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# Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech

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*"This morning, for breakfast, he requested something called wheat germ, organic honey, and Tiger's Milk."*

*"Oh yes, those are the charmed substances that some years ago were felt to contain life-preserving properties."*

*"You mean, there was no deep fat? No steak, or cream pies, or hot fudge?"*

*"Those were thought to be unhealthy, precisely the opposite of what we now know to be true."*

*"Incredible!"*

*From Woody Allen's 1973 movie* Sleeper, *about a man who falls asleep in 1973, and awakens two hundred years later.*

## I. INTRODUCTION: RECOGNIZING THE SCIENTIFIC-COMMERCIAL SPEECH CONUNDRUM

Imagine, for a moment, that Congress has enacted the "False and Misleading Medical and Scientific Reporting Act of 1990." The law is premised on a fear that scientific quackery may cause significant societal harm by confusing the public and inducing its members to seek out costly, worthless, and possibly harmful medical cures or supposed scientific advances. The Act establishes a special commission of scientific and medical experts to rule on the accuracy of any proposed scientific or medical theory that conceivably could cause public harm or confusion. Such scientific or medical assertions must be substantiated to the commission's satisfaction, or the speaker risks issuance of a cease and desist order, imposition of criminal penalties, or both.

Only the narrowest of free speech theorists[1] would find this statute to meet the requirements of the first amendment. Indeed, most observers[2] would recoil at the creation of such a governmentally imposed "Big

1. One such exception, at least prior to his confirmation hearings, would have been Judge Robert Bork, who wroto that "[t]here is no basis for judicial intervention to protect any . . . form of expression [other than political speech], he it scientific, literary or that variety of expression we call obscene or pornographic." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971). Robert Nagel is another scholar who would provide only very limited protection to speech of any kind. *See* R. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 27-59 (1989). He appears to make no special mention of scientific expression, however.

2. *See, e.g.*, Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 26? (urging protection of scientific speech); *see also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970) stating:

> [F]reedom of expression is an essential process for advancing knowledge and discovering truth. An individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds. Discussion must be kept open no matter how certainly true an accepted opin-

Brother" of scientific inquiry. In part, this is because imposing a governmental pall of intellectual orthodoxy is inconsistent with the assumptions traditionally deemed to underlie a free society. The ability to engage in uninhibited intellectual inquiry and communication is essential to the mental and personal development of the individual.[3] This development is indispensable if individuals are to participate actively in the governing of their lives, an activity inherent in a democratic system.[4]

The instinctive repugnance felt toward this hypothetical statute derives from another premise of a fundamentally democratic society: what might be labeled the "principle of epistemological humility." This principle posits that whatever the currently prevailing beliefs may be, history teaches us that scientific or moral advances may at some future point make those beliefs appear either silly or monstrous.[5] Accordingly, the Supreme Court has said "there is no such thing as a false idea" under the first amendment.[6] "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[7] While the Court was quick to distinguish assertions of basic fact,[8] assertions of *scientific* fact traditionally are viewed as similar to the expression of ideas,[9] because both fall within the zone of the epistemological humility principle. Hence, any attempt by the government to impose a national scientific orthodoxy could undermine or inhibit the advance of scientific knowledge, thus undermining a key value of the first amendment.[10]

Despite the protection given by traditional first amendment theory to scientific assertions, when the very same assertions are part of a commercial promotion of a product, attitudes change dramatically. Governmental regulation of product health claims demonstrates the clearest

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ion may seem to be; many of the most widely acknowledged truths have turned out to be erroneous.

3. *See* T. EMERSON, *supra* note 2, at 6. My own analysis of this free speech value appears in M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 19-29 (1984).

4. *See* Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285 (1966). John Stuart Mill is often associated with the developmental value of democracy. *See generally* J. MILL, ON LIBERTY (1978).

5. *See infra* text accompanying notes 55-61.

6. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

7. *Id.* at 339-40.

8. *Id.* at 340.

9. *See supra* note 2.

10. *See* B. NEUBORNE, FREE SPEECH—FREE MARKETS—FREE CHOICE: AN ESSAY ON COMMERCIAL SPEECH 2 (1987) (footnote omitted):

> The laws that govern the physical and social universe can never be revealed except through a vigorous exchange of hypotheses and information that permits the identification of error and the recognition of scientific progress. We rightly sense that interference with free speech threatens to freeze conventional perceptions of reality into permanent intellectual prisons.

application of this dichotomy today. Because of both the public's strong desire for information about how the use or consumption of a product may affect one's health and the often uncertain, controversial, and changing nature of medical science, the government, on numerous occasions, has regulated health claims made on behalf of various commercial products. Both the Federal Trade Commission (FTC)[11] and the Food and Drug Administration (FDA)[12] exercise regulatory authority over health claims for various products. Regulation also has been sought at the state level, primarily through attempted judicial enforcement against allegedly deceptive product health claims.[13]

A number of free speech commentators quite probably would find little constitutional difficulty with these regulations. Many commentators believe that so-called commercial speech automatically is rendered beneath first amendment concerns.[14] The Supreme Court once provided commercial speech similarly short shrift,[15] but in more recent years it has recognized that such expression deserves a level of constitutional protection beyond the trivial.[16] The Court has made clear, however,

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11. The FTC's authority derives from § 12 of the Federal Trade Commission Act (Act), 15 U.S.C. § 52 (1988), which provides:

> It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement . . . [b]y any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, or cosmetics.

In addition, § 5 of the Act, 15 U.S.C. § 45 (1988), which applies to advertising for more than merely foods, provides that "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." According to one group of authorities, "A central principle in FTC law is that if advertising claims are not adequately substantiated they will be regarded as deceptive or unfair." J. CALFEE & J. PAPPALARDO, HOW SHOULD HEALTH CLAIMS FOR FOODS BE REGULATED? AN ECONOMIC PERSPECTIVE 7 (1989).

12. J. CALFEE & J. PAPPALARDO, *supra* note 11, at 5 (footnote omitted): "FDA authority over disease prevention claims in food marketing arises from the Food Drug and Cosmetic Act . . . which prohibits the sale of misbranded foods or drugs in interstate commerce." Section 403(a) of the Food Drug and Cosmetic Act provides that "[a] food shall be deemed to be misbranded [if] its labeling is false or misleading in any particular." 21 U.S.C. § 343 (1988). *See generally* Hutt, *Government Regulation of Health Claims in Food Labeling and Advertising*, 41 FOOD DRUG COSM. L.J. 3 (1986).

13. A current example is the proceeding brought in Texas state court by the State of Texas against the Quaker Oats Company. The State alleges that "Quaker has embarked upon a campaign of deception, designed to entice Texans who are concerned about their cholesterol levels and the risk of heart attack to buy and consume Quaker's oatmeal and oat bran products . . . as a substitute for traditional medical treatment" and that Quaker is "motivated solely by the base purpose of selling as much of Quaker's products as possible." Plaintiff's Original Petition at 3, Texas v. Quaker Oats Co., (Dist. Ct., Dallas County, Texas, Sept. 7, 1989) (No. 89-10762-M).

14. *See, e.g.*, Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); *see also infra* Part III(B).

15. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

16. *See, e.g.*, Linmark Assocs. v. Willingboro, 431 U.S. 85 (1977) (holding that prohibition on "for sale" signs on lawns violated the first amendment); Virginia State Bd. of Pharmacy v. Virginia

that commercial speech receives only the limited protection commensurate with its inferior position in the scale of first amendment values.[17] Consequently, the Court has allowed certain forms of regulation for commercial speech that clearly would be impermissible for more traditional subjects of expression.[18]

I have argued that this disparate treatment of commercial speech is not justified by any legitimate understanding of first amendment theory.[19] One need not dispute the Court's reduced level of protection given to commercial speech, however, in order to reject reduced protection for assertions of scientific theory about a product contained in a commercial advertisement. Such speech appropriately is viewed not as commercial, but rather as fully protected scientific expression. To hold otherwise would be to penalize traditionally protected expression for no reason other than the communicator's personal motivation for making that expression. Motivation never has influenced the level of protection given to speech in other contexts[20] and its use cannot be rationalized under first amendment theory.[21]

This does not mean that assertions of scientific theory contained in commercial advertisements deserve absolute protection. The Court never has provided such an extreme degree of protection to even the most traditional subjects of expression;[22] therefore, full protection to scientific-commercial speech would not require an absolute constitutional shelter. In the presence of either a truly compelling governmental interest[23] or a finding of conscious or reckless falsity, *all* speech may be

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Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (protecting advertisement of prescription drug prices).

17. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978) (allowing bar to discipline lawyer for soliciting a client).

18. *See, e.g.*, Friedman v. Rogers, 440 U.S. 1 (1979) (allowing state to prohibit optometrists from practicing under trade names); *Ohralik*, 436 U.S. at 447. For further discussion, see M. REDISH, *supra* note 3, at 63 (footnotes omitted): "[T]he Court has felt free to allow regulation of commercial speech when it is shown merely that damage 'may' occur, or that harm is 'likely,' or that there is a 'possibility' of harm. These standards are clearly unacceptable in virtually any other area of first amendment application."

19. *See* M. REDISH, *supra* note 3, at 60-68. *See generally* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

20. *See infra* text accompanying notes 76-78.

21. *See infra* Part III(B).

22. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650 (1981) (stating that as "a general matter, it is clear that a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid goverumental objective"); New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (defamation of public official not protected if said with knowledge of falsity or reckless disregard of truth or falsity); Dennis v. United States, 341 U.S. 494 (1951) (political advocacy of unlawful conduct is not protected); Feiner v. New York, 340 U.S. 315 (1951) (speech prohibited to prevent reaction by a hostile audience).

23. *See* cases cited *supra* note 22.

regulated.[24] The same should be true of scientific-commercial speech. Scientific-commercial speech should receive the same level of constitutional protection given to pure scientific expression with only one limited exception required by certain historical differences. Under the approach advocated here, before a court upholds governmental regulation of assertions of scientific theory contained in commercial advertisements, it first should have to inquire whether the regulation of the same assertion, made to the same audience by an individual lacking a profit motive, would be upheld. Certain guidelines may be provided to help answer this question in specific instances.[25] Regardless of how the reviewing court chooses to resolve this issue, the answer generally should not vary on the basis of the presence or absence of the profit motive.

Governmental regulation of product health claims can take one of two general forms, depending on the nature of the government's asserted interest for the regulation. Initially, the government conceivably might wish to prohibit *all* health claims concerning a particular group of products, such as foods, because of a fear that the public could misconstrue or exaggerate such claims. Second, the government might wish to prohibit as false or deceptive claims found either to be inconsistent with scientific consensus or to fail a type of cost-benefit analysis that weighs the potential benefit of the advertising against its potential harms. The former type of regulation has been employed in the past by the FDA in the labeling of foods.[26] The latter traditionally has been used by the FTC in the regulation of product advertising,[27] and a similar approach is likely to be employed in the future by the FDA.[28]

These regulatory options give rise to distinct first amendment problems, and the remainder of this Article is devoted to their examination. Part II considers the constitutionality of a total ban on health claims by certain products, and concludes that such a ban is unconsti-

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24. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); *New York Times*, 376 U.S. at 254.

25. *See infra* text accompanying notes 136-38.

26. *See* J. CALFEE & J. PAPPALARDO, *supra* note 11, at iv (noting that more "health information had not appeared in food labeling earlier because the Food and Drug Administration . . . officially prohibited this use of health findings for many years").

27. *See id.* at viii. While the FTC employed the "consensus" method in negotiating a ban on tar and nicotine advertising in 1960, its current "substantiation" doctrine is an application of what Calfee and Pappalardo refer to as the "expected value" rule, which states:

> Under this doctrine the decision to allow or prohibit an advertising claim is based upon a comparison of the likely costs and benefits of each action. A rigid consensus is not uniformly required to support accurate claims. Put simply, the FTC's policy allows manufacturers to use information surrounded by scientific debate as long as the scientific finding is accurately represented, the degree of evidence is not misrepresented, and the claim passes a rough cost-benefit test.

*Id.* at viii-ix.

28. *See* 21 C.F.R. pt. 101 (1990) (food labeling rules).

tutional even under the reduced level of protection given by the Supreme Court's commercial speech precedents.[29] Part III examines the government's authority to regulate scientific assertions concerning products' health effects when those assertions are deemed to be inconsistent with current consensus.

## II. Banning All Product Health Claims: Constitutionality Under the Commercial Speech Doctrine

No federal regulatory agency presently adheres to the policy that all health claims by certain product categories are impermissible.[30] Until recently, however, the FDA followed a policy similar to an absolute bar,[31] and in any event an examination of the constitutionality of such a practice can be valuable as a working measure of how far regulators may go in inhibiting scientific-commercial expression.

A total ban on product health claims violates the first amendment regardless of whether my argument that product health claims be deemed fully protected scientific expression is accepted. Even under the reduced protection that the Supreme Court accords to commercial speech, a total ban likely would be found unconstitutional.

*Central Hudson Gas & Electric Corp. v. Public Service Commission*[32] announced the Court's current test for protection of commercial speech. In *Central Hudson* the Supreme Court adopted a four-part standard for commercial speech protection under the first amendment: (1) it must concern lawful activity and not be misleading; (2) the government interest must be substantial; (3) the regulation must directly advance the governmental interest asserted; and (4) it must not be more extensive than necessary to serve that interest.[33] The level of protection provided by this test is noticeably less than that given traditional subjects of expression;[34] however, its impact is by no means negligible.[35]

In the case of a total ban on product health claims, the state's asserted interest in preventing the public from exaggerating the implications of concededly truthful claims is not "substantial" and is inconsistent with the precepts underlying the first amendment,[36] be-

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29. *See infra* text accompanying notes 32-34. *But see infra* note 35 and accompanying text.
30. *See* J. Calfee & J. Pappalardo, *supra* note 11, at iv-v.
31. *See id.* at iv.
32. 447 U.S. 557 (1980).
33. *Id.* at 566.
34. *See* cases cited *supra* note 22.
35. Employing this standard, the Court has invalidated regulations of commercial speech in Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983), as well as in *Central Hudson* itself.
36. *See* Justice Brandeis's famed concurring opinion in Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., joined by Holmes, J., concurring):

cause it is premised on the fear that the public cannot be trusted to make valid judgments about truthful expression. For example, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[37] the Court invalidated a prohibition on the advertising of prices of prescription drugs, rejecting the argument that consumers might give such information undue weight. The Court, in referring to this approach as "highly paternalistic," reasoned that price information should not be assumed harmful in itself, because people will discern their best interests when they are well informed through free and open, rather than closed, channels of communication. In any event, said the Court, the first amendment has made the choice "between the dangers of suppressing information, and the dangers of its misuse if it is freely available."[38]

The same logic would seem to apply directly to the government's asserted interest in banning even concededly truthful health claims. Allowing the government to require the withholding of truthful information relevant to lawful activity because of a fear that the public will misunderstand that information abandons the essential premise of democratic government, namely that the individual can assess competing information and make lawful, life-affecting choices on the basis of that assessment.[39]

The only factor conceivably complicating this analysis derives from Justice Rehnquist's opinion for the Court in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico.*[40] In upholding Puerto Rico's partial ban on the advertising of legalized casino gambling, Justice Rehnquist reasoned that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[41] If this logic is generalized, it would seem to all but

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> Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law . . . .
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> . . . .
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> . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

37. 425 U.S. 748 (1976) (the decision initially recognizing substantial protection for commercial speech).

38. *Id.* at 770.

39. For further discussion, see A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960): "The principle of the freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."

40. 478 U.S. 328 (1986).

41. *Id.* at 345-46.

eliminate *any* first amendment protection for commercial speech. The government's power to prohibit commercial activity is, for all practical purposes, plenary.[42] If the supposedly "greater" power to regulate commercial activity is thought logically to subsume the "lesser" power to regulate promotion of that activity, then the government's constitutional authority to regulate commercial speech far exceeds that envisioned by the *Central Hudson* test.[43] That the Court intended to adopt so dubious a proposition, however, is highly unlikely.

Because Justice Rehnquist in *Posadas* at least purported to adhere to and apply the *Central Hudson* test,[44] it is difficult to believe that the Court intended to adopt a constitutional philosophy so fundamentally inconsistent with that test. More importantly, the greater-includes-the-lesser philosophy is directly at odds with seventy years of Supreme Court first amendment jurisprudence concerning the advocacy of unlawful conduct. Since its famed decision in *Schenck v. United States*,[45] which adopted the clear-and-present danger test, the Supreme Court consistently has provided at least some degree of first amendment protection to such advocacy.[46] Yet, if Justice Rehnquist's logic is accepted, presumably Congress could ban *all* such advocacy, because by hypothesis Congress could ban—indeed, already has banned—the conduct advocated by such expression. Justice Rehnquist, then, necessarily would be overruling *every* Supreme Court decision since 1919 concerning the constitutional protection for unlawful advocacy.[47] Merely based on Justice Rehnquist's comment, it is difficult to believe that a majority of the Court concurs in such a conclusion. The fatal flaw in Justice Rehnquist's reasoning is that he actually has reversed the "greater" and the "lesser." His logic effectively reduces the greater first amendment protection of expression to the considerably lesser fifth amendment protec-

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42. The government's power is constitutionally limited only by the virtually nonexistent substantive due process requirement of legislative rationality. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday closing laws); Railway Express Agency v. New York, 336 U.S. 106 (1949) (allowing limits on advertisements on vehicles).

43. *See supra* text accompanying notes 32-35. The *Central Hudson* test provides far more substantial protection to commercial speech than the Court gives to commercial conduct.

44. *Posadas*, 478 U.S. at 340-44.

45. 249 U.S. 47 (1919).

46. In Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), the Court declared:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions.

47. Even decisions largely unprotective of speech recognize that advocacy of unlawful conduct is deserving of at least *some* level of constitutional protection. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951) (applying an ad hoc balancing test); Gitlow v. New York, 268 U.S. 652, 668-70 (1925) (finding antisedition statute reasonable).

tion afforded commercial conduct.

The Court, in a decision last term, appears to have rejected indirectly Justice Rehnquist's specious *Posadas* logic. In *Board of Trustees v. Fox*[48] the Court modified one element of the *Central Hudson* test. While acknowledging that the Court repeatedly has stated that government restrictions upon commercial speech may be no more broad or no more extensive than "necessary" to serve a substantial interest,[49] Justice Scalia's opinion for the Court noted that the government does not have the burden of demonstrating that the type of restriction is "the least severe that will achieve the desired end."[50] He emphasized, however, that the test is far different from the fourteenth amendment rational basis test because the government's goal must be substantial, and the cost carefully calculated. "Moreover, since the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require."[51]

The *Fox* Court's continued adherence to the broad outlines of *Central Hudson* demonstrates that Justice Rehnquist's logic in *Posadas* has not led to the demise of meaningful first amendment commercial speech protection. Moreover, Justice Scalia's distancing of the commercial speech standard from the rational basis test also underscores the Court's rejection of Justice Rehnquist's analysis, because that analysis logically would have led to the use of the rational basis standard in commercial speech cases.[52] Thus, *Central Hudson* remains the governing standard, and even as modified in *Fox*,[53] there should be little doubt that a total ban on product health claims would be unconstitutional.

Regulatory agencies' inability to ban product health claims, however, does not necessarily mean that they lack authority to prohibit or penalize health claims found to be false or misleading. If such claims were characterized as commercial speech, the courts would deny them constitutional protection because they clearly fail *Central Hudson*'s first prerequisite: that the speech "not be misleading."[54] Nevertheless, it is not clear that product health claims should receive the reduced level of first amendment protection afforded commercial speech. I now turn to this issue.

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48. 109 S. Ct. 3028 (1989).

49. *Id.* at 3032.

50. *Id.* at 3035.

51. *Id.* (citation omitted).

52. *See supra* text accompanying notes 45-47.

53. *See supra* text accompanying notes 48-51.

54. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980); *see supra* text accompanying notes 32-35.

## III. Regulating "False" Product Health Claims: Establishing the Intersection of Commercial and Scientific Expression

### A. *Scientific Expression and the Principle of Epistemological Humility*

Few free speech observers would find constitutionally tolerable a widespread system of governmental suppression of scientific opinion,[55] even when that opinion differed dramatically from the prevailing scientific consensus. The validity of the principle of epistemological humility is shown by recalling only a few of the many times throughout history when widespread scientific consensus subsequently proved to be pitifully inaccurate. From the suppression of Galileo's adoption of Copernicus's theory that the earth rotates around the sun[56] to the medical profession's early rejection of Pasteur's germ theory[57] to the prerelativity theory assertion by a leading physicist that only minor advances remained for physics[58] to the FTC's contention, as recently as 1950, that cigarette smoking was not harmful to healthy adults,[59] by now we should have learned our lesson. Indeed, only recently some have begun to challenge the consensus concerning the connections between certain foods and cholesterol, on the one hand, and between high cholesterol and heart disease, on the other hand.[60] Thus, viewed from the broad perspective of history, any attempt by the government to lock in a prevailing scientific consensus is likely to be either futile or dangerous. In addition, such attempts undermine both the search for knowledge and the development of a free and open exchange of information and opinion, traditionally deemed central values served by the right of free expression.[61]

The belief that the very same scientific claims automatically lose their full level of constitutional protection when made by a product manufacturer in a commercial advertisement needs some logical basis,

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55. *See supra* text accompanying notes 2-4.

56. *See* Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037, 1042 (W.D.N.C. 1973) (recounting Galileo's story). *See generally* G. de Santillana, The Crime of Galileo (1955).

57. *See* R. Dubos, Louis Pasteur: Free Lance of Science 248 (1950).

58. In 1899 famed physicist A.A. Michelson stated: "The more important fundamental laws and facts of physical science have all been discovered, and these are so firmly established that the possibility of their ever being supplanted in consequence of new discoveries is exceedingly remote . . . . Our future discoveries must be looked for in the sixth place of decimals." F. Richtmeyer, E. Kennard & J. Cooper, Introduction to Modern Physics 43 (6th ed. 1969).

59. "The record shows . . . that the smoking of cigarettes . . . in moderation by individuals . . . who are accustomed to smoking and who are in normal good health . . . is not appreciably harmful." R.J. Reynolds Tobacco Co., 42 F.T.C. 706, 724 (1950); *see* Calfee, *The Ghost of Cigarette Advertising Past*, Reg. Nov.-Dec. 1986, at 35, 37.

60. Moore, *The Cholesterol Myth*, Atlantic Monthly, Sept. 1989, at 37.

61. *See supra* text accompanying note 36.

in terms of free speech theory, for the drawing of such a strict dichotomy. It is doubtful, however, that such a basis may be found.

### B. *Economic Motivation and Free Expression: The Difficulty of Defining Commercial Speech*

Those who conclude that commercial speech deserves either only limited first amendment protection[62] or none at all[63] naturally bear the burden of defining that concept. Presumably, any principled definition should turn on the reason for separating commercial speech from other forms of expression. For example, if the basis for this dichotomy is the assumption that the first amendment is designed solely to facilitate the processes of self-government,[64] and that commercial speech is irrelevant to attainment of that value,[65] then the definition will depend on the subject matter of the expression. The logic behind this assumption would have to be that the subject of the comparative merits of commercial products is irrelevant to political decision making.

The adoption of that definition also logically would exclude from first amendment protection speech such as warnings from consumer advocates about certain products or the findings contained in *Consumer Reports* magazine, because those concern the identical subject matter discussed in commercial advertisements. Yet the Supreme Court clearly has not provided a reduced level of first amendment protection to *Consumer Reports*,[66] and that treatment is fully consistent with the Court's general definition of commercial speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[67] and subsequent decisions, the Court has characterized commercial speech as "speech which does 'no more than propose a commercial transaction.' "[68] Very few advertisements actually do *nothing more* "than propose a commercial transaction," including many of the advertisements

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62. *See supra* note 14 and accompanying text.

63. *See, e.g.*, Bork, *supra* note 1.

64. *See, e.g.*, A. MEIKLEJOHN, *supra* note 39; Bork, *supra* note 1.

65. *See, e.g.*, Jackson & Jeffries, *supra* note 14.

66. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) (recognizing the applicability of the *New York Times v. Sullivan* conscious-or-reckless-falsity test to a magazine article about a commercial product).

67. 425 U.S. 748, 762 (1976).

68. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (quoting *Virginia State Board*, 425 U.S. at 762, and Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)). In *Central Hudson*, 447 U.S. 557 (1980), the Court defined "commercial speech" as "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561. After *Bolger*, however, the Court "again seems to equate commercial speech and commercial advertising," and "seemed to equate the two even in *Central Hudson*." Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1222 n.70 (1983).

characterized by the Court as commercial speech.[69] Thus, the Court seems to mean that the proposal of a commercial transaction is a necessary, though perhaps not sufficient,[70] condition for inclusion within the definition of commercial speech. This approach excludes from the definition of commercial speech both *Consumer Reports* and consumer advocates because neither is proposing a commercial transaction.

Under this definitional structure, one could understand how scientific claims asserted in commercial advertisements might—though need not[71]—be distinguished, for first amendment purposes, from the same claims when made by those lacking a direct financial interest: commercial advertisements "propose a commercial transaction," but the scientific claims made by so-called objective experts do not. The logic of the Court's definitional approach reasonably may be questioned, however, because it is unclear why an otherwise fully protected statement loses full protection when a proposal for a commercial transaction is appended.

The presence of a proposal for a commercial transaction cannot be the sole element that determines whether speech is commercial speech if one rationalizes reduced protection on the grounds that commercial speech is unrelated to effective self-government,[72] because the same is true of a comment on commercial products that contains no such proposal. Arguably, inclusion of a proposal for a transaction takes the speech out of the realm of the pure exposition of ideas and brings it closer to the concept of "action."[73] The first amendment, however, never has been thought to be the exclusive preserve of abstract ideas.[74]

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69. *Bolger* is an illustration. *See infra* text accompanying notes 112-17.

70. A persuasive argument could be fashioned that when the predominant element of the communication necessarily concerns a traditionally protected subject, the inclusion of a proposal for a transaction should not be enough to render a statement commercial speech. *See infra* text accompanying note 120. Purely as a predictive doctrinal matter, however, the Court probably would deem any statement including such a direct proposal to be "commercial." *See infra* text accompanying note 121.

71. *See supra* note 70.

72. *See, e.g.*, Jackson & Jeffries, *supra* note 14.

73. Professor Emerson has argued that "a fundamental distinction must be drawn between conduct which consists of 'expression' and conduct which consists of 'action.' 'Expression' must be freely allowed and encouraged. 'Action' can be controlled, subject to other constitutional requirements, but not by controlling expression." T. EMERSON, *supra* note 2, at 17. Thus, "when the communication is so close, direct, effective, and instantaneous in its impact that it is part of the action," he believes it should not be protected by the first amendment. *Id.* at 404. That Professor Emerson would define a communication merely including a proposal for a transaction as "action," rather than "expression," however, is highly doubtful under these definitions.

74. As Justice Holmes wrote, "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth." Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., joined by Brandeis, J., dissenting).

Advocacy of action has long been considered to fall within classic concepts of protected expression.[75] Indeed, there would be no small degree of irony in rationalizing reduced protection for commercial speech on the grounds that the proposal of a commercial transaction constitutes "action," while a consumer advocate's urging of the public *not* to buy a product simultaneously is viewed as fully protected "expression."

The only other conceivable rationale for the Court's reliance on the presence of a commercial proposal in its definition of commercial speech is the simple fact of the profit motivation for the speech. The Court must be understood as saying that otherwise fully protected speech loses some or all of its constitutional protection when the speaker stands to profit financially from the listener's acceptance of the argument being made.

This logic is doubtful from the perspective of first amendment theory. A speaker's motivation, standing alone, never has reduced the level of constitutional protection given particular types of expression. Thus, one who defames a public figure may speak out of the most evil motives of spite, religious or racial hatred, or vengeance, yet those statements are protected fully unless uttered with knowledge of their falsity or reckless disregard of their truth or falsity.[76] Similarly, a newspaper usually includes expression for the sole purpose of financial gain, yet that expression is fully protected under the first amendment.[77] Scholars have defended the Court's penalization of commercial speech because of its profit motivation by arguing that "[w]hatever else it may mean, the concept of a first amendment right of personal autonomy in matters of belief and expression stops short of a seller hawking his wares."[78] This mode of reasoning, however, which might be labeled "proof by hyperbolic pejorative," does little either to advance the analysis or to explicate the Court's logic.

Professor Baker presented a somewhat more tempered—though no less fallacious—rationale in the exposition of his "liberty model" of free speech.[79] Professor Baker believes a fundamental rationale for free speech protection is the desire to foster communication that defines or develops "the self."[80] Because "the values supported or functions per-

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75. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969). *See generally* Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159 (1982).

76. New York Times v. Sullivan, 376 U.S. 254 (1964); *see also* Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988) (holding that constitutional protection of public discourse does not depend upon the motivation for the expression).

77. *New York Times*, 376 U.S. at 266.

78. Jackson & Jeffries, *supra* note 14, at 14.

79. Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

80. *Id.* at 992.

formed by protected speech result from that speech being a manifestation of individual freedom and choice,"[81] Baker concludes that speech which "does not represent an attempt to create or affect the world in a way which can be expected to represent anyone's private or personal wishes" is undeserving of first amendment protection.[82] Baker reasons that although the speech may cause change or advance knowledge, if it "is not a manifestation of the speaker's values," it does not serve this liberty value and is not protected.[83] Market forces, rather than individual choice, dictate what and how much a commercial enterprise will advertise, he argues,[84] and, therefore, commercial advertising should be unprotected.

Excluding scientific assertions made by commercial advertisers from the scope of fully protected expression while fully protecting identical assertions when made by a neutral scientist or when reported in a newspaper makes perfect sense, if Professor Baker's theory is accepted. Professor Baker's fallacies, however, are both numerous and fatal.[85] Initially, if the first amendment right consists at least in part of the listener's right to receive information,[86] then the speaker's motive logically should be irrelevant to the analysis. An equally important point, largely ignored by Professor Baker,[87] is that many people make a living by means of self-expressive work.[88] Many speakers stand to achieve direct personal gain in one way or another from the listener's acceptance of their speech—from the political candidate seeking election to the picketing welfare recipient seeking an increase in benefits. If the constitutional protection of speech were reduced or eliminated solely on the basis of a speaker's motivation for personal gain, considerably more than commercial advertising would be affected. Indeed, one could argue persuasively that even objective scientists have strong personal interests in the acceptance of the truth of their assertions, be-

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81. Baker, *supra* note 14, at 3.

82. *Id.*

83. Baker, *supra* note 79, at 991 n.86.

84. *See generally* Baker, *supra* note 14.

85. I have explored the fallacies of Professor Baker's analysis in detail in M. REDISH, *supra* note 3, at 30-36, 49-52.

86. Both respected commentators and the Supreme Court have stated this view in the context of noncommercial speech. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) (stating that "the Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (stating that it "is the right of the viewers and listeners, not the right of the broadcasters, which is paramount"); A. MEIKLEJOHN, *supra* note 39.

87. *See* M. REDISH, *supra* note 3, at 50-52.

88. *Id.* at 50.

cause disbelief of those assertions will do little to help their careers. Similarly, a newspaper obviously possesses a strong commercial interest in the public's acceptance of its claims about the health impact of certain products. For example, when a sensationalist tabloid proclaims that onions prevent heart attacks,[89] many purchase the newspaper because they wish to learn a new method of improving their health; they presumably would not buy the newspaper unless they thought the claim had at least some basis in fact.

Perhaps support for Professor Baker's analysis can be found in the recently developed theories of the modern civic republican scholars, who decry the existence of interest groups and their influence over a political process that should be defined by the common good.[90] Because commercial advertisers presumably are motivated solely by the desire to increase profits, the modern republican theorists might wish to exclude commercial speech from the scope of first amendment protection. The civic republicans, however, are misguided in their efforts to define a coherent, objective concept of common good, because they effectively are attempting to superimpose their externally derived political values on the populace in total derogation of the fundamental notion of self-determination. The essential premise of self-determination is that individuals may choose to govern their lives in the manner they believe best, even if that includes acting in their own self-interest. The civic republicans' belief in imposition of a distinct common good directly conflicts with this value.[91] In any event, even modern republican scholars acknowledge that private interests are relevant inputs into politics.[92] Thus, their acceptance of Professor Baker's "liberty model" as the exclusive measure of free speech protection is not clear.

The Court does not appear to have adopted Professor Baker's "liberty model." The Court has provided full protection to corporations' contributions to debate about public issues, despite the obvious profit motivation for those communications.[93] Professor Baker acknowledges that these decisions are wholly inconsistent with his theoretical frame-

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89. *See* The Globe, Feb. 20, 1990, at 7, col. 1.

90. *See, e.g.*, Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1540, 1550 (1988) [hereinafter *Beyond the Republican Revival*]; *see also* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29 (1985).

91. *See* Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U.L. REV. 761, 761-64, 775-83 (1989).

92. *See, e.g., Beyond the Republican Revival, supra* note 90, at 1541.

93. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1 (1986) (newsletter mailed with utility bill); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (same); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (advertisement giving bank's views on proposed tax).

work,[94] and the decisions themselves make clear that the Court has not adopted Professor Baker's "liberty model." In these decisions the Court has noted that a "company has the full panoply of protections available to its direct comments on public issues."[95]

This concession by the Court makes all but unintelligible its prerequisite to the categorization of expression as commercial speech that the speech propose a commercial transaction, because combining these two principles results in the following enigma: Speech solely concerning commercial products or services is not necessarily commercial speech, since, under the Court's definition, if the discussion of products or services does not propose a commercial transaction it is considered fully protected speech.[96] Yet the mere presence of a profit motive for expression does not automatically render speech "commercial," because by the Court's own acknowledgement a corporation's direct contributions to public debate are fully protected. Thus, under the Court's precedents, neither a commercial subject matter nor the presence of a profit motive is a sufficient condition for a finding that particular expression constitutes commercial speech. The Court, then, seems to require the presence of *both* a commercially oriented subject matter *and* a speaker motivated by profit to support a finding of commercial speech. Yet the Court's willingness to find speech fully protected when either one of the two is absent renders dubious its willingness to reduce protection when both are present. If discussion of commercial products is not included automatically within the commercial speech category, and if the existence of a profit motive fails to achieve the same result, the Court effectively has acknowledged that neither factor renders speech "commercial."

Those who oppose protection of commercial speech might well respond that the answer simply is to deny full protection to the profit motivated speaker in all contexts, despite the reference to public issues and the absence of a direct request for purchase. That analysis, however, effectively would undermine the well-established principle that a speaker's motivation is irrelevant to the level of first amendment protection given particular speech.[97] More importantly, such an analysis effectively would punish a speaker solely because of his profit motivation and would, therefore, constitute an irrational insertion of an anti-capitalistic philosophy into a supposedly politically neutral free speech

94. Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's* The Value of Free Speech, 130 U. PA. L. REV. 646 (1982).

95. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983) (citing *Consolidated Edison*, 447 U.S. at 530).

96. *See supra* text accompanying notes 66-70.

97. *See supra* text accompanying notes 76-78.

theory.[98]

A synthesis of the Court's "propose-a-commercial-transaction" prerequisite for a finding that speech is commercial and its simultaneous acknowledgement that a corporation enjoys "the full panoply of [first amendment] protections available for its direct comments on public issues,"[99] reasonably might conclude that a commercial enterprise would have a fully protected right to discuss the scientific merits of its product, as long as it did not urge purchase directly. While probably accurate, this conclusion is by no means certain. In *Central Hudson Gas & Electric Corp. v. Public Service Corp.* the Court recognized a distinction between fully protected "institutional and informational" messages, on the one hand, and those "clearly intended to promote sales," on the other.[100] Because *any* statement by a commercial enterprise about the scientific properties of its product could be deemed "intended to promote sales," it is conceivable that the Court would characterize any such statement as proposing a commercial transaction. The problem, however, is that the Court erroneously has viewed statements that are "informational" and those which are "intended to promote sales" as mutually exclusive. This need not be the case. The confusion results primarily because the Court has evolved this commercial versus informational distinction in cases in which the informational statement and the promotional element actually are severable; in product health claims, on the other hand, the two issues are intertwined inextricably.

A synthesis of the Court's approach to the dichotomy may be derived by contrasting three decisions: *Bolger v. Youngs Drug Products Corp.*,[101] *Consolidated Edison Co. v. Public Service Commission*,[102] and *First National Bank v. Bellotti*.[103] In *Consolidated Edison* the Court invalidated the state public service commission's suppression of bill inserts by the company that discussed controversial public issues.[104] The Court relied on its earlier decision in *Bellotti*[105] to reject the assertion that a state may restrict corporate speech to specified issues.[106] In *Bel-*

98. *See* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (stating that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); Kingsley Int'l Pictures Corp. v. Regents of N.Y.U., 360 U.S. 684, 688 (1959). *See generally* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

99. *Bolger*, 463 U.S. at 68.

100. 447 U.S. 557, 562 n.5 (1980).

101. 463 U.S. 60 (1983).

102. 447 U.S. 530 (1980).

103. 435 U.S. 765 (1978); *see also Pacific Gas & Elec.*, 475 U.S. at 1.

104. 447 U.S. at 544.

105. 435 U.S. at 765.

106. *Consolidated Edison*, 447 U.S. at 533.

*lotti* the Court had framed the question for decision as "whether the corporate identity of the speaker deprives . . . proposed speech of what otherwise would be its clear entitlement to protection." Justice Powell, answering the question in the negative, noted that "the Court has not identified a separate source for the right [of free speech] when it has been asserted by corporations."[107] He reasoned that "the Court's [free speech] decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas."[108] He therefore could "find no support . . . for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation."[109] While the Court was unwilling to define the outer reaches of this corporate right,[110] it did note that "[e]specially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended."[111] Doctrinally, under both *Consolidated Edison* and *Bellotti*, once it is acknowledged that a product's scientific properties or impact on health represent "public issues," a corporation must have a first amendment right to contribute to debate on those issues. This right is subject to the strong protections of a compelling interest analysis, which is above and beyond its more limited commercial speech right.

In *Bolger*, however, the Court attempted to explain the factors that determine whether the exercise of corporate speech falls within the comment-on-public-issues category or under the less protected commercial speech heading. *Bolger* concerned a first amendment challenge to a federal statute[112] that prohibited the mailing of unsolicited advertisements for contraceptives. Youngs, a contraceptive manufacturer, proposed a mailing of advertisements that would include informational material discussing "public" issues such as venereal disease and family planning.[113] While the Supreme Court ultimately found the postal service's prohibition of Youngs's mailing to be unconstitutional,[114] it ini-

107. *Bellotti*, 435 U.S. at 780.
108. *Id.* at 783.
109. *Id.* at 784.
110. *Id.* at 777.
111. *Id.* at 785-86 (footnote omitted).
112. 39 U.S.C. § 3001(e)(2) (1988).
113. *Bolger*, 463 U.S. at 62 & n.4.
114. Youngs, said the Court, was proposing commercial speech presenting "truthful information relevant to important social issues" and, therefore, was protected by the first amendment under the commercial speech doctrine. *Id.* at 69.

tially rejected Youngs's argument that the pamphlets should not be deemed less protected commercial speech because they included discussion of social issues. Merely because these pamphlets are advertisements does not require the conclusion that they are commercial speech, and "the reference to a specific product does not by itself render the pamphlets commercial speech," Justice Marshall's opinion reasoned.[115] Additionally, Youngs's economic motivation alone clearly would be insufficient to turn the materials into commercial speech.[116] Somewhat curiously, however, Justice Marshall concluded that "[t]he combination of *all* these characteristics . . . provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech."[117] Under the *Bolger* analysis, then, the combined presence of the advertisement context, the reference to a specific product, and an economic motivation for the expression appear to dictate a finding of commercial speech.

One might assume, under *Bolger*'s three-factor test, that an advertisement by a manufacturer discussing a product's scientific properties would be classified as commercial speech and thus receive the reduced protection provided by the *Central Hudson* test,[118] although that same information, if conveyed by a neutral party, undoubtedly would be characterized as fully protected speech. That conclusion, however, does not follow necessarily, as can be seen by examining the specific factual context in which the *Bolger* Court developed its test. In *Bolger* the information about public issues and the commercial promotion were linked gratuitously. As the Court expressly recognized,[119] Youngs quite easily could have distributed pamphlets discussing the general problems of venereal disease and family planning without simultaneously promoting its specific products. In developing its test, the Court made its concern clear: "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues."[120]

When, however, a public issue *directly concerns a product*—for example, the effect of oat bran on cholesterol—to characterize everything a manufacturer says about the scientific properties of its product as

115. *Id.* at 66.
116. *Id.* at 67.
117. *Id.*
118. *See supra* text accompanying notes 32-34.
119. *Bolger*, 463 U.S. at 66-67.
120. *Id.* at 68. Of course, to the extent the discussion of venereal disease or family planning concerned the role of prophylactics, as a generic matter, in the treatment of the former or the implementation of the latter, the situation in *Bolger* would be quite similar to the case of product health claims. In such an event, the Court's conclusion that the advertisement and the public discussion were not inextricably intertwined would have been incorrect.

commercial speech effectively revokes a corporation's "full panoply of protections available to its direct comment on [that] public issue[],"[121] a right conceded by the *Bolger* Court itself. Thus, when a particular product and a public issue are intertwined inextricably, if *Bolger*'s definition of commercial speech is not to consume the fully protected corporate right to comment on public issues,[122] the following ground rules would have to be recognized: If a real scientific debate about the health impact of a product exists, the manufacturer would retain a fully protected right to comment on that debate, as long as it did not promote simultaneously and *directly* the sale of the product. This comment would receive full first amendment protection, even though the likely and intended impact of the comment on the listener would be the creation of a desire to purchase that product.

One reasonably could criticize this doctrinal resolution because it draws irrational distinctions. On the one hand, if we begin with the premise that a manufacturer's promotion of its product deserves only the reduced first amendment protection given to commercial speech, it should make no difference whether the promotion is direct or indirect. On the other hand, if a corporation is recognized as having a fully protected first amendment right to comment on public issues, even if the corporation has a concrete financial interest in that issue, and if it is conceded generally that the health impact of a corporation's product is a public issue, why is that corporate right any less valuable once the corporation adds a direct promotion?

One response to these criticisms is that, purely on the narrow doctrinal level of court positivism,[123] this resolution is the only conceivable means of reconciling the two coexisting lines of Supreme Court precedent on the matter. If one were ultimately to conclude, however, that this suggested doctrinal resolution is fatally illogical, then it should be clear, in terms of fundamental free speech theory, which of the two doctrinal lines should prevail. When a product's health impact is characterized as a public issue, a corporation must possess a fully protected right to state its side of the argument, because those on the other side of the public debate will retain the "full panoply of protections"[124] for their commentary. Otherwise, the public would be deprived of information and opinion on one side of the argument, in direct contravention of fun-

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121. *Id.*

122. *See supra* notes 104-11 and accompanying text (discussing *Consolidated Edison* and *Bellotti*); *supra* notes 112-15 and accompanying text (discussing *Bolger*).

123. *See* Powell, *Reaching the Limits of Traditional Constitutional Scholarship* (Book Review), 80 Nw. U.L. Rev. 1128, 1136-37 (1986).

124. *See supra* note 121 and accompanying text.

damental precepts of free speech theory.[125] Exclusion of corporate commentary on regulatory issues, for example, effectively amounts to a governmental preference for speech advocating regulation and governmental disdain for belief in a free market economy, because the speech of those advocating regulation will receive full protection, but those with the strongest incentive to oppose regulation—the corporations subject to that regulation—will receive only the reduced protection given commercial speech. Just as "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,"[126] neither does the first amendment embody their rejection. To the contrary, the first amendment was largely designed to prevent just such governmental viewpoint preference.[127]

Similarly, to rationalize an exclusion of corporate commentary from full protection because corporations have a direct financial interest in the outcome of the debate would alter dramatically traditional first amendment values. If such grounds exclude corporations from full first amendment protection, then comments by Michigan automobile workers urging an increase in automobile import tariffs or urgings by senior citizens for an increase in social security benefits logically would have to receive reduced protection as well, because the speakers clearly possess a direct financial interest in the outcome of the public debate to which they directed their commentary. These examples, in which no one seriously could doubt that full first amendment protection would be provided, should make clear that the first amendment never has been interpreted to reduce protection because of a speaker's private economic motivation. The public may appropriately discount a speaker's commentary on the basis of an economic motivation, but this does not mean that such commentary is inherently false or lacking in persuasive value. Indeed, this is especially likely to be true for product health claims when those possessing both the most substantial resources to fund research and the strongest incentive to do so are the commercial manufacturers.

### C. *Establishing the Contours of Constitutionally Valid Regulation*

It should be clear at this point that a corporation's health claims for its products receive full first amendment protection, at least under certain circumstances. But the Supreme Court never has equated full first amendment protection with absolute protection. A compelling gov-

125. *See supra* note 98 and accompanying text.
126. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
127. *See supra* text accompanying notes 97-98.

ernmental interest may justify regulations of content.[128] It is necessary, then, to set out the contours of constitutionally valid governmental regulatory authority over product health claims.

Initially, the Court never has extended first amendment protection to conscious falsehoods or to statements made with reckless disregard of truth or falsity.[129] Thus, if one making a health claim for a product—either the manufacturer or an objective scientific observer—is found knowingly to have communicated a falsehood or to have been reckless about the issue of falsity, the first amendment would have no applicability.[130] Because knowledge is a wholly subjective factor, it is naturally difficult to prove. This difficulty, however, has not prevented the Court from employing the knowing-or-reckless-falsehood standard in the defamation area,[131] quite probably because of the unattractiveness of the alternatives—either allowing even conscious falsehoods to go unregulated or regulating even good faith factual assertions.

Reasonable inferences drawn from objective data often may prove state of mind.[132] Thus, in the area of product health claims, a complete absence of even arguably probative scientific data to support the claim reasonably could be found to constitute recklessness, if not actual knowledge of falsity, which renders regulation constitutional. The fact that a health claim departs from governing scientific consensus should not alone, however, be deemed a sufficient basis to justify a finding of either knowledge of falsity or recklessness, because the principle of epistemological humility plays such an important role in both free speech theory in general and free scientific inquiry in particular.[133] Thus, reliance by federal regulatory agencies on departure from scientific consensus as a basis for the prohibition of health claims should be deemed to violate the first amendment, at least to the extent commer-

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128. *See* Young v. American Mini Theaters, 427 U.S. 50, 66 (1976) (stating that the "question whether speech is, or is not, protected hy the First Amendment often depends on the content of the speech"). The Court has recognized that even fully protected expression may be regulated on the showing of a compelling governmental interest. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 533-34 (1980).

129. *See* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964); *see also supra* note 24 and accompanying text.

130. The Court has considered various aspects of the fact-finding process on the knowledge-of-falsity issue in several decisions. *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (concerning appropriate summary judgment standard); Herbert v. Lando, 441 U.S. 153 (1979) (concerning scope of discovery on knowledge-of-falsity issue); St. Amant v. Thompson, 390 U.S. 727 (1968) (significantly curbing the jury's fact-finding authority in determining whether a defendant in a defamation action brought by a public figure has acted with reckless disregard of the truth or falsity of his statements).

131. *See, e.g.*, cases cited *supra* notes 129-30.

132. *See* 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2730 (1983 & Supp. 1990).

133. *See supra* text accompanying notes 55-61.

cial advertisements containing scientific claims are deemed to be fully protected expression. The knowledge-or-reckless-disregard standard probably could be applied, however, when the advertiser or communicator misrepresents the current state of the scientific consensus, even though reasonable difference of opinion may exist over the scientific reality. Nevertheless, because the need for open scientific debate is so ingrained in our constitutional tradition, governmental regulation should be allowed only when the danger to the public is great, and the advertiser's claim is patently inaccurate.

Arguably, under certain circumstances a compelling interest may be found to justify regulation, even in the absence of a finding of conscious or reckless falsity. If the government can demonstrate that serious physical harm may result from the listener's belief of what is universally deemed a scientifically inaccurate health claim made about a product, the governmental interest in regulation conceivably could be deemed compelling. Because in such a case the government always has available the option of prohibiting the actual sale,[134] however, and because, by hypothesis, at least an arguable scientific basis for the health claim is assumed to exist,[135] first amendment interests would be served better by prohibiting regulation of the claim. In any event, to the extent the first amendment interest is deemed outbalanced by the compelling governmental interest in safety, the result logically should be similar for claims made by neutral scientists, as well as commercial advertisers.

### *D. Equating Scientific and Commercial Expression: The "Dilution" Danger*

The standards adopted for the regulation of a manufacturer's health claims[136] must be nearly identical to those employed to test the constitutionality of the hypothetical regulation of the same comments made by neutral scientists to roughly the same audience. Full protection for one must be full protection for the other. If distinctions in the amount of protection are to be drawn, it must be because the difference in the source of the communication somehow gives rise to a difference in the amount of harm caused by the expression, justifying the finding of a compelling interest in one situation but not the other.

In one sense, a health claim made by a product's manufacturer,

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134. Such economic activity is classifiable as conduct rather than protected speech. *See supra* text accompanying notes 42-43.

135. As previously noted, if there existed absolutely no evidentiary basis to support the scientific claim, it is likely that the claim reasonably could be found to have been made with either knowledge of falsity or reckless disregard of truth or falsity. *See supra* text accompanying notes 129-33.

136. *See supra* text accompanying notes 129-35.

rather than a neutral scientist, is actually likely to reduce the danger of harm because a consumer is much more inclined to be skeptical of claims made by an interested manufacturer than by an objective observer.[137] In another sense, however, a claim made by the manufacturer, at least when it is included in a product advertisement or label, may be given greater credence by consumers, because of the reasonable assumption that the manufacturer would not be allowed to make such claims if the relevant regulatory agencies had deemed them to be false or deceptive. This is not an assumption that a consumer reasonably could make about the claims of an objective scientific observer. That distinction, nevertheless, would not justify a ban on health claims found to be inconsistent with governing scientific consensus because a compelling interest standard demands that governmental regulation be structured narrowly to be no more intrusive than necessary.[138] Rather, requiring inclusion of a disclaimer of governmental approval could satisfy the legitimate governmental interest in avoiding consumer confusion. Thus, the FTC reasonably might require an advertiser to state that the Commission takes no position on the validity of the health claim being made. In this manner, the legitimate regulatory interest may be satisfied without significantly interfering with the advertiser's right to contribute to the public debate concerning the product's health impact.

Other than this one exception, no legitimate basis in first amendment theory exists for differentiating the scope of constitutionally valid regulatory authority between the scientific claims made by a commercial manufacturer and those made by an objective scientific observer. This position, however, might be subjected to the criticism that equating commercial and scientific expression, even for the limited purpose of scientific claims for products, could lead to a dangerous dilution of traditionally protected expression.[139] The fear is that the equation of the two types of expression will lead to a *reduction* in the level of protection given the traditional category as much as it will lead to an *increase* in the protection of the commercially motivated expression. This concern apparently grows out of the assumption that the Court will up-

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137. *See* Redish, *supra* note 19, at 461 n.163 (stating that it "should be questioned . . . whether the consuming public would be more likely to believe Dr. Linus Pauling or the orange juice companies when they say that vitamin C cures colds").

138. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960).

139. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (stating that to "require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech"); *see also* Barrett, *"The Uncharted Area"—Commercial Speech and the First Amendment*, 13 U.C. DAVIS L. REV. 175, 208-09 (1980).

hold a certain degree of regulatory authority over commercial speech, no matter what, and that its equation with traditional subjects of expression necessarily will lead to a reduction of the traditional protection to the lowest common denominator.

The dilution concern, however, fallaciously places the conceptual cart before the horse. Unless one can justify rationally, at the outset, the distinction in treatment between the different types of expression in terms of free speech theory, the dilution criticism is misplaced. If one assumes that the two forms of speech serve the same values and give rise to the same harms, then those concerned about the danger of dilution logically should focus their criticism on the Court for irrationally failing to raise the level of constitutional protection it gives to commercial speech. If, on the other hand, one finds that a compelling interest justifies the Court's upholding of commercial speech regulation, and if one still cannot find a theoretically sound basis for providing greater protection to the traditional form of expression, then logically one should not fear the possibly diluting effect caused by the equation of the two types of speech.

One who believes that free speech theory logically justifies reduced protection for commercial speech[140] need not rely on the dilution fear to justify the distinction. Those who rely on nothing more than the concern over dilution to reject commercial speech protection, then, simply are evoking the intuitive, nonrational assumption that speech by a commercial advertiser is somehow beneath traditional first amendment concerns.[141] My goal here has been to demonstrate that speech by a commercial enterprise concerning the scientific properties of its product deserves as full first amendment protection as similar statements made by an objective scientific observer. Unless one accurately can point out the fallacies in my logic, the fear that the level of constitutional protection given pure scientific expression may be reduced as a result should carry no weight.

### *E. Epistemological Humility, Constitutional Fact, and Judicial Review of Administrative Findings of Falsity*

Assume, as is the likely case under existing doctrine, that scientific claims, when included as part of a direct commercial promotion, are deemed to constitute commercial speech and receive the reduced level of first amendment protection provided by the *Central Hudson* test.[142] Under the first prong of this standard, a finding of the claim's falsity

140. *See* sources cited *supra* note 14.
141. *See generally* Jackson & Jeffries, *supra* note 14.
142. *See supra* text accompanying note 33.

automatically removes the speech from the scope of the first amendment, but a finding that the claim is truthful will lead to a substantial degree of constitutional protection against governmental regulation.[143] The truth or falsity of the advertiser's claim, then, often will determine the constitutionality of the challenged regulation.

In light of this analysis, it is amazing that the post-*Bolger* lower court decisions so uniformly have ceded enormous discretion to the administrative regulator to determine the truth or falsity of the advertiser's claim.[144] Both statutory[145] and judicial[146] traditions have granted broad judicial deference to administrative fact-finding within the scope of the agency's expertise. An equally venerable tradition,[147] however, requires that issues of "constitutional fact" must be examined de novo by the reviewing court.[148] A "constitutional fact" is a factual determination that, if resolved one way, will render governmental action constitutional and, if resolved another way, will render it unconstitutional. When the issue of constitutionality implicates liberty interests,[149] the Supreme Court consistently has held that our system of separation of powers demands independent judicial determination of such factual issues. The reasons for the rule are clear. As I have argued previously in another context:

> Nonjudicial administrative regulators of expression exist for the sole purpose of regulating; this is their raison d'etre. They simultaneously perform the functions of prosecutor and adjudicator and, if only subconsciously, will likely feel the obligation to justify their existence by finding some expression constitutionally subject to regulation. Such a systemic danger does not plague the functioning of a judicial

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143. *See supra* text accompanying notes 48-53.

144. A leading example is the decision in Federal Trade Comm'n v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985). The FTC had sought to enjoin the advertising of cigarette tar content alleged to be deceptive. The company disputed the application of the FTC's method employed to test the ratings. The D.C. Circuit, in affirming the grant of the injunction, noted that a court can overrule an agency's decision only when that decision is arbitrary or capricious. *Id.* at 44; *see also* Bristol-Myers Co. v. Federal Trade Comm'n, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); Federal Trade Comm'n v. Pharmtech Research, Inc., 576 F. Supp. 294 (D.D.C. 1983).

145. *See* 5 U.S.C. § 706(2)(A) (1988) (arbitrary or capricious standard of review).

146. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

147. This tradition is associated primarily with the famed decision in Crowell v. Benson, 285 U.S. 22 (1932).

148. In St. Joseph Stock Yards v. United States, 298 U.S. 38 (1936), the Supreme Court modified *Crowell*'s requirement that the reviewing court hold a de novo hearing on the issue of constitutional fact, but reiterated the requirement of de novo review.

149. While the *Crowell* doctrine generally fell into disrepute in property rights cases as the level of constitutional protection for those rights diminished, *see* Schwartz, *Does the Ghost of* Crowell v. Benson *Still Walk?*, 98 U. PA. L. REV. 163 (1949), in personal liberty suits it has retained vitality. *See, e.g.*, Cross v. United States 512 F.2d 1212, 1217 (4th Cir. 1975) (reviewing grocery store's qualification for food stamp program); Jenkins v. Georgia, 418 U.S. 153 (1974) (finding film *Carnal Knowledge* not obscene); Jacobellis v. Ohio, 378 U.S. 184, 190 n.6 (1964) (finding of obscenity).

> forum. In addition, the tradition of independence from external political pressure provides grounds for preferring judicial to administrative adjudication.[150]

Accordingly, the Supreme Court has held that, because obscene expression falls outside the scope of first amendment protection,[151] findings of obscenity are constitutional facts subject to de novo judicial review.[152] No basis exists for distinguishing findings of falsity for commercial speech.

Moreover, the framework established by the principle of epistemological humility should give us pause before we allow a formal governmental finding that a certain scientific assertion is false. Thus, even if we acknowledge that in extreme cases the government may make such findings, and even if we concede that such scientific assertions are to receive only the reduced protection associated with commercial speech, at the very least we should demand that such findings be made by the single independent governmental organ ultimately entrusted with the task of protecting free and open communication: the judiciary.

## IV. CONCLUSION

The public today is sensitive to the impact of the foods it consumes and the products it uses to improve its health. As a result, manufacturers also have become more sensitive to the implications that their products have for public health. In the true tradition of American capitalism, commercial enterprises have determined that health sells, and to a large extent they have devoted their research, marketing, and advertising resources toward both improving the health impact of their products and informing the public of those improvements.[153] Thus, allowing manufacturers to emphasize the health implications of their products likely will increase public awareness of these health concerns. Expression by those with the greatest incentive to speak will increase the level of public awareness about issues that directly will affect their lives and over which they have control. This represents the classic role that free expression can and should play in our society. The level of public interest in communication and information concerning the health implications of everyday products is no less when that informa-

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150. M. REDISH, *supra* note 3, at 148-49 (footnotes omitted).

151. Miller v. California, 413 U.S. 15, 23 (1973).

152. *Jacobellis*, 378 U.S. at 190 n.6.

153. One illustration is the cereal market, in which there exists "clear evidence that . . . producer advertising and labeling added significant amounts of information to the market and reached groups that were not reached well by government and general information sources." P. IPPOLITO & A. MATHIOS, HEALTH CLAIMS IN ADVERTISING AND LABELING: A STUDY OF THE CEREAL MARKET ix (1989). The same authors assert that "producer advertising was a significant source of information on the potential benefits of fiber." *Id.* at xi.

tion comes from the manufacturer of those products than when the same information comes from an objective scientific or medical expert.

When speech is allowed to be "uninhibited, robust, and wide open,"[154] there exist risks of misinformation, confusion, and even deception. Recognition that such communications deserve full first amendment protection, however, does not imply that society is defenseless against intentional economic fraud. The first amendment, even in its most classic applications, is not an absolute. Because of the historical lessons taught us by the principle of epistemological humility, however, we should hesitate to stifle scientific assertions simply because they are inconsistent with current scientific consensus. One of the fundamental premises of the first amendment is that, except in the most extreme cases, the proper response to speech we deem inaccurate is not repression but rather counter speech.[155] The Court adheres to this principle for political speech, regardless of the speaker's motivation. There is no reason, in either logic or history, to treat scientific expression any differently.

154. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

155. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., joined by Holmes, J., concurring); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (stating that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas").