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Speech, Spam, and Central Hudson: Redefining the Terms of Commercial Speech

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SPEECH, SPAM, AND CENTRAL HUDSON:
REDEFINING THE TERMS OF COMMERCIAL SPEECH

by Justin Torres

Abstract

Congressional attempts to curtail the growth of email spam consistent with the First Amendment highlight the uncertainty and confusion surrounding the Supreme Court’s commercial speech doctrine. This confusion stems from two central yet ambiguous terms central: “commercial speech” and “substantial state interest.” Throughout its commercial speech cases, the Court has broadened and narrowed the definition of commercial speech in various contexts, subjecting some speech to commercial speech regulations while exempting other speech. And it has steadily broadened the definition of “substantial state interest” to take in a number of dignitary and moral harms, to the point that the requirement is no longer a meaningful limit on state power. This Note proposes a new definition of “commercial speech” that, though broader than those employed by the Court, better captures the interests that it has sought to balance in drawing the commercial/noncommercial line. The definition also responds to new forms of commercial speech—including spam—that have challenged the Court’s traditional definition. To cabin the broad potential applicability of this definition, the Note proposes to narrow the kind of interest that is substantial enough to justify a commercial speech regulation, limiting it to the state’s interest in protecting informed consumer decision making. This approach not only ensures that states do not regulate “too much” speech, but is also more consistent with the reasons we protect commercial speech and with the roots of commercial speech doctrine. It also provides a more secure First Amendment justification for the CAN-SPAM Act, while raising concerns about attempts to close state-maintained servers to spam.

First there was email, and soon after, there was spam. Generally defined as unsolicited, bulk commercial email, spam affects almost every Internet user, with estimates of its costs—in lost productivity, anti-spam technology purchases, and damage

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1 See DAVID CRYSTAL, LANGUAGE AND THE INTERNET 53 (Cambridge 2001).

2 Precisely quantifying the amount of spam sent every year is a tricky business, and the Federal Trade Commission has generally declined to put a specific number on the problem. See Fed. Trade Comm’n, Effectiveness and Enforcement of the CAN-SPAM Act: A Report 6, n.15 (2005) (aggregating several estimates of spam volume). One technology security firm estimated that the average business professional receives eleven spam emails per day, even after installing anti-spam filters. Email Failing to Satisfy Businesses (Feb. 5, 2007), http://www.bcs.org/server.php?show=conWebDoc.11394 (last visited Mar. 20, 2007). A 2007 Pew survey found that 37 percent of email users said spam had increased in their personal email accounts, and 29 percent of work email users said the same, with both numbers being an increase over previous years. DEBORAH FALLOWS, PEST INTERNET AND AMERICAN LIFE PROJECT, THE VOLUME OF SPAM IS GROWING IN AMERICANS’ PERSONAL AND WORKPLACE EMAIL ACCOUNTS, BUT EMAIL USERS ARE LESS BOTHERED BY IT 2 (2007), http://www.pewinternet.org/pdfs/PIP_Spam_May_2007.pdf.
from the viruses it carries—ranging into the billions of dollars per year. Spam emailers have also become increasingly savvy in their attempts to circumvent even the most sophisticated filters. \(^4\) In 2003, concerned that the flood of spam threatened the viability of email as a communications tool, \(^5\) Congress passed the “CAN-SPAM Act,” \(^6\) creating criminal and civil penalties for sending certain kinds of spam. Even after the passage of the Act, some commentators persisted in calling for an outright ban. \(^7\)

Just how far does the government’s power to regulate spam extend? To answer that question requires answering two others: Is spam worthy of any First Amendment protection? And if so, what kind of government interest will justify regulating, or even banning, such speech?

The interaction of the First Amendment with commercial speech regulations has seemingly been settled by the Supreme Court. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, \(^8\) the Court established that commercial speech—a category that encompasses most email spam—is protected by the First Amendment. And in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the

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Court ruled that intermediate scrutiny applies to commercial speech regulation through a four-pronged test of whether such regulation is constitutional.9

But this apparent certainty masks the substantial ambiguity surrounding two central issues in commercial speech doctrine: What precisely is commercial speech? And what kinds of state interests are “substantial” enough to justify regulating, even banning, such speech? The Court has broadened and narrowed the definition of commercial speech in various contexts, subjecting some speech to commercial speech regulations while exempting other (often similar) speech. And it has steadily broadened the definition of “substantial state interest,” to the point that the requirement is no longer a meaningful limit on a state’s power to regulate commercial speech.

This Note proposes a new definition of “commercial speech” that, though broader than the definition generally employed by the Court, better captures the interests that it has sought to balance in drawing the commercial/noncommercial line. The definition also responds to new forms of commercial speech—including spam—that have challenged the Court’s traditional definition. To cabin the broad potential applicability of this definition, I propose to narrow the kind of interest that is substantial enough to justify a commercial speech regulation, by limiting it to the state’s interest in protecting accurate and informed consumer decision making. I do this by reference to federal and state consumer protection law.

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9 Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 566 (1980) (“In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”).
This approach not only ensures that states do not regulate “too much” speech, but is also more consistent with the reasons we protect commercial speech and with the roots of commercial speech doctrine. My definitions, and the arguments that support them, are contained in Part II of this Note. In Part III, I apply these definitions to the CAN-SPAM Act and to state efforts to ban spam. But preparatory to applying these new definitions, it is useful to revisit, in Part I, the evolution of the Court’s commercial speech cases.

I. THE PROBLEMS OF COMMERCIAL SPEECH

If any test for determining whether commercial speech regulations serve a substantial state interest is to be applied consistently, stable definitions of both “commercial speech” and “substantial interest” are critical. Yet, the Court has offered at least three definitions of commercial speech, and never settled on any one. It has also moved from reading “substantial state interest” narrowly in Virginia Board, as concerning a state’s interest in enabling informed consumer decision making, to encompassing a whole range of moral concerns and dignitary harms. The general sense that Central Hudson has been applied inconsistently is largely caused by the inconsistent definitions of these central terms.

A. Defining Commercial Speech

Drawing the line between commercial and non-commercial speech has proved no easy task, as the Court has admitted on numerous occasions. In one of the earliest commercial speech cases, Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, the Court employed a narrow definition: Commercial speech does “no more

than propose a commercial transaction.”11 It does not “editorialize on any subject, cultural, philosophical, or political . . . report any particularly newsworthy fact, or . . . make generalized observations even about commercial matters.”12 At base, “[t]he ‘idea’ [of commercial speech] is simply this: ‘I will sell you the X [good or service] at the Y price.’”13 This has been described as “the test” for commercial speech,14 and has been repeated throughout the Court’s commercial speech cases.15 The Court was also careful, in Virginia Board, to distinguish commercial speech from core political or expressive speech carried in advertisements, sold for profit in the form of books, pamphlets, or movies, or soliciting a contribution or donation.16

In Central Hudson, however, while the Court cited the narrower definition of commercial speech drawn from Pittsburgh Press,17 it also offered a broader definition: “expression related solely to the economic interest of the speaker and its audience.”18 The Court employed this broad definition because the speech at issue in Central Hudson did not, in fact, propose a commercial transaction.19 In his concurrence, Justice Stevens rejected the broader definition, “lest speech deserving of greater constitutional protection

12 Virginia Board, 425 U.S. at 761.
13 Id.
16 Virginia Board, 425 U.S. at 761.
17 Central Hudson, 447 U.S. at 562.
18 Id. at 561.
19 The Court describes the speech as “promotional,” id. at 560, and it seems to have consisted of general “brand-identity” advertising, rather than specifying any particular good or service.
be inadvertently suppressed.”20 And he rejected the idea that the kind of “promotional advertising” at issue in Central Hudson could even be termed commercial speech at all.21

Justice Stevens’ concurrence would prove prescient. Three years after Central Hudson, the Court confronted a case in which the speech proposed a transaction and was related to the speaker’s economic interest, while also doing something else. In Bolger v. Youngs Drug Products, Inc., the Post Office denied a condom manufacturer’s application to mail flyers that advertised the price and availability of its products and commented on controversial issues such as family planning and preventing venereal disease.22 Youngs claimed that its mailing was fully protected political speech.23 The Court noted, “Most of appellee’s mailings fall within the core notion of commercial speech—speech which does ‘no more than propose a commercial transaction.’ Youngs’ informational pamphlets, however, cannot be characterized merely as proposals to engage in commercial transactions.”24 The Court analyzed the flyers under a new three-factor test: (1) whether the speech was in a form that traditionally was considered to be commercial speech, (2) referenced a specific product, (3) was motivated by economic gain.25 In Bolger, “The combination of all these characteristics . . . provides strong support for the . . . conclusion that the informational pamphlets are properly characterized as commercial speech.”26

20 Id. at 579.
21 Id. at 583. See infra notes 67–74 and accompanying text for a complete discussion of the facts in Central Hudson.
23 Id. at 65.
24 Id. at 66 (citations omitted).
25 Id. at 66–67.
26 Id. at 67.
Even in the unsettled realm of commercial speech, the Bolger test confused more than it illuminated. The Court noted that all three of the factors need not be present to find that speech is commercial.\textsuperscript{27} It declined to decide whether speech must reference a particular product or service to make it commercial.\textsuperscript{28} Finally, it failed to distinguish Bolger from other cases where the Court applied strict scrutiny because the speech implicated other important interests, despite the fact that all three factors were present.\textsuperscript{29}

Only once since Bolger has the Court accepted a case in which the outcome would have turned on the definition of commercial speech. Nike, Inc. v. Kasky involved a marketing campaign by the shoe manufacturer defending against allegations of repressive work conditions in its overseas plants.\textsuperscript{30} Nike was sued under a California consumer protection statute for making false and misleading statements.\textsuperscript{31} Though the campaign did not include any “proposal to a transaction,” the California Supreme Court held that “[b]ecause the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker’s own business operations for the purpose of promoting sales of its products, . . . [the] messages are commercial speech.”\textsuperscript{32} The Court granted certiorari on the thorny question of whether a commercial entity’s speech on matters of public controversy—whether or not it proposed a transaction—constituted commercial speech.\textsuperscript{33} But in the end, the Court

\begin{itemize}
\item \textsuperscript{27} Id. at 68 n.14.
\item \textsuperscript{28} 539 U.S. 654 (2003).
\item \textsuperscript{30} 539 U.S. 653 (2003).
\item \textsuperscript{31} Id. at 655–56.
\item \textsuperscript{32} Id. at 657.
\item \textsuperscript{33} Id.
\end{itemize}
dismissed the petition as improvidently granted, drawing a bitter dissent that accused the majority of ducking the issue.  

Given the Court’s non-decision in Kasky, it seems unlikely that the Court will return to the definition of commercial speech any time soon. Absent guidance from the Court as to which of its three definition to use, lower courts have been left to deal with uncertainty at the very heart of the commercial speech doctrine.

B. The Ever-Broader State Interest Test

At the same time, the Court has broadened the kinds of state interests that will justify commercial speech regulations, moving from a narrow conception of preventing consumer harm towards a more amorphous conception of preventing harms to society or to the dignity of a regulated profession. Prior to Virginia Board, the Court rejected the proposition that the undignified form or “objectionable” content of commercial speech could justify keeping consumers in the dark about legal goods and services. For example, in Bigelow v. Virginia, a newspaper publisher was convicted under a statute that made encouraging or facilitating an abortion a misdemeanor. The Virginia Supreme Court twice upheld the conviction as a valid exercise of the state’s police power to

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34 Id. at 683 (“If this suit goes forward, both Nike and other potential speakers, out of reasonable caution or even an excess of caution, may censor their own expression well beyond what the law may constitutionally demand. That is what a ‘chilling effect’ means. It is present here.”) (Breyer, J., dissenting) (internal citations omitted).

35 See, e.g., Zauderer, 471 U.S. 647 (commercial speech not subject to regulation because it is in poor taste or foments litigation); Buckley v. Valeo, 424 U.S. 1, 17–18 (1976) (political speech not unprotected because it is in the form of an advertisement); N. Y. Times Co. v. Sullivan, 376 U.S. 254, 265–66 (1964) (“editorial” advertisement not subject to commercial speech regulations); Smith v. California, 361 U.S. 147, 150 (1959) (booksellers’ unknowing possession of obscene book could not be regulated under commercial speech code); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (“sacrilegious” film could not be suppressed through commercial speech regulation); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) (religious literature sold for profit not commercial speech).

regulate the medical profession. The Court overturned the conviction on grounds that a state could not use commercial speech regulations to prohibit speech when its interest was not in regulating commercial harms but in keeping consumers uninformed about legal—if allegedly objectionable—goods and services.

*Virginia Board*, the case that established First Amendment protection for commercial speech, relied squarely on *Bigelow* in holding that for a commercial speech regulation to be valid, it must aim at abating some kind of harm to consumers. Plaintiffs in the case were a consumer and two advocacy groups who challenged a Virginia statute that threatened pharmacists with civil and criminal penalties for “unprofessional conduct,” defined to include “publish[ing], advertis[ing] or promot[ing], directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs . . . .” The state’s pharmacy board asserted that a number of interests supported the prohibition on advertising, including concerns that lower-priced pharmacists who advertised would skip steps in the compounding of drugs; that the costs of advertising would be passed off to consumers; that price-shopping would discourage stable pharmacist-consumer relations, and that advertising would transform dignified professionals into “mere retailers.” The Court then summarized these asserted interests:

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37 Id. at 814–15.
38 Id. at 827–28 (Virginia “is, in effect, advancing an interest in shielding its citizens from information about activities outside Virginia’s borders, activities that Virginia’s police powers do not reach. This asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances”).
40 Id. at 749.
41 Id. at 768.
It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the “professional” pharmacist out of business.  

Deeming this approach “paternalistic,” the Court struck down the regulation. The Court began by examining why commercial speech was afforded any First Amendment protection. Such speech is of interest to a consumer because it provides information about products, services, and prices, an interest that “may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.” Because “the allocation of our resources [in a free economy] in large measure will be made through numerous private economic decisions,” society also has an interest in seeing that such decisions “be intelligent and well informed.”

Commercial speech, then, is protected by the First Amendment because it helps consumers, by accurately informing them of the availability of goods and services and by aiding informed decision making. Implicit in this rationale is the principle that commercial speech should go unprotected by the First Amendment when it harms that decision making process, by keeping consumers in the dark about market choices. In Virginia Board, however, the interest asserted by the state had nothing to do with the effect the speech had on consumers, but with the effect the speech had on pharmacists. As the Court noted, in a key if understated line, “There is no claim that the advertising

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42 Id. at 770.
43 Id. at 770.
44 Id. at 763.
45 Id. at 765.
ban in any way prevents the cutting of corners by the pharmacist who is so inclined.”

If a speech ban could be shown to prevent harm to consumers—for example, by preventing fraud in drug compounding—it might be justifiable, but not otherwise.

The kinds of speech regulations that the Court suggested would past muster strengthen the conclusion that regulation of commercial speech is only justified if it prevents harm to consumer decision making. Besides reasonable time, place, and manner restrictions that apply to any speech, even core political speech, the Court’s examples all related to protecting consumer decision making—commercial speech that is false or misleading or concerns illegal topics or activities. Such speech harms consumer decision making by providing inaccurate information or enticing consumers into illegality. The protected status of commercial speech does not mean that the state has no interest in ensuring that “the stream of commercial information flows cleanly as well as freely.”

In the next major commercial speech case, the Court was more explicit in holding that preventing harm to something or someone other than consumers was not a substantial state interest that justified a speech ban. A year after Virginia Board, the Court took up an issue that it had reserved both in that case and in Bigelow—the extent to

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46 Id. at 769. Of course, the state does have a legitimate interest in seeing to the professionalism of its pharmacists, but that interest is served by state regulation of the credentialing, training, and conduct of pharmacists, not by regulating their commercial speech. See id. at 770 (“Virginia is free to require whatever professional standards it wishes of its pharmacists . . .”).

47 Id. at 771.

48 Id.

49 Id. at 772.

50 Id.
which the state could regulate commercial speech by attorneys. Bates v. State Bar of Arizona concerned the suspension of two attorneys—operators of a “legal clinic” that provided low-cost, standardized legal services—who violated a ban on newspaper advertising by attorneys. Arizona asserted a number of interests in support of the ban: adverse effects on attorney professionalism, the inherently misleading nature of attorney advertising, preventing unnecessary litigation, fears that advertising would increase the cost of legal services by increasing overhead and creating barriers to entry into the market by young attorneys, adverse effects on the quality of legal services, and the difficulties of enforcing prohibitions on misleading and deceptive advertising. The Court had little trouble concluding that these were makeweight justifications, and that the state’s true aim was preventing harm to the dignity of a regulated profession, an interest that had been rejected in Virginia Board. More tellingly, the Court did not rely on any suggestion that there was an insufficient “fit” between the regulation and the harms alleged. It simply rejected outright the asserted interests as insufficient.

51 The Court had, in both cases, indicated that the special nature of the legal profession might mean that speech restraints improper in other contexts would be justifiable in attorney advertising cases. See Virginia Board, 425 U.S. at 773 no.25; id. at 773–775 (concurring opinion); Bigelow, 421 U.S. at 825 n.10.


53 Id. at 368.

54 Id. at 372 (“It is argued that advertising of legal services inevitably will be misleading (a) because such services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement, (b) because the consumer of legal services is unable to determine in advance just what services he needs, and (c) because advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill.”).

55 Id. at 375.

56 Id. at 377.

57 Id. at 378 (“It is argued that the attorney may advertise a given ‘package’ of services at a set price, and will be inclined to provide, by indiscriminate use, the standard package regardless of whether it fits the client’s needs.”).

58 Id. at 379.

59 Id.
But the very next year the Court found a speech ban justified because of a state’s interest in preventing harm to someone or something other than consumers. In *Ohralik v. Ohio State Bar Association*, a personal injury attorney was sanctioned under a bar rule that prohibited in-person solicitation, after he approached an accident victim in her hospital bed and went to her passenger’s home to offer his services. The Court had little trouble in upholding the speech ban on grounds that in-person solicitation by attorneys, because it tended to be coercive, caused significant harm to consumer decision making.

But the Court added a separate rationale for upholding the ban: such regulations served a “particularly strong” state interest in maintaining professional standards among attorneys and, more generally, the dignity of the legal profession. Though the *Bates* Court had rejected “professionalism” as a legitimate state interest that justified a speech ban, the *Ohralik* Court, just one year later, averred that the “*Bates* Court did not question a [s]tate’s interest in maintaining high standards among licensed professionals,” though it did not actually cite to *Bates* to justify the proposition.

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60 436 U.S. 447, 450–52 (1978). Driving the Court’s opinion in *Ohralik* is a clear (and justifiable) disgust at Ohralik’s actions, which went beyond mere in-person solicitation. The attorney concealed a tape recorder and recorded both conversations, *id.* at 450–51, and offered a “little tip” to the passenger concerning the scope of the driver’s uninsured motorist coverage, *id.* at 451. Both the driver and the passenger were legal adults but had not yet graduated from high school, and the driver was in traction at the time Ohralik visited her in hospital room. *Id.* After both attempted to fire him, Ohralik sued his former clients for breach of contract and collected one-third of their settlements despite the fact that both were represented by other attorneys during the settlement period. *Id.* at 452.

61 *See id.* at 454 (“a significant potential for harm to the prospective client”); *id.* at 455 n.10 (“linked to the goals of preventing barratry, champerty, and maintenance”); *id.* at 457 (“may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection . . . encourage[s] speedy and perhaps uninformed decision making”).

62 *Id.* at 460.

63 *See supra* note 59 and accompanying text.

64 *Ohralik*, 436 U.S. at 461.

65 *See id.* at 461 n.17. Rather, the Court cited to *Virginia Board*’s assertion that the state had a strong interest in maintaining “a high degree of professionalism on the part of licensed pharmacists.” *Virginia Board*, 425 U.S. at 766. The cited language, however, is drawn from the section of that case in
In *Central Hudson*, however, the notion of protecting consumer decision making would drop out entirely.\textsuperscript{66} *Central Hudson* concerned a state regulatory ban on advertisements by an electrical utility.\textsuperscript{67} The state commission asserted that advertising would increase electricity usage, impeding conservation efforts and increasing costs.\textsuperscript{68} In two paragraphs that, notably, cite no legal authority, the Court accepted that this interest could support the speech ban.\textsuperscript{69} However, under the newly-crafted four-part test\textsuperscript{70} the

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66 The year prior to *Central Hudson*, the Court decided *Friedman v. Rogers*, 440 U.S. 1 (1979), upholding a Texas law prohibiting the practice of optometry under a trade name because such names had a tendency to deceive. *Id.* at 12–13 (“A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public.”) (footnote omitted). Essentially, the Court applied a rational basis test to a state’s determination that specific speech was likely to deceive. Later decisions would cast doubt on the idea that a state had only to advance a rational basis for banning commercial speech as potentially deceptive. *See, e.g.*, *Edenfield*, 507 U.S. at 770–71 (noting that the burden of proving that speech is deceptive “is not satisfied by mere speculation or conjecture”). Furthermore, a commercial speech regulation is constitutionally suspect if it “provides only ineffective or remote support for the government’s purposes,” *id.* at 770 (quoting *Central Hudson*, 447 U.S. at 564), or if there is “little chance” that the law will advance the state’s goal. *Lorillard*, 533 U.S. at 566. If tested under the Court’s present commercial speech doctrine, the Texas law would likely fail for only indirectly advancing the state’s interest.

Historically, *Friedman* can be read as moving the Court towards the looser conception of “substantial interest” articulated in *Central Hudson* the following year. But the decision came in the early years of the Court’s development of the commercial speech doctrine, when the definition of such speech was still up for grabs. The decision, then, may have been driven by a desire to separate cleanly this newly protected category of speech and trademarks. Further, the decision came at the high-water mark of the Court’s deference to state power to regulate commercial activity after the collapse of economic due process. Indeed, there is a way of reading the protection afforded commercial speech as a reaction to increasingly intrusive state regulation of commercial activity. That is certainly how two early leading commentators read the commercial speech doctrine, albeit unfavorably. *See* Thomas Jackson & John C. Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 6 (1979) (“Although disallowing state interference with commercial advertising serves other values that merit careful legislative consideration . . . these values are not appropriate for judicial vindication under the First Amendment.”). It is notable that despite the Court’s willingness to defer to the state’s determination that a trade name could deceive consumers, the interest in *Friedman* is still within the realm of regulating harm to consumer decision making. As such, the case does not really stand outside the framework for commercial speech articulated in this essay, though for the above-noted reasons it remains an anomaly among the Court’s commercial speech cases.

68 *Id.* at 568.
69 *Id.* at 568–69.
Court rejected the ban because the interest was not directly advanced by the regulation and suppressed more speech than necessary.

The idea that a state could keep consumer costs low by prohibiting advertising had been rejected in both Virginia Board and Bates, and has never been resuscitated in subsequent commercial speech cases. In the end, the substantial interest discussion in Central Hudson has come to stand for the proposition that speech bans are justified when they serve to depress consumption of legal but objectionable products. More importantly, though the discussion of the state’s interest did not include a citation to Ohralik to the effect that interests other than preventing harms to consumers could be deemed substantial, it rejected the proposition that was implicit in Virginia Board and central to Bates: that to be substantial, a state interest had to concern abating harm to consumer decision making.

This broadening of what could serve as a substantial state interest has meant, effectively, the end of the “substantial state interest” prong as a meaningful limit on the government’s ability to regulate commercial speech. In the nearly three decades since Central Hudson, only once, in Zauderer v. Office of Disciplinary Counsel, has a case

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70 See supra note 9.
71 Id. at 569.
72 Id. at 571.
73 See supra notes 41 and 56.
74 See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 521 (1996) (describing the government’s interest in Central Hudson as “suppressing information in order to discourage consumption”) (Thomas, J., concurring).
75 In Bolger, the Court did reject the asserted state interest in shielding “recipients of mail from materials that they are likely to find offensive,” Bolger, 463 U.S. at 71, a conclusion compelled by the Court’s holding in Carey. But it deemed substantial the state’s interest in “aiding parents’ efforts to discuss birth control with their children,” id. at 73, before striking the regulation down on one of the later prongs of Central Hudson, as too extensive a regulation of commercial speech. Id. In Bolger, then, the exception proves the rule—the Court has upheld as substantial a number of interests that have nothing to do with enabling informed consumer decision making.
hinged on the substantial interest prong of *Central Hudson*. The case is something of an outlier: The facts were almost identical to those in *Bates*, the state changed the rationale for the speech regulation several times through the course of the litigation, and all of the interests it eventually asserted had been rejected in previous cases.\(^{76}\) (Also tellingly, the one speech restriction the Court upheld in that case was a requirement that contingent-fee attorneys disclose that losing plaintiffs could be liable for litigation costs\(^ {77}\)—in the context of attorney advertising, a piece of information that is crucial to informed consumer decision making.) In all of its other commercial speech cases, the Court has upheld asserted state interests as substantial even as they have become increasingly attenuated from preventing harm to consumer decision making.\(^ {78}\)

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\(^{76}\) As the Court dryly noted, “The interest served by the application of the [Ohio rules] is not apparent from a reading of the opinions of the Ohio Supreme Court and its Board of Commissioners.” *Zauderer*, 471 U.S. at 639. Through the course of the litigation, Ohio asserted at least four different interests that justified the speech ban, including privacy interests of consumers, *id.* at 641, preventing unnecessary litigation, *id.* at 642, the difficulty in distinguishing between truthful and misleading advertising, *id.* at 643, 648, and maintaining the dignity of the legal profession, *id.* at 646. These, of course, had all been rejected in *Virginia Board* and *Bates*. See also *id.* at 647-48 (“Although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State’s desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule.”).

\(^{77}\) *Id.* at 650 (“In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio . . . has only required them to provide somewhat more information than they might otherwise be inclined to present.”).

C. Growing Consensus

Academics have been largely hostile to the Court’s commercial speech doctrine as it has developed in the years since Central Hudson, and lower court judges have been unusually frank in discussing the doctrine’s shortcomings. The Justices themselves have all but admitted that the doctrine has not been applied consistently. The Court’s multi-pronged analysis has collapsed into a “holistic” determination of whether the Court believes that a particular speech regulation is justified. If not, they may determine that the speech at issue is not commercial speech, exempting it entirely from regulation—but without actually settling on a definition of commercial speech or applying the distinction Two cases—Greater New Orleans Broadcasting and 44 Liquormart—deserve explanation. In both, the Court expressed doubt as to the substantiality of the state’s asserted interest. See Greater New Orleans Broadcasting, 527 U.S. at 186–87; 44 Liquormart, 517 U.S. at 504. But in both cases the Court invalidated the speech restrictions not on the substantial state interest test, but because they did not materially advance the asserted interest. See Greater New Orleans Broadcasting, 527 U.S. at 188; 44 Liquormart, 517 U.S. at 505. It is impossible to prove that doubts about the substantiality of the asserted state interest drove the outcomes in those cases, though it seems likely. But it remains true that since Bates, only once has a commercial speech case ever hinged on the substantial state interest test. Further, even if true, it is hardly an indication that the test has been applied consistently.


80 See, e.g., 44 Liquormart, 517 U.S. at 526–27 (“The courts, including this Court, have found the Central Hudson ‘test’ to be, as a general matter, very difficult to apply with any uniformity.”) (Thomas, J. concurring); Greater New Orleans Broadcasting, 527 U.S. at 183–84 (“The four parts of the Central Hudson test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three.”). Writing for the Court in Greater New Orleans Broadcasting, Justice Stevens also noted the “intricacies” of applying the test. Id. at 184.
in a principled way. Or, if the speech is commercial, the Court may decide based on its view of the “fit” between the state interest and the regulation. But in doing so it has reached apparently contradictory outcomes in like cases. For example, the Court has upheld some speech bans on what seems like a “vice” exception to First Amendment protection for commercial speech, while striking down other bans that were clearly based on moral objections to the underlying activity being advertised. And it has both struck down and upheld regulations that sought to ban advertising in the service of maintaining a proper “atmosphere.” In the end, it is difficult to find a consistent and principled application of Central Hudson, or reach any other conclusion than the blunt assessment of one observer: that commercial speech doctrine is “a mess.”

II. REDEFINING THE TERMS OF COMMERCIAL SPEECH

Short of scrapping Central Hudson and starting over, is there a way to repair the commercial speech doctrine so that it can be applied in a consistent and principled way? The answer, explained below, is to adopt a broad definition of “commercial speech” and pair that with a narrow reading of “substantial state interest.”

81 Compare, e.g., Carey, 431 U.S. at 678 (advertisement of contraceptives cannot be regulated as commercial speech), with Bolger, 463 U.S. at 60 (advertisement of contraceptives can be regulated as commercial speech). Making the distinction drawn in these two cases even more remarkable is the fact that the advertisements in Carey did no more than propose a transaction, while the advertisements in Bolger included speech that, unconnected to a proposed transaction, would clearly have been protected as core political speech. Thus in these two cases, the purely commercial speech received greater protection than mixed commercial/political speech.

82 Compare, e.g., Lorillard, 535 U.S. at 525 (state may regulate tobacco advertising) and Edge Broadcasting Co., 509 U.S. at 426 (state may ban advertisements for gambling), and Posadas, 478 U.S. at 328 (state may regulate gambling advertising), with 44 Liquormart, 517 U.S. at 484 (state may not regulate liquor advertising).

83 Compare, e.g., Fox, 492 U.S. at 469 (upholding ban on commercial speech that marred atmosphere of college campus), with City of Cincinnati, 507 U.S. at 410 (striking down ban on commercial speech justified on grounds of aesthetic atmosphere).

A. Broadening Commercial Speech

The Court should adopt a definition of commercial speech that resembles the broader definition employed in *Central Hudson*, though one that more precisely captures the many interests the Court has attempted to protect when it has defined commercial speech. As Justice Stevens noted in *Central Hudson*, merely defining commercial speech as speech “related to a speaker’s economic interest” is too broad, since it would take in many of the forms of “speech for a profit” that the Court has consistently exempted from the commercial speech category, such as books, films, or charitable solicitations.85 As the *Bolger* Court noted,86 however, a reference to a specific product or service cannot be the defining quality of commercial speech, either. The speech in *Central Hudson*, for example, was “promotional” speech—speech that touted a brand name, but did not offer a particular product for sale. Indeed, many modern advertisements are aimed primarily at associating a brand with appealing qualities or lifestyles.87 This was why the Court moved away, in that case, from the stricter “propose a transaction” language of *Pittsburgh Press*.88 Yet intuitively, it makes sense that a workable definition of commercial speech must encompass such “brand-building” promotional advertising, since it is clearly aimed at influencing consumer decision making.

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85 *See supra* note 16 and accompanying text; *see also* Fox, 492 U.S. at 481–82 (noting that “[s]ome of our most valued forms of fully protected speech are uttered for a profit”).

86 *See supra* note 28 and accompanying text.

87 Think, for example, of the famous “1984” television ad for Macintosh that premiered during the 1984 Super Bowl—widely considered to be the most effective piece of advertising ever produced. *See The Fifty Best, ADVERTISING AGE* 35 (Vol. 66 1995). The ad is set in a grim future world whose citizens march in conformist lockstep to hear propaganda by a “Big Brother” character. Eluding the helmeted police, a young woman throws a hammer through the screen, freeing the world from Big Brother’s grip. The ad never mentions the product it advertises, and has no discernible relation to personal computers, but cemented Apple’s brand identity as the hip alternative to drab, Windows-based PCs. *See* 1984, http://www.theapplecollection.com/Collection/AppleMovies/mov/1984_big.mov (last accessed Mar. 20, 2008).

88 *See supra* note 19 and accompanying text.
There are also strong practical reasons for broadening the definition of commercial speech, relating to the extraordinary growth and increasing variety of commercial speech, especially commercial advertising. In 1990, Kozinski and Banner noted the rise of the “ad-vertorials,” advertisements that also included comment on public issues, as well as new forms of advertising such as music videos.\(^89\) Even then, these new advertising forms presented a difficult problem of classification for a commercial/non-commercial speech distinction that rests on the *Pittsburgh Press* notion of commercial speech as doing “no more” than proposing a transaction. These new forms of advertising also fit uneasily within the three-factor *Bolger* test, since one of the factors is whether the speech is in a form traditionally used to advertise goods and services.\(^90\)

If anything, the problem of classification has grown even murkier since 1990, with the rise of such innovative new forms of marketing of such as viral marketing\(^91\) and “non-referential” advertising.\(^92\) Most of these marketing approaches do not “propose a

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\(^90\) See *supra* notes 27–29 and accompanying text.

\(^91\) Viral marketing is generally defined as using pre-existing social networks to increase brand awareness. See generally DOUGLAS RUSHKOFF, MEDIA VIRUS! (1994). Associated techniques of viral marketing include advertisements—often placed in unusual settings, such as small postcard-sized advertiseements placed above urinals in urban bars and nightclubs—that feature nothing more than a catchy phrase, for example, “Seeing is Believing,” and a web address. Other forms include cryptic, mass-distributed text messages, quite similar to email spam. One of the more famous viral marketing campaigns was Burger King’s “Subservient Chicken” web site. The site features a man dressed in a chicken costume filmed in a nondescript apartment that is clearly meant to look like the first apartment of a recent college graduate—Burger King’s target audience. Users could type and submit commands such as “dance” or “play dead,” and, using pre-recorded video, the chicken would enact the command. In March 2005, a year after the website went active (with almost no fanfare), it was reported that within a day of being released, the site received a million hits, and 20 million within a week. Over the course of a year, there were 14 million unique visitors to the site, and Burger King reported that after the site went active, overall sales increased an average of 9 percent a week and consumers reported double-digit growth of awareness of Burger King products. See Mae Anderson, *Dissecting “Subservient Chicken”*, *AdWEEK* 36 (March 5, 2005). Yet no products are advertised on the site and it includes only very subtle references to Burger King. See Subservient Chicken, http://www.subservientchicken.com (last accessed Mar. 20, 2008).

\(^92\) Defined, broadly, as advertising that is ironic, absurdist, and topically unrelated to the product or service being promoted. An example was a television ad that aired during the 1999 Super Bowl for E*Trade, an online stock brokerage. The ad featured two men in flannel shirts, sitting in lawn chairs in their
transaction” in any traditional sense, but are not conceptually distinguishable from traditional “X good at the Y price” advertising, in that they seek to influence consumer decision making.

This Note proposes a more precise definition of commercial speech: speech by commercial producers that seeks, in some ultimate sense, to entice consumers to purchase a good or service that is not the speech itself, regardless of whether it actually references the product. This definition better captures the various interests the Court has sought to capture in defining commercial speech than do the broad “economic interests” definition of Central Hudson, the form-based Bolger test, or the unworkably narrow “propose a transaction” test of Pittsburgh Press. It takes in traditional “X for Y” advertising and new formats such as viral marketing, while exempting business journalism and films, books, or plays. Under this definition, the film you watch or the review you read that influenced you to buy your ticket are not commercial speech, but the newspaper advertisement listing the places and times the film is exhibited, as well as the trailer you watch prior to the film’s commencement, are commercial speech. Not only does this capture more precisely all the interests the Court has sought to weigh in attempting to define commercial speech, it responds to the consumer’s common sense expectation about where the line between commercial and non-commercial speech should fall. It is also flexible enough to be applied consistently to future forms of commercial speech.

Narrow definitions of commercial speech that putatively allay concerns about regulating “too much” speech will be exploited by clever marketers long before the legal garage, clapping their hands as a monkey danced to samba music on top of a paint bucket. The tag line of the ad was, “Well, we just wasted 2 million bucks. What are you doing with your money?”—a play on the enormous cost of advertising during the Super Bowl. In the original ad, the only reference to E*Trade was the company’s logo on the monkey’s t-shirt. See Wasted 2 Million, http://www.youtube.com/watch?v=BnQMq5wtZcg (last accessed Mar. 20, 2008).
system can adjust the definition to deal with their innovations. In order to retain applicability and utility going forward, a broad reading of “commercial speech” is a practical necessity. The broader definition also reduces incentives for speakers to avoid regulation by crafting appeals that fall outside of some overly narrow definition.

B. Narrowing Substantial Interest

To mitigate the wide applicability of this definition, the Court should return to the rationale of Virginia Board and reject commercial speech regulations that rest on grounds other than protecting consumer decision making. Under this reading, a state may continue to ban commercial speech that advocates illegal activities, that is misleading, or that harms consumer decision making. This approach has already garnered three votes from the Supreme Court in 44 Liquormart, and is implicit in the rationale for Justice Thomas’s concurrence in that case. Yet even in 44 Liquormart, there was little discussion by the plurality of what might constitute harm to consumer decision making. Properly defining the term is of central importance, since a broad reading could render the category as elastic as the Court’s present substantial interest test.

It may be easier to begin to define the term by reference to what is not a harm to consumer decision making. Prevention of undignified or tasteless advertising; harms to the dignity or professionalism of a regulated profession; aesthetic harms such as reducing

93 See 44 Liquormart, 517 U.S. at 501 (“When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”) (Stevens, J., for himself and Ginsburg and Kennedy, JJ.).

94 See id. at 518 (“In cases such as this, in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in [Central Hudson], should not be applied, in my view. Rather, such an ‘interest’ is per se illegitimate and can no more justify regulation of ‘commercial’ speech than it can justify regulation of ‘noncommercial’ speech.”) (Thomas, J., concurring).
visual clutter or maintaining a proper atmosphere; or reducing the secondary effects of legal but “objectionable” products, would not suffice to justify a proposed speech regulation. This formulation of what is not a harm to consumer decision making suggests that under this Note’s test, many of the Court’s commercial speech cases would have ended at the “substantial interest” prong of Central Hudson.\(^95\)

But is there a positive definition of “harm to consumer decision making”? The burgeoning law of consumer protection, which cuts across specific areas of the law and has its roots in the common law torts of fraud and deceit, provides the best reference. For example, a large body of case law develops the Lanham Act’s bar on “deceptive marks.”\(^96\) The Federal Trade Commission Act has a well-developed body of case law defining deceptive, coercive, or unfair trade practices in a variety of different industries.\(^97\) Perhaps the best definition of “consumer deception” comes from the Uniform Deceptive Trade Practices Act, parts of which have been enacted in thirty-six states, which prohibits traditionally proscribed activities such as misrepresentations of affiliation, source, origin, quality, or price, while also going beyond traditional formulations to include such practices as advertising “with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity” or making “false or

\(^{95}\) Besides Central Hudson itself the cases most clearly in this category are Lorillard, 535 U.S. at 569 (preventing access by minors to tobacco products); Greater New Orleans Broadcasting, 527 U.S. at 185–86 (reducing social costs of gambling); 44 Liquormart, 517 U.S. at 504 (promoting temperance); Coors Brewing, 514 U.S. at 486 (forestalling “strength wars” among beer brewers); Edge Broadcasting Co., 509 U.S. at 426 (1993) (supporting neighboring states’ ban on gambling); City of Cincinnati, 507 U.S. at 416 (safety and aesthetics); Fox, 492 U.S. at 475 (promoting an educational atmosphere on college campuses); Posadas, 478 U.S. at 341 (reducing demand for casino gambling); Bolger, 463 U.S. at 73 (aiding parents’ efforts to discuss birth control with their children); and Metromedia, 453 U.S. at 507 (traffic safety and city aesthetics).


misleading statements of fact concerning the reasons for, existence of or amounts of, price reductions.\footnote{98} Similarly, the Uniform Consumer Sales Practices Act, upon which many state consumer protection codes are based, protects against misrepresentations about needed repairs, requires accurate disclosures concerning the scope of warranties and rebates, and guards against breakdowns in fair bargaining such as one-sided bargains, taking advantage of the infirm or mentally handicapped, and other unconscionable sales practices.\footnote{99}

Thus, the same interests that justify state regulation of commercial \emph{practices} that harm the consumer decision making process, generally speaking, will also justify regulation of commercial \emph{speech} to prevent the same harms.\footnote{100} Judicial inquiry will, of course, be necessary to set the outer boundaries of what constitutes harm to consumer decision making. The touchstone of this inquiry should be to ensure the free flow of accurate information about legal goods and services, as originally articulated in \emph{Virginia}

\footnote{98 \textsc{Uniform Deceptive Trade Practices Act} (Revised ed. 1966).}
\footnote{99 \textsc{Uniform Consumer Sales Practices Act} (Revised ed. 1966).}
\footnote{100 Jed Rubenfeld has suggested a similar approach to commercial speech regulation as part of his larger project to shift from balancing tests towards a purposive analysis in First Amendment cases. \textit{See Jed Rubenfeld, The First Amendment’s Purposes}, 53 \textit{Stan. L. Rev.} 767 (2001). Towards the end of his article he notes that under his approach Commercial speech … could no longer be treated as a second-class First Amendment citizen. Regulating commercial speech to police its factual truth would not be problematic. Nor would regulating commercial speech that advertised unlawful conduct: if the conduct is unlawful, a specific proposal to engage in that conduct can be made unlawful too. But regulating commercial speech that truthfully advertises lawful conduct would be problematic. Where a course of conduct itself is not itself prohibited, speech attempting to induce people to engage in that conduct cannot be prohibited either. For here the exception just discussed—that speech may be prohibited when it participates in a prohibited course of conduct—does not apply. On the contrary, speech is here deliberately singled out for adverse legal treatment—speech is treated worse than the corresponding action—which purposivism does not accept. These conclusions may run counter to some of the language of the older commercial speech cases, but they are consistent with the recent cases, which arguably have arrived at this result already. \textit{Id.} at 830.}
In order to forestall the doctrine’s collapse into paternalistic regulation of “objectionable” products on the grounds that they harm consumers, this inquiry should focus on consumer decision making, not a general notion of “consumer harm.”

Rather than relying on narrow definitions of commercial speech, as the Court has done in the past, this test narrows the applicability of commercial speech regulations altogether. At the same time, it remains congruent with the “common-sense” rationales on which the Court has based commercial speech regulation, rationales which simply do not apply when commercial speech regulations are employed to serve interests other than preventing harm to consumer decision making.

The Court has identified two such broad, “common-sense” rationales for affording commercial speech less constitutional protection than other forms of speech. First, commercial speech is objective and verifiable, which makes it—unlike much core political speech, which deals with statements of opinion—more susceptible to regulation for falsity. Second, because the sine qua non of commercial speech is business profits, it is an especially hardy form of speech, less susceptible to being chilled by overbroad regulation. That these rationales apply even to commercial speech in a “common-

101 See supra notes 44–47 and accompanying text.
102 For example, cigarettes are clearly a “harmful” product, but banning cigarette advertising does not protect consumers as consumers; it regulates speech about a legal product on grounds other than ensuring the flow of accurate consumer information. By contrast, a regulation requiring a warning about the health effects of cigarettes does serve the consumer decision making process, by offering information critical to that process. Thus, the state can require warnings to inform consumers, but not ban cigarette ads because it prefers that people not smoke.
103 See Friedman, 440 U.S. at 10 (1979); Bates, 433 U.S. at 381; Virginia Board, 425 U.S. at 771–72 n.24.
104 See Friedman, 440 U.S. at 10; Bates, 433 U.S. at 381; Virginia Board, 425 U.S. at 771–72 n.24.
sense” way is debatable. But to the extent they do, they are far less convincing outside of the context of a regulation that seeks to abate harms to consumer decision making.

For example, commercial speech is more verifiable to the extent it makes factual claims concerning, say, the price of ground beef, the accuracy of which assertion can be ascertained. But what if the objection to commercial speech is that the sale of ground beef has unwanted environmental or health effects? If the legislature feels strongly that the sale of ground beef has such effects, it has tools to deal with them, among them outlawing the sale of ground beef. But for the Court to allow the legislature to forbid commercial speech for reasons besides the falsity of that statement is to push the “verifiability” rationale into realms where it is no longer applicable.

The “durability” rationale for allowing commercial speech regulation is similarly inapplicable when the state asserts an interest other than protecting informed consumer decision making. It is likely true that commercial entities will continue to advertise no matter what restrictions the Court places on their freedom to do so, because they have economic incentives to engage in even highly regulated marketing. Indeed, many forms of speech are more or less “durable” in the sense of being unlikely to be cowed by regulation (think of activists who engage in civil disobedience). Yet only in the commercial speech setting does the fact that we can regulate speech because it is durable become an argument for why we should regulate speech.

105 As Kozinski & Banner note, supra note 78, at 635–38, most qualitative or comparative commercial claims are hardly “verifiable,” nor are political statements necessarily “unverifiable.” The statement, “If we don’t change the system, Social Security will begin to run a deficit in 2017” is likely more verifiable than “Pepsi is the choice of a new generation,” yet the former is fully protected political speech and the latter less-protected commercial speech. Additionally, the verifiability of speech is hardly a touchstone of First Amendment protection—scientific speech, after all, is “verifiable,” but no less protected for that fact.
This Note’s proposed approach still gives states wide latitude to regulate troubling examples of fraud or sharp dealing. States would still have the ability, for example, to prohibit in-person solicitation of accident victims by attorneys; to prohibit mailed solicitations from attorneys that give the false impression that a lawyer has “special knowledge” about the recipient’s legal troubles; to ban unsupported claims about the effectiveness of products; to require disclosure of key terms in a mortgage agreement; or, in cases where it is unclear whether a solicitation is a proposal to a transaction, to require a disclaimer that an advertisement is actually an advertisement. Nonetheless, it cannot be denied that these new definitions would work a sea change in the Court’s commercial speech jurisprudence.

III. APPLYING THE DEFINITIONS

These new definitions also provide a useful framework for analyzing the CAN-SPAM Act and many of the state laws regulating email spam. The public perception of the Act is that it makes it illegal to spam. But the Act is actually far less comprehensive than that. Congress acknowledged in its findings that email, and even commercial email, was a valuable tool with a number of social benefits. So it attempted to curb the most troublesome aspects of spam while not throttling commercial emails entirely.

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106 See, e.g., Ohralik, 436 U.S. at 447.
110 See, e.g., Zauderer, 471 U.S. at 651.
111 See supra at note 95.
112 See id. § 2(a)(1)-(12).
The heart of the CAN-SPAM Act prohibits materially fraudulent or deceptive commercial email, including email with deceptive subject lines or descriptions of origin,\textsuperscript{113} provides for enforcement by federal agencies, states, and Internet service providers ("ISPs"),\textsuperscript{114} and authorizes the Federal Trade Commission to promulgate rules that implement the purposes of the Act.\textsuperscript{115} The Act requires commercial emailers to include an “opt-out” mechanism to allow recipients to stop unsolicited emails, give notice that the email is an advertisement and include a valid physical business address,\textsuperscript{116} and makes commercial emailers liable for failing to respond to consumer requests to opt out.\textsuperscript{117} It preempts state anti-spam laws, “except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.”\textsuperscript{118} And it explicitly has no bearing “on the lawfulness or unlawfulness, under any other provision of law, of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages.”\textsuperscript{119}

As written, the CAN-SPAM Act not only easily satisfies the Central Hudson test as currently applied by the Court, but would also pass constitutional muster under this Note’s proposed test. That the state has a substantial interest in banning or regulating deceptive or fraudulent speech is unquestioned. In the context of commercial email,

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\begin{itemize}
  \item \textsuperscript{113} 15 U.S.C. §§ 7703-04.
  \item \textsuperscript{114} Id. § 7706.
  \item \textsuperscript{115} Id. § 7711.
  \item \textsuperscript{116} Id. § 7704(5)(a).
  \item \textsuperscript{117} Id. § 7704(4)(a).
  \item \textsuperscript{118} Id. § 7707(b)(1).
  \item \textsuperscript{119} Id. § 7708.
\end{itemize}
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requiring accurate and non-deceptive subject lines and sender information is a valid application of that principle, since it responds to the rationale for protecting commercial speech—accurate consumer decision making—that I have suggested is the touchstone for whether a state interest is substantial enough to justify regulation of commercial speech. Opt-out provisions, so long as they provide at least one opportunity for a commercial speaker to communicate with potential consumers, have long been upheld by the Court and even under my proposed test, pose no First Amendment problem, since email addresses almost certainly are not a public forum—just as U.S. postal mailboxes are not.  

Importantly, the Act does not completely ban commercial spam, unless it is deceptive or fraudulent. More than a quarter of the thirty-nine state laws regulating email spam go further than the CAN-SPAM Act and raise serious constitutional questions because they have the practical effect of banning nearly all commercial email. The Act explicitly pre-empted two state laws with “opt-in” provisions that prohibited commercial emails unless the consumer requests them, instead of the standard opt-out provision. Eight states included a provision making it illegal to send spam through an ISP that had a

120 See Rowan v. United States Post Office Dept., 397 U.S. 728 (1970) (upholding a law that allowed recipients to opt out of mass mail list); see also U.S. Postal Service v. Greenburgh Civic Ass’ns, 453 U.S. 114 (1981) (holding that there was no right of public access to individuals mailboxes, even though the boxes were under government control).


122 See CAL. BUS. & PROF. CODE §§ 17529.2(a) & (b) (2004) (prohibiting all unsolicited commercial emails from California businesses or businesses outside California sent to California citizens); DEL. CODE ANN. § 937 (1999) (prohibiting distribution of “any unsolicited bulk commercial electronic mail (commercial E-mail) to any receiving address or account under the control of any authorized user of a computer system.”).
policy of not transmitting commercial email, so-called “provider’s policy” provisions. Like opt-in laws, these provisions have the practical effect of banning nearly all commercial email, since few providers, if any, would permit the transmission of commercial email if not required to do so. These provisions raise very difficult First Amendment issues, including the still-unresolved question of whether private networks such as ISPs (and the telephone and telegraph networks of an earlier era) are public or semi-public First Amendment fora. Certainly, the suggestion that private entities can regulate the free flow of political or expressive content is deeply troubling, and such concerns would apply to the flow of commercial information insofar as such information is protected by the First Amendment. It is notable that Congress considered but rejected a provider’s policy provision as part of the CAN-SPAM Act and eventually took no position on the question, leaving it to be resolved by the courts.125

In all cases of strict state bans on commercial emails, the asserted interest on which the ban rests is either the state’s interest in preserving the efficiency of ISP servers or in preserving the equanimity of email recipients, or both.126 As explained in further detail below, commercial speech regulation justified on those grounds would definitely

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125 See supra note 118 and accompanying text.

126 See infra at notes 132–133.
fail this Note’s test, because it would prohibit speech on grounds other than harms to consumer decision making.127

The more interesting application of the CAN-SPAM Act comes when the ISP is itself the state. Does a state ISP’s policy of blocking commercial emails entirely—possibly legal if the ISP is a private entity128—violate the First Amendment? In White Buffalo Ventures, LLC v. University of Texas at Austin,129 the Regents of the University of Texas ordered the college’s servers to block all incoming unsolicited commercial email under a general policy forbidding solicitation on campus.130 The emails met all the requirements for commercial mail under the CAN-SPAM Act, including an opt-out mechanism.131 The Fifth Circuit decided that Texas had two substantial state interests that could serve to justify the ban: “server efficiency”132 and “user efficiency,” which it defined as “the ability of [University of Texas] email account holders to go about their daily business without constantly having to identify and delete unwanted commercial spam.”133 Ultimately, the Regents’ rules were found to pass constitutional muster.134

127 Id.
128 See supra note 119 and accompanying text.
129 White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366 (5th Cir. 2005). It should be noted that the case was not decided under the CAN-SPAM Act but under a Texas state statute that resembled it, since the Fifth Circuit—in a somewhat tortured passage—held that the CAN-SPAM Act, despite its explicit pre-emption provision, did not in this case pre-empt state law because to hold otherwise would be in tension with the purposes of the act. Id. at 370–74. But for analytical purposes, the distinction makes little difference, since the Texas statute is almost identical to the CAN-SPAM Act.
130 Id. at 368 n.2.
131 Id. at 369 n.5.
132 Id. at 376. The court concluded that the ban was not narrowly tailored to serve this interest, but did conclude that it was narrowly tailored to serve the “user efficiency” interest. Id. at 376–77.
133 Id. at 376 n.19.
134 Id. at 369.
Here, tightening the definition of what could serve as a “substantial state interest” would make a difference in the constitutional analysis. Under the Court’s present broad reading, there is no doubt that interests in “server efficiency” and “user efficiency” would be upheld as substantial. Separately, the ban could likely be upheld under *Fox* as an attempt to maintain a solicitation-free atmosphere on a college campus, though the interest is less well-served by a ban on email solicitation than the ban on in-person solicitation in that case.\(^\text{135}\)

But both would fail under the narrower definition proposed in this essay. Clearly “user efficiency,” as defined above, does not relate to consumer decision making. To the contrary, such a ban actually prevents informed consumer decision making by keeping consumers in the dark about market choices. Nor is “server efficiency” a substantial state interest under this tighter test, though the question is closer, since an argument can be made that overloading ISP servers interferes with consumers’ ability to access goods and services (as well as other types of speech) through the Internet. But this interest is still quite attenuated from the core of harms to consumer decision making as delineated in state and federal consumer protection law. Regardless, there is no authority that allows a government ban on an entire category of speech because the state infrastructure necessary to “process” such speech is not in place. In the end, neither of these interests are substantial under the test proposed in this Note, because they do not serve informed consumer decision making.

**IV. CONCLUSION**

\(^{135}\) *See supra note 78.*
The boundaries of First Amendment protection for various kinds of speech and other expression are never cleanly drawn. This is especially so in the realm of commercial speech, a doctrine that encompasses such matters as Congress’ commerce clause power, the states’ power to regulate commercial practices, the protection afforded trademarks, and the law of contracts and consumer protection. In different cases, considerations outside the First Amendment have drawn the Court in different directions as it has sought to balance competing interests. The result has been a body of law that is inconsistent and difficult to apply.

It does not have to be this way. With recent changes in the makeup of the Court, the prospects for a full-dress reconsideration of commercial speech doctrine seem as good as ever, especially with the departure of Chief Justice Rehnquist, a vociferous critic of First Amendment protection for commercial speech. The Court should abandon narrow definitions of commercial speech, since they can never capture the diversity and increasing innovation of commercial marketing and advertising. But it should return to the original rationale of Virginia Board, limiting the kinds of interests that will justify commercial speech regulations to those that seek to prevent harms to the consumer decision making process. In this way, the Court can ensure consistent application of a doctrine whose scope has become increasingly difficult to predict since Central Hudson. And it will harmonize the doctrine with the reasons we provide any First Amendment protection to commercial speech in the first place: because such speech plays an important role in facilitating consumer decision making in a free economy.