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The Compelled Commercial Speech Cases: Why Not Just Flip a Coin?

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I. INTRODUCTION

Government regulation of commercial enterprises takes many forms. Among the most familiar forms are requirements that commercial speakers convey particular government-approved commercial messages, presumably for the sake of some sufficient benefit to the persons thereby informed. This Article discusses the difficult problems generated by the case law of compelled commercial speech. Controversies and important paradoxes are examined herein, on the way to the surprising conclusion that in light of the ordinarily limited interests on both sides of the case, typical compelled commercial speech cases can be responsibly resolved, all else equal, by merely flipping a coin.

First, the Article briefly outlines the Supreme Court of the United States's most important compelled commercial speech cases.[1] These cases arise in the broader context of commercial speech regulation more generally.[2] The leading Supreme Court case focusing distinctively on legally compelled commercial speech is that of *Zauderer v. Office of Disciplinary Counsel*.[3] The compelled commercial speech cases,

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1. *See infra* Section II.

2. The touchstone of which is still Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980). *Central Hudson* also briefly addresses the vexed question of the boundary between commercial speech and non-commercial speech of all sorts, which we shall not herein pursue.

3. 471 U.S. 626 (1985).

including *Zauderer*, have already generated conflicting scholarly reactions.[4]

The Article then discusses a number of important problems latent in the Supreme Court case law, some of which have been identified, but conflictingly addressed by the lower federal courts.[5] Most surprisingly, it turns out that contrary to nearly universal belief, we actually cannot say that the *Zauderer* compelled commercial speech test really is, overall, less protective of recognized commercial speech rights than is the broader *Central Hudson* test.[6]

On the basis of the relevant case law and the available empirical evidence, the Article then considers uncertainties, complications, conflicts, and mixed results of compelled commercial speech regulation,[7] in general,[8] and more particularly regarding nutrition, diet, health, and disease.[9]

The Article then concludes[10] that all else equal, the empirical evidence, legal assumptions, doctrines, tests, and values, including the value of commercial free speech, as they are typically construed, suggest that typical compelled commercial speech cases could be as justifiably determined by randomly flipping a coin as by any more respectable adjudicative process. As it turns out, both the recognized commercial speech interests and the real magnitude of the government regulatory interest, as actually advanced in practice by the typical compelled commercial speech regulation, tend to be quite modest. There are, surprisingly, typically only limited legal interests on both sides of the case.

II. THE RELEVANT SUPREME COURT CASE HISTORY

Commercial speech was not granted distinctive constitutional protection until the 1976 case of *Virginia State Board of Pharmacy v.*

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4. *See, e.g.*, Martin H. Redish, *Compelled Commercial Speech and the First Amendment*, 94 NOTRE DAME L. REV. 1749, 1772–74 (2019). *But see* STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT? ch. 6 (Cambridge University Press ed., 2016). Professor Redish would, in general, typically accord stringent protection to commercial speakers, whether the restriction in question involves compelled commercial speech or prohibitions of commercial speech. Professor Shiffrin's approach is less solicitous of commercial speech rights in general.

5. *See infra* Section III.

6. *See id.* at notes 129–40 and accompanying text.

7. *See infra* Section IV.

8. *See id.*

9. *See id.*

10. *See infra* Section V.

Virginia Citizens Consumer Council.[11] The Court began by recognizing that many persons care more about their consumer product purchases than about political issues.[12] In constitutionally enshrining the individual and collective interest in informed commercial transactions, the Court retained some scope for regulatory limits on commercial speech. Thus, commercial speech that is deemed false, deceptive, misleading, or a proposal for an illegal transaction would simply be subject to prohibition.[13] *Virginia Pharmacy*, in this respect, allowed states to promote the "purity" of the flow of commercial speech as well as the sheer volume of such speech.[14]

The Court in *Virginia Pharmacy* framed the narrow issue before it as "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients."[15] To this question, the Court in *Virginia Pharmacy* answered no.[16]

This holding left open whether, or how, states could also regulate commercial speech on grounds other than falsity, misleadingness, deceptiveness, or a contemplated illegal activity.[17] Those questions were addressed four years after *Virginia Pharmacy* in *Central Hudson Gas & Electric Corporation v. Public Service Commission*.[18] The summary holding of *Central Hudson* reasserts and then elaborates on *Virginia Pharmacy*'s limitations as follows:

> 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[19] advances the

11. 425 U.S. 748 (1976). For a very brief, but relatively recent, updating of the Court's commercial speech doctrine post-*Virginia Pharmacy*, see Express Oil Change, LLC v. Miss. Bd. of Licensure, 916 F.3d 483, 487–88 (5th Cir. 2019).

12. *Va. Pharmacy*, 425 U.S. at 763–65.

13. *See id.* at 770–72.

14. *See id.* at 771–72.

15. *Id.* at 773.

16. *Id.*

17. *See id.* at 771–72.

18. 447 U.S. 557.

19. This requirement that the substantial government interest be advanced directly, rather than, presumably, indirectly or not at all, seems curious. Why shouldn't achieving a substantial interest indirectly ever be permissible? Sometimes, a substantial problem may only admit of being attacked indirectly. Or we might say that most substantial

> governmental interest asserted, and whether it is not more extensive than is necessary[20] to serve that interest.[21]

Thus, *Central Hudson*, as a general commercial-free speech test, requires, apart from its other elements, merely a showing by the government of a "substantial" interest in regulating the speech in question.[22] That is, under *Central Hudson*, commercial speech can be regulated, all else equal, if the government interest is merely substantial, as opposed to compelling, or overridingly important.[23]

More crucial for our purposes, the holding in *Central Hudson* requires a substantial government interest in restricting the commercial speech but does not require that the restriction also pass any sort of interesting balancing test. Specifically, the Court in *Central Hudson* does not provide for any possibility that the substantial

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problems must be attacked indirectly, to one degree or another. The process of imposing the death penalty, for example, involves multiple discernible steps.

Perhaps the simplest, and purely stylistic, explanation for why the opinion from *Central Hudson* focuses on a distinction between direct and indirect advancement, rather than on substantially advancing the government interest, is that the immediately prior element of the test, on the required weight of the government interest, has itself already referred to the distinction between substantial and insubstantial.

Technically, it would be possible for a multipart judicial test to require a substantial government interest, a substantial advancement of that substantial interest, and a substantial relationship between the substantial government interest and the regulatory means chosen to promote that substantial interest. Stylistically, though, one use of "substantial" precludes any other use of the same term in the same test formulation.

20. This apparently rigorous formulation of a narrow tailoring requirement was quickly converted into a less demanding requirement of merely reasonable proportionality between the government interest and the scope of the regulation at issue. *See, e.g.*, Bd. of Tr. v. Fox, 492 U.S. 469, 477–80 (1989); City of Cincinnati v. Discovery Network, Inc. 507 U.S. 410, 416 (1993); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001). For a similar prompt judicial climb-down from an apparently rigorous narrow tailoring requirement to a more accommodating inquiry into mere reasonably proportionate tailoring in the separate free speech area of content-neutral restrictions on speech, compare United States v. O'Brien, 391 U.S. 367, 377 (1968) (noting an incidental restriction on speech must be "no greater than is essential" to promote the government interest) with Ward v. Rock Against Racism, 491 U.S. 781, 797–800 (1989) (rejecting a least restrictive alternative or genuinely narrow tailoring requirement).

21. *Cent. Hudson*, 447 U.S. at 566.

22. *Id.*

23. For background, *see* Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226, 2231 (2015). Of course, the holding of *Central Hudson* allows the categorical exclusion of speech that is false, deceptive, misleading, or a proposal to engage in an illegal transaction. *See Cent. Hudson*, 447 U.S. at 563–64. This feature is not explicitly incorporated into the *Zauderer* test, 471 U.S. at 651, and in that respect may be more stringently restrictive of speech than *Zauderer*, while still being less restrictive of speech than *Zauderer* in other respects.

government interest in regulating the speech may be outweighed, in any sort of comparative or balancing inquiry, by any other conflicting government interest, by any conflicting interest asserted by the commercial speaker, or by any interest of any audience for the commercial speaker.

Thus, the Court in *Central Hudson* does not provide for holding a commercial speech regulation unconstitutional by means of any sort of interest balancing test.[24] As we shall see below, this feature is not shared by all constitutional free speech tests applicable to commercial speech.[25] In particular, the key compelled commercial speech case of *Zauderer v. Office of Disciplinary Counsel*[26] arguably embodies, in all instances, just such a broad interest balancing test.[27]

The Court in *Zauderer* addresses the regulation of commercial speech, but in the context in which a government seeks to compel commercial speech, as distinct from seeking to restrict, suppress, or prohibit some commercial message the speaker would otherwise wish to convey.[28] The *Zauderer* test for cases of compelled commercial speech encompasses several distinct elements.[29]

In particular, the Court in *Zauderer* noted that the speech restriction at issue involved only an attorney's commercial advertising and a legally compelled addition to or accompaniment of that speech.[30] The Court focused, at least in the context of the *Zauderer* case, on a governmental interest in dissipating "the possibility of consumer

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24. The opinion in *Central Hudson* does briefly declare that the scope of the commercial speech restriction "must be in proportion to" the scope of the asserted governmental interest in restricting the speech in question. *Cent. Hudson*, 447 U.S. at 564. But the Court's reference here to "proportion" is then clarified to refer not to a more general balancing of interests, but to degrees of tailoring, even though tailoring is then taken as a separate element of the overall *Central Hudson* test. *Id.* at 564–65.

25. See most crucially the discussion *infra* notes 129–40 and accompanying text.

26. 471 U.S. 626 (1985) (addressing legally mandated additional disclosures in an attorney's commercial advertisement).

27. *Id.* at 651 (referring to the possibility of compelled commercial speech as potentially "unduly burdensome"). The most obvious construal of an inquiry into possible undue burdensomeness of a requirement is that some sort of general interest balancing is involved. Some burdens may be undue, and others not undue. Some sort of broader assessment and evaluation would thus seem to be implied.

28. *Id.* at 650 (asserting "material differences between disclosure requirements and outright prohibitions on speech.").

29. *Id.* at 651. There is, however, occasional uncertainty over whether all of the considerations discussed in *Zauderer* amount to elements of the already applicable *Zauderer* test, or instead whether the presence or absence of one or more of these considerations should instead determine whether *Zauderer*, or else *Central Hudson* or some other test, should govern under the circumstances.

30. *Id.* at 651.

confusion or deception"[31] from the advertisement in the absence of the legally mandated clarifying language.[32]

The Court in *Zauderer* was then careful to specify, although without any elaboration, that the compelled commercial speech in *Zauderer* was both "purely factual," and, in addition, "uncontroversial" information. [33] Clarification of both of these unusually vague requirements was left to lower courts.[34]

At least equally importantly, the holding of *Zauderer* clearly prioritized the speech interests of the audience for the commercial speech in question,[35] specifically by comparison with the assumedly minimal speech interest of the commercial speaker.[36] The free speech interests at stake in commercial speech, in general, are thus said to be primarily those of the consumers, rather than the producers, of commercial information.[37] In particular, "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech."[38]

The Court in *Zauderer*, however, then arguably imposed serious qualifications on both the power of governments to compel commercial speech and on the priority of consumer speech rights over those of compelled commercial speakers.[39] Specifically, the Court recognized that "unjustified," or else "unduly burdensome," disclosure requirements might violate the commercial speaker's free speech rights.[40]

On the most straightforward reading—a judicial test element looking to undue, or excessive, burdensomeness—amounts to some sort of comparative balancing test; whatever one's understanding of the free speech interests of compelled commercial speakers or of their audience

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31. *Id.* For other conceivably sufficient governmental interests, see *infra* notes 60–74 and accompanying text.

32. *Zauderer*, 471 U.S. at 651. Of course, preventing possible consumer confusion or deception had been established as a cognizable and perhaps decisive consumer speech regulatory interest under the broader *Central Hudson* test. *See Cent. Hudson*, 447 U.S. at 565.

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

34. *See infra* Section III.

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

36. *See id.*

37. *See id.*

38. *Id.* Actually, though, some "flat prohibitions" on commercial speech may be narrow or inconsequential for one or more speakers, given the speakers' remaining alternative speech channels. For brief discussion of the Court's familiar if overbroad claim, see *infra* note 92 and accompanying text.

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

40. *Id.*

consumers. We pursue the question of a balancing test in *Zauderer* below.[41]

The Court in *Zauderer* closed its analysis, however, by apparently backing away from, and perhaps setting aside, not only any balancing, but much of its immediately preceding concerns and limitations.[42] At least by the way of a brief explicit summary holding, the Court declared that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related[43] to the State's interest in preventing deception[44] of consumers."[45]

Zauderer remains the preeminent compelled commercial speech case, whatever its incompleteness, lack of clarity, or controversiality. Among the Supreme Court cases interpreting *Zauderer*, we find the attorney-regulation cases of *Ibanez v. Florida Department of Business and Professional Regulation*[46] and *Milavetz, Gallop & Milavetz v. United States*.[47] The Court in *Milavetz* treats the decision in *Zauderer* at somewhat greater length than does the Court in *Ibanez* but does little to clarify holding in *Zauderer*.[48]

The Court in *Milavetz* does characterize the *Zauderer* compelled commercial speech test as imposing "less exacting scrutiny"[49] than the commercial speech restriction case of *Central Hudson*.[50] The Court in *Milavetz* echoes the assertion in *Zauderer* that the crucial speech interests in commercial speech cases are those of audience consumer, rather than the commercial speaker.[51] The Court in *Milavetz* then simply reiterates *Zauderer*'s odd juxtaposition of an apparent broad

41. *See infra* notes 129–40 and accompanying text.

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

43. This use of "reasonably related" may refer either to the limited degree of tailoring between the purpose and the impact of a regulation under minimal scrutiny, or, in concise fashion, to the considerations, including of balancing and any undue burdens on the speaker. Undue burdening is certainly also unreasonable.

44. Again, whether a government's interest in compelled commercial speech can extend beyond preventing consumer deception is taken up in later cases. *See infra* notes 60–74 and accompanying text.

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

46. 512 U.S. 136, 143 (1994) (noting the holding in *Zauderer* as imposing upon the government the burden of showing real, non-speculative, non-conjectural harms to be remedied by compelled speech).

47. 559 U.S. 229 (2010).

48. *Id.* at 249–51.

49. *Id.* at 249.

50. *Id.* at 255 (Thomas, J., concurring in part and concurring in the judgment) (noting that the rule in *Zauderer* imposes "a still lower standard of scrutiny" on speech regulation, compared to *Central Hudson*).

51. *Id.* at 249 (majority opinion citing *Zauderer*, 471 U.S. at 651).

interest balancing test for compelled commercial speech[52] with an arguably minimalist "reasonable relationship" test.[53]

The Supreme Court itself has not yet meaningfully addressed the concerns and uncertainties generated by the *Zauderer* compelled commercial speech case.[54] Recently, however, the Court, in dicta, reiterated that under *Zauderer*, a compelled commercial speech regulation must not be "unjustified or unduly burdensome" on the commercial speaker[55] and that the regulating government must bear the burden of showing that the regulation is neither unjustified nor unduly burdensome.[56] But the Court also did not repudiate its prior language suggesting something like a mere reasonableness review in compelled commercial speech cases.[57] Nor did the Court explicitly reject the theory that in compelled commercial speech cases, the free speech interest at stake is primarily that of the potential audience of consumers, rather than that of the commercial speaker.[58]

Thus, the lower courts have, since the *Zauderer* opinion, largely been left on their own to seek, or to construct, clarity in the area of compelled commercial speech.[59] Below, we briefly survey the current state of play of the major unresolved issues under *Zauderer*.

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52. *Milavetz*, 559 U.S. at 250 (quoting *Zauderer*, 471 U.S. at 651) (referring to "[u]njustified or unduly burdensome" compelled commercial speech requirements).

53. *Milavetz*, 559 U.S. at 250 (quoting *Zauderer*, 471 U.S. at 651).

54. The Court has referred to its *Zauderer* test as "more deferential," but by specific contrast with, apparently, a content-based strict scrutiny test. *See* Nat'l Inst. of Fam. Life & Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018). In *Becerra*, the Court declined to apply the rule from *Zauderer*; rather than apply *Zauderer* and perhaps strike down the compelled speech regulation, at least in part on the grounds that the compelled speech was not "purely factual and uncontroversial information" about the speaker's terms of service. *Id.* (quoting *Zauderer*, 471 U.S. at 651).

55. *Becerra*, 138 S. Ct. at 2377–78 (quoting *Zauderer*, 471 U.S. at 651).

56. *See id.* (citing *Ibanez*, 512 U.S. at 146). If the Court has chosen to view governmentally compelled speech, of either a commercial or non-commercial sort, as a content-based regulation of private actor speech, the Court would then be forced to address whether compelled commercial speech regulations would then, as contented-based, trigger demanding strict scrutiny judicial review under *Reed*, 135 S. Ct. 2218. The Court has thus far declined to decisively clarify the relationship between commercial speech regulations and regulations based on the content of the speech evoking strict scrutiny under *Reed*.

57. *See supra* note 43 and accompanying text.

58. *See supra* notes 35–38 and accompanying text.

59. *See supra* note 26 and accompanying text. For a sense of the varied academic responses, see *supra* note 4. *See also* Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 ARIZ. L. REV. 421 (2016) (noting that compelled commercial speech should be treated as other sorts of restrictions on commercial speech, and in particular, pursuant to the *Central Hudson* test); Jonathan H. Adler, *Persistent*

III. CONSENSUS AND CONTROVERSY IN THE LOWER COURTS AS TO COMPELLED COMMERCIAL SPEECH

First among unresolved issues with the rule from *Zauderer* is the scope of applicability of the case. The Court in *Zauderer* itself referred only to the government interest in "preventing deception of consumers."[60] This, for a time, led the United States Court of Appeals for the District of Columbia Circuit to apply *Zauderer* only to those compelled commercial speech cases in which the government interest was preventing or curing misleading commercial advertising.[61] But a government might also seek to compel commercial speech for reasons apart from countering consumer deception.[62] And thus, for a time, the District of Columbia Circuit applied the more general *Central Hudson* test[63] in those cases of compelled commercial speech where the government interest did not focus on consumer deception.[64] But then in

Threats to Commercial Speech, 25 J.L. & POL'Y 289 (2016) (urging less judicial deference to the consuming public's purported "right to know"); Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J.L. & POL'Y 53, 55 (2016) ("communities should have considerable flexibility to mandate warnings geared towards protecting the public's health"); Andrew C. Budzinski, Note, *A Disclosure-Focused Approach to Compelled Commercial Speech*, 112 MICH. L. REV. 1305, 1309 (2014) (encouraging "a lenient standard of review to regulations that compel disclosure of factual information"); Peter Bozzo, *The Treachery of Images: Reinterpreting Compelled-Speech Doctrine*, 65 DEPAUL L. REV. 965, 1012 (2017) (critiquing, as outmoded, the distinction between factual statements and emotional appeals); Jennifer M. Keighly, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 543 (2012) (urging rational basis review where "the disclosure serves the state's interest in an informed public, and . . . the disclosure informs the audience . . . instead of spreading the government's normative message"); Felix T. Wu, *The Commercial Difference*, 58 WM. & MARY L. REV. 2005, 2009 (2017) ("[i]f the compulsion is directed not to a person, but to an artificial entity with no intrinsic rights to 'freedom of mind,' then the rationale for heightened scrutiny of speech compulsions dissolves.").

60. *Zauderer*, 471 U.S. at 651; Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 519 (D.C. Cir. 2015) (quoting *Zauderer*, 471 U.S. at 651).

61. *See Nat'l Ass'n of Mfrs.*, 800 F.3d at 519.

62. *See id.* For an endorsement of a similarly narrow scope of application for *Zauderer*, *see* Alexis Mason, Note, *Compelled Commercial Disclosures: Zauderer's Application to Non-Misleading Commercial Speech*, 72 U. MIAMI L. REV. 1193, 1200 (2018).

63. *See Cent. Hudson*, 447 U.S. at 564–66.

64. *See Nat'l Ass'n of Mfrs.*, 800 F.3d at 519. A requirement, for example, that the product to be sold was not, in some specified fashion, involved in civil or international war, child labor or some other exploitive labor practice, produced in some specified undesired fashion, or derived from non-local sources, and so on, could be of interest to much of the public, yet not clearly fall within the standard scope of consumer deception. *See infra* notes 67–74 and accompanying text.

2015, the en banc District of Columbia Circuit flatly held "that *Zauderer* in fact does reach beyond problems of deception."[65]

More broadly, the general trend among the lower courts seems to have been to expand the applicability of *Zauderer* to include government interests beyond narrow understandings of consumer deception.[66] Courts have considered, for example, speech requirements imposed for the sake of encouraging the reduced consumption of some, if not all, added sugar drinks,[67] along with, interestingly, mention in the ad itself of the disclosure's legally required status.[68] As well, there have been compelled disclosures with respect to so-called "conflict minerals" from the Democratic Republic of the Congo;[69] "country of origin" meat labeling requirements;[70] reducing obesity by requiring, in practice, a selected ten percent of local restaurant menus to specify caloric counts;[71] environmental enhancement through mandatory labeling of light bulbs containing mercury;[72] and supposedly promoting public health and consumers' informed sovereignty through requiring disclosure that milk-related products derive from, without any required explanation, what it referred to as "rBST-treated"[73] cows.[74]

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65. Am. Meat Inst. v. USDA, 760 F.3d 18, 20 (D.C. Cir. 2014) (en banc) (reviewing a case involving involved a diplomatically interesting "country of origin" labeling requirement).

66. *See, e.g.*, the accounting in CTIA—The Wireless Ass'n v. City of Berkeley, 873 F.3d 774, 775 (9th Cir. 2017) (citing cases from the United States District Courts of for the Districts of Columbia, First, Second, and Sixth Circuits), as well as the later stage of this case reported at 928 F.3d 832 (9th Cir. 2019).

67. *See* Am. Beverage Ass'n v. City and Cty. of San Francisco, 916 F.3d 749, 753 (9th Cir. 2019) (en banc).

68. *See id.*

69. *See Nat'l Ass'n of Mfrs.*, 800 F.3d at 520.

70. *See Am. Meat Inst.*, 760 F.3d at 20.

71. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 117–18 (2d Cir. 2009).

72. Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 107 (2d Cir. 2001).

73. Vermont consumers were thus apparently credited with knowing that "rBST" treatment refers to recombinant Bovine Somotropin, a synthetic hormone growth stimulant. *See* Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69–70 (2d Cir. 1996). Query whether even the bare "r," or the "recombinant," term by even itself would be typically understood by consumers in any meaningful way. Query, more broadly, the likely effectiveness of this regulation in significantly promoting the public health, or even in meaningfully promoting a genuinely knowledgeable consuming public.

74. *See id. See also*, for a further option, PSEG Long Island LLC v. Town of N. Hempstead, 158 F. Supp. 3d 149, 165 (E.D.N.Y. 2016) (determining that a mandatory health warning on wooden utility poles treated with the hazardous chemical preservative "Penta" as not lying within the scope of commercial speech, as the required warning bore no sufficient relationship to the utility's sales or other commercial interests) (declining as

The lower courts have also, inescapably, devoted some attention to the application and meanings of the Court's distinction in *Zauderer* between "purely factual"[75] and not purely factual disclosures,[76] as well as to the Court's equally fascinating distinction between controversial and uncontroversial compelled disclosures.[77] In particular, the "conflict minerals" case of *National Association of Manufacturers v. Securities Exchange Commission*[78] attempts the unenviable task of identifying boundary lines between purely factual and non-purely factual statements, as well as between controversial and uncontroversial compelled speech requirements in this context.[79]

The problem here is not just the unusual vagueness of these distinctions. Vagueness pervades the law, to one degree or another, for good or ill.[80] Rather, references to uncontroversiality,[81] and to the idea of pure factuality as part of a legal test,[82] run directly counter to a

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well to largely immunize the requirement as government, rather than private party, speech).

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

76. *See id.* For a critique, see Bozzo, *supra* note 59.

77. *See Zauderer*, 471 U.S. at 651. This distinction may well seem to be unusually "unstable" in context. For background, *see* Lauren Fowler, Note, *The "Uncontroversial" Controversy in Compelled Commercial Disclosures*, 87 FORDHAM L. REV. 1651 (2019) (contrasting facticity and ideology).

78. 800 F.3d 518.

79. *Nat'l Ass'n of Mfrs.*, 800 F.3d at 527–30 (citing *Am. Meat Inst.*, 760 F.3d at 27).

80. *See, e.g.*, TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW (2000); Keith C. Culver, *Varieties of Vagueness*, 54 U. TORONTO L.J. 109 (2004); Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491 (1994); Alex Silk, *Theories of Vagueness and Theories of the Law*, 25 LEGAL THEORY 132 (2019); Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509 (1994). More broadly, *see, e.g.*, TIMOTHY WILLIAMSON, VAGUENESS (1994); Roy Sorenson, *Vagueness*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://plato.stanford.edu/entries/vagueness.html (rev. version April 5, 2018). For a classic formulation of the idea of constitutionally excessive vagueness, see the opinion of Justice Holmes in *Connally v. General Constr., Inc.*, 269 U.S. 385, 391 (1926) (referring to a statutory term that is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application").

81. Controversial mandated speech may in some cases be only latently controversial, in the sense of being uncontroversial on its face, but controversial in light of further information. A mandatory nutrition label on a food product may seem uncontroversial, at least if more broadly principled objections to all such mandated labels are ignored. But a food producer may then point to studies contesting the relevance to health of one of the required nutrition disclosures. For background, see *Am. Beverage Ass'n*, 916 F.3d at 757.

82. Consider the judiciary's chronic difficulties in distinguishing questions of "fact" from questions of law, and from "mixed" questions of law and fact. *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982); Miller v. Fenton, 474 U.S. 104, 113 (1985). The *Pullman-Standard* case confesses that no method for unerringly

number of important current cultural trends. Any meaningful distinction between pure fact, and say, opinion, value, emotion, and theory is dubious under, merely for example, various postmodernisms and their successors,[83] and various other approaches to nature[84] and morality.[85] What we take to be a "fact" may depend crucially on our preexisting theories, on the instruments with which we choose to seek and observe "facts," and on our cultural presuppositions more generally.[86]

Some apparently factual-mandated commercial message may actually operate in part as expressions of officially recognized sympathies and values.[87] Any stigmatizing effect of such rules on the commercial speaker may, or may not, be mitigated if the speaker is allowed to specify that the speech is legally required and to try to justify its position on the policy issue in question.[88] More generally, in *Zauderer*, the Court's focus on the ideas of pure factuality and on uncontroversiality, if they are not simply ill-advised, inescapably add murkiness and indeterminacies to the application of the test in practice.

A much broader problem with the *Zauderer* test involves its focus not on the speech rights of the speaker and the audience,[89] but on the speech rights of the audience.[90] The Court in *Zauderer* thus declares

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distinguishing matters of fact from matters of law is available. *See Pullman-Standard*, 456 U.S. at 288. Note that matters of "fact" in our context must be distinguished not so much from law, as from opinion, from value, and from theory as well.

83. For an overview, see BRIAN MCHALE, THE CAMBRIDGE INTRODUCTION TO POSTMODERNISM (2015).

84. *See, e.g.*, JOHN MCDOWELL, MIND AND WORLD (Cambridge Univ. Press 2d ed. 1996) (the passivity of our sensory perceptions as complemented by our active conceptualizing), and the assertions as to the theory-ladenness of supposedly pure perceptual observations in THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (Univ. of Chicago Press ed., 1970). The distinction between "subjective opinion" and pure fact is addressed in, *e.g., Nat'l Ass'n of Mfrs.*, 800 F.3d at 538 (Srinivasan, J., dissenting).

85. *See, e.g.*, Simon Blackburn's projectivist quasi-realism, as briefly expounded in Richard Joyce, *Projectivism and Quasi-Realism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2015), https://plato.stanford.edu/entries/moral-anti-realism/Projectivism-quasi-realism.html. More specifically, *see* Bozzo, *supra* note 59.

86. See the authorities cited *supra* notes 83–85, as well as the useful LARRY LAUDAN, SCIENCE AND RELATIVISM (1990).

87. *See Nat'l Ass'n of Mfrs.*, 800 F.3d at 530 (noting the required conflict-free mineral label as involving an ethical taint, regardless of any favorable or unfavorable actual effect).

88. *See id.* at 531–32 (Srinivasan, J., dissenting).

89. *See Va. Pharmacy*, 425 U.S. at 756–57.

90. The audience for mandated safety warnings on wooden utility poles would not typically be thought of as prospective or actual consumers of those poles. *See PSEG Long Island*, 158 F. Supp. 3d at 165.

that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides."[91] Even more explicitly, the commercial speaker's "constitutionally protected interest in not providing any particular factual information in his advertising is minimal."[92]

This emphasis on the speech interests of the audience, or of consumers, rather than those of the commercial speakers, has unusual implications for the free speech interest analysis. To the extent that commercial speaker interests are discounted, the regulating government and the parties with genuine significant free speech interests will, oddly, tend to be on the same side of the case, and typically with compatible, if not identical, regulatory and speech interests. The government and the parties with the crucial speech interest both tend to favor the compelled speech requirement. The essential adversarialism of the litigated judicial case is thereby largely muted or suppressed.

In any compelled commercial speech case, the court presumably seeks out first some sufficiently weighty government regulatory interest at stake in the case. Mere speculation by the government, or an embrace by the government of some marginal purpose, may not suffice.[93] But if the courts discount the free speech interests of the commercial speaker, any meaningful scrutiny of the government's regulatory purpose will, all else equal, typically seem unnecessary. The significant speech interests will then typically be those of potential consumers, on whose behalf of the communal speech regulation in question was presumably adopted. Unless other interests are also taken

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

92. *Id.* (emphasis omitted); *see also Am. Meat Inst.*, 760 F.3d at 23. This point is emphasized in Robert Post, *C. Edwin Baker Lecture for Liberty, Equality, and Democracy: Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 877–78 (2015). In Professor Post's terms, "[r]egulations that force a speaker to disgorge more information to an audience do not contradict the constitutional purpose of commercial speech doctrine. They may even enhance it." *Id.* at 877. *See also id.* at 883 ("commercial speakers retain 'minimal' First Amendment interests."). Professor Post's interpretation of *Zauderer*, in this respect, is in turn favorably cited in, among other cases, *Nat'l Ass'n of Mfrs.*, 800 F.3d at 534 (Srinivasan, J., dissenting).

93. As in mere idle public curiosity. Thus, typically, a health or safety interest with at least modest plausibility may suffice, but a compelled commercial speech regulation that is justified "on the basis of 'strong consumer interest and the public's "right to know"'" may well not suffice. *See Amestoy*, 92 F.3d at 73 (bovine recombinant growth hormone product mandated labeling case).

into account, the regulation supposedly[94] promotes the wishes and interests of consumers in having access to whatever commercial information may be involved.

There are doubtless further complications,[95] but in typical cases, even mere curiosity[96] on the part of some consumers, legally enshrined in a compelled commercial speech regulation, would thus seem to be constitutionally unobjectionable.[97] Even in the absence of a health or safety concern,[98] consumers might reasonably want mandated disclosure of, say, the manufacturers' rankings, perhaps by some government or private agency, on any number of commercial considerations.[99] This follows, certainly, if we assume the relevant speech interests to be as the courts have described them.

A further unresolved problem is that of the required degree of tailoring between the government purpose and the effect of the regulation. If the commercial speaker in question does indeed have only a minimal relevant free speech interest,[100] perhaps greater latitude for the regulating government would be called for. The case law as it stands, however, displays uncertainty as to matters of evidentiary burdens and the required precision of tailoring in the compelled commercial speech cases. Consider, in particular, the following differences between the United States Courts of Appeals for the

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94. Virtually any of the compelled speech mandates may have unanticipated, often indirect, consequences that tend to defeat the announced purposes of the compelled commercial speech regulation. For discussion, see *infra* Section IV, along with cases such as *Nat'l Ass'n of Mfrs.*, 800 F.3d at 530.

95. As in the case of potential audience members who have legal standing to raise constitutional or other cognizable objections to the (mandated) visibility of the message in question, or of a compelled commercial speech regulation that is somehow exceptionally burdensome on the speaker on non-speech grounds.

96. *But see CTIA*, 928 F.3d at 844; *Amestoy*, 92 F.3d at 73.

97. For interesting background, see *Am. Meat Inst.*, 760 F.3d at 31–33 (Kavanaugh, J., concurring in the judgment). For a more critical outcome, see Adler, *Persistent Threats*, *supra* note 59.

98. As distinct from, say, the broadly construed public "welfare."

99. Merely for example, disclosure of overall environmental rankings, manufacturing processes, parent companies and subsidiaries, recycling practices, etc. Even consumer favoring of local, instate, or American products on grounds unrelated to health or safety might suffice. For discussion, see *Am. Meat Inst.*, 760 F.3d at 23. Of course, Dormant Commerce Clause issues may arise in some such cases. For general background, *see*, *e.g.*, Chris Erchull, Note, *The Dormant Commerce Clause —A Constitutional Barrier to Sustainable Agriculture and the Local Food Movement*, 36 W. NEW ENG. L. REV. 371 (2014).

100. *See supra* notes 89–99 and accompanying text.

Second[101] and Ninth[102] Circuits on the subject of mandated nutrition labeling.

The Second Circuit's case addressed a New York City Health Code requirement that restaurants "post calorie content information on their menus and menu boards."[103] The court recognized the protected status of commercial speech in general, but found no constitutional violation[104] where the regulation "mandates a simple factual disclosure of caloric information and is reasonably related to New York City's goals of combating obesity."[105] Certainly, the typical minimum scrutiny equal protection case gives the regulating government the benefit of the doubt not only on the effectiveness of the policy, but on the tailoring of the regulation to the legislative purpose.[106] One might well wonder whether the contribution of the mandated calorie, counts by itself to actually resolving the problem of obesity, is likely to be significant. But one might also wonder about the degree of tailoring of the regulation to the interest in reducing obesity, especially when we recognize that the regulation at stake actually covered only about "ten percent of restaurants in New York City."[107]

One might thus wonder why a regulation of commercial speech on the basis of content should be deemed sufficiently tailored in addressing only ten percent[108] of the arguably relevant speakers in question. If we again discount the speech interests of the commercial speakers,[109] there remain the speech interests of the potential audience for the calorie count messages.[110] Courts that emphasize the interest of consumers in potentially receiving presumably valuable messages as to calories should normally want such messages to be disseminated to wider audiences. Again, the government and the crucial speech interests should be largely on the same side.

In sharp contrast, the Ninth Circuit has pressed aggressively into issues of degrees of tailoring in a closely related context.[111] San Francisco required that some, but not all, added-sugar drinks, but not

101. *See N.Y. State Rest. Ass'n*, 556 F.3d 114.

102. *See Am. Beverage Ass'n*, 916 F.3d 749.

103. *N.Y. State Rest. Ass'n*, 556 F.3d at 117.

104. *Id.* at 118.

105. *Id.*

106. *See*, classically, Ry. Express Agency v. N.Y., 336 U.S. 106 (1949); Minn. v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

107. *See N.Y. State Rest. Ass'n*, 556 F.3d at 117.

108. *See id.*

109. *See supra* notes 91–92 and accompanying text.

110. Classically, *see Va. Pharmacy*, 425 U.S. at 756–57.

111. *See supra* note 102.

other products with added sugar, bear a particular message in some, but not all, forms of their advertising of such drinks.[112] Where applicable, the officially required language ran as follows: "WARNING: Drinking beverages with added[113] sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco."[114] Crucially, from the perspective of the court, this warning was required to "occupy at least 20% of the advertisement"[115] in question.

The court ultimately held that, given the need to balance the speech interests and burdens involved, the 20% minimum requirement was insufficiently narrowly tailored under *Zauderer*.[116] The court admitted that the 20% minimum figure has been applied in tobacco advertising and other contexts.[117] And there was also evidence in the record that relatively large warning messages tend to be more effective than smaller such messages.[118]

The court held, however, that even the government's own evidence empirically indicated that a warning covering only 10% of the advertisement, or half the legally required size, would be effective in generating increased consumer understanding.[119] Thus, the court concluded that a compelled warning of half the legally required size "would accomplish Defendant's stated goals."[120] Given the relevant balancing of burdens and interests under *Zauderer*,[121] a minimum space requirement of 10% would thus be effective and more narrowly tailored to the aim of the regulation.[122]

The Second and Ninth Circuits thus illustrate remarkable judicial uncertainty and divergence as to even the most basic dimensions of any

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112. *See Am. Beverage Ass'n*, 916 F.3d at 753, 754 (excluding advertisements in "periodicals[,] television[,] electronic media," and relatively small advertising signs, among other exemptions).

113. Thus, advertisements for, say, pure apple juice would fall outside the scope of the ordinance. *See* other exemptions *id.* at 754.

114. *Id.* at 753.

115. *Id.* at 754.

116. *Id.* at 756–57.

117. *Id.* at 757.

118. *Id.*

119. *See id.* Questions of degrees of promoting any government interest tend to be set aside or downplayed by courts, in the absence of meaningful data. For background, see R. George Wright, *Wiping Away the Tiers of Judicial Scrutiny*, 93 ST. JOHN'S L. REV. (forthcoming 2020).

120. *Am. Beverage Ass'n*, 916 F.3d at 757.

121. *See id.* at 756.

122. *See id.* at 757.

tailoring inquiry under *Zauderer* and the ensuing compelled commercial speech cases. In part, this remarkable uncertainty reflects underlying judicial confusion over the Court's reference, in *Zauderer*, to not imposing undue burdens[123] on the commercial speakers involved in a given case.[124] A number of the lower court opinions seem to give some attention to the issue of a possible undue burden imposed by the regulation on speech.[125] Other courts, however, either implicitly or explicitly do not.[126] Neither the courts incorporating a distinct "undue burden" test, nor those declining to apply such a test, typically[127] ask

123. *See supra* notes 27, 39–40 and accompanying text.

124. It is clearly possible that the most of the relevant burden of compelled commercial speech falls on audience members, rather than on the speaker. *See infra* Section IV. But this does not seem to be the intended thrust of the Court's opinion in *Zauderer*, despite the opinion's broader focus on the speech rights of audience members.

125. *See, e.g.*, *Am. Beverage Ass'n*, 916 F.3d at 756 (stating that the *Zauderer* test asks whether the speech requirement is "(1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome"); 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1053 (8th Cir. 2014) (noting that compelled commercial speech regulations must not be "so 'unjustified or unduly burdensome' that they 'chill[] protected commercial speech'") (leaving open the possibility that "unjustifiedness" may itself also be a matter of interest balancing, as well as the possibility that any interest balancing under *Zauderer* test must focus narrowly on chilled protected speech); *id.* at 1062 (stating similar language); Dwyer v. Cappell, 762 F.3d 275, 283–84 (3d Cir. 2014) (recognizing an "undue burden" requirement, but apparently limiting its application to chilling, specifically, constitutionally protected commercial speech, which may involve an unfortunate logical circularity) (citing, *inter alia*, Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd., 632 F.3d 212, 228–29 (5th Cir. 2011)); Masonry Bldg. Owners v. Wheeler, 394 F. Supp. 3d 1279, 1297 (D. Or. 2019) (reiterating the *American Beverage* formulation, *supra*); Core-Mark, Int'l, Inc. v. Mont. Bd. of Livestock, 218 U.S. Dist. LEXIS 187359, at *12 (D. Mont. 2018) (inquiring into "undueness" of any burden, but actually finding only a constitutionally acceptable minimal burden in the form of "a non-obtrusive, factually accurate date stamp be applied to milk cartons") (but thus taking the compelled speech's presumed factual accuracy into account at two separate phases of the *Zauderer* test). For background, see Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 990–91 (2017) (assuming the *Zauderer* test to be more lenient than the *Central Hudson* test, *see id.* at 973).

126. *See, e.g.*, Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 556 (6th Cir. 2012) (requiring a mere "reasonable relationship," or reasonable tailoring, while explicitly setting aside any concern for possible undue burdensomeness or unjustifiedness of the regulation) (citing *Milavetz*, 559 U.S. at 249–52); *N.Y. State Rest. Ass'n*, 556 F.3d at 134 (noting regulatory underinclusiveness of factual commercial messages is permissible under *Zauderer*, and thus "rational basis applies and NYSRA concedes that it will not prevail if we apply that test"); *Nat'l Electric Mfrs. Ass'n v. Sorrell*, 272 F.3d at 114–15 (noting that given the minimal speech impact of compelling only truthful, factual commercial speech, the crucial test under *Zauderer* is whether there is "a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose").

127. Consider the suggestion that some compelled commercial speech regulations may be so burdensome as to practically rule out the most desired forms of commercial

whether the regulated speaker, or the audience, would still retain any realistic alternative means of either conveying or receiving the commercial message in question.[128]

Even more importantly, though, any "undue burden" test, or any similar interest balancing test under *Zauderer*[129] would imply that the nearly universal understanding of the stringency of the *Zauderer* test as compared to *Central Hudson*,[130] is mistaken. Specifically, the case law clearly indicates that the test under *Zauderer* is generally a "weaker," or less stringent, test[131] than the broader and more familiar commercial speech test in *Central Hudson*.[132] This popular sense of the test under *Zauderer* as simply less stringent and more accommodating, across the board, of government regulations is mistaken.

Simply put, a commercial speech restriction under *Central Hudson* survives, all else equal, if the government can show merely a substantial[133] interest that is appropriately promoted by the restriction

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advertising by the regulated speaker. *See Dwyer*, 762 F.3d at 283 (citing *Ibanez*, 512 U.S. at 146–47).

128. *See generally* the authorities cited *supra* notes 125–26. For the under-recognized importance of considering the realistic availability and costs of a speaker's remaining unregulated speech channels, as distinct from any kind of tailoring analysis, see R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57 (1989).

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

130. *See Cent. Hudson*, 447 U.S. at 566.

131. *See, e.g., Milavetz*, 559 U.S. at 249; *Am. Beverage Ass'n*, 916 F.3d at 767–68 (Nguyen, J., concurring in the judgment) (distinguishing *Zauderer*'s mere "rational basis" test from *Central Hudson*'s more demanding "intermediate scrutiny" test); *Nat'l Ass'n of Mfrs.*, 800 F.3d at 522 (referring to "*Zauderer*'s loose standard of review" and "the more demanding standard of *Central Hudson*"); *id.* at 537 (Srinivasan, J., dissenting) (distinguishing "the relaxed standard set forth in *Zauderer* [and] the more restrictive test of *Central Hudson*"); *id.* at 541 (Srinivasan, J., dissenting) ("of course, if the Rule passes muster under *Central Hudson*, it necessarily survives the 'less exacting scrutiny described in *Zauderer*'"); Safelite Group, Inc. v. Jepsen, 764 F.3d 258, 259, 261–62 (2d Cir. 2014) (noting *Central Hudson* as imposing "intermediate scrutiny," whereas *Zauderer* requires only rationality or reasonableness); *Discount Tobacco City & Lottery, Inc.*, 674 F.3d at 555 (noting that where applied to factual commercial disclosure requirements, *Zauderer* as merely a "rational-basis rule"); *N.Y. State Rest. Ass'n*, 556 F.3d at 132 (noting the test under *Zauderer* as a "rational basis test"); *Nat'l Electric Mfrs. Ass'n*, 272 F.3d at 114–15 (accord).

132. For an analysis and critique of the idea of a substantial, as perhaps distinct from an "undue," burden in the law, see R. George Wright, *Substantial Burdens in the Law*, 46 SW. L. REV. 1 (2016).

133. *See Cent. Hudson*, 447 U.S. at 566. Substantial is distinct from an overridingly important, or compelling, government interest in restricting speech. *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1 (2010); Burson v. Freeman, 504 U.S. 191 (1992).

in question. In contrast, and despite the lesser stringency of the *Zauderer* test in other respects, a speech regulation under *Zauderer* may not survive, again, all else equal, even if the regulation similarly promotes a substantial government interest. In fact, regulations may survive under *Central Hudson* and yet be struck down under *Zauderer* even if the substantial interest being promoted is precisely the same.

This paradox reflects the fact that beyond its initial gatekeeping exclusion of some forms of objectionable commercial speech, the rule from *Central Hudson* is not usually interpreted to require any broad balancing of interests, beyond reasonable proportionality in tailoring,[134] once a directly promoted substantial interest is shown.[135] The Court in *Central Hudson* does not ask whether the advancing of the substantial[136] government interest is outweighed, in the sense of imposing an undue[137] or excessive burden on the speech interests of either the commercial speaker or perhaps that speaker's audience.[138] The holding in *Central Hudson* in this sense lacks a general balancing test.

But as the opinion from *Zauderer* is often, though hardly always, interpreted, the supposedly weaker[139] *Zauderer* test does indeed require, where necessary, this additional broad interest balancing inquiry.[140] Thus, under *Zauderer*, but typically not *Central Hudson*, an attempt to further a substantial government interest might still be declared unconstitutional, as unduly or excessively burdening the speech interests of either the speaker or, perhaps, a consumer audience, as in the case of a confusing or lengthy required disclosure.

We again recognize that *Central Hudson* allows for striking down, for example, false commercial speech with no interest balancing. *See Cent. Hudson*, 447 U.S. at 566.

134. *See id.* and the subsequent commercial speech regulation tailoring cases referred to *supra* note 20.

135. *See Cent. Hudson*, 447 U.S. at 566. "Direct" promotion may amount in practice to something like substantial or significant promotion of the interest at stake. But this inquiry, even if it requires interest balancing at all, does not require interest balancing of the broader sort invited in *Zauderer*. *See also supra* notes 19, 24 and accompanying text.

136. *See id.*

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

138. Recall that the opinion from *Zauderer* is commonly interpreted to prioritize the speech rights of consumers, and of other actual or potential audience members, rather than the speech rights of the commercial speakers themselves. *See supra* notes 91–92 and accompanying text.

139. *See* the sources cited *supra* note 131.

140. For a recent statement, see *CTIA—The Wireless Ass'n*, 928 F.3d at 848–49. *See also* the apparently conflicting approaches to "undue burdensomeness" under the test from *Zauderer* taken by the courts cited *supra* notes 125–26.

The possibility of a broad speech–interest balancing test under *Zauderer* only raises the stakes involved in the crucial question of whether compelled commercial speech is typically effective or broadly cost-justified. We take up the conflicting intuitions and uncertainties therein below.

IV. COMPELLED COMMERCIAL SPEECH IN PRACTICE: THE PROBLEMS OF DETERMINING COST–EFFECTIVENESS

The problems of determining the existence and sizes of the benefits and the costs, intended and unintended,[141] of government regulatory programs in general have been thoughtfully studied.[142] It is occasionally suggested that, unfortunately, the benefits and costs of many regulatory programs can reasonably be thought of as largely mutually-cancelling.[143] Our focus, though, is on the difficulties in establishing significant overall net benefits of typical programs of compelled commercial speech.[144]

The costs and benefits of compelled commercial speech programs may in some respects track those of non-speech oriented regulatory programs. As merely one example of such tracking, consider the practice in which major players in a given market actually seek the implementation of burdensome regulations on that market in order to disproportionately burden small competitors and potential market entrants.[145] We can imagine such a practice in the compelled commercial speech area as well.

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141. *See, e.g.*, Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECONOMY 677 (1975).

142. *See, e.g.*, EAMONN BUTLER, PUBLIC CHOICE: A PRIMER (Inst. of Econ. Affairs ed., 2012); PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER (Princeton Univ. Press ed., 2014); CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE (Brookings Inst. Press ed., 2007); Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOCIOLOGICAL REV. 894 (1936).

143. *See* SCHUCK, *supra* note 142, at 4, 20–25 (citing, *e.g.*, WINSTON, *supra* note 142).

144. The potential benefits of compelled commercial speech could include not only broad health, welfare, and safely interests, but any separate enhancement of the audience's free speech interests, as recipients of compelled commercial messages. *See supra* notes 60–74 and the accompanying text on the scope of legitimate regulatory interests under *Zauderer*; as well as *supra* note 92 and the authorities cited therein.

145. *See, e.g.*, Organization for Economic Co-operation and Development, *Going for Growth Interim Report*, at ch. 2, www.oecd.org/eco/growth/reducing-regulatory-barriers-to-competition-2014.pdf; Patrick McLaughlin, Matthew D. Mitchell & Anne Philpot, *The Effects of Occupational Licensure on Competition, Consumers & the Workforce* (Nov. 3, 2017), www.mercatuscenter.org.publications/study-american-capitalism/effects-

Consider, for example, a state law prohibiting any competitor in a market from mentioning its own affiliates, in a particular context, unless that commercial speaker also mentions one or more of their competitors.[146] There is certainly a case to be made that requiring, in effect, all commercial speakers to mention one more of their own competitors enhances competition, tends to reduce consumers' search costs, and adds meaningfully to the typical consumer's storehouse of relevant commercial information, all at modest cost to the consumer. To the extent that these effects are real, the consumer's freedom of speech interests are, presumably, promoted.[147]

But it is also possible to tell a different story about requiring commercial speakers to advertise their own competitors, for free, where they advertise or otherwise discuss their own or affiliated services. A requirement that one advertises a competitor—say, a major established competitor—if one advertises at all, may lead to less advertising, and thereby less dissemination of the names and services of all market entrants. Perhaps, in some contexts, this reduced level of commercial advertising would be thought to ill-serve the free speech interests of consumers.[148]

The court in *Safelite Group, Inc. v. Jepsen*[149] actually notes potentially even more severe costs of just this sort of compelled commercial speech. The court refers to the regulation in question as "a very serious deterrent to commercial speech."[150] But then, more specifically, the court, in an opinion by a distinguished law and economics expert, maintains that "such laws are highly likely to further covertly protectionist, rather than consumer information, goals—in particular, by protecting existing businesses, which may be well known, against new entrants."[151]

On this theory, suppressed advertising in general may tend to entrench the established competitor's market shares. But the largest current competitors may already have lower marketing costs per

occupational-licensure. For a conceivably relevant instance as addressed by the Supreme Court, see the internet sales tax burden discussions in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

146. As, in summary form, in *Safelite Group, Inc.*, 764 F.3d at 266.

147. *See supra* note 92 and accompanying text.

148. *See*, most importantly, the fundamental logic underlying the majority opinion in *Va. Pharmacy*, 425 U.S. 748 (noting the consuming public's interest in informed market transactions).

149. 764 F.3d 258; *see also supra* note 146.

150. *Safelite Group, Inc.*, 764 F.3d at 264. Senior Judge Ralph K. Winter has taught at the Yale Law School in related areas.

151. *Id*.

customer, and this advantage might be blunted by a regulation requiring them to mention smaller and new market entrants. A new entrant that can hardly afford to meaningfully advertise might be harmed by having to mention an already well-known major competitor, but, in turn, benefitted by being itself repeatedly introduced to potential customers by that major competitor's own regulated advertising. The overall effects then, may offset, or may be limited, or simply difficult to determine.

There is also some evidence in the case law itself of adverse, unanticipated consequences of commercial speech regulation.[152] Courts in the commercial speech cases are barred from attempting to justify their regulations solely on the basis of "speculation or conjecture."[153] But meaningful evidence as to the likely future consequences of a regulation of commercial speech is often incomplete, skewed, or absent when such regulations are initially challenged.[154] Judging on the basis of grossly incomplete, biased, speculative, or conjectural evidence further enhances the likelihood that the overall value of the chosen judicial result, across time, will be indeterminate, nearly random, or limited, in light of their actual mixed or offsetting effects.

In the compelled commercial speech cases, the possibility of adverse unanticipated consequences—indeed, of the perverse "backfiring" of the regulation in question—has been raised.[155] In *National Association of Manufacturers v. Securities and Exchange Commission*,[156] the regulation involved mandated disclosure of the commercial speaker's use of gold and other metals originating in or near the conflict-torn Democratic Republic of the Congo. The aim of the regulation was to decrease the revenue flow to groups perpetuating the armed conflict, thereby encouraging an abatement of the ongoing humanitarian crisis.[157]

The problem, though, as the court recognized, is the sheer uncertainty and contestability of this largely empirical prediction.[158] The court recognized in particular the possibility that the labeling requirement might indeed have perversely backfired.[159] The backfiring

152. *See supra* notes 141–42.

153. Edenfield v. Fane, 507 U.S. 761, 770 (1993).

154. For a critique and a recommended remedy in broader context, *see* R. George Wright, *supra* note 119.

155. *See, e.g.*, *Nat'l Ass'n of M'frs. v. SEC*, 800 F.3d at 526–27 (discussing "conflict minerals").

156. 800 F.3d 518.

157. *See id.* at 526.

158. *Id.* at 527.

159. *Id.* at 526.

might have occurred "because some companies in the United States are now avoiding the [Democratic Republic of the Congo],"[160] with the unintended result that "miners are being put out of work or are seeing even their meager wages substantially reduced, thus exacerbating the humanitarian crisis and driving them into the rebels' camps as a last resort."[161] Consequences need not track any government's desires and intentions.

Again, our point is not that the commercial speech mandate in this specific case either has, or has not, failed of its essential purpose, or even made matters substantially worse. This case instead illustrates the broader claim that commercial speech mandates tend to have overall results that are either difficult to establish, mixed, limited, equivocal as to desirable and undesirable actual effects, unclear as any significant results, a matter of speculation and conjecture, or close to neutral in their largely offsetting positive and negative effects over any time frame.

Consider as well compelled commercial speech involving consumer product labeling, specifically in the area of nutrition information. Recall that in *New York State Restaurant Association v. New York City Board of Health*,[162] the court addressed a City health regulation requiring a selected 10%[163] of City restaurants to "post calorie content information on their menus and menu boards" for the purpose of "combating obesity" and related diseases.[164] The real state interest at stake thus was not merely in providing consumer information, but in actually significantly changing consumer habits, on the basis of the mandated information, so as to meaningfully affect obesity and disease levels.[165]

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160. *Id.*

161. *Id.* (citing investigative articles in the journal FOREIGN POLICY and in the WASHINGTON POST).

162. 556 F.3d 114.

163. *See id.* at 117.

164. *Id.* at 118. *See also id.* at 134 (discussing an "obesity epidemic"). Note that the City sought, rather more modestly, the mere instrumental or intermediate goal of reducing "consumer confusion and deception," and of promoting "informed consumer decision-making," so as to reduce obesity and its related diseases. *Id.* at 134. Under these circumstances, however, the instrumental goals would hardly be of much significance if they did not then somehow lead to significantly better nutrition habits. Even universal nutritional literacy, with memorized calorie counts, presumably along with other relevant measures, would hardly be worth pursuing as a state interest if such nutritional literacy did not lead to significantly upgraded consumer choices. The relevant state interest can hardly be satisfied by even a flawless consumer understanding of the dietary grounds of their unchanging obesity and disease levels.

165. *See supra* note 164. The Restaurant Association doubted that the regulations at issue would achieve this goal. *See N.Y. State Rest. Ass'n*, 556 F.3d at 133.

Interestingly, the Restaurant Association challenging this compelled commercial speech regulation did not merely propose to be relieved of all burdening of their commercial speech. Instead, the Restaurant Association expressed a preference for a more detailed requirement as to the variety of nutritional data points to be disclosed.[166] Thus, the Restaurant Association preferred a substantially broader and more nutritional information disclosure requirement.[167]

Logically, there are several possible grounds on which to prefer a more exhaustive nutritional labeling requirement. Nutrition, after all, is not reducible to calories alone; sugars[168] and sodium, for many consumers, may be equally significant.[169] As well, restaurant chains spanning more than one jurisdiction have an at least minimal interest in the uniformity of the nutrition information disclosure requirements they must meet.[170] And doubtless quite unlike the Restaurant Association, a far less responsible regulated party could conceivably prefer greater disclosure requirements for the sake of cognitively overloading some customers who might otherwise choose to dine elsewhere.[171]

A crucial problem thus lies in the fact that the substantial government interest in nutrition labeling, in tobacco, and in most other commercial contexts, cannot possibly be the mere publication, public display, or mere disclosure of the information in question. A genuinely substantial government interest, in the compelled commercial speech cases, must more typically involve some substantial consumer behavior change as a result of the mandated disclosure.[172] A more nutritionally

166. *See N.Y. State Rest. Ass'n*, 556 F.3d at 133.

167. *Id.*

168. Note, *e.g.*, the emphasis on added sugars, as distinct from calories, at issue in *Am. Beverage Ass'n*, 916 F.3d at 753.

169. And perhaps less well estimated without the labels. See the discussions associated with the Nutrition Labeling and Education Act of 1990, Pub. L. No. 101–535, 104 Stat. 2353, codified at 21 U.S.C. §§ 301, 321, 337, 343, 345, 371 (2000). Whether, after almost thirty years, the Act has led to significant reductions in nutrition-based major diseases is plainly open to debate. For background, *see*, *e.g.*, ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISES OF TRANSPARENCY 189 (Cambridge Univ. Press ed., 2007).

170. *See* FUNG, *supra* note 169, at 190.

171. *See generally* the sophisticated analysis in OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (Princeton Univ. Press ed., 2014).

172. A government might conceivably claim that the interest at stake is merely in a better-informed consumer public, even if the public's behavior then remains unchanged. But it is implausible to say that the government's interest in better informed, but unchanged levels of, say, dangerous obesity is itself substantial.

informed, but no less self-destructive, public can hardly constitute a substantial government interest.

Some courts have begun to recognize the possibility of a failure of the enhanced availability of information to then be translated into an increase in legislatively preferred consumer behaviors. Disclosure may not enhance and may even undermine consumer compliance, especially as the overall number of required consumer disclosures proliferates.[173] Time and attention devoted to one mandated commercial disclosure by a typical consumer may mean less time and attention for another, perhaps more significant, disclosure.[174]

These and related problems and paradoxes have been usefully explored by Professors Ben-Shahar and Schneider. They argue that in the commercial context, "'[m]andated disclosure" may be the most common and least successful regulatory technique in American law."[175] The available empirical evidence indicates that, in general, "people don't notice disclosures, don't read them if they see them, can't understand them if they try to read them, and can't use them if they read them."[176]

Inescapably, there are problems of the "various forms and degrees of illiteracy and innumeracy."[177] In general, mandated disclosures, where they do work, tend to disproportionately help these who are already well off and may need help the least.[178] More broadly, any given compelled disclosure may, for the consumer, impose a cognitive "overload."[179] And then there is a different sort of "overload" problem, in which mandated commercial disclosures accumulate and "become so numerous that none of us can begin to read and assimilate all of the

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173. *See CTIA—The Wireless Ass'n*, 873 F.3d at 777 (Wardlaw, J., dissenting in the denial of the petition for rehearing en banc) (citing CTIA—Wireless Ass'n v. City of Berkeley, 854 F.3d 1105, 1126 (Friedland, J., dissenting in part)). It has been argued that warning-proliferation may actually "backfire" due to warning-fatigue, anxious overreaction resulting in adverse health outcomes, and a rebellious "forbidden-fruit" effect. *See The Side Effects of Health Warnings*, SOCIAL ISSUES RESEARCH CENTRE BULLETIN (May 12, 1999), www.sirc.org/news/sideeffects.html. Not all such warnings, of course, are legally mandated.

174. *See id.*

175. BEN-SHAHAR & SCHNEIDER, *supra* note 171, at 3.

176. *Id.* at 55. But consider, paradoxically, the problem of the arguably overwhelming proliferation of such required disclosures. *See id.* at 56. This suggests the further problem that genuinely helpful mandated commercial speech may tend disproportionately to help those who are already privileged in economic class or educational status. *See id.*

177. *Id.* at 56.

178. *See id.* at 56, 136.

179. *See id.* at 56.

disclosures thrust upon us."[180] The food and nutrition labels we have referred to throughout have been particularly judged to be commonly ineffective.[181]

When compelled disclosures are suspected of largely failing of their purpose, there is often still a feeling that better results would follow if the disclosures in question could be re-written in "simpler" terms.[182] Attempts to "simplify" required commercial disclosures, however, create their own problems.[183] Such attempts generate not only distortions, but their own further complexities.[184] The problem of excessive mandated speech[185] reflects the fact that legislatures may tend to focus on the given problem at hand, rather than on noticing as well that their proliferating mandates unfortunately tend, cumulatively, to "overgraze the disclosure commons."[186]

Part of the cause of chronically excessive, if often ineffective, commercial mandates may be that such mandates do not typically impose substantial direct financial costs on the government itself.[187] Once the regulation is imposed on private actors, any monitoring costs are largely at the discretion of the government, as are any costs of later amending the rule.[188] For regulated parties, the costs of compliance may be far lower than discontinuing sales of the product or service in question—assuming the regulation was not actually sought by one or more of the regulated commercial speakers.[189] And more generally, such regulations may be thought of as a less controversial alternative to

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180. *Id*. Think of the remarkably detailed literature insert accompanying many over-the-counter medicines generally thought of, by consumers and others, as typically safe. In fact, to some consumers, a leaflet, rather than a prohibition of the product, may suggest the product's safety, based on government investigation.

181. *See id*. at 43, 136–37.

182. *See id*. at 119, 140.

183. *See id*. at 119 & ch. 8.

184. *See id.* at 119; R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U.L. REV. 715 (2000).

185. *Cf.* more broadly R. George Wright, *Public Fora and the Problem of Too Much Speech*, 106 KY. L.J. 409 (2018).

186. BEN-SHAHAR & SCHNEIDER, *supra* note 171, at 139. The underlying reference is presumably to Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (suggesting, by broad implication, that the adopters of each separate new commercial speech requirement would not fully account for the cumulatively suboptimal consequences of other legislation doing likewise).

187. *See* BEN-SHAHAR & SCHNEIDER, *supra* note 171, at 145.

188. *See id*.

189. *See supra* note 145 and accompanying text.

prohibiting sales of the product, or to paternalistic policies involving a hard shove rather than a mere nudge.[190]

The costs of ineffective compelled commercial speech rules may not, however, be confined to the speaker, or to the considerations noted above. In some cases, compelled speech mandates can do other sorts of harm as well. In particular, compelled commercial speech rules may in effect politically "block" the adoption of any other alternative kind of regulation, even if the alternative might be somewhat more effective. This concern applies especially with respect to less well-off groups who would benefit disproportionately from more effective forms of regulation.[191] More generally, compelled speech requirements "can undercut other regulation, . . . impair decisions, injure markets, exacerbate inequality, and in some important cases, cripple valuable enterprises."[192]

The background in which the mandated disclosure takes place may also dilute or, in an extreme case, negate any consumer guidance value. Consider again the important field of information and advice regarding nutrition, diet, and health risks. This field is not yet, to say the least, an

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190. For background, see RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (Penguin Books ed., 2009); Cass Sunstein & Richard Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003). For recent arguments for the policy merits of stronger forms of paternalism, *see* SARAH CONLY, AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM (Cambridge University Press ed., 2013); JASON HANNA, IN OUR BEST INTEREST: A DEFENSE OF PATERNALISM (Oxford Univ. Press ed., 2018).

191. BEN-SHAHAR & SCHNEIDER, *supra* note 171, at 169; *See also supra* notes 176 and accompanying text.

192. BEN-SHAHAR & SCHNEIDER, *supra* note 171, at 169. Professor Sunstein takes up some of these concerns in Cass R. Sunstein, *Nudges That Fail*, 20 BEHAVIOURAL PUB. POL'Y 4 (2017). For criticism of BEN-SHAHAR & SCHNEIDER, *supra* note 171, see, *e.g.*, Margaret Jane Radin, *Less Than I Wanted to Know: Why Do Ben-Shahar & Schneider Attack Only 'Mandated' Disclosure?* (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2462818, as well as the virtual book symposium available at https://lawprofessors.typepad.com/contractsprof_blog/2014/09/introducing-the-authors (Sept. 11, 2014). For elaboration of some of the problems noted by Ben-Shahar & Schneider, see, *e.g.*, Uri Benoliel, Jenny Buchan & Tony Gutentag, *Revisiting the Rationality of Disclosure Laws: An Empirical Analysis*, 46 HOFSTRA L. REV. 469 (2017) (noting beyond the problem of consumers' bounded rationality, there is also a common consumer bias toward undue personal optimism concerning the disclosed risks); Oren Bar-Gill, David Schkade & Cass R. Sunstein, *Drawing False Inferences From Mandated Disclosures,* https://doi.org/10.1017/bpp.2017.12 (Nov. 14, 2017) (raising the possibility that consumers might be over-deterred in interpreting as a warning a particular disclosure that is motivated instead merely by right-to-know or anti-competitive considerations).

exact science.[193] Consumer confusion as to food, health, and nutrition risks in some areas has been, and remains, pervasive.[194] In this area, at least, the overall available consumer information, including recommendations and warnings, has been "[i]nconsistent, incomplete, and contradictory."[195]

Consumer confusion over inconsistent unofficial and official advice leads to skepticism, and perhaps even to policy "backfiring," including with respect to even the best-supported nutrition advice.[196] Nor is consumer confusion as to health warnings limited by educational level or by age.[197] And to these factors, we must add in important uncertainties as to how much attention is actually paid by consumers to consumer nutrition labels, as well as to the extent of any linkage between reading such labels and improved health.[198] As for the likely

193. *See, e.g.*, the observation of the renowned social science methodologist John Ioannidis, *Editorial: Implausible Results in Human Nutrition Research* (Nov. 14, 2013), https://doi.org/10.1136/bmj.f668 ("[a]lmost every single nutrient imaginable has peer reviewed publications associating it with almost any outcome").

194. *See, e.g.*, Foodinsight.org, *2018 Food and Health Survey* (May 13, 2018), https://foodinsight.org/2018-food-and-health-survey.

195. Lara Spiteri Cornish & Caroline Moraes, *The Impact of Consumer Confusion on Nutrition Literacy and Subsequent Dietary Behavior* (Apr. 20, 2015), https://doi.org/10.1002/mar.20800.

196. *See* Rebekah H. Nagler, *Adverse Outcomes Associated with Media Exposure to Contradictory Nutrition Messages*, 19 J. HEALTH COMMUNICATIONS 24 (2014) (noting, however, the possibility that some persons with a disease now claim greater prior confusion than actually existed). *See also* the "backfiring" responses noted *supra* note 173.

197. *See* Rebekah H. Nagler, *supra* note 196; *Contradictory Nutrition News Creates Consumer Confusion*, (Jan. 28, 2014), www.sciencedaily.com/releases/2014/01/140128153814.htm. A conscientious consumer might notice contradictory claims regarding, say risky levels of dietary sodium intake. *See, e.g.*, Michael H. Alderman & David A. McCarron, *Are You Getting Too Much Salt in Your Diet? Probably Not*, WALL STREET JOURNAL, (June 2, 2019), www.wsj.com/articles/are-you-getting-too-much-salt (noting the range of conflicting recommendations); Larry Husten, *Lancet Paper Adds to Evidence That Reducing Salt to Very Low Levels May Be Dangerous*, (Apr. 9,2018), www.cardiobrief.org/2018/08/09/lancet-paper-adds-to-evidence; Jane E. Henney, et al., *Sodium-Intake Reduction and the Food Industry*, N ENGL J MED (May 29, 2019), www.nejm.org/full/10.1056/NEJMp1905244 (citing *Dietary Reference Intakes for Sodium and Potassium*, FOOD POL'Y, (March 5, 2019), www.nationalacademies.org/hmd/Reports/2019/dietary-reference-intakes-sodium-potassium.aspx) (noting some remaining uncertainties).

198. There may certainly be a positive relationship between nutrition label use and the directly related choice of healthier products. *See* Jesus Barreiro-Hurle, Azucena Gracia & Tiziana de Magistris, *Does Nutrition Information on Food Products Lead to Healthier Food Choices?*, 35 FOOD POL'Y 221, 228 (2010). The actual degree to which nutritional labels are consulted is uncertain. *See* Gill Cowburn & Lynn Stockley, *Consumer Understanding and Use of Nutrition Labeling: A Systematic Review*, 8 PUB. HEALTH NUTRITION 21, 24 (2005); Cliona Ni Mhurchu et al., *Do Nutrition Labels Influence*

overall health impact of reading nutrition and health labels, one study concluded that "[d]espite food label use being associated with improved dietary factors, label use alone is not expected to be sufficient in modifying behavior ultimately leading to improved health outcomes."[199]

The important subject matter of nutrition labeling—whether the labeling is legally mandated or not—thus illustrates the broader overall sense that the value of compelled commercial speech is typically uncertain, dubious, limited, clearly mixed and offsetting, speculative and conjectural, or simply not susceptible of persuasive assessment.

V. CONCLUSION

Legally compelled commercial speech is a commonplace phenomenon, and in that sense, important. As one court has noted, "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information."[200] The evidentiary basis for such regulations at the time of enactment[201] is, however, typically weak.[202] Overall, the evidence seems to suggest that the effects of compelled commercial speech tend to be modest to minimal, unfortunately skewed,

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Healthier Food Choices?, 121 APPETITE 360, 360 (2018) (in one study involving barcoded products, "[l]abels were viewed for 23% of all purchased products, with decreasing frequency over time"). We may, however, tend not to read labels on purchased items if we have purchased the item in the past, and have read the label on some prior occasion.

It is also possible that any positive relationship between reading nutrition labels and healthier produce choices may reflect factors such as educational level or income. *See* Robert E. Post, et al., *Use of the Nutrition Facts Label in Chronic Disease Management: Results from the National Health and Nutrition Examination Survey*, 110 J. AM. DIETETIC ASS'N 628, 630 (2010).

199. Nicholas J. Ollberding, Randi L. Wolf & Isobel Contento, *Food Label Use and Its Relation to Dietary Intake Among US Adults*, 110 J. AM. DIETETIC ASS'N 1233, 1233 (2010).

200. *Nat'l Elec. Mfrs Ass'n*, 272 F.3d at 116. Among other conspicuous examples, the court lists securities disclosures, tobacco labeling, nutritional labeling, pollutant concentrations in water discharges, toxic substance releases, prescription drug advertisements, workplace hazards, and warnings of exposures to hazardous substances. *See id.* Again, though, as the need for such warnings increase so, typically, should the value of actually reducing, in some sensible way, the risks involved and numbers of persons affected, as distinct from merely putting potentially adversely affected parties on some sort of notice of the risks in question.

201. For background and broader discussion, see R. George Wright, *supra* note 119.

202. *See*, merely for example, Arthur G. Fraas & Randall Lutter, *How Effective Are Federal Mandated Information Disclosures?*, 7 J. BENEFIT COST ANALYSIS 326 (2016).

murky and indeterminate, mixed and offsetting, if not occasionally backfiring perversely for unanticipated reasons.[203]

We may, on this basis, conclude that the likely net effects of any given compelled commercial speech rule will be, unpredictably, either modestly positive, neutral, or modestly negative. But perhaps instead of deciding these cases on the basis of our recommended inexpensive random coin flip, the courts should presume against the constitutionality of such regulations, and then factor in the weight of free speech considerations.

The logic of current free speech case law, however, paradoxically strengthens the argument for random coin flipping to decide compelled commercial speech cases. The cases, again, assume that the free speech interests of the compelled commercial speakers, unlike in political speech cases and in other sorts of commercial speech regulation cases, are modest.[204] The primary speech interests in the compelled commercial speech cases are instead assumed to be those of actual or potential consumers of the product or service in question.[205] The interests of consumers, though, is again precisely what are only dubiously, minimally, or even adversely served in practice by the compelled commercial speech in the typical case.[206] A consumer's free speech interest in receiving compelled commercial speech messages that are typically confusing, ineffective, modestly effective, variously overwhelming, or even perverse in their overall effect is, inescapably, limited at best.

We are left, then, in typical compelled commercial speech cases, with distinctly modest actual promotion of any relevant government interest, and with similarly modest overall advancement of the relevant free speech interests. Despite the perceptions of the parties, little is typically at stake on either side of the case. Rather than expensively and, in the aggregate, arbitrarily adjudicate, such cases, we would be better off resolving this class of cases through the inexpensive toss of a coin.[207]

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203. *See supra* Section IV. For a survey of perverse, largely ineffective, or harmful results, see Kesten C. Green & J. Scott Armstrong, *Evidence on the Effects of Mandatory Disclaimers in Advertising*, 31 J. PUB. POL'Y & MARKETING 293, 293 (2016).

204. *See supra* note 92 and accompanying text; Wu, *supra* note 59, at 2009.

205. *See id.*

206. *See supra* notes 202–03 and accompanying text.

207. The parties' knowledge that any otherwise appropriate such case will at some point be decided randomly, through a coin toss, should discourage often futile discovery expenses. To the extent that either governments or commercial parties do not find the prospect of a coin-flip to be especially dignified or otherwise attractive, the coin-flip rule should then incentivize significantly better empirical research into this area of the law,

and significantly better justified governmental regulations, so that the logic of coin-flip adjudication would then become obsolete. *See supra* note 201.