thus remains post-*Sorrell*.

Though *dicta* in *Sorrell* suggests a willingness to eliminate reduced protection for commercial speech, the holding does not take this step. Post-*Sorrell*, commercial speech still generally receives reduced First Amendment protection under the test provided by *Central Hudson*.

B. **Listener Interests Outshine Speaker Interests**

Both speaker and listener interests animate commercial speech. But listener interests provide more support for protecting commercial speech.

In *Virginia Pharmacy Board*, the Court explained that both speaker and listener interests support protecting commercial speech. Listener interest motivated the suit—consumers sued challenging the government’s advertising restriction as an interference with their First Amendment right to receive commercial information.

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70 Id. at 2659.
71 See id. at 2663-65.
72 See id.
73 See id. at 2667.
74 See id.
75 See id. at 2667-68.
77 Id. at 753-54.
The Court explained that a listener’s interest in receiving commercial information is important. It is “keen, if not keener by far, than . . . [receiving] the day’s most urgent political debate.” Conversely, a commercial speaker’s interest, which is primarily economic, pales in comparison to the listener’s interest in receiving information.

Listener interest is really society’s “strong interest in the free flow of commercial information.” Commercial speech is important because it disseminates information “as to who is producing and selling what product, for what reason, and at what price.” Such dissemination is necessary to inform private economic decisions, which fuel the free-market economy. “It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”

The free flow of commercial information is indispensible for another reason. It enables formation of “intelligent opinions as to how [this country’s economic] system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy,” the free flow of information serves that lofty goal. The Court cited the importance of providing such information to consumers in striking down the government’s attempt to restrict the flow of such information.

Though Virginia Pharmacy Board focused significantly on listener interests, it did not completely disregard speaker interests. According to the Court, though the commercial speaker’s interest is purely economic, that “hardly disqualifies him from protection under the First Amendment.” Commercial speakers’ interests are minimal, but they exist.

Speaker and listener interests thus both support some level of protection for commercial speech. The next question to consider is precisely what type of protection is appropriate.

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78 See id. at 763.
79 Id.
80 Id. at 762.
81 Id. at 764.
82 Id. at 765.
83 See id.
84 Id.
85 See id.
86 See id. at 770.
87 See id. at 763-65.
88 Id. at 762.
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C. Regulation

1. Test for Speech Restrictions: Central Hudson

Four years after Virginia State Board of Pharmacy decided that commercial speech deserves First Amendment protection, the Supreme Court considered the level of protection. It attempted to answer this question in Central Hudson Gas & Electric Corp. v. Public Services Commission.90

In Central Hudson, the Court considered whether a law banning a utility’s promotional advertising violated the First Amendment. In holding that it did, the Court fashioned a multi-pronged test91 equivalent to intermediate scrutiny.92

To apply this test, a court first determines if the commercial speech is protected—that is, if it is neither misleading nor related to unlawful activity.93 If protected, the government must assert a substantial interest justifying a restriction on the speech.94 The restriction must not only directly advance the government’s asserted interest, but it should be no more extensive than necessary to satisfy that interest.95

Central Hudson’s intermediate scrutiny is a departure from the strict scrutiny applied to content-based regulations of public discourse.96 As a result, a law that targets commercial speech has a better chance of survival than a content-based law targeting political speech. This disparate treatment is not universally accepted as appropriate, but it is the Supreme Court’s current approach.97

90 See 447 U.S. 557, 566 (1980).
91 See id.
93 Cent. Hudson, 447 U.S. at 566. The Supreme Court has distinguished actually misleading speech from potentially misleading speech: “Actually or inherently misleading commercial speech may be prohibited entirely, but ‘[s]tates may not completely ban potentially misleading speech if narrower limitations can ensure that the information is presented in a nonmisleading manner.’” Christopher P. Guzelian, True & False Speech, 51 B.C. L. Rev. 669, 706 n.131 (May 2010) (quoting Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, 512 U.S. 136, 152 (1994)). According to Guzelian, “[a]ctually misleading commercial speech seems to require scientific knowledge that the speech caused injurious false perceptions.” Id. But, “[w]hat is unclear, however, is what modicum of scientific evidence (short of scientific knowledge) suffices to say that commercial speech is potentially misleading—that is, that the speech has potentially caused injurious false perceptions, but is not known to have done so.” Id.
94 Cent. Hudson, 447 U.S. at 566. A court may not supplant the government’s stated interests with other suppositions. Fla. Bar, 515 U.S. at 624.
95 Cent. Hudson, 447 U.S. at 566.
96 See Post, supra note 2, at 558.
97 See Troy, supra note 49, at 128–29; see also supra notes 35–43 and accompanying text.
A question has arisen over how broadly *Central Hudson* applies. Does it apply only to the situation addressed in that case—where a law restricts speech, or is it a default framework for commercial speech that applies generally, save rare instances? Some, like Justice Thomas, argue that *Central Hudson* is already a downward departure from the protection afforded public discourse, so it should generally create a floor beneath which protection should not drop.

The test is important. If courts apply a test more lenient than *Central Hudson*, they will more likely uphold government regulation. Courts are of course already more likely to uphold government regulation of commercial speech because of *Central Hudson*. The question that remains is just how much government control over commerce is optimal when regulation affects free-speech rights.

2. Test for Factual Disclosures: *Zauderer*

Five years after *Central Hudson*, the Court considered another type of commercial-speech regulation, a factual-disclosure requirement, in *Zauderer v. Office of Disciplinary Counsel*. There the Court explained that where the government compels disclosure of factual and uncontroversial information, that disclosure requirement will receive lenient scrutiny.

In *Zauderer*, an attorney advertised that clients who lost would owe no legal fees, but he omitted that they would owe costs. The state required that the attorney disclose this additional, factual information.

The Court considered how to test the validity of the government’s disclosure requirement. It questioned whether *Central Hudson* should apply as the default test for regulation of commercial speech or whether a more lenient test should apply. The Court held *Central Hudson* inapplicable and adopted a more lenient test.

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100 See id. at 651.
101 Id. at 633.
102 See id. at 650.
103 See id.
104 See id. at 650-51.
105 See id.
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*Zauderer* created a “reasonable relationship” test. It provides that commercial speakers’ rights are “adequately protected as long as disclosure requirements are reasonably related to the State’s interest,” which in *Zauderer* was preventing consumer deception.

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107 *Zauderer*, 471 U.S. at 651. An issue has arisen post *Zauderer* over whether its test applies where a factual-disclosure does not target consumer deception. Courts and commentators disagree. Compare, e.g., United States v. Philip Morris, 566 F.3d 1095, 1144-45 (D.C. Cir. 2009) (suggesting for disclosure requirements to be constitutional under *Zauderer* they must be geared towards thwarting efforts to mislead consumers or capitalize on prior deceptions), and Allstate Ins. Co. v. Abbott, 495 F.3d 151, 166 (5th Cir. 2007) (finding that unlike *Zauderer*, the case at issue involves minimal potential for customer confusion; therefore, *Central Hudson* applies), and Int’l Dairy Foods Ass’n v. Amestoy, 92 F.3d 67, 69-70, 72 (2d Cir. 1996) (applying *Central Hudson* where law compels commercial speech); and United States v. Wenger, 427 F.3d 840, 849 (10th Cir. 2005) (explaining its test as a combination of *Central Hudson* and *Zauderer* whereby satisfying *Zauderer* satisfies part of *Central Hudson*), and Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d 950, 966 (9th Cir. 2009) (categorizing *Zauderer’s* standard as “the factual information and deception prevention” standard (emphasis added)), with N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009) (noting that “*Zauderer’s* holding was broad enough to encompass nonmisleading disclosure requirements”), and Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n, 475 U.S. 1, 16 n.12 (1986) (plurality) (“The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations.”), and Envtl. Def. Ctr., Inc. v. United States, 344 F.3d 832, 848-51 (9th Cir. 2003) (analogizing to *Zauderer* and finding that requiring municipalities to engage in speech educating the public about the impacts of storm-water discharge and about the hazards of improper waste disposal is a proper required disclosure under the First Amendment and is not compelled speech). This disagreement over whether *Zauderer* applies beyond disclosure requirements that target consumer deception is because *Zauderer* phrased its reasonable relationship test as it applied in that case, which incorporated the government interest at stake there, preventing consumer deception. See *Zauderer*, 471 U.S. at 651. The Supreme Court has not conclusively resolved the question, though a few cases have suggested, while not squarely holding, that *Zauderer* is limited to preventing consumer deception. See Milavetz, Gallop, & Milavetz v. United States, 120 S. Ct. 1324, 1329 (2010) (applying *Zauderer* because the law targeted misleading speech and imposed a disclosure requirement rather than an affirmative speech prohibition); United States v. United Foods, Inc., 553 U.S. 405, 415 (2001) (distinguishing *Zauderer* because there was no suggestion in *United Foods* that the assessments were imposed to eliminate consumer deception); see also Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, 512 U.S. 136, 142-47 (1994) (relying on *both Zauderer* and *Central Hudson* and holding incredibly specific disclosure that effectively created a prohibition was unconstitutional and limiting holding to record before it). This paper does not resolve the question of whether *Zauderer* actually applies where the government interest is something other than targeting consumer deception. Instead, it addresses the normative question—whether *Zauderer* should apply in such instances. See infra Part V.

110 *Zauderer*, 471 U.S. at 650-51.
In Zauderer, the Court explained that lenient review was appropriate for two reasons. First, the factual-disclosure requirement did not restrict speech. Rather, it prescribed “purely factual and uncontroversial information about the terms under which [Zauderer’s] services w[ould] be available.”

Factual-disclosure requirements, the Court went on to explain, are entitled to lenient review, unlike laws restricting speech, which receive Central Hudson’s more-rigorous scrutiny. In rejecting Central Hudson, the Court emphasized significant differences between factual-disclosure requirements and restrictions on speech. Importantly, when the State requires purely factual disclosures, it does not prevent speakers from stating anything but merely requires that they provide more information.

And “[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides,” a commercial speaker’s interest in not providing particular factual information is minimal. Accordingly, factual-disclosure requirements encroach far less on First Amendment rights than do speech prohibitions.

This position accords with the Court’s focus in Virginia Pharmacy Board on the critical interest listeners’ have in receiving information. Because the primary reason commercial speech receives protection is to ensure consumers receive information, and a commercial speaker’s interest in not providing this information is minimal, regulation requiring that commercial speakers provide more information faces lenient review.

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114 Id. at 651.
115 Id.
116 See id. at 650-51.
117 See id. at 650.
118 Id. Where on the other hand a law prohibits speech, Central Hudson applies. See id. at 638. Speech prohibitions are beyond the scope of this paper, which addresses only laws requiring expression.
119 Id. at 651.
120 Id.
121 See supra Part III.B.
122 See Zauderer, 471 U.S. at 651.
Zauderer also highlighted material differences between factual-disclosure requirements in the commercial-speech context and the compulsion of speech regarding politics, religion, and other matters of opinion. Scholar Robert Post terms the latter "public discourse." The former mandates providing purely factual information while the latter forces citizens "to confess by word or act their faith [in] politics, religion, and opinions." Where the former is concerned, lenient scrutiny may apply, and where the latter is concerned, rigorous scrutiny applies.

Factual-disclosure requirements are similar to laws compelling public discourse because both cause a speaker to speak when she otherwise would not. But Zauderer emphasized that causing a speaker to provide additional factual and uncontroversial information in the commercial arena creates far less of a First Amendment problem than causing a speaker to espouse ideology in the non-commercial arena.

Though the Court sets forth this distinction, and it makes sense, it creates a line-drawing dilemma. When does a factual disclosure entitled...
to lenient review suddenly become compelled speech requiring strict scrutiny? Is there a principled way to discern in any given case whether a regulation mandates providing additional factual information versus compelling espousal of beliefs and ideology?

Before 2001, a viable line might have been between commercial and non-commercial speech. If a regulation mandated additional information in the commercial—speech context, Zauderer should apply. If instead it compelled public discourse in a non-commercial context, the compelled-speech doctrine should apply. This distinction lost viability, however, with United States v. United Foods, the second case in a trilogy of compelled-subsidy cases, the Glickman trilogy.

IV. THE Glickman TRILOGY & COMPelled-COMMERCIAL SPEECH

Prior to 2001, “compelled-commercial speech” was somewhat of an oxymoron. Compelled speech fit one paradigm where Barnette and Wooley applies, and commercial speech fit another, where Zauderer applies. Zauderer recognized this distinction when it fashioned a lenient test for factual disclosures in the commercial context, which it distinguished from compelled public discourse.

After Zauderer, the Supreme Court appeared to maintain this distinction. It explained that where government requires factual disclosures, it fosters First Amendment interests. This is in contrast to those instances where the government compels public discourse, which creates First Amendment problems. Because requiring factual disclosures furthers First Amendment interests whereas compelling public discourse hinders those interests, it makes sense that mandatory disclosures receive more lenient scrutiny than laws compelling public discourse.

After Zauderer it seemed that requiring commercial speakers to provide additional information through factual disclosures did not implicate the interests at stake in compelled-speech cases, which generally involved compelled public discourse. It thus seemed that determining whether forced speech was commercial in nature—as compared to public

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157 See infra Part IV.B.
158 See supra Part II.
159 See infra Part IV.B.
160 See Zauderer, 471 U.S. at 651; see also Post, supra note 2, at 559-62.
162 See supra Part II.
163 But see supra note 1.
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discourse—could provide a decent means to decide whether Zauderer or the compelled-speech doctrine applied.  

This conclusion dissipated with three, conflicting Supreme Court cases that arose in a slightly different, but related, context. This trilogy of cases—Glickman v. Wileman Bros. & Elliott, Inc., United States v. United Foods, and Johanns v. Livestock Marketing Association—are compelled-subsidy cases.  

Compelled-subsidy cases are slightly different but closely related to compelled-speech cases. With compelled speech, the government forces an individual to actually espouse a message. With compelled subsidy, it forces an individual to fund a message.  

The concerns animating First Amendment protection against compelled speech carry over to compelled-subsidy cases. If the compelled-speech doctrine prevents the government from compelling a person to espouse a message, the compelled-subsidy doctrine generally prevents it from compelling that person to fund that same message expressed by another. 

Because compelled subsidy is so closely related to compelled speech, these cases are relevant here. Indeed, one of the compelled-subsidy cases, United States v. United Foods, implicitly created a compelled-commercial-speech doctrine. This has created the line-drawing problem of determining where the compelled-commercial-speech doctrine ends and Zauderer begins. Answering this question requires reviewing the trilogy, beginning with Glickman v. Wileman Bros. & Elliott, Inc.  

165 But see supra note 1. As the Supreme Court noted in Riley v. National Federation of the Blind, “[p]lurality commercial speech is more susceptible to compelled disclosure requirements” than fully protected speech. 487 U.S. 781, 796 n.9 (1988).
169 For purposes of the First Amendment values at stake here, compelled speech and compelled subsidy are the same. See Post, supra note 2, at 563.
170 See Johanns, 544 U.S. at 557.
171 Id.
172 Id. at 557-58.
173 See id.
174 See Post, supra note 2, at 563 (noting that the values at stake in compelled-speech cases are the same as those at stake in compelled-subsidy cases).
A. Glickman v. Wileman Bros. & Elliott, Inc.

The Supreme Court first analyzed a compelled-subsidy requirement in the commercial context in Glickman v. Wileman Bros. & Elliott, Inc.177 In Glickman, the Court considered whether marketing orders issued pursuant to a federal check-off program that required contributions for generic tree-fruit advertising violated the First Amendment.179 The advertising’s message claimed that tree-fruit is “wholesome, delicious, and attractive to discerning customers.”180 It did not differentiate between brands and thus suggested that all tree-fruit is worth consuming irrespective brand. The Court cited multiple reasons the marketing orders compelling funding this advertising did not violate the First Amendment.

First, the Court stressed the intricacy of the regulatory regime at issue. The orders compelling funding were part of a regulatory scheme that was already very detailed and required that tree-fruit producers trade their independence for cooperation.181 Because tree-fruit producers were already compelled to further the common good, forcing them to fund speech for that aim was not a problem.182

Second, Glickman emphasized that the program did not prevent tree-fruit producers from communicating a message; it did not restrict speech as in Central Hudson.185 Because tree-fruit producers were free to supplement the advertising with their own views, the regulation did not need to satisfy more heightened scrutiny.186

Third, the Court upheld the regulation because it did not compel speech directly.187 Despite that the compelled-subsidy and compelled-speech doctrines protect similar interests, the Court distinguished the compelled subsidy in Glickman on the basis that it was a subsidy rather than a forced utterance of speech.188 The Court would later undermine this distinction in United Foods.189

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177 Id.
178 Id. at 460-61.
179 Id. at 462.
180 See id. at 469.
181 See id.
182 Id. at 469 & n.12.
183 Id.
184 Id. at 469-70.
185 Id.
186 Id.
188 Id.
Glickman explained that the heightened scrutiny applied to compelled speech did not apply to the compelled subsidy because the subsidy did not require producers to “repeat an objectionable message out of their own mouths,” or “require them to use their own property to convey an antagonistic, ideological message,” or “force them to respond to a hostile message when they would prefer to remain silent,” or “require them to be publicly identified or associated with another’s message.” Because the tree-fruit producers in Glickman were not compelled directly to express a message, the Court distinguished the compelled subsidy from traditional compelled-speech cases.

Though Glickman treats compelled speech and compelled subsidies differently, it does so because compelled speech is a more serious problem than compelled subsidy. Thus, compelled speech should typically receive at least as stringent scrutiny as compelled subsidy.

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

The Court characterized the advertising regulations as a “species of economic regulation that should enjoy the same strong presumption of validity that [the Court] accord[s] to other policy judgments made by Congress.” With this deferential review, the Court upheld the marketing orders.

In reaching this conclusion, the Court apparently assumed that the producers agreed with the tree-fruit advertising since they were tree-fruit producers. This ignored the producers’ actual protestations that they disagreed with the advertising content because they believed tree-fruit was not fungible.

190 Glickman, 521 U.S. at 470.
191 See id. at 470-71 & n.13.
192 See id. at 469-70.
193 Id. at 472.
194 See id. at 467-68 & nn.10-11, 471-72.
195 Id.
196 See id.
197 See id. at 470.
198 See id. at 468-470 & n.10.
According to the Court, that some producers may not wish to support the generic advertising of their product “is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.”

The Court explained that the tree-fruit producers’ objections were different than where “objection rest[s] on political or ideological disagreement with the content of the message.”

In effect, the Court suggested that where a message is commercial it cannot be ideological, and by extension, it is not considered compelled speech under the First Amendment. In other words, Glickman suggested that compelled-commercial speech does not exist: where speech is compelled in the commercial context, it receives lenient review. Where a law instead compels public discourse, it receives heightened review under Barnette/Wooley.

This paradigm was ill advised as the Court implicitly recognized when it reversed itself just a few years later in United Foods. Glickman limited its conception of ideology too narrowly, refusing to recognize an ideological message could occur in a commercial-speech context.

A message that all tree-fruit is attractive and delicious to discerning customers is laden with value judgments and opinions. That tree-fruit producers disagreed with the content of the message should have suggested that the message was not free from ideology. Glickman should have characterized the message as ideological and applied heightened review. If it had done so, it would have recognized that compelled ideology raises significant First Amendment concerns even if that ideology occurs in the context of commercial speech. The Court attempted to course correct in United Foods, but it did so with a less-than satisfying solution.

B. United States v. United Foods, Inc.

Four years after Glickman the Court did an abrupt about face in United States v. United Foods, Inc. The Court again considered a federal check-off program that compelled subsidization of generic advertising, distinguishing rather than overturning Glickman.

200 Id. at 477.
201 See id.
203 See infra Part V.
204 See Glickman, 521 U.S. at 468 nn.10 & 11
205 See United Foods, 533 U.S. at 408-09.
United Foods contradicted Glickman in two ways. First, though Glickman had distinguished compelled speech from compelled subsidies, United Foods cited compelled-speech authority to support its decision not to apply lenient scrutiny to the compelled subsidy. Second, it contradicted Glickman’s suggestion that commercial speech cannot be compelled.

United Foods explained that the fact that speech aids a commercial purpose does not completely deprive it of First Amendment protection. According to the Court, “First Amendment concerns apply [to the compelled subsidy] because of the requirement that producers subsidize speech with which they disagree.” Mushroom producers would like to disseminate the message that their mushrooms are superior, but the compelled subsidy compelled them to fund the message that mushrooms are worth consuming irrespective of the brand.

This scenario was nearly identical to Glickman where the Court reached the opposite conclusion. In contrast to Glickman, United Foods explained that the pettiness of the disagreement with the message does not eradicate First Amendment concerns. The Court correctly recognized that “First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens to pay special subsidies for speech on the side that it favors” irrespective of the loftiness of the debate.

The Court attempted to correct Glickman’s suggestion that commercial speech can never contain ideology. But rather than acknowledging that commercial speech can contain ideology and providing a principled means to ascertain when a message is ideological, the Court simply explained

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206 See id. at 410-11, 413.
207 See id. at 410.
208 Id. at 410-11.
209 Id. at 411.
210 See Glickman, 521 U.S. at 468, 472 & nn.10-11.
211 See United Foods, 533 U.S. at 411.
212 Id.
213 See Glickman, 521 U.S. at 472; United Foods, 533 U.S. at 411. Scholar Robert Post characterizes United Foods’s a little differently than I do. He claims United Foods repudiated Glickman’s position “that the compelled subsidization of speech does not raise First Amendment concerns unless the compelled speech is ideological in nature.” Post, supra note 2, at 557, 574. I claim it repudiated Glickman’s position that commercial speech cannot contain ideology. In other words, he characterizes United Foods’s holding as compelled speech need not be ideological. I characterize the holding as commercial speech may contain ideology. His characterization may more closely mirror the Court’s language in United Foods, but my interpretation is also permissible. See United Foods, 533 U.S. at 410-11. Though the distinction is more form over substance, it has consequences for the framework I propose later in the paper.
that commercial speech may be compelled.\(^\text{214}\) In doing so, *United Foods* implicitly created a compelled-commercial-speech doctrine.\(^\text{215}\)

But the Court failed to provide a framework for when the compelled-commercial-speech-doctrine applies. Instead of clarifying matters, the Court's decision to strike the compelled funding ultimately hinged on a different basis, the comprehensiveness of the regulatory scheme.\(^\text{216}\) It was on this sole basis that the Court distinguished *Glickman*, noting that the other reasons *Glickman* cited for its holding existed only within the context of a different, more-cooperative regulatory scheme.\(^\text{217}\)

According to the Court, the advertising marketing orders in *Glickman* arose in the context of a regulatory scheme that displaced competition to such an extent that the freedoms of individuals to act independently was already significantly constrained by means other than the compelled advertising subsidy. In *Glickman*, “the mandated assessments for speech were ancillary to a more comprehensive program restricting market autonomy,” but in *United Foods* the advertising was “the principal object of the regulatory scheme.”\(^\text{218}\) And for the Court, this was the problem.

In distinguishing *Glickman* in this fashion, the Court erroneously suggested that this was the primary basis for *Glickman*'s holding. And it undermined the other reasons *Glickman* had cited.\(^\text{219}\)

It also left unanswered questions about the scope of this newly created compelled-commercial-speech doctrine. For instance, if commercial speech may be compelled, where does compelled-commercial speech stop and factual-disclosure requirement begin? And what framework applies to compelled-commercial-speech regulations? Is it *Barnette/Wooley*, *Zauderer*, *Central Hudson*, or something else entirely?

The *Barnette/Wooley* framework applies to laws compelling public discourse, but the Court did not directly apply this framework in *United Foods* where a subsidy, not speech, was compelled.\(^\text{220}\) Instead it relied on *Abood v. Detroit Board of Education*\(^\text{221}\) and *Keller v. State Bar of*...

\(^\text{214}\) *United Foods*, 533 U.S. at 410-411.

\(^\text{215}\) See Post, supra note 2, at 576-78.

\(^\text{216}\) *United Foods*, 533 U.S. at 411-12.

\(^\text{217}\) See id.

\(^\text{218}\) Id.

\(^\text{219}\) See Post, supra note 2, at 572 (noting “*Glickman* offered three, logically distinct and independent justifications for its holding.”).

\(^\text{220}\) See *United Foods*, 533 U.S. at 413.

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California, cases where individuals were forced to fund group expression despite disagreeing with it.

United Foods re-examined Glickman through this framework. According to the Court, Glickman passed the Abood/Keller test because the compelled subsidy for advertising was germane to the regulatory scheme’s valid purpose of fostering cooperation to improve the tree-fruit market. Because the compelled subsidy for mushroom advertising was not pursuant to a broader, cooperative regulatory regime, the program and its compelled subsidy furthered only the very speech to which the mushroom producers objected, and this ran afoul of Abood and Keller. Thus, the expression the mushroom producers were “required to support [was] not germane to a purpose related to an association independent of the speech itself,” and thus the assessments violated the First Amendment.

Applying Abood/Keller may make sense for a compelled subsidy where one is forced to subsidize another’s message, but it does not make sense applied to a law directly compelling speech. After all, with a compelled subsidy, a person is forced to fund another’s speech, and a logical, preliminary question is whether they should be forced to associate with that person’s message. When a law compels speech directly, however, it need not be associated with another private party’s message. Often it is the government’s message that is being compelled.


See United Foods, 533 U.S. at 413. Abood and its progeny say that paying for speech is equivalent to speaking. See Kathleen M. Sullivan & Robert C. Post, It’s What’s for Lunch: Nectarines, Mushrooms, & Beef—The First Amendment & Compelled Commercial Speech, 41 Loy. L.A. L. Rev. 359, 363 (2007). And if the government compels someone to fund speech and then uses that money for purposes not germane to the valid reason justifying the exaction, the funder has “a conscientious objector’s right to have a pro rata refund of [her] funds to the extent they are going to the non-germane purpose.” Id. at 363-64. Neither Abood nor Keller arises in the commercial-speech arena. See Abood, 431 U.S. at 211, 221-23 (invoking law that compelled state and local employees to pay fees to union so that it could act as collective-bargaining agent of all employees even if non-union members); Keller, 496 U.S. at 4 (invoking members of California state bar who sued claiming bar’s use of bar dues to finance ideological and political causes with which members disagreed violated First Amendment rights); see also Ellis v. Bd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 447-457 (1984) (considering whether union could use fees for various purposes attendant to running a union); Lehner v. Ferris Faculty Ass’n, 500 U.S. 507, 516-19 (1991) (explaining that union fees may be used for expenses that are germane to collective bargaining, and this does not include political or ideological activities).


See id. at 415.

See id. at 415-16.

Foods did not determine whether Abood/Keller applies to laws compelling speech, as compared to subsidies.

United Foods thus leaves open some important questions. Should the Barrente/Wooley or the Abood/Keller line of cases apply to compelled-commercial speech? And where does compelled-commercial speech stop and Zauderer’s factual disclosure begin? The last case in the trilogy that followed United Foods failed to answer either question.

C. Johanns v. Livestock Marketing Association

After United Foods, the Supreme Court again considered whether a compelled subsidy of generic advertising violates the First Amendment. Unlike United Foods, Johanns v. Livestock Marketing Association held that it did not. But, once again, it did so for entirely different reasons.

In Johanns, beef producers argued that a federal check-off program that compelled funding for generic beef advertising constituted an improper compelled subsidy. According to the beef producers, the program forced them to fund advertising that “promotes beef as a generic commodity,” which “impedes their efforts to promote the superiority of, inter alia, American beef, grain-fed beef, or certified Angus or Hereford beef.” The producers claimed the program forced them to subsidize a message with which they disagreed and thus violated United Foods.

The Court disagreed, distinguishing United Foods. According to the Court, United Foods never considered whether the speech was “government speech” and was therefore appropriate for that reason. Finding the compelled subsidy for beef advertising to constitute a funding of government speech, the Court held that the check-off was proper and created a sweeping exception to the compelled-subsidy doctrine that it had not considered in Glickman or United Foods.

The Court held that when the government compels funding of the government’s own message, the First Amendment is not implicated at all. This is of course in stark contrast to the compelled-speech doctrine,

228 See Johanns, 544 U.S. at 553.
229 Id. at 550.
230 See id. at 555-56.
231 Id. at 556 (internal pagination omitted).
232 See id. at 555-56.
233 See id. at 558-59.
234 See id.
235 See id. at 558-59 & n.3, 564-65.
236 See id., at 559, 562-64. Where government speech is not involved, Johanns leaves United Foods intact. See Post, supra note 2, at 557.
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which involves the government compelling the direct utterance of the government’s message.\textsuperscript{237} 
\textit{Johanns} government-speech exception thus creates a wide pass for forced \textit{funding} of government speech, which should not apply when the government compels utterance of its message directly.

The Court also reinforced a distinction between compelled speech and compelled subsidy when it rejected the beef producers’ claim that the advertisements improperly credited the message to them.\textsuperscript{238} The Court dismissed this argument because the law was facially challenged, and on its face, it did not require such an attribution.\textsuperscript{239} And the Court explained that this attribution argument goes to compelled speech not compelled subsidy.\textsuperscript{240} This suggests the government-speech exception applies only to compelled subsidies but not compelled speech.

Though \textit{Johanns} distinguished compelled speech from compelled subsidy, it did not undermine the understanding that \textit{United Foods}, a compelled-subsidy case, created a compelled-commercial-speech doctrine.\textsuperscript{241} Like \textit{Glickman}, \textit{Johanns} distinguished the compelled-speech and compelled-subsidy doctrines because the harm of compelled speech is graver than that of compelled subsidy.

\textit{Johanns} suggests that a unique harm arises when a speaker is forced to stamp her imprimatur on speech by uttering it as compared to funding someone else’s dissemination of it.\textsuperscript{242} With compelled speech, a message is attributed to a speaker even though she disagrees with it, and it is this attribution that creates the harm.\textsuperscript{243} With compelled subsidy, the message should not be attributed to the individuals who fund it.

\textit{Johanns}’s suggestion—that compelled speech poses a graver harm than compelled subsidy—should equally apply when a commercial speaker is forced to stamp her approval on a commercial message. Thus, despite the Court’s inconsistency on whether compelled-speech principles apply to compelled-subsidy cases, the Court has consistently explained that compelled speech poses a graver dangers than compelled subsidies.

\textit{The Glickman} trilogy reveals a few points. First, after \textit{United Foods} courts will subject regulations compelling subsidization of commercial

\begin{itemize}
  \item \textsuperscript{237}See supra Part II.
  \item \textsuperscript{238}Johanns, 544 U.S. at 554, 564.
  \item \textsuperscript{239}See id. at 564-65.
  \item \textsuperscript{240}See id.
  \item \textsuperscript{241}See id.
  \item \textsuperscript{242}See id. at 564-66 & n.8.
  \item \textsuperscript{243}See id. at 565 & nn.8, 11.
  \item \textsuperscript{244}See id. If there is attribution of government speech, \textit{Johanns} government-speech exception may not apply. See id. at 564-67.
\end{itemize}
speech with which a speaker disagrees to heightened scrutiny as set forth in Abood/Keller. Second, this holding implicitly created compelled-commercial speech. Where the government compels a commercial speaker to espouse a message with which she disagrees, this too should face heightened scrutiny. Third, where the government compels subsidizing the government’s message, Johanns instructs that this does not raise a First Amendment issue.

Viewed as a whole, the Glickman trilogy establishes that compelled-commercial speech exists and raises serious First Amendment concerns. The obvious next question is what are its implications?

V. PROBLEMS & SOLUTIONS

The Glickman trilogy’s implicit creation of compelled-commercial speech raises important questions. For instance, where does the doctrine of compelled-commercial speech stop and factual disclosures under Zauderer start? Is there a principled means to distinguish between the two?

Also, which test should apply to compelled-commercial speech? Should it be the test used for compelled public discourse (Barnette/Wooley)? Or should it be the test used in United Foods for compelled subsidy (Abood/Keller)? Or perhaps it should be something different entirely?

After exploring these questions, this Part proposes a solution. It draws on the doctrines of commercial speech and compelled speech, remaining true to the speaker and listener interests animating the doctrines. It also draws on a social-science theory developed at Yale University—Cultural Cognition theory.

The proposed framework begins by providing a meaningful way to categorize regulations. Once a regulation is categorized, the framework dictates which test applies. This approach offers a principled means to reconcile the doctrines while remaining true to the relevant interests at stake.

A. Problems

The creation of compelled-commercial speech in United Foods left some important questions unanswered. First, if compelled-commercial speech requires heightened review, how should we determine where this heightened review is appropriate and where instead Zauderer’s lenient
review for factual disclosures is appropriate? Second, which test should apply to compelled commercial speech, *Barnette/Wooley, Abood/Keller,* or something else?

After *United Foods,* the notion that the lenient review of *Zauderer* should generally apply to forced speech in the commercial context lost viability. *United Foods* made clear that the compulsion of commercial speech raises significant First Amendment concerns. One may thus no longer argue that the decision as to when *Zauderer* applies versus heightened review turns on whether the speech is commercial or public discourse. Instead, another means of distinguishing factual disclosures from compelled-commercial speech is necessary.

Of course, one person’s factual disclosure is another’s compelled-commercial speech. Obvious cases may exist at either end of the spectrum, but for the vast majority of gray areas for which the law is notorious, the compelled-commercial-speech doctrine has created a line-drawing problem.

A case that reached the Seventh Circuit, *Central Illinois Light Co. v. Citizens Utility Board,* provides an example. At issue in that case was an Illinois act that compelled utilities to place messages created by a citizens’ utility board in the billing envelopes mailed to customers. One such message read: “‘WARNING! This utility bill may be hazardous to your budget. We don’t have to tell you how much your electric, gas, and phone bills have increased in recent years. And the sad truth is that there’s no end in sight.’”

The Seventh Circuit distinguished *Zauderer,* explaining that *Zauderer* involved disclosure of purely factual, uncontroversial information. *Zauderer* did not suggest, insisted the Seventh Circuit, that “companies can be made into involuntary solicitors for their ideological opponents.”

But one wonders how far this logic goes. The message at issue in *Central Illinois Light Company* presents a fairly straightforward case because that message seems plainly problematic. Common sense suggests

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246 *United Foods* modified First Amendment landscape in a number of ways, which scholar Robert Post describes as “novel” and “seriously misguided.” See Post, *supra* note 2, at 557.

247 See *supra* Part IV.B.

248 827 F.2d 1169 (7th Cir. 1987).

250 See id. at 1171.

251 See *id. at* 1171 n.2.

252 See *id. at* 1173.
forcing a utility to disseminate a message expressing values antithetical to its business should raise serious First Amendment concerns.

But in less clear cases, how should one draw principled lines between mandatory disclosure of information and compelled speech? Skilled attorneys on each side will argue the same regulation falls into either category.

A commercial speaker who does not want to disseminate information will argue that she disagrees with it, and thus it constitutes compelled speech. According to this reasoning, any message a speaker does not wish to disseminate is ipso facto compelled speech rather than a factual disclosure. And of course, if a speaker has brought the case to court in the first place, it is because she would prefer not to disseminate the message.

The government’s obvious response will be that it is simply requiring the commercial speaker to provide additional, factual information. But this argument proves too much. The statement that a utility is charging its consumers too much money is of course factual information, but it is also arguably ideological and viewpoint based, as the Seventh Circuit found. But the suggestion that Zauderer should only apply where the government seeks to prevent consumer deception suffers from its own infirmities.

Central Illinois Light Co. suggests one familiar basis for distinguishing Zauderer from compelled speech, preventing consumer deception. But the suggestion that Zauderer should only apply where the government seeks to prevent consumer deception suffers from its own infirmities.

First it fails to address those situations where a regulation targets consumer deception, but there is disagreement over whether the regulation mandates factual disclosures or compels speech. Second, it undermines the interest that listeners have in receiving commercial information, an interest that animates the entire commercial-speech doctrine. After all, a consumer’s right to receive information about a specific product or service she is considering purchasing should not turn only on whether commercial speakers misled them. And third, it ignores Zauderer’s admonition that a commercial speaker’s interest in not providing additional information about the product or service she is selling is minimal. If a commercial speaker’s interest in not providing this additional information is truly minimal, the government should face limited scrutiny to overcome it.

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254 See id. at 1172-74.
255 See id. at 1173. See also supra note 107.
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Some other means to distinguish between the doctrines is needed. Part of the problem behind uncovering an effective solution stems from Glickman and United Foods.

Glickman distinguished ideology from the commercial speech at issue. In essence, it said ideology is one sphere, and commercial speech is a separate sphere. This is misguided.

Commercial speech may be ideological. Ideology is defined as a body of belief that guides an individual, social movement, group, or class. Just because speech proposes a commercial transaction does not automatically mean it is not part of a body of belief. There may be overlap. Glickman itself provides such an example.

The essence of the message there, that tree-fruit is worth consuming irrespective of the brand, is ideology embedded within commercial speech. It expresses a value judgment—tree-fruit is good. And it is prescriptive—implying that one should consume tree-fruit. It is ideological because it offers a belief about the positivity of tree-fruit that attempts to guide individuals towards purchasing tree fruit.

Glickman’s refusal to characterize the message as ideology set the stage for United Foods. United Foods appropriately applied heightened scrutiny because the message there was akin to compelled public discourse in commercial speech. Though United Foods did not characterize the message that mushrooms are worth consuming irrespective of the brand as ideological, it clearly is, just as the message in Glickman was.

258 See 2 OXFORD ENGLISH DICTIONARY 622 (2d ed. 1989) (“A systematic scheme of ideas, usu. relating to politics or society, or to the conduct of a class or group, and regarded as justifying actions, esp. one that is held implicitly or adopted as a whole and maintained regardless of the course events.”).
259 See infra Part V.B.
260 Admittedly, most all advertising is value laden and prescriptive. Advertising attempts to persuade consumers to purchase products. But the problem arises when the government prescribes that ideology rather than permitting commercial speakers to espouse their own ideology. Speakers are free to spread their own ideological messages, but the First Amendment prevents the government from coercing the content of those messages without satisfying strict scrutiny. Cf. Wooley v. Maynard, 430 U.S. 705, 714-16 (1977). The government is permitted, however, to compel espousal of some purely factual information. See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).
The message that mushrooms are worth consuming irrespective their brand is an opinion, a value judgment, not a fact. Yes, mushrooms may be rich in nutrients, but the conclusion that they are worth consuming irrespective their brand does not necessarily follow. Perhaps some brands subject their mushrooms to harsh chemicals, for example, or do any number of things that would render their brand not worth consuming.

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

A workable framework must provide a principled means to determine whether a regulation compels a factual disclosure or compels ideology within commercial speech. And it should remain true to the interests at stake in both the compelled- and commercial-speech doctrines.

The framework should also help answer which test applies to compelled-commercial speech? Should the test the Court applied to a compelled subsidy in United Foods (Abood/Keller) apply? Or should the test the Court applies to compelled public discourse (Barnette/Wooley) apply instead?

B. Solutions

A workable framework faces many hurdles. It must answer the questions identified above while remaining true to the relevant doctrines. The following approach endeavors to accomplish both.

Under this framework, one first determines if a regulation falls into one of three categories: (1) mandatory disclosure of uncontroversial facts about a specific product or service sold; (2) mandatory disclosure of controversial facts about a specific product or service sold; or, (3) mandatory disclosure of facts about something other than a specific

262 If instead, the message was that mushrooms contain Vitamin B, that would be an uncontroversial fact about the specific product sold, and Zauderer should apply, unless of course mixed empirical support exists that mushrooms contain this Vitamin, in which case, Central Hudson should apply. See infra Part V.B.

263 See supra Part II.

264 As discussed above, United Foods did not frame the issue this way. United Foods notes the point that the messages in Glickman and United Foods are not political or ideological, but it maintains that the speech is in need of heightened protection anyway. See United Foods, 533 U.S. at 411-13. This suggests that commercial speech, though not ideological, requires protection. My position is a slight twist on this. I maintain that speech may be commercial and ideological and thus deserves protection. It deserves protection because it is ideological not in spite that it is not.
Cultural Cognition as a Tool to Combat the Compelled-Commercial-Speech Conundrum

If the regulation is a Category 1, *Zauderer*’s lenient review should apply. If it is Category 2, *Central Hudson* should apply. If it is Category 3, the heightened scrutiny of *Barnette/Wooley* should apply.

A graphic display of the system looks like this:

<table>
<thead>
<tr>
<th>Category #</th>
<th>Type of Regulation</th>
<th>Test</th>
<th>Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Compels disclosure of uncontroverted factual information about the specific product or service sold</td>
<td><em>Zauderer</em></td>
<td>Reasonable relationship test</td>
</tr>
<tr>
<td>2</td>
<td>Compels disclosure of controverted factual information about the specific product or service sold</td>
<td><em>Central Hudson</em></td>
<td>Intermediate scrutiny</td>
</tr>
<tr>
<td>3</td>
<td>Compels ideology within commercial speech or compels providing information not about the specific product or service sold</td>
<td><em>Barnette/Wooley</em></td>
<td>Strict Scrutiny</td>
</tr>
</tbody>
</table>
Determining which category applies requires determining whether the regulation requires providing uncontroverted or controverted facts about the specific product or service sold or ideology. To answer this question, the framework draws on a social-science-theory called Cultural Cognition, which addresses unconscious cultural bias in fact perception.

1. Cultural Cognition Theory

Dan Kahan and Donald Braman of Yale have created the Cultural Cognition Project. “Cultural cognition refers to the tendency of individuals to conform their beliefs about disputed matters of fact . . . to values that define their cultural identities.” Cultural cognition may operate as a bias for individuals attempting to categorize any given regulations as factual or ideological. Getting most people to agree on what constitutes fact is fraught with difficulty. Drawing on mechanisms that combat cultural cognition bias should help prevent this bias from infecting the framework and interfering with courts’ determinations of what constitutes fact versus ideology.

In their work on cultural cognition, Kahan and Braman maintain that individuals’ cultural commitments unconsciously bias their perceptions of facts. “In other words, a critical distinction exists between cultural

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265 Riley v. National Federation of the Blind, 487 U.S. 781 (1988), does not prevent this distinction. There the Court instructed that where the government compels fully protected speech, it makes no difference whether the speech is fact or opinion. See 487 U.S. at 797-98. As Riley acknowledged, it did not address where the overall speech is commercial and thus not fully protected. See id. at 795-96 & n.9; see also supra note 1. This is the same reason why cases like Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), Pacific Gas & Electric Co. v. Public Utility Commission, 475 U.S. 1 (1986) (plurality), and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), do not foreclose the framework offered in this paper. They dealt with laws that interfered with a speaker’s expressive message. Cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 63-64 (2006) (describing these cases in this fashion). Under the framework proposed here, where a law compels ideology and thus interference with a speaker’s expressive message, it too receives heightened scrutiny. See infra Part V.B.2.

266 See Cultural Cognition Project, http://www.culturalcognition.net/ (last visited Aug. 5, 2011). The framework proposed in this paper does not apply Cultural Cognition literally. It is instead guided by the concepts underpinning the theory. See id.


268 See Dan M. Kahan & Donald Braman, Cultural Cognition & Public Policy, 24 YALE L. & POL’y REV. 149, 150 (2006) [hereinafter Public Policy]; see also Paul M. Secunda, Cultural Cognition at Work, 38 FLA. STAT. L. REV. 107, 109 (2010); David G. Yosifon, Legal Theoretic Inadequacy & Obesity Epidemic Analysis, 15 GEO. MASON L. REV. 681, 725 (2008). Cultural cognitions argue that individuals’ value classifications tend to align along two dimensions: a group dimension, which addresses how individualistic or communitarian people are and a grid dimension, which addresses how hierarchical or
outlooks as a source of normative judgment or evaluation, on the one hand, and cultural outlooks as an unconscious influence of perceptions of fact, on the other.”

Cultural cognition affects how individuals process information. “It is cognitively easier to believe factual assertions that comport with our norm-pervaded moral evaluations and cognitively harder to believe those that conflict with or threaten them.” As a result, individuals unknowingly conform their factual beliefs to their values, selectively crediting information that furthers those values while discrediting whatever does not. Thus, “seemingly empirical debates over all manner of public policy will be guided by the invisible hands of conflicting cultural worldviews.”

Because public-policy questions over “highly charged political issues” are controversial and supported by mixed scientific evidence, they are the types of questions most susceptible to cultural cognition bias. “Most of us form our views on controversial subjects without formal study of the often cacophonous scientific analysis of the questions.” Instead, when members of society disagree, individuals tend to “instinctively trust those who share our values.”

Certain types of public-policy questions are more easily infected with this bias. These include whether global warming exists; whether the death penalty deters; whether gun control reduces violent crime; and, whether abortion is safe. An example in a specific case is whether the police used excessive force.

An example from current events is the FDA’s recent cigarette-advertising regulations. The FDA unveiled regulations requiring that all cigarette advertising warn potential consumers that cigarettes cause fatal lung disease. Though many may agree that this is a “fact,” there are egalitarian they are. See Yosifon, supra note 269, at 725-26. “People’s views about different kinds of risks can be mapped along these classification schemes.” Id. at 726.

Secunda, supra note 269, at 109.

See id. at 109. See Public Policy, supra note 269, at 151-52, 165-66.


Id. at 157. See id. at 167-68; Secunda, supra note 269, at 109; Yosifon, supra note 269, at 726-27.

Id. at 727 (internal quotations omitted). See Public Policy, supra note 269, at 165, 167-68.

Secunda, supra note 269 at 118-21. The FDA recently unveiled several, new warning labels for cigarette packages. See Dep’t of Health & Human Services, June 21, 2011,
those who debate the accuracy of it,\textsuperscript{282} thus mixed empirical support renders this a fact susceptible to cultural cognition bias. Likewise, different judges may view this “fact”, differently and may have trouble analyzing the FDA’s regulation to determine if it is a compelled disclosure or compelled-commercial speech.

Where money is at stake, as is generally the case in regulation of business, mixed empirical support may often be purchased, yielding more conflicting empirical data and more fact-perception inconsistency.

Cigarettes are a good example of this. The tobacco industry has helped to create mixed scientific messages on the health risks of smoking cigarettes “by pumping millions of dollars into research to create the appearance of varied scientific opinions on an issue” that seemed scientifically settled.\textsuperscript{283} “Such studies [have] provided the ambiguity that smokers, already motivated to doubt the science indicating that their addiction [i]s deadly, needed to continue viewing their own smoking as unproblematic.”\textsuperscript{284} And such mixed empirical support complicates determining if the advertising regulations compel factual disclosures or ideology.

Means exist to combat cultural cognition bias. One useful tool that Paul Secunda has argued for to combat the bias in the employment context is a concept Cass Sunstein developed, judicial humility of mind.\textsuperscript{285} Judicial humility is a moment of pause in which judges realize they are human and make mistakes.\textsuperscript{286} During this moment, self-aware judges


\textsuperscript{282} See, e.g., Gayle Sulik, What We Could Learn from George Burns About Breast Cancer, July 31, 2010, http://gaylesulik.com/2010/07/what-george-burns-could-teach-us-about-breast-cancer-risk/ (last visited Aug. 1, 2011) (“While there is a strong probability that smoking causes lung cancer, the smoking-lung cancer equation is not definitive for all individuals.”). For example, some might argue that cigarettes alone do not cause lung disease but rather a combination of cigarette smoking and genetics causes it. See id. There are people who smoke and never develop such disease. See id. George Burns, the famous cigar-smoking centenarian is a good example. See id.

\textsuperscript{283} See Yosifon, supra note 269, at 732.

\textsuperscript{284} See id. at 732.

\textsuperscript{285} See generally Cass R. Sunstein, If People Would be Outraged by Their Rulings, Should Judges Care?, 60 STAN. L. REV. 155 (2007); see also Secunda, supra note 269, at 111, 140-41 (arguing that to combat cultural cognition bias “judges could exercise judicial humility to guide courts away from unnecessary decisions that appear to embrace partisanship and delegitimize the concerns of a group of citizens who come out on the losing end in such cases”).
perform a mental double-check for decisions they will render that are contentious. Judges would attempt to self-correct “for their inability to fully appreciate how their subconscious values operate to shape their perceptions of particular facts.” They would temper their decision either in result or at least in the way they write the opinion.

Judicial humility of mind is a tool to combat cultural cognition bias, and it provides a means to limit this bias from infecting the proposed framework. Because some regulations compelling speech involve gray areas that do not involve clear “facts” but rather disputed data susceptible to bias, humility of mind is especially necessary to combat cultural cognition bias where gray areas are involved. Cultural Cognition theory, and the judicial-humility-of-mind de-biasing technique, are thus integral parts of the proposed framework to determine the appropriate judicial scrutiny for regulations compelling speech in these gray areas.

2. The Proposed Framework

For a new First Amendment framework to work in this arena, it must remain true to the important interests at stake in the compelled-speech and commercial-speech doctrines, and it must answer the questions created by the concept of compelled-commercial speech. Cultural Cognition theory and the de-biasing technique of judicial humility of mind provide useful tools for this framework.

The framework requires answering a threshold question of what type of regulation is at issue. A Category 1 regulation requires a commercial speaker to disclose uncontroverted factual information about a specific product or service sold. A Category 2 regulation requires the disclosure of controversial factual information. And a Category 3 regulation compels ideology within commercial speech, or it compels information about something other than a specific product or service sold.

Once the category is determined, the appropriate test is applied. Zauderer applies to Category 1; Central Hudson applies to Category 2; and, Barnette/Wooley apply to Category 3 regulations.

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286 See Secunda, supra note 269 at 140-41.
287 See id. at 140-41.
288 See id. at 141.
289 See id. 141-42.
290 Maintaining humility of mind is an important part of theory creation generally. See Nancy Levit, Listening to Tribal Legends: An Essay on Law & the Scientific Method, 58 FORDHAM L. REV. 263, 273 (Dec. 1989). “Pretensions to knowledge are as unscientific as ignorance, and more dangerous.” Id.
291 This framework does not apply outside of the commercial-speech realm.
This framework accomplishes the goals identified. It remains true to speaker and listener interests, and it provides a principled means to determine whether a regulation is compelled-commercial speech or a factual-disclosure requirement.

i. Determine the Category

To determine which category applies, one must first determine whether the regulation compels an uncontroverted fact about a specific product or service sold (Category 1), a controverted fact about a specific product or service sold (Category 2), information about something other than a specific product or service sold, or ideology (Category 3). To determine the category, one must ascertain if the information compelled is always true in every instance, or could reasonable people disagree on the veracity of the message?

Category 1 regulations involve disclosure of uncontroverted facts about the specific products or services sold. These disclosures describe a state of affairs that either exists or does not.

For example, if a loaf of bread contains wheat flour, that fact is demonstrably provable and not open to value disagreements. It describes an uncontroverted state of being. The same is true of the fact that cigarettes contain nicotine.

If a shirt is blue, that is an uncontroverted state of being. Observers may disagree over its tone or shade. They may be colorblind and incapable of perceiving the shirt’s blueness. Or they may wish to deny that it is blue (perhaps if they detest the color). But if the shirt is actually blue, this is an indisputable fact.

Another example of an uncontroverted factual statement, derived from Zauderer, is that a lawyer holds clients responsible for costs but not for fees. Assuming this accurately describes reality, it is a fact, a truth. It is uncontroversed information about a state of being. And it is a fact about

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292 “Fact” means truth. 5 OXFORD ENGLISH DICTIONARY 651 (2d. ed. 1989) (“Something that has really occurred or is actually the case; something certainly known to be of this character; hence, a particular truth known by actual observation or authentic testimony, as opposed to what is merely inferred, or to a conjecture or fiction; a datum of experience, as distinguished from the conclusions that may be based upon it.” (emphasis added)).

293 That a fringe, irrational person refuses to acknowledge the truth does not render it non-truth.

294 Of course the decision to reveal this information involves individual discretion. There are numerous facts that different people would think should or should not be revealed. Though the decision to reveal certain facts involves personal choice, this does not render the information non-factual.
the specific service the lawyer is selling. Though the lawyer may not wish to reveal this fact because it may scare off some business, it is indisputably a fact nonetheless.

If instead of requiring disclosure of uncontroverted, factual information, a regulation requires disclosure of controverted factual information about a specific product or service sold, the regulation falls in Category 2. For factual information to be “controverted,” it must have mixed empirical support for its existence as an actual state of being.

For this criterion to be meaningful, mixed empirical support requires a critical amount of divergent evidence pointing to more than one potentially accurate description of reality. How does one determine whether this critical mass is satisfied?

A critical mass of differing evidence is an amount sufficient to cause a reasonable consumer to choose between two competing views. There may be a majority view and a minority view, but as long as there are multiple views espoused by even a substantial minority of scientists or the public, there is a controversy over whether the piece of information accurately describes reality. A party would need to cite such evidence to the court. One fringe person arguing that the moon is made of green cheese will not do.

The new FDA regulation requiring that cigarette advertisements state that cigarettes cause fatal lung disease should likely fall into this category. A court would first need to be sure, however, that there is sufficient mixed empirical support for this statement. Assuming there is, this is a controverted statement with empirical support for both sides. This disclosure is also a statement about the specific product sold. Because mixed empirical support creates an area most susceptible to cultural cognition bias, regulations in this gray area should receive a level of scrutiny that accounts for and combats this bias. The corresponding test for Category 2 does this.

One additional point is relevant to factual-disclosure requirements in general (both Categories 1 and 2). Not all facts are appropriate for any given factual-disclosure requirement. If someone sells mushrooms, and the government compels the seller to provide information on cantaloupes, this makes little sense. Appropriate factual-disclosure requirements should compel facts about the specific product or service sold.

Note this is not asking whether reasonable people disagree on whether to share information but whether they disagree on the content of the message.

See supra notes 281-84 and accompanying text. Of course the statement that cigarettes “may” cause lung disease is as uncontroverted as cigarettes contain nicotine and thus falls into Category 1.
Moving beyond factual-disclosure requirements to compelled-commercial speech brings us from Categories 1 and 2 to 3, which addresses regulations compelling ideology within commercial speech. It also addresses regulations compelling that commercial speakers provide information about something other than the specific products or services sold.

Category 3 regulations compel opinions or value judgments. A value judgment is a statement that something is good or bad; that one believes in something; or, that one should do something.\(^{297}\)

The fact that a sizeable majority holds on opinion does not transform it from compelled ideology to fact. Barnett and Wooley make this clear.\(^{298}\) To find otherwise would overlook minority rights and violate the Bill of Rights.\(^{299}\) Where a regulation compels such ideology, it fits in Category 3.

A regulation also fits in Category 3 where it conscripts commercial speakers to provide information about something other than the specific products or services they are selling. For instance, if a regulation requires that an Audi dealer include price information of cheaper competitors in his advertising, this falls in Category 3.

The reason this regulation falls in Category 3 is because it places a heavy burden on the Audi dealer to disseminate information antithetical to his interests that is not even about the specific product or service he is selling. The burden to provide such information should not fall on the dealer. The regulation compelling the dealer to disseminate this information should face heightened review because it compels a commercial speaker to use his property to spread information about

\(^{297}\) See Smit, supra note 268, at 52 (“A ‘value judgment’ is . . . a judgment regarding the irreducible ‘goodness,’ ‘badness,’ etc., of something, or the equivalent judgment that something ‘should’ or ‘should not’ be done.”). Of course a message need not take the form of a command to constitute ideology. The message that mushrooms are worth consuming irrespective the brand implicitly suggests mushrooms should be consumed, and this renders it ideological. It is an “ought” not an “is.” Cf. Levit, supra note 290, at 279.


\(^{299}\) An example illustrates the point. Not long ago in American history, a majority of people may have said that interracial marriage is wrong. But this is clearly a value judgment, an opinion, not a fact. That a majority of people may agree on an opinion may make it uncontroverted, but it does not make it fact. Compelling speakers to espouse the majority’s opinion raises serious First Amendment concerns and should receive heightened scrutiny under Barnette and its progeny.
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something other than a product or service he is selling that is antagonistic to his purpose in advertising his product. 301

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

ii. Apply the Corresponding Test

Once the appropriate category is ascertained, the appropriate test should be applied. Under this framework, Zauderer applies to Category 1, Central Hudson to Category 2, and Barnette/Wooley to Category 3.

Zauderer is the appropriate test for Category 1 regulations. Applying its lenient review to uncontroverted information about the product or service sold furthers the listener interests in receiving information discussed in Zauderer and Virginia Pharmacy Board.

It makes sense to apply Zauderer when the government compels disclosure of uncontroverted facts about the product or service sold to assist consumers in deciding whether to purchase. An important reason commercial speech receives First Amendment protection is to provide consumers with ample information in the marketplace of ideas. 301 This listener interest is paramount over a commercial speaker’s interests in not providing such information because such disclosures require that commercial speakers provide information that is unquestionably accurate about specific products or services they are selling.

300 Cf. Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n, 475 U.S. 1, 17-18 (1986) (plurality); Cent. Ill. Light Co. v. Citizens Util. Bd., 827 F.2d 1169, 171-74 (7th Cir. 1987). Pacific Gas & Electric and Cent. Illinois Light Co. support categorizing regulations compelling information not about the specific product or service sold as Category 3 regulations, but these cases are distinguishable. In both cases, the speech involved ideology not just factual information. See Pac. Gas & Elec. Co., 475 U.S. at 8-9; Cent. Ill. Light Co., 827 F.2d at 1171 n.2. Despite this, these cases are useful by comparison because the idea is the same: a commercial speaker should not be forced to spread information not about his specific product or service. To permit this would be to permit the government to use personal property to spread information it deems important for listeners to receive despite a heavy burden on speakers. Because the information is not about the seller’s products or services, the speaker interest in not providing this information should outweigh the listener interest in receiving the information from this particular speaker. The government could of course always force the competitors to provide their own price information.

301 See supra Part III.B.

302 It is for this reason that if the government mandated that a commercial speaker disclose information about her competitors’ product, this would not be considered a factual-disclosure requirement under the framework because competitor information is not information about the specific product or service the commercial speaker is selling.
And cultural cognition should not bias perceptions of these facts because there is not a competing cacophony of scientific evidence pointing in multiple directions. Because of this, the appropriate test for Category 1 does not need to attempt to remedy this bias, and Zauderer should apply.

Zauderer instructs that a factual-disclosure requirement is constitutional where it requires “purely factual and uncontroversial information about the terms under which [one’s] services will be available.” And it requires that a disclosure is reasonably related to the government’s interest.303

There should be two, acceptable government interests for a Category 1 regulation. The government is either attempting to prevent consumer deception (the interest at stake in Zauderer), or it is attempting to provide uncontroversial, factual information about the specific products or services sold.305

304 See id.
305 Courts and commentators disagree over whether Zauderer should apply beyond laws targeting deception. See supra note 107. Not applying Zauderer to regulations requiring commercial speakers provide factual and uncontroversial information about the specific products or services they are selling ignores Zauderer’s instruction that such disclosures are appropriate. See Zauderer, 471 U.S. at 651. It also ignores listener interests by undervaluing the importance of providing listeners with information in the commercial context. See supra Part III.B. And it ignores the emphasis the Court placed in both Zauderer and Virginia Pharmacy Board on the minimal interest commercial speakers have in not providing this additional information. See supra Part III.B; see also Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n, 475 U.S. 34 (1986) (Rehnquist, J., dissenting) (citing Zauderer’s language that a commercial speaker’s interest in not providing additional information is minimal and noting that “because the interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views clearly identified as those of the speaker is de minimis”). Rehnquist argues in dissent in Pacific Gas & Electric Co. that corporations should not have any negative free-speech rights because it strains the rationale of cases like Barnett and Wooley to the breaking point since corporations do not have a conscience or mind on which compelled speech may intrude. See Pac. Gas & Elec. Co., 475 U.S. at 33-35. If a speaker’s interest in not providing information is minimal, the government should only need to overcome a lenient test, like Zauderer, when it requires that a speaker provides this information.

306 If a commercial speaker misled consumers by suggesting the competitors’ prices were different than they actually were, and the government required a disclosure to correct this and thus prevent consumer deception, the government’s regulation would fall into Category 1 not Category 3, despite that the regulation is not about the specific product or service sold. If, however, there is no deception to correct, forced disclosure of competitor information should generally fall into Category 3.
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If a law compels disclosure of uncontroverted facts about the specific product or service sold, the law falls into Category 1, and Zauderer applies. The test drawn from Zauderer is whether the law is reasonably related to the government interest of providing uncontroversial, factual information about the specific products or services sold, or preventing consumer deception.\footnote{See supra Part V.B.2.i.}

If instead of requiring a disclosure of uncontroverted facts, a regulation compels disclosure of controverted facts, the regulation falls into Category 2. Central Hudson applies here.

\textit{Central Hudson} applies to Category 2 because this category is most likely infected with cultural cognition bias.\footnote{See, e.g., Allstate Ins. Co. v. Abbott, 495 F.3d 151, 164-68 (5th Cir. 2007) (applying \textit{Central Hudson} where the potential for consumer confusion is minimal, and the provisions at issue both restrict and compel commercial speech); Borgner v. Brooks, 284 F.3d 1204, 1210 (11th Cir. 2002) (applying \textit{Central Hudson not Zauderer} to disclosure requirements where speech is only potentially, not inherently misleading); Int’l Dairy Foods Ass’n v. Amestoy, 92 F.3d 67, 69-70, 72 (2d Cir. 1996) (applying \textit{Central Hudson} where law compels, as opposed to restricts, commercial speech); Charles R. Yates, III, \textit{Note, Trimming the Fat: A Study of Mandatory Nutritional Disclosure Laws & Excessive}}

\textit{Central Hudson}’s intermediate scrutiny encompasses the spirit of humility of mind because it is mid-level scrutiny. It inherently recognizes that these gray areas do not involve facts on which all agree but rather potentially biased empiricism, and it counters that with a test that is neither too lenient nor too stringent but in the middle.

It also serves speaker and listener interests. Because \textit{Central Hudson} provides more heightened scrutiny than Zauderer, it recognizes that speaker interests should be more protected where there is not unanimous agreement that the facts required for disclosure actually exist. But it also does not place too high a barrier preventing the government from informing consumers about important information about the products or services they may purchase.

Applying \textit{Central Hudson} here has the added benefit of providing a compromise for another reason: many believe it should apply to factual-disclosure requirements.\footnote{Translating judicial humility of mind into a formal standard of review requires some creative thinking. This is obviously not a literal application of judicial humility of mind. Rather, it aims to embody the purpose behind the heuristic.} Striking this compromise through the
framework **embodies** another means of combating cultural cognition, expressive overdetermination.\(^{313}\)

Expressive overdetermination is a manner of discourse that infuses a solution with so many social meanings that “every cultural group can find affirmation of its worldviews within it.”\(^{314}\) The idea is that if a solution inherently validates the differing positions, all sides will be more likely to accept that resolution.\(^{315}\)

The proposed framework captures the spirit of this. Currently courts and commentators disagree on whether Zauderer or Central Hudson applies to factual disclosures generally.\(^{316}\) This framework suggests that both are correct. Zauderer applies to factual disclosures of undisputed facts while Central Hudson applies to disclosures with mixed evidentiary support.

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\(^{314}\) *Judicial Deference, 67 WASH. & LEE L. REV. 787, 814 (2010)* (maintaining that *Central Hudson* should apply where a law mandates disclosure of calorie counts); *see also* United States v. Wenger, 427 F.3d 840, 849 (10th Cir. 2005) (applying *Central Hudson* to disclosure requirement but using Zauderer to satisfy *Central Hudson*); *cf. also* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 491 (1997) (Souter, J., dissenting) (“Zauderer carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.”).

\(^{315}\) Compare supra note 312, with *N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009) (noting that “Zauderer’s holding was broad enough to encompass nonmisleading disclosure requirements” (emphasis added)); Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 310 n.8 (1st Cir. 2005) (Toruella, concurring) (explaining that the court found no cases limiting Zauderer’s holding to potentially deceptive advertising aimed at consumers); United States v. Bell, 414 F.3d 474, 484-85 (3d Cir. 2005) (citing Zauderer and noting that the government may impose reasonable regulations to prevent consumer deception, and likewise “mandatory disclosure of factual, commercial information does not offend the First Amendment”); *SEC v. Wall Street Publ’g Inst., Inc.,* 851 F.2d 365, 373-74 (D.C. Cir. 1988) (citing Zauderer and noting that “disclosure requirements have been upheld in regulation of commercial speech even when the government has not shown that “absent the required disclosure, [the speech would be false or deceptive]”); *cf. Envtl. Def. Ctr., Inc. v. United States*, 344 F.3d 832, 848-51 (9th Cir. 2003) (analogizing to Zauderer and finding that requiring municipalities to engage in speech educating the public about the impacts of storm-water discharge and about the hazards of improper waste disposal is a proper required disclosure under the First Amendment and does not qualify as compelled speech). *But see Pharm. Care Mgmt. Ass’n*, 429 F.3d at 316 (including state interest of preventing deception to consumers as part of Zauderer’s test and suggesting state interest did concern preventing deception to consumers); Yates, *supra* note 278, at 812-13 (maintaining that Zauderer is limited to preventing consumer deception and is inapplicable where a law mandates disclosure of calorie counts).
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Where a regulation moves beyond factual disclosure about the product or service sold entirely and either compels commercial speech enmeshed with ideology or compels information not about the specific product or service sold, the regulation falls into Category 3. Heightened scrutiny applies here.

The actual test the framework adopts is not the test from *United Foods* or *Abood/Keller*. Rather, it is the heightened scrutiny of *Barnette/Wooley*.

*United Foods* dictates that a law compelling ideology even within the context of regulating commercial speech raises serious First Amendment concerns for commercial speakers’ rights. Where compelled ideology is involved, speakers’ rights not to speak become paramount. Forced ideology invades speakers’ freedom of mind, forcing them to espouse values and beliefs they do not truly hold.

Compelling ideology also invades listeners’ rights to receive genuine information. Compelling speakers to provide ideology with which they disagree presents listeners with a skewed picture of speakers’ opinions. Listeners may alter their behavior after observing this coerced but insincere expression. Such government coercion obstructs true consent of the governed as recognized in *Barnette* and *Wooley*.

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

Post is correct that *United Foods* shifted the focus to speaker interests in those cases where ideologically enmeshed commercial speech is compelled. By subjecting such regulations to heightened scrutiny, the proposed framework remains true to *United Foods* by placing speaker interests above all else where this occurs.

Though *United Foods*’ displaced listener interests where ideologically enmeshed commercial speech is compelled, this does not mean it marginalized listener interests in all cases. Instead, *United Foods* may be

317 See supra Part II.
318 Post, supra note 2, at 577.
319 Id.
read as rejecting the notion that commercial speakers automatically have little rights because the speech is commercial.

One may interpret United Foods as the Court’s admonition that commercial speech is important too. Where a law compels ideology, the Court will scrutinize the law more strictly irrespective of whether it arises in the commercial or non-commercial context. This does not violate Zauderer, which held that a commercial speaker’s interest in not disclosing factual information is minimal.

Of course, the Court did not highlight this distinction in United Foods. Nor did it characterize the speech as ideology. Instead, it explained that “First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.” In other words, the law compelled espousal of a sentiment contrary to the commercial speakers’ beliefs, and this raised serious First Amendment concerns.

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

The First Amendment is similarly threatened where a law requires that a speaker provide information about something other than the specific product or service sold. The commercial speaker should not have to bear the burden of disseminating this information. Such information should not even fall under the less-protected category of commercial speech. Commercial speech is speech that

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320 See United States v. United Foods, Inc., 533 U.S. 405, 410 (2001). According to the Court, “[o]ur precedents concerning compelled contributions to speech provide the beginning point of our analysis. The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection, as held in the cases already cited.” Id.

321 Id. at 410-11. Admittedly, these same concerns may arise for Category 2 cases where commercial speakers disagree that the factual disclosures are factual. The difference is in these cases, the required disclosures provide information about products or services, not ideology. Where information is relevant to products or services sold, the listener interest in receiving information becomes important. And, since sufficient data supports the position that Category 2 regulations are factual, a less rigorous test should apply. The proposed framework attempts to account for these issues by applying the intermediately heightened scrutiny of Central Hudson to Category 2 regulations.
proposes a transaction. Such speech receives less First Amendment protection because it is economically motivated.

Such economic motivations should extend only to the specific products or services sold. Because economic motivation justifies lesser protection for commercial speech in the first place, where these motivations are absent (where the information compelled is not about the specific product or service sold), the compelled speech should not be afforded less protection. And where the government compels a speaker to utter protected speech based on its content, this creates serious First Amendment issues. Heightened review is thus appropriate where the government compels a speaker to provide information about something other than the product or service she is selling.

Heightened scrutiny should apply to Category 3, but the question remains what type of heightened scrutiny? Although United Foods applied Abood/Keller, Barnette/Wooley is the more appropriate framework. Barnette/Wooley mandates strict scrutiny while Abood/Keller provides that government may not require dissenters to fund ideological messages of a group not germane to the reasons justifying forcing those individuals to associate with the group in the first place.

In United Foods, because the regulatory scheme did not require group action aside from the speech itself, the compelled subsidy ipso facto was not germane to a broader associational purpose and thus violated the First Amendment. United Foods appears then to require that a law compel association or some form of group action to fall in the category of a compelled subsidy.

322 See supra Part III.
323 See supra Part III.
324 If economic motivations extend beyond that, the government would not need to compel the speech. The commercial speaker would likely share such information of her own accord.
325 This point should not be taken too far. Where the government compels that a commercial speaker provide information about a specific product or service sold, it does not matter if it is against the speaker’s interests to disclose this information. An example of this is where a regulation mandates providing calorie information for very fattening foods, and commercial speaker will earn less money as a result. This is still a required disclosure of uncontroveted, factual information about a specific product or service sold, and Zauderer applies. See supra Part V.B.2.i.
327 See United Foods, 533 U.S., at 410, 415-16.
329 See United Foods, 533 U.S. at 415-16.
330 See id.
This may make sense in the compelled-subsidy arena, but it makes little sense in the compelled-speech arena. Compelled subsidies compel support of another private-party’s speech, so it makes sense to first question whether the law appropriately compels association with that speaker and then question whether the compelled funding is germane to that appropriately compelled association. If one cannot be forced to associate with someone, then she should not be forced to finance that person’s message.

But compelled speech compels espousal of the government’s message. And neither Barnette nor Wooley required a compelled association as a prerequisite for compelled speech.

If United Foods’s application of Abood/Keller applies to compelled-commercial speech, much compelled-commercial speech will fail simply because there may not be an associational component to the law in question. But this makes little sense. Barnette and Wooley do not require this associational component for compelled public discourse, so why should it be required of compelled-commercial speech?

It should not. United Foods’s framework is a poor fit for compelled-commercial speech. The Barnette/Wooley framework is better. It provides the heightened review that United Foods instructed was important, but is test is more appropriate in this context. Barnette and Wooley instruct that compelling ideology creates serious First Amendment problems requiring heightened review. That the compelled ideology is enmeshed in commercial speech should not alter this. Where the government compels a speaker to espouse an ideological message, it forces a speaker to utter a value that is not her own, and whether this value is commercial or not, the harm is the same: violation of speakers’ and listeners’ freedom of mind. Because the harm stemming from compelled ideology exists even where that ideology is commercial, the test used for compelled ideology should apply to compelled-commercial speech. That same heightened scrutiny is also appropriate

332 See supra Part II.
333 See Wooley v. Maynard, 430 U.S. 705, 714-15 (1977) (analogizing to Barnette where individual interests against compelled expression of message with which one disagrees motivated decision). Indeed Wooley explained that the compelled-speech doctrine would apply even where one person’s views differ from the majority group’s views. See Wooley, 430 U.S. at 715 (“[T]hat most individuals agree with . . . New Hampshire’s motto is not the test . . . . The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.”).
334 See supra Part II.
Cultural Cognition as a Tool to Combat the Compelled-Commercial-Speech Conundrum

where the government compels a commercial speaker to provide information about something other than the specific product or service she is selling.\textsuperscript{335}

To recap, \textit{Barnette/Wooley} is the appropriate test for Category 3 regulations. \textit{Zauderer} is appropriate for Category 2, and \textit{Central Hudson} for Category 3. A \textit{test suite illustrates application of the framework, and it tests its effectiveness.} \textsuperscript{335}

3. Test Suite

A test \textit{suite illustrates how the framework applies and tests its effectiveness.} The four regulations for this test suite are: (1) a law requires that advertising note a product is foreign made if it is subject to 20\% or greater processing overseas; (2) a law requires that fast-food restaurants post warnings on their packaging that consuming foods high in fat leads to obesity; (3) a law requires that restaurants provide the recommended daily caloric intake on their menus;\textsuperscript{336} and, (4) a law requires that accountants advertise the price of their three, major competitors.

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

Regulation 1 compels providing uncontroverted, factual information about a specific product sold, so it falls into Category 1. The percentage of processing of a product that occurs abroad is a demonstrable fact the content of which should be uncontroversial.

Regulation 2 requires disclosing controversial facts about a product sold. There is disagreement over whether consumption of fat necessarily lead to obesity.\textsuperscript{337} Some maintain that sugar, carbohydrates, or genetics play the major role in causing obesity.\textsuperscript{338} Because there is mixed empirical support for this asserted fact about the product sold, it falls into Category 2.

\textsuperscript{335} See supra nn.322-26 and accompanying text.
\textsuperscript{338} See id.
Regulation 3, which compels restaurants to provide the recommended daily caloric intake, does not contain factual information about the specific product or service sold. It compels expression of a value judgment—individuals should consume X number of calories per day—thus, it is a Category 3 regulation.

Regulation 4, which compels accountants to provide the price of their three, major competitors, requires providing information about something other than the service sold. It requires providing information about another person’s services. It thus also falls into Category 3.

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

With Regulation 1, which requires disclosing that the product is foreign made if more than 20% of it is produced abroad, a court would likely find that requiring disclosure of this information is reasonably related to the government’s interest in providing information about the specific product sold to assist a reasonable consumer in deciding whether to purchase. Thus, the regulation should survive Zauderer.

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

With Regulation 3, which requires disclosing the suggested daily caloric intake, a court would apply strict scrutiny. First, it would determine if the government has a compelling interest for compelling disclosure of this information. Public health likely satisfies this. Then a court would ask whether the government’s purpose can be more narrowly achieved in a manner that does not stifle personal liberties. Here a court would likely determine that the government’s purpose to inform the public.

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341 See id at 716-17.
about the number of calories the government recommends that individuals consume can be more narrowly achieved. Rather than conscripting commercial speakers to disseminate this information, the government could provide this information through PSAs, for example. The law would most likely fail under this strict scrutiny.

With Regulation 4, which requires that accountants disclose the pricing of their three, major competitors, a court would apply strict scrutiny. It would first determine if the government has a compelling reason justifying the regulation. Assuming informing consumers of competing prices to ensure they can pay their taxes is a compelling interest, the court would then decide whether this interest could be more narrowly achieved through different regulation. The court would likely find that the government could achieve its objective through narrower means. For instance, it could require that all accountants advertise their own price information. This would inflict less of a burden among commercial speakers. Regulation 4 would thus fail strict scrutiny.

This test suite shows that the proposed framework provides a principled means to decide which test to apply to a law forcing commercial speech. It also furthers the listener and speaker interests that animate the compelled- and commercial-speech doctrines.

VI. CONCLUSION

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

By drawing on an innovative behavioral-science theory called Cultural Cognition, this paper endeavors to provide a framework for categorizing forced-speech regulations to determine the appropriate test to apply to ascertain constitutionality. It also illustrates how this framework applies to different types of forced-speech regulations. This framework should bring clarity and consistency into a currently confused area of First Amendment law.

342 This does not account for the possibility that this message is government speech, and may avoid First Amendment problems via this framework. Cf. Johanns, 544 U.S. at 559, 562. This question is beyond the scope of this paper.

343 Though the First Amendment unambiguously safeguards speaker interests, the Supreme Court has noted that it serves significant societal interests wholly apart from the speaker's interest in self-expression. It also “protects the public's interest in receiving information.” Pac. Gas & Elec. Co. v. Pub. Utils. Co., 475 U.S. 1, 8 (1986) (plurality) (internal citations and quotations omitted).
An issue has arisen post Zauderer because of the way the Court phrased its reasonable relationship test. It phrased it as it applied.\(^1\) In Zauderer, the government interest at was preventing consumer deception, and the Court’s reasonable relationship test directly incorporated this interest.\(^2\) Because of this, some have maintained that Zauderer applies only to laws targeting consumer deception and not to factual-disclosure requirements more generally.\(^3\)

This argument makes sense if one considers only the language of the test itself and the facts of Zauderer. But the remainder of Zauderer greatly undermines this position. Zauderer includes wide-sweeping language emphasizing the importance of the information-providing function factual disclosures provide.\(^4\) It also includes ample language minimizing the interest commercial speakers have to withhold factual information given that providing information is the primary reason commercial speech receives protection in the first place.\(^5\) This position accords with the Court’s focus in Virginia Pharmacy Board on listener interests in commercial speech.\(^6\)

If providing more factual information is important, and a commercial speaker has a minimal interest in not providing this information, the test for government mandated disclosures of such information should militate toward upholding the disclosures. Zauderer is more likely to do this than Central Hudson because it is a more lenient test.

Zauderer provides mixed messages on whether it applies to all factual disclosures or whether it applies only to those factual disclosures targeting consumer deception. Aspects of the opinion support each position, and both positions have been taken.\(^7\)

Under a narrow interpretation of Zauderer, Central Hudson arguably provides the test for analyzing most commercial-speech regulation with Zauderer carving out a small subset (factual disclosures targeting deception) for more lenient treatment. Under a broader interpretation, Zauderer carves out a larger subset of commercial-speech regulation for lenient review, which includes factual disclosures serving other interests.

Post-Zauderer cases support both positions. Some suggest that Zauderer is not limited to disclosures targeting deception. A plurality of the Supreme Court for example has cited Zauderer for the proposition that “[t]he State, of course, has substantial leeway

\(^1\) See Zauderer, 471 U.S. at 651.
\(^2\) See id.
\(^3\) See, e.g., United States v. Philip Morris, 566 F.3d 1095, 1144-45 (D.C. Cir. 2009) (suggesting for disclosure requirements to be constitutional under Zauderer they must be limited to purely factual and uncontroverted information geared towards thwarting efforts to mislead consumers or capitalize on prior deceptions); Allstate Ins. Co. v. Abbott, 495 F.3d 151, 166 (5th Cir. 2007) (finding that unlike Zauderer, the case at issue involves minimal potential for customer confusion; therefore, Central Hudson applies); cf. also Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d 950, 966 (9th Cir. 2009) (categorizing Zauderer’s standard as “the factual information and deception prevention” standard (emphasis added)).
\(^4\) See Zauderer, 471 U.S. at 650-51.
\(^5\) See id. at 651.
\(^6\) See supra notes 64-74 and accompanying text.
\(^7\) See Zauderer, 471 U.S. at 650-51; see also Royal, supra note 91, at 17 n.123 (discussing split of authority).
in determining appropriate information disclosure requirements for business corporations. The Second Circuit Court of Appeals expressly held that Zauderer is not limited to laws targeting consumer deception, and the Ninth Circuit has taken a similar approach.

Others have disagreed finding that Zauderer should not extend beyond laws targeting consumer deception. The Supreme Court has suggested, while not squarely holding, that Zauderer may not apply beyond laws targeting consumer deception.

United States v. United Foods, Inc., for example, a compelled subsidy case, distinguished Zauderer in this fashion. There the Court claimed its decision not to apply Zauderer was correct because there was no suggestion that the assessments were imposed to eliminate consumer deception. The implication of this is that were the compelled subsidy targeting consumer deception, the Court would have applied Zauderer. Thus, Zauderer is limited to laws targeting consumer deception.

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9 See N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009) (noting that “Zauderer’s holding was broad enough to encompass nonmisleading disclosure requirements”).
10 Cf. Envtl. Def. Ctr., Inc. v. United States, 344 F.3d 832, 848-51 (9th Cir. 2003) (analogizing to Zauderer and finding that requiring municipalities to engage in speech educating the public about the impacts of storm-water discharge and about the hazards of improper waste disposal is a proper required disclosure under the First Amendment and is not compelled speech).
11 See Allstate Ins. Co. v. Abbott, 495 F.3d 151, 164-68 (5th Cir. 2007) (applying Central Hudson where the potential for consumer confusion is minimal, and the provisions at issue both restrict and compel commercial speech); Int’l Dairy Foods Ass’n v. Amestoy, 92 F.3d 67, 69-70, 72 (2d Cir. 1996) (applying Central Hudson where law compels, as opposed to restricts, commercial speech); see also United States v. Wenger, 427 F.3d 840, 849 (10th Cir. 2005) (explaining its test as a combination of Central Hudson and Zauderer whereby satisfying Zauderer satisfies part of Central Hudson).
12 One such case is Ibanez v. Florida Department of Business & Professional Regulation, 512 U.S. 136 (1994), but this case should not be read as limiting Zauderer in this fashion.

In Ibanez, an attorney advertised that she was a Certified Public Accountant (CPA) and a Certified Financial Planner (CFP). See Ibanez, 512 U.S. at 138. Despite that this was true, the Board of Accountancy reprimanded her for engaging in false, misleading, and deceptive advertising. Id.

The Board charged Ibanez with practicing accounting in an unlicensed firm; using a specialty designation, CFP, that the Board had not approved; and, appending CPA after her name misleadingly suggesting that she abides by the Public Accountancy Act. See id. at 140. The Court treated the state’s action in reprimanding the speech as a restriction on speech, and it applied Central Hudson. See id. at 142-45. When, however, the Court addressed the alternative argument that a disclaimer was minimally required to render the speech not misleading, the Court cited Zauderer. See id. at 146.

In applying Zauderer, the Court explained that the government bears the burden of showing that the “harms it recites are real and that its restriction will in fact alleviate them to a material degree.” Id. (internal quotations omitted). Because the Board failed to point to any real harm, and it required an incredibly specific disclosure, which effectively created a prohibition, the disclosure was unduly burdensome and thus violated Zauderer. See id. at 146-47.

The Court carefully limited its holding to the record before it, explaining that it expressed no opinion whether on a different record, the Board’s disclaimer might be appropriate. Id. at 146. Because the Court limited its holding to the facts of the case, which involved a particularly onerous disclaimer where the government had failed to point to any harm that was even potentially real, Ibanez should not require a standard more stringent than Zauderer for factual-disclosure requirements generally.

14 See id. at 416.
15 See id.
Though this is a reasonable reading, it is avoidable. Another reading is that the Court was explaining why *Zauderer* was not binding—because the compelled subsidy did not target consumer deception. In other words, had the law targeted consumer deception, *Zauderer* would dictate the result because *Zauderer* covers that situation. Under this reading, the Court in *United Foods* chose not to extend *Zauderer* beyond the circumstances in which it arose, but it did not foreclose the possibility. The Court did not hold that *Zauderer* may only apply to laws targeting consumer deception.16

A more recent Supreme Court decision also suggests *Zauderer* is limited to laws preventing consumer deception, though it too does not so hold. In *Milavetz, Gallop, & Milavetz v. United States*,17 the Court held that disclosure requirements in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 survived a First Amendment challenge.18

In applying *Zauderer*, the Court emphasized that the regulation targeted misleading speech as did the regulation in *Zauderer*.19 But it did not hinge its decision to apply *Zauderer* on this basis alone.20 Instead, it explained that it is for that reason “and because the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech” that *Zauderer* applies.21

The Court’s use of “and” suggests *Zauderer* requires both conditions: (1) a regulation mandates a disclosure, and (2) its purpose is to eliminate deception. One might surmise that if either condition is absent a different test applies, perhaps *Central Hudson*. A problem with this stems from the Court’s description of *Central Hudson*.

According to *Milavetz*, where a law restricts non-misleading speech, *Central Hudson* applies.22 This suggests *Central Hudson* embodies two conditions opposite *Zauderer*: (1) a law restricts speech, and (2) it targets non-misleading speech.23

If this dichotomy between *Zauderer* and *Central Hudson* in fact exists, it leaves open the question of which test applies where only one condition is satisfied. For example, which test applies where a law compels a factual disclosure to serve some interest besides preventing consumer deception?

16 See id.
17 120 S. Ct. 1324 (2010).
18 See id. at 1329.
19 See id. at 1339.
20 See id.
21 See id.
22 See id.
23 Milavetz’s distinction of another case, *In re R.M.J.*, 455 U.S. 191 (1982), also suggests that these are the conditions for applying *Central Hudson*. In *In Re R.M.J.*, the ethical rules at issue restricted speech that was not inherently misleading, and *Central Hudson* applied. See Milavetz, 120 S. Ct. at 1340; see also *In re R.M.J.*, 455 U.S. at 203-06.
After Milavetz, a question remains whether Zauderer may apply beyond laws targeting consumer deception, or whether the Supreme Court has completely foreclosed that possibility. And perhaps more importantly, a normative question remains regarding which is the best course.24

Zauderer should apply both where the government interest is preventing deception and where it is providing information to consumers about the products or services for sale. Zauderer’s broad language regarding the importance of providing such information supports this position.25 Zauderer emphasizes this interest and minimizes commercial speakers’ interest in not providing such information.26

Virginia Phramacy Board also supports this position. In protecting commercial speech, it focused on the critical interest listeners’ have in receiving information.27 Because the primary reason commercial speech receives protection is to ensure consumers receive information, regulation requiring that commercial speakers provide more information furthers that interest and should face lenient review.

Zauderer provides this lenient review. It should apply where the government either aims to provide information to consumers about products or services for sale or where it aims to prevent consumer deception.28

Zauderer vs. Compelled Speech

Zauderer left open another question. Where does Zauderer stop and compelled speech begin?

If the law compels disclosure that cigarettes contain nicotine, this is an uncontroverted fact about the contents of a product and a Category 1 regulation.

If the fact is instead that cigarettes cause lung disease, a court may observe a substantial minority of scientific evidence disputing this, such that a reasonable person could disagree with the statement. Because of the mixed empirical support, this is a Category 2 regulation.

24 Justice Thomas questions the premise of Zauderer, “that, in the commercial-speech context, the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.” Milavetz, 120 S. Ct. at 1343 (internal quotations omitted). Thomas “would be willing to reexamine Zauderer and its progeny in an appropriate case to determine whether these precedents provide sufficient First Amendment protection against government-mandated disclosures.” Id. Justice Thomas is not the first to argue that Zauderer is not sufficiently protective of commercial speech. See, e.g., Conn. Bar Ass’n v. United States, 620 F.3d 81, 93 n.15 (2010) (noting Justice Brennan’s opinion in Zauderer where he maintained that Central Hudson should apply to regulation of commercial speech whether outright suppression or mandatory disclosure).

26 See id.
27 See supra notes 64-74 and accompanying text.
28 Where instead of providing information about a product or service for sale, the government compels an ideological message, Zauderer should not apply. See infra Part V.B.2. (discussing the proposed framework in which Barnette/Wooley would apply to compelled ideology).
If instead a law required displaying the message “stop smoking now,” this would not be a factual disclosure at all but a compelled ideological statement, and a Category 3 regulation. Another example is the statement at issue in *United Foods*—that mushrooms are worth consuming irrespective the brand. This is ideology not fact because it moves from the descriptive to the prescriptive. It implicitly contains the message that one should consume mushrooms.

Under the proposed framework, Category 1 regulations mandate providing descriptive information about a product or service that is indisputably descriptive of an actual state of being, such as ingredients. *Zauderer* applies here. Where the actual state of being is controverted, such as whether cigarettes cause fatal lung disease, *Central Hudson* applies. And where the compelled information does not describe a state of being but offers a normative prescription on what one should or should not do, e.g., “stop smoking now,” it is ideology, and *Barnette/Wooley* applies.  

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29 The message need not take the form of a command to constitute ideology. The message that mushrooms are worth consuming irrespective the brand implicitly suggests mushrooms should be consumed, and this renders it ideological. It is an “ought” not an “is.” *Cf.* Levit, *supra* note 257, at 279.