

# GLICKMAN v. WILEMAN BROS. & ELLIOT, INC.: HAS THE SUPREME COURT LOST ITS WAY?

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## I. INTRODUCTION

In the past several decades, the United States Supreme Court's consideration of speech moved fairly steadily in one direction: toward greater protection of expression. The Court treated state restrictions on freedom of expression with great skepticism. Burning a cross on the lawn of a black family is protected expression,<sup>1</sup> as is burning a flag,<sup>2</sup> or purveying non-obscene pornography.<sup>3</sup> The expression of almost any idea,<sup>4</sup> whether it is political, social, or religious, may be limited by the government only if the restriction meets the high standard of strict scrutiny.<sup>5</sup> Courts consistently found in almost

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1. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 397 (1992). The Court considered the conviction of several youths under a statute that forbade cross-burning if it would cause "anger, alarm, or resentment in others on the basis of race, creed, color, or gender." *Id.* at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)). The Court found that this ordinance initiated censorship of political expression, and therefore violated the First Amendment. See *id.* at 385.

2. See *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

3. See *Roth v. United States*, 354 U.S. 476, 484 (1957). While finding the material at issue in *Roth* obscene, the Court stated that "ideas having even the slightest redeeming social importance" are protected under the First Amendment, thus protecting non-obscene pornography. *Id.* at 484. Justice Douglas, joined by Justice Black, would have protected even obscenity: "I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field." *Id.* at 514 (Douglas, J., dissenting).

4. There are only a few categories of expression that fall outside First Amendment protection. Among these are fighting words, see *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1972) (defining "fighting words" as words having "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed"), obscenity, see *supra* note 3 and accompanying text, and the defamation of non-public figures, see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 323 (1974).

5. See, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The strict scrutiny standard requires a showing that the restriction on expression "is

every area that, no matter how repellant the idea, no matter whom it may offend, the expression of ideas is protected by the First Amendment, and the government may restrict it only in very limited circumstances.<sup>6</sup>

One notable exception to this trend is the Court's treatment of commercial speech.<sup>7</sup> Until the 1970s, with a few exceptions created

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necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45; see also *Cornelius*, 473 U.S. at 800. To be narrowly tailored, a restriction must be the least restrictive means available to further the interest. See *Sable Communications of Cal., Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 126 (1989). A restriction that cannot meet this high standard, as few can, is generally valid only if it is a content-neutral restriction on the time, place, or manner in which the expression takes place. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

6. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (protecting expression at a Ku Klux Klan rally, including the statement "I believe the nigger should be returned to Africa, the Jew returned to Israel"); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (allowing a group of Nazis to march through a predominantly Jewish neighborhood).

7. It is not entirely clear what does and does not fall within the definition of commercial speech. The Supreme Court found in two cases that print advertisements with written information were not commercial speech, see *infra* notes 18 and 23 and accompanying text, but found in a more recent case that largely informational pamphlets containing the name of a manufacturer were commercial speech, see *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 68 (1983). At various times the Court defined commercial speech as "speech which does no more than propose a commercial transaction," *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1973) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)), and as "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980). Further, the Court has identified characteristics that do not necessarily make expression commercial speech, but that might in some circumstances. Neither the fact that the pamphlets in *Bolger* were "conceded to be advertisements," nor that they referred "to a specific product," and their sender "had an economic motivation for mailing them" were enough by themselves to make the pamphlets commercial speech. *Bolger*, 463 U.S. at 66-67. However, the Court found that these factors taken together were sufficient to make the pamphlets commercial speech. See *id.* at 67.

These definitions are not very helpful in determining what will be treated as commercial speech. In *Bolger*, the Court found that speech conveying information as well as advertising a product is commercial speech, although such speech would seemingly do "more than propose a commercial transaction." *Id.* (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 762). The speech at issue in *Bolger* fell within the definition of commercial speech under the second test, as would news or information about economic matters that most people would not consider commercial speech.

Because of inconsistencies with commercial speech precedent and a lack of clarity in these definitions, there is a need for a clear definition of commercial speech. For a general discussion, see Michael W. Field, *On Tap: 44 Liquormart, Inc. v. Rhode Island: Last Call for the Commercial Speech Doctrine*, 2 ROGER WILLIAMS U. L. REV. 57, 80-84 (1996); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L.

largely by defining the advertisements as something other than commercial speech,<sup>8</sup> the Court did not grant commercial speech any constitutional protection at all. Since that time, the results in commercial speech cases are confusing and inconsistent. Rather than moving in one direction, the level of protection given to commercial speech seemingly ranges from almost none to something near the level of protection given to other forms of protected speech, with little predictability about what standard the courts will apply in any particular case.<sup>9</sup> In recent years, however, it seemed that the Court might be moving again toward greater protection of commercial speech.<sup>10</sup>

The implication of the Supreme Court's recent decision in *Glickman v. Wileman Bros. & Elliot, Inc.*<sup>11</sup> is that the Supreme Court may be changing direction yet again in its treatment of commercial speech. It seems from this opinion that commercial speech will continue to receive a different level of protection than nearly all other forms of speech. The Court in *Wileman* considered a rule promulgated by the Secretary of Agriculture requiring fruit growers to pay for the generic advertising of their products.<sup>12</sup> The Court found not only that the requirement that the growers pay for the advertising does not violate the First Amendment, but also stated that it did not present a First Amendment issue.<sup>13</sup> This holding is an example of the Court's reluctance to extend First Amendment protection to commercial speech when non-commercial speech may very well be protected under the same circumstances. Justice Thomas's

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REV. 627, 638–48 (1990); David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359, 381–402 (1990). For purposes of this Note, it is sufficient to define “commercial speech” as it was used in the last two decades; the text of a book is not commercial speech, while the text of a pamphlet advertising a product probably is; a newspaper or magazine article is not commercial speech, but an advertisement in a newspaper or magazine probably is; a television show is not commercial speech, but a television commercial most likely is.

8. See *infra* notes 15 and 18 and accompanying text.

9. See *infra* Part II.A; see also Margaret Whelan, Note, *Common Sense and Commercial Speech*, 48 U. PITT. L. REV. 1121, 1134 (1987) (noting that “[t]he Supreme Court’s approach to commercial speech has little theoretical consistency, and has created much confusion both as to the definition of commercial speech and the precise nature of this category’s constitutional status”).

10. See *infra* notes 61–88 and accompanying text.

11. 117 S. Ct. 2130 (1997).

12. See *id.*

13. See *id.* at 2138–39 (Thomas, J., dissenting).

dissent in *Wileman Bros.* argues, as will this Note, that commercial speech should be given the same protection as other speech: strict scrutiny.<sup>14</sup>

This Note first examines the historical caselaw with regard to commercial speech, compelled speech, and mandatory funding of speech. Next, it discusses the majority and two dissenting opinions in *Wileman Bros.* It then considers the reasons for the unequal treatment of commercial speech and the implications of granting commercial speech full First Amendment protection. This Note concludes that restrictions on commercial speech should be subject to the same level of scrutiny as other restrictions on speech.

## II. HISTORICAL OVERVIEW

### A. Commercial Speech Cases

The history of commercial speech, while short, is confusing and convoluted. The Supreme Court's response to commercial speech ranges from finding no constitutional basis for protecting it, to placing rigorous limitations on a state's ability to restrict it. In recent years, the Court has created a standard to determine whether restrictions on commercial speech violate the First Amendment, but the application of that standard is not consistent and it remains difficult to predict when commercial speech will be protected.

The Court's initial response to commercial speech was to give it no protection at all. In *Valentine v. Chrestensen*,<sup>15</sup> the Court considered whether the Constitution protected a handbill advertising submarine rides.<sup>16</sup> Although, even at that time, handbills carrying a political, social, or religious message would have been protected,<sup>17</sup> the Court found that commercial handbills were not because "the Constitution imposes no such restraint."<sup>18</sup>

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14. *See id.* at 2142.

15. 316 U.S. 52 (1942).

16. The advertisements violated a statute forbidding commercial handbilling. *See id.* at 52 & n.1.

17. *See generally* *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) (stating that "the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution"); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (compelling that liberty of the press is not an exclusive right "confined to newspapers and periodicals [but] necessarily embraces pamphlets and leaflets").

18. *Valentine*, 316 U.S. at 54.

Two decades later, the Court found an exception to this rule when the speech, although commercial, had political or social content. The speech at issue in *New York Times v. Sullivan*<sup>19</sup> was an advertisement discussing the hardships faced by the civil rights movement in the South, and soliciting financial support for the work of Dr. Martin Luther King, Jr.<sup>20</sup> Although the purpose of the advertisement was to raise money, the Court found that it “was not a ‘commercial’ advertisement.”<sup>21</sup> Additionally, the Court found any commercial motive for the advertisement irrelevant.<sup>22</sup> The advertisement thus received full First Amendment protection.<sup>23</sup>

The Supreme Court subsequently found a similar exception where the advertisement related to a constitutionally-protected activity. In *Bigelow v. Virginia*,<sup>24</sup> the Court determined that an advertisement for abortion services was protected speech.<sup>25</sup> The Court

19. 376 U.S. 255 (1964).

20. *See id.* at 256–57.

21. *Id.* at 266. The advertisement in question was different from the handbill in *Valentine* because the *New York Times* advertisement “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.” *Id.*

22. *See id.* It stated “[t]hat the *Times* was paid for publishing the advertisements is as immaterial . . . as is the fact that newspapers and books are sold.” *Id.*

23. *See id.*

24. 421 U.S. 809 (1975).

25. *See id.* at 829. The publisher of a weekly newspaper was convicted of violating a Virginia statute making it a misdemeanor to encourage the procurement of an abortion. *See id.* at 813–14. The advertisement published in the newspaper read as follows:

UNWANTED PREGNANCY LET US HELP YOU  
 Abortions are now legal in New York There are no  
 residency requirements. FOR  
 IMMEDIATE PLACEMENT IN ACCREDITED  
 HOSPITALS AND CLINICS AT LOW COST  
 Contact  
 WOMEN'S PAVILION  
 515 Madison Avenue New York, N.Y. 10022 or call  
 any time  
 (212) 371-6670 or (212) 371-6650 AVAILABLE  
 7 DAYS A WEEK STRICTLY CONFIDENTIAL.  
 We will make all arrangements for  
 you and help you with information and counseling.

*Id.* at 812.

stated that although the speech had a commercial purpose, that alone did “not make it valueless in the marketplace of ideas.”<sup>26</sup> Like the advertisement at issue in *Sullivan*, the advertisement for the Women's Pavilion did more than advertise a service: “It contained factual material of clear public interest.”<sup>27</sup> Further, as a result of the then recently-decided *Roe v. Wade*,<sup>28</sup> the topic of the advertisement related to a constitutionally-protected activity.<sup>29</sup> Although the Court discussed *Valentine* and interpreted the holding of that case very narrowly, it did not overturn the *Valentine* decision.<sup>30</sup> The Court stated that it “need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.”<sup>31</sup>

A year later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>32</sup> the Court faced the issue of whether the First Amendment protected an advertisement with a purely commercial purpose.<sup>33</sup> Unlike the advertisements at issue in *Sullivan* and *Bigelow*, the price advertising considered in *Virginia State Board of Pharmacy* had neither social significance nor did it involve a constitutionally-protected activity.<sup>34</sup> The Court found sev-

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26. *Id.* at 826.

27. *Id.* at 822. The Court stated:

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience — not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another state and its development, and to readers seeking reform in Virginia. The mere existence of the Women's Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy.

*Id.*

28. 410 U.S. 113 (1973) (establishing that the right to an abortion is constitutionally protected).

29. *See Bigelow*, 421 U.S. at 822.

30. *See id.* at 819–21. The Court called the holding in *Valentine* “a limited one,” standing only for the proposition that the ordinance was “a reasonable regulation of the manner in which commercial advertising could be distributed.” *Id.* at 819. It stated: “The fact that it had the effect of banning a particular handbill does not mean that [*Valentine*] is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge.” *Id.* at 819–20.

31. *Id.* at 825.

32. 425 U.S. 748 (1976).

33. *See id.* at 761–62.

34. *See id.* at 762. The Court noted:

eral “commonsense differences” between commercial speech and other types of speech.<sup>35</sup> Among those differences were that it was “more easily verifiable” and “more durable” than ordinary speech.<sup>36</sup>

Nonetheless, the Court found that commercial speech was not “so far removed from any ‘exposition of ideas,’ and from ‘truth, science, morality, and arts in general, . . .’ that it lacks all protection.”<sup>37</sup> Although the *Virginia State Board of Pharmacy* Court stated that commercial speech does receive some First Amendment protection, it did not indicate the extent of that protection.<sup>38</sup>

In 1986, the Supreme Court announced a test to determine the extent to which commercial speech would be protected.<sup>39</sup> In *Central Hudson Gas & Electric v. Public Service Commission*,<sup>40</sup> the Court set forth a four-part test to determine whether a regulation of commercial speech violated the First Amendment and stated that the basis of First Amendment protection for commercial speech is “the informational function of advertising.”<sup>41</sup> The various prongs of the *Central Hudson* test follow: (1) that the commercial speech in question is “neither misleading nor related to unlawful activity”;<sup>42</sup> (2) that the restriction advance a substantial interest; (3) that the restriction be proportional to the interest advanced; and (4) that the restriction is “carefully designed to achieve the [s]tate’s goal.”<sup>43</sup> The Court stated

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Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or [p]olitical. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The “idea” he wishes to communicate is simply this: “I will sell you the X prescription drugs at the Y price.” Our question, then, is whether this communication is wholly outside the protection of the First Amendment.”

*Id.* at 761.

35. *See id.* at 771 n.24.

36. *Id.* These differences mean that certain protections that ordinary speech receives might not be necessary to protect commercial speech. *See id.*

37. *Id.* at 762 (quoting, in order, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Roth v. United States*, 354 U.S. 476, 484 (1957)).

38. *See id.* at 761–63.

39. *See Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980).

40. *Id.* The Public Service Commission had prohibited utility service advertising, but allowed informational advertising to continue. *See id.* at 559.

41. *Id.* at 563–66.

42. *Id.* at 564.

43. *Id.* The test is sometimes referred to as a three-pronged test, using the final three elements from *Central Hudson*, labeled (2) through (4). *See, e.g., Wileman*, 117 S. Ct. at 2149 (Souter, J., dissenting).

that whether the fourth prong was met

may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.<sup>44</sup>

Under this test, the Court found the Public Service Commission's advertising ban violated the First Amendment.<sup>45</sup>

Despite the seemingly clear-cut *Central Hudson* test, the Court's subsequent commercial speech decisions remain confusing and unpredictable. In *Posadas de Puerto Rico Associates v. Tourism Co.*,<sup>46</sup> the Court considered a Puerto Rican statute allowing casinos to advertise in publications aimed at tourists, but not in publications aimed at Puerto Rican residents.<sup>47</sup> The Court found that the state had a substantial interest in reducing gambling among its residents.<sup>48</sup> Determining whether prongs three and four of the *Central Hudson* test were met, the Court stated, "basically involve[s] a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends."<sup>49</sup> The Court found that the legislature's belief that the regulation would advance that interest was a reasonable one.<sup>50</sup> It then essentially stated that whether the fourth prong of the *Central Hudson* test was met would be left for the legislature to determine.<sup>51</sup> The Court strayed even further from the previous decade of commercial speech jurisprudence when it stated that "the greater power to completely ban casino gambling necessarily in-

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44. *Central Hudson*, 447 U.S. at 564.

45. *See id.* at 572. The Court found the interest of promoting energy conservation substantial, and the connection between the ban and achieving that goal to be "a direct link." *Id.* at 568-69. However, there were a number of other methods to advance that interest; thus, the advertising ban did not meet the fourth prong of the test. *See id.* at 570-71.

46. 478 U.S. 328 (1986).

47. *See id.* at 340-41.

48. *See id.* at 341.

49. *Id.*

50. *See id.* at 342.

51. *See id.* at 344. The Court stated that "it is up to the legislature to decide whether or not [an alternate] policy would be as effective in reducing the demand for casino gambling as a restriction on advertising." *Id.*



cludes the lesser power to ban advertising of casino gambling.<sup>52</sup>

The Court reaffirmed its weakening of the fourth prong of the *Central Hudson* test in *Board of Trustees v. Fox*.<sup>53</sup> The *Fox* Court stated that the requirement contained in the fourth prong of *Central Hudson*, that the means used to achieve the state's interest be not more extensive than necessary, was not the same as the least restrictive alternative requirement of strict scrutiny.<sup>54</sup> The connection between the restriction on speech and the interest furthered by the restriction did not have to be a "perfect" one but only a "reasonable" one.<sup>55</sup>

Thus, in *Posadas* and *Fox* the Supreme Court seemed to move away from the protective approach it took toward commercial speech in *Virginia State Board of Pharmacy* and *Central Hudson*. In applying the *Central Hudson* test post-*Posadas*, however, the Court was not as consistent to legislative deference as *Posadas* suggested that it should be. Following *Posadas*, the Court

permitted certified public accountants to solicit clients in person, while prohibiting attorneys from doing the same . . . . [A] federal statute prohibiting radio stations from broadcasting lottery announcements in non-lottery states was upheld, because it advanced the health, safety, and welfare of residents, but a federal statute seeking to promote the health, safety, and welfare of citizens by prohibiting alcohol content on labels was found unconstitutional.<sup>56</sup>

Thus, despite the seeming clarity of the *Central Hudson* test, its application in these cases did not provide any clear indicators of when restrictions on commercial speech would be allowed and when they would violate the First Amendment.

The Supreme Court hinted in one recent case that it was moving away from the lower standard of commercial speech protection.<sup>57</sup>

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52. *Posadas*, 478 U.S. at 345–46.

53. 492 U.S. 469 (1989).

54. *See id.* at 480.

55. *See id.* The Court stated that a restriction on commercial speech did not have to be "the single best disposition but one whose scope is in proportion to the interest served." *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

56. Field, *supra* note 7, at 68–69 (1996) (citations omitted) (referring, in order, to *Edenfield v. Fane*, 507 U.S. 761 (1993); *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995); *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995)).

57. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416–31 (1993).

Cincinnati passed an ordinance allowing news racks containing newspapers, but banning those that distributed handbills, including the free magazine published by the Discovery Network.<sup>58</sup> The city argued that this restriction was permissible because the speech affected was commercial and thus of “lower value.”<sup>59</sup> The Court disagreed with the city stating that “the city’s argument attaches more importance to the distinction between commercial and non-commercial speech than our cases warrant and seriously underestimates the value of commercial speech.”<sup>60</sup> Despite its inconsistent approach to commercial speech, the Court made it clear that commercial speech is valuable and may not be arbitrarily restricted.

Amid this confusion, the Court heard *44 Liquormart, Inc. v. Rhode Island*.<sup>61</sup> *44 Liquormart* was fined for placing an advertisement that violated a Rhode Island law prohibiting the advertising of liquor prices.<sup>62</sup> A majority of the Court found that the Twenty-first Amendment did not preclude the First Amendment from applying to the statute in question,<sup>63</sup> and all of the Justices agreed that the liquor price advertising ban was unconstitutional.<sup>64</sup> However, the members of the Court disagreed about the continuing validity of *Central Hudson* and *Posadas*.<sup>65</sup>

Justice Stevens stated that different standards should be applied to the regulation of commercial speech, depending on the purpose of the regulation.<sup>66</sup> He stated that there is less reason to protect

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58. *See id.* at 412–13.

59. *Id.* at 428.

60. *Id.* at 419.

61. 517 U.S. 484 (1996).

62. *See id.* at 492–93. *44 Liquormart* placed an advertisement that, although it did not mention the prices, had the word “wow” next to pictures of liquor bottles. *See id.* The Rhode Island Liquor Control Administrator found that the advertisement implied a reference to liquor prices and therefore violated the law prohibiting the advertisement of liquor prices. *See id.*

63. The Twenty-first Amendment repealed the Eighteenth Amendment and allowed the states to prohibit interstate commerce in alcoholic beverages. *See* U.S. CONST. amend. XXI. The Court stated that “although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State’s regulatory power over the delivery or use of intoxicating beverages within its borders, the Amendment does not license the [s]tates to ignore their obligations under other provisions of the Constitution.” *44 Liquormart*, 517 U.S. at 516 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984)).

64. *See 44 Liquormart*, 517 U.S. at 516.

65. *See id.*

66. *See id.* at 501–02. Justice Stevens was joined in his opinion by Justices Kenne-

dishonest or deceptive commercial speech.<sup>67</sup> When regulations prohibit “truthful nonmisleading messages,” however, Justice Stevens found “far less reason to depart from the rigorous review that the First Amendment generally demands.”<sup>68</sup>

Justice Stevens next applied the *Central Hudson* test to the price advertising ban.<sup>69</sup> He stated that the test must be applied with “special care” because the regulation involved truthful, nonmisleading speech and was not aimed at protecting consumers.<sup>70</sup> The State had shown neither that the advertising ban “directly advance[d]” its stated interest of reducing alcohol consumption,<sup>71</sup> nor that the regulation was “no more extensive than necessary.”<sup>72</sup> Because the regulation could not pass the *Central Hudson* test, it certainly would not pass the more rigorous scrutiny Justice Stevens applied to “the complete suppression of truthful, nonmisleading commercial speech.”<sup>73</sup>

Justice Stevens also discussed the *Posadas* opinion.<sup>74</sup> He conceded that *Posadas* supported the State's reasoning, but stated that “*Posadas* clearly erred in concluding that it was ‘up to the legislature’ to choose suppression over a less speech-restrictive policy.”<sup>75</sup> Justice Stevens rejected the “greater includes the lesser” reasoning of *Posadas* as well, stating that “it is inconsistent with both logic and well-settled doctrine.”<sup>76</sup>

Although Justice O'Connor also found the price advertising ban unconstitutional, her reasons were not as broad as those of Justice

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dy and Ginsburg. *See id.* at 485.

67. *See id.* at 501.

68. *Id.*

69. *See id.* at 504. Justice Stevens was joined in this section by Justices Kennedy, Souter, and Ginsburg. *See id.* at 485.

70. *See 44 Liquormart*, 517 U.S. at 507.

71. *Id.* at 504. The Court acknowledged that the advertising ban might promote higher liquor prices. *See id.*

72. *Id.* at 507. The Court noted that there were a number of other ways in which the State could have discouraged liquor consumption without regulating speech, including raising prices or directly restricting sales or promoting education about the dangers of drinking. *See id.*

73. *Id.* at 508.

74. *See id.* at 509–14. Justice Stevens was joined in this section by Justices Kennedy, Thomas, and Ginsburg. *See id.* at 485.

75. *Id.* at 509 (citation omitted).

76. *44 Liquormart*, 517 U.S. at 511.

Stevens.<sup>77</sup> Justice O'Connor stated that she would "resolve this case more narrowly" by using the *Central Hudson* test.<sup>78</sup> Justice O'Connor's concurrence also discussed *Posadas*, but did not reject its reasoning.<sup>79</sup> However, she noted that since *Posadas*, the "Court ha[d] examined more searchingly the State's professed goal."<sup>80</sup>

Justice Thomas wrote separately to argue that the state's interest in keeping information about a lawful product from consumers is "per se illegitimate."<sup>81</sup> For that reason, Justice Thomas would hold that the *Central Hudson* test should not be applied to any truthful advertising.<sup>82</sup> He discussed that the application of the fourth prong of *Central Hudson* to regulations banning truthful commercial speech regarding legal activities would always result in the regulations being found unconstitutional.<sup>83</sup> Justice Thomas advocated that the Court abandon *Central Hudson* in such instances and return to the simpler standard of *Virginia State Board of Pharmacy*, finding "all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible."<sup>84</sup>

Justice Scalia wrote separately, as well.<sup>85</sup> While he "share[d] Justice Thomas's discomfort with the *Central Hudson* test,"<sup>86</sup> both parties argued in the context of that test.<sup>87</sup> Thus, he concluded that the Court did not have before it "the wherewithal to declare *Central Hudson* wrong."<sup>88</sup>

## B. Compelled Speech Cases

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77. *See id.* at 528–34 (O'Connor, J., concurring). Justice O'Connor was joined by Chief Justice Rehnquist and Justices Souter and Breyer. *See id.* at 528.

78. *Id.* at 528. The regulation was not a reasonable method to reduce alcohol consumption because the state had other, more effective means it could use to achieve that goal without restricting speech. *See id.* at 530–31.

79. *See id.* at 531.

80. *Id.*

81. *Id.* at 518 (Thomas, J., concurring).

82. *See 44 Liquormart*, 517 U.S. at 518–24.

83. *See id.* at 525–26.

84. *Id.* at 526.

85. *See id.* at 517–18 (Scalia, J., concurring).

86. *Id.* at 517.

87. *Id.* at 518.

88. *44 Liquormart*, 517 U.S. at 518.

The Supreme Court holds that compelling a person to speak is a violation of the speaker's First Amendment rights.<sup>89</sup> This is true whether the speaker is a natural person or a corporation.<sup>90</sup> In certain circumstances, a person may be required to allow another's speech, but not if the ideas expressed in the speech would be associated with the person required to allow it, or if the person required to allow the speech would feel compelled to respond to it.<sup>91</sup>

In an early decision involving compelled speech, the Court found a rule requiring students to pledge allegiance to the flag unconstitutional,<sup>92</sup> overruling a decision it had made only three years earlier.<sup>93</sup> Forcing the students to recite the flag salute "require[d] *affirmation of a belief* and an *attitude of mind*."<sup>94</sup> Finding that this act violated the First Amendment, the Court stated that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matter of opinion or force citizens to confess by word or act their faith therein."<sup>95</sup>

The Court later considered whether New Hampshire's prohibition of covering the State's motto, "Live Free or Die," on license plates violated the First Amendment.<sup>96</sup> This prohibition presented the issue of whether the State could require a person to display a political message on private property.<sup>97</sup> In finding the prohibition

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89. See *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (discussed *infra* notes 96–98).

90. See *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (discussed *infra* notes 103–05).

91. See *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (stating that a "speaker has the autonomy to choose the content of his own message").

92. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 644 (1943).

93. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593 (1940), *overruled by* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 644 (1943).

94. *Barnette*, 319 U.S. at 633 (emphasis added).

95. *Id.* at 642.

96. See *Wooley v. Maynard*, 430 U.S. 705, 706 (1977). *Maynard*, a Jehovah's Witness, stated that he found the slogan offensive to his "moral, religious, and political beliefs." *Id.* at 707. He stated that

by religious training and belief, I believe my "government" Jehovah's Kingdom offers everlasting life. It would be contrary to that belief to give up my life for the [S]tate, even if it meant living in bondage. Although I obey all laws of the State not in conflict with my conscience, this slogan is directly at odds with my deeply held religious convictions.

*Id.* at 707 n.2.

97. See *id.* at 713.

unconstitutional, the Court also found the “right to speak and the right to refrain from speaking” to be “complementary components of the broader concept of individual freedom of mind.”<sup>98</sup>

While the State may not require a person to speak, the Court found in *PruneYard Shopping Center v. Robins*<sup>99</sup> that being required to allow others to speak does not violate the First Amendment in all circumstances.<sup>100</sup> *PruneYard* was a private shopping center that had a rule prohibiting all “publicly expressive activity . . . not directly related to its commercial purposes.”<sup>101</sup> The Court distinguished this case from *Wooley*, stating that: (1) the shopping center was open to the public, so that any views expressed by speakers on the property would “not likely be identified with those of the owner”; (2) the State did not select any particular message to be expressed; and (3) the shopping center was free to “disavow any connection with the message.”<sup>102</sup>

Although *PruneYard* established that in certain circumstances one is required to allow another to speak, that will not be the case when doing so would force one to respond to the specific speech. The holding in *PruneYard* did not allow the California Public Utilities Commission to require private utility companies to include in outgoing bills, flyers critical of the utility company.<sup>103</sup> The requirement to include the flyers forced the utility company to respond to what the flyers had said, and “that kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster.”<sup>104</sup> The Court stated that “[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say.”<sup>105</sup>

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98. *Id.* at 714 (quoting *Barnette*, 319 U.S. at 633–34).

99. 447 U.S. 74 (1980).

100. *See id.* at 88.

101. *Id.* at 77.

102. *Id.* at 87.

103. *See Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16 (1986).

104. *Id.*

105. *Id.* at 912. This line of reasoning was reinforced in *Riley v. National Federation of the Blind*, 487 U.S. 781, 796–97 (1988). The Court stated in that case:

There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees “freedom of speech,” a term necessarily comprising the decision of both what to say and what not to say.

*Id.*

Later cases reinforced the importance of the right to remain silent. The Court found in one case that the group sponsoring a parade was not required to include another group in the parade when it disagreed with the other group's message.<sup>106</sup> The sponsoring group's decision "to exclude a message it did not like from the communication it chose to make . . . is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another."<sup>107</sup> Unlike the situation in *PruneYard*, parade watchers would interpret the message of each group marching in a parade as part of the overall theme of the parade, and that was enough to uphold the decision to exclude a particular group under the First Amendment.<sup>108</sup>

### C. Mandatory Funding Cases

The Court's treatment of mandatory funding of expressive activity is a "corollary to the principle that what may not be suppressed may not be coerced."<sup>109</sup> Just as a person may not be forced to make a particular statement, in most circumstances a person may not be compelled to pay for another person to make that statement.

This principle originated with *Abood v. Detroit Board of Education*,<sup>110</sup> which involved a teacher's union. The teacher's union included in a collective bargaining agreement the provision that the school district would be an "agency shop," so that any teachers who chose not to join the union were required to pay a "service charge equal to the regular dues" paid by union members.<sup>111</sup> The Court found that requiring the union to represent all employees did not violate the Constitution.<sup>112</sup> The fact that some of the money the employees were forced to contribute was spent on political and ideological matters unrelated to collective bargaining, however, did violate the First Amendment.<sup>113</sup> That the employees were "compelled to make, rather than prohibited from making, contributions for politi-

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106. See *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995).

107. *Id.* at 574.

108. See *id.* at 576-77.

109. *Wileman*, 117 S. Ct. at 2144 (Souter, J., dissenting).

110. 431 U.S. 209 (1977).

111. *Id.* at 1787-88.

112. See *id.* at 232.

113. See *id.* at 234.

cal purposes work[ed] no less an infringement of their constitutional rights.”<sup>114</sup> Thus, while the Court found no constitutional problem with the teachers being required to pay union dues, the fact that the dues were spent on expressive activity unrelated to the purpose of the union made the funding requirement unconstitutional.<sup>115</sup>

The Court later set forth guidelines determining when employees could be required to fund the expressive union activity.<sup>116</sup> The first guideline was the mandate, already made clear in *Abood*,<sup>117</sup> that the expression be germane to the union's purpose.<sup>118</sup> The Court stated that the funding requirement must also “be justified by vital policy interest[s] . . . and . . . not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.”<sup>119</sup> Mandatory funding of expenses related to collective bargaining passed this test, but funding of expenses related to lobbying, litigation unrelated to that particular bargaining unit, and “[p]ublic relations expenditures designed to enhance the reputation of the teaching profession” did not.<sup>120</sup>

### III. GLICKMAN v. WILEMAN BROS. & ELLIOT, INC.

#### A. Facts and Procedural History

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114. *Id.*

115. *See id.*; *see also* *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990). In *Keller*, the Court held unanimously that compulsory bar dues could be used for “regulating the legal profession or improving the quality of the legal service available to the people of the State,” *id.* at 14 (quoting *Lathrop v. Donahue*, 367 U.S. 820, 843 (1961)), but could not be used “to endorse or advance a gun control or nuclear weapons freeze initiative,” *id.* at 16.

116. *See* *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991).

117. 431 U.S. at 209.

118. *See id.*

119. *Id.*

120. *Id.* at 527–29 (quoting *Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388, 1394 (6th Cir. 1989), *rev'd in part* 500 U.S. 507 (1991)). The Court stated:

[P]ublic speech in support of the teaching profession generally is not sufficiently related to the union's collective-bargaining functions to justify compelling dissenting employees to support it. Expression of this kind extends beyond the negotiation and grievance resolution context and imposes a substantially greater burden on First Amendment rights than do the latter activities.

*Id.* at 528–29.



The Agricultural Marketing Agreement Act,<sup>121</sup> passed as part of the New Deal, allows the Secretary of Agriculture to “promulgate marketing orders for certain fruits and vegetables.”<sup>122</sup> Several “growers, handlers, and processors of California tree fruits” objected to certain of the orders promulgated by the Secretary of Agriculture.<sup>123</sup> Among the orders to which the respondents objected was one requiring them to pay “the cost of generic advertising of California nectarines, plums, and peaches.”<sup>124</sup>

In 1987 and 1988, the fruit growers (Wileman) filed petitions with the Secretary of Agriculture challenging the advertising requirements, as well as several other standards imposed on them.<sup>125</sup> The administrative law judge who heard the case found for Wileman with respect to its claims under the Administrative Procedure Act, but did not consider the First Amendment claims with respect to the advertising.<sup>126</sup> The judicial officer for the Department of Agriculture heard the petitions of Wileman and a number of others fruit growers, and reversed all findings of the administrative law judge.<sup>127</sup> The United States District Court for the Eastern District of California granted summary judgment for the Secretary of Agriculture.<sup>128</sup> Wileman appealed to the Ninth Circuit Court of Appeals.<sup>129</sup>

The Ninth Circuit found that requiring growers to pay for generic advertising violated the First Amendment.<sup>130</sup> As the standard set forth in *Abood* had been interpreted by that court, the “First Amendment right of freedom of speech includes the right not to be compelled to render financial support for others' speech.”<sup>131</sup> Therefore, the Ninth Circuit applied the *Central Hudson* test to the funding requirement.<sup>132</sup> It found that although the government had a

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121. 7 U.S.C. § 610 (1994).

122. *Wileman Bros. & Elliot, Inc. v. Espy*, 58 F.3d 1367, 1372 (9th Cir. 1995), *rev'd sub nom.* *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130, 2142 (1997); *see also* 7 U.S.C. § 608c(6), (7) (1994).

123. *Wileman*, 117 S. Ct. at 2134.

124. *Id.*

125. *See id.* at 2135.

126. *See id.*

127. *See Espy*, 58 F.3d at 1374.

128. *See Wileman*, 117 S. Ct. at 2135.

129. *See Espy*, 58 F.3d at 1374.

130. *See id.* at 1380.

131. *Id.* at 1377.

132. *See id.* at 1378–80.

substantial interest in “enhancing returns to peach and nectarine growers,”<sup>133</sup> the government had not shown that the advertising program “directly advances” that interest, because it had not presented evidence that the generic advertising increased consumption of fruit more than individual advertising by the growers would.<sup>134</sup> Further, the Ninth Circuit found that the program was not “narrowly tailored” to meet the government interest at stake because there were other alternatives that would have been less burdensome, such as giving growers a credit for engaging in advertising on their own.<sup>135</sup>

The Ninth Circuit's holding was inconsistent with a Third Circuit Court of Appeals decision finding that a similar advertising program involving beef did not violate the First Amendment.<sup>136</sup> Thus, the Supreme Court granted certiorari in *Wileman Bros.* to resolve a split in the circuits.<sup>137</sup>

### B. The Majority Opinion

The majority<sup>138</sup> in *Wileman Bros.* stated that the issue was “whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.”<sup>139</sup> The Court stated that there were three characteristics of the advertising

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133. *Id.* at 1378.

134. *See id.* at 1378–79.

135. *See id.* at 1380. The Ninth Circuit also noted that in none of the 33 other states in which peaches are grown or the 28 other states in which nectarines are grown, were growers required to pay for generic advertising. *See id.*

136. *See Wileman*, 117 S. Ct. at 2137. The conflict began with *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), in which the court found that a statute requiring beef producers to pay for generic advertising did not violate the First Amendment. *See id.* at 1136–37; *see also Wileman*, 117 S. Ct. at 2137.

137. *See Wileman Bros. & Elliot, Inc. v. Espy*, 58 F.3d 1367, 1367 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1875 (1996).

138. Here, the Court divided differently than in *44 Liquormart*. *See Wileman*, 117 S. Ct. at 2133–34. The majority opinion in *Wileman* was written by Justice Stevens and joined by Justices O'Connor, Breyer, Kennedy, and Ginsburg. *See id.* at 2133. Chief Justice Rehnquist and Justices Souter, Scalia, and Thomas dissented. *See id.* at 2133–34. In *44 Liquormart*, the section of Justice Steven's opinion that discussed *Central Hudson* had been joined by Justices Kennedy, Souter, and Ginsburg. *See* 116 S. Ct. at 1499. Justices O'Connor, Souter, Breyer and Chief Justice Rehnquist voted together. *See id.* at 1500.

139. *Wileman*, 117 S. Ct. at 2138.

program that distinguished it from other laws and regulations found to violate the First Amendment:

First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.<sup>140</sup>

Justice Stevens stated that because of these differences, “none of our First Amendment jurisprudence provides any support for” subjecting the requirement to heightened scrutiny.<sup>141</sup>

The Court then considered, and then dismissed, each of Wileman's First Amendment arguments.<sup>142</sup> First, Justice Stevens stated that the amount of money available to the growers for their own advertising did not constitute a “restriction on speech” any more than any other economic regulation would.<sup>143</sup>

Second, the Court indicated, the requirement that the growers fund advertising was not compelled speech.<sup>144</sup> The regulations at issue in *Wileman* did not force the growers “to repeat an objectionable message out of their own mouths, . . . require them to use their own property to convey an antagonistic ideological message, . . . force them to respond to a hostile message when they would prefer to remain silent, . . . or require them to be publicly identified or associated with another's message.”<sup>145</sup>

Third, the Court distinguished the facts of *Wileman Bros.* from those of *Abood*.<sup>146</sup> Justice Stevens stated that *Abood* “recognized a

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140. *Id.*

141. *Id.*

142. *See id.* at 2138–42.

143. *Id.* at 2138–39. The Court pointed out that regulations such as “employee benefits [or] inspection fees” also limit the amount of money available for advertising, but this does not violate the First Amendment:

The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget. The fact that an economic regulation may indirectly lead to a reduction in a handler's advertising budget does not itself amount to a restriction of speech.

*Id.* at 2139.

144. *See id.* at 2139.

145. *Wileman*, 117 S. Ct. at 2139 (citations omitted).

146. *See id.* at 2139–41.

First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's freedom of belief."<sup>147</sup> In contrast, the fruit growers advertising fees would not create a "crisis of conscience" in those forced to make them.<sup>148</sup> Even if the growers did not like the advertisements or thought that they were ineffective, this dislike was not "political or ideological disagreement with the content of the message."<sup>149</sup> Justice Stevens stated that the mandatory funding cases have found that funding requirements for speech "germane" to the group's goals and purposes do not violate the First Amendment.<sup>150</sup> In *Wileman Bros.*, the advertising that the assessments are used to fund is "germane to the purposes of the marketing orders," thus it is not ideological.<sup>151</sup>

For these reasons, the Court found, that the Ninth Circuit erred in applying the *Central Hudson* test.<sup>152</sup> The Court found the application of the test "inconsistent with the very nature and purpose of the collective action program at issue here."<sup>153</sup> The nature of the plan was to "displac[e] unrestrained competition with government supervised cooperative marketing programs."<sup>154</sup> Individual advertising might promote the sale of a particular grower's fruit, but not the overall sales of that type of fruit.<sup>155</sup> Justice Stevens stated that generic advertising was a policy that had been endorsed by the majority of the growers.<sup>156</sup> And, the fact that some growers did not join in

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147. *Id.* at 2139 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977)).

148. *Id.* at 2139–40. The Court stated:

None of the advertising . . . promotes any particular message other than encouraging consumers to buy California tree fruit. Neither the fact that respondents may prefer to foster that message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message.

*Id.*

149. *Id.* at 2140.

150. *See id.*

151. *Wileman*, 117 S. Ct. at 2140. The purpose the Agricultural Marketing Agreement Act sets forth for the marketing orders authorized by that Act is "to establish and maintain . . . orderly marketing conditions for agricultural commodities in interstate commerce." *Espy*, 58 F.3d at 1372 (citing 7 U.S.C. § 602(1)).

152. *See Wileman*, 117 S. Ct. at 2141.

153. *Id.*

154. *Id.*

155. *See id.*

156. *See id.* at 2141–42.

that consensus was not reason to override the majority by invoking the First Amendment.<sup>157</sup> Thus, the Court reversed the Ninth Circuit.<sup>158</sup> The Court held the advertising program was not a First Amendment issue for the courts to resolve, but an issue of economic policy to be decided by “producers and administrators.”<sup>159</sup>

### C. Justice Souter's Dissent

Justice Souter, joined in whole or in part by three other Justices,<sup>160</sup> disagreed not only with the proposition that the regulation in question did not involve speech, but also with the idea that the First Amendment was relevant to mandatory funding only if the subsidized speech “is ideological or political or contains a message with which the objecting person disagrees.”<sup>161</sup> Justice Souter stated:

The legitimacy of governmental regulation does not validate coerced subsidies for speech that the government cannot show to be reasonably necessary to implement the regulation, and the very reasons for recognizing that commercial speech falls within the scope of First Amendment protection likewise justifies the protection of those who object to subsidizing it against their will.<sup>162</sup>

For that reason, the dissenting Justices argued that mandatory funding of commercial speech should be treated no differently than mandatory funding of other types of speech.<sup>163</sup>

In Part I of the opinion, joined by all of the dissenters, Justice Souter stated that before *Abood* could be applied, with a few exceptions such as obscenity, all speech receives some First Amendment protection.<sup>164</sup> Also, “protected speech may not be made the subject of coercion to speak or coercion to subsidize speech.”<sup>165</sup> The fact that speech is motivated by economic interests does not remove it from

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157. *See id.* at 2142.

158. *See Wileman*, 117 S. Ct. at 2142.

159. *Id.*

160. Justice Souter's dissent was joined by Chief Justice Rehnquist and Justice Scalia, and by Justice Thomas except as to Part II applying *Central Hudson*. *See id.* at 2142 (Souter, J., dissenting).

161. *Id.*

162. *Id.*

163. *See id.*

164. *See Wileman*, 117 S. Ct. at 2143 (Souter, J., dissenting).

165. *Id.*

the protection of the First Amendment.<sup>166</sup> Both consumers and advertisers have legitimate interests in commercial speech that give that speech “social importance.”<sup>167</sup> Because commercial speech is protected by the First Amendment, compelling commercial speech is suspect, and subject to constitutional scrutiny,<sup>168</sup> implying that one may not be forced to pay to support the speech of others.<sup>169</sup>

The majority, the dissent stated, misread *Abood* in this regard.<sup>170</sup> The holding in *Abood* was a specific application of the principle that the “government retains its full power to regulate commercial transactions directly, despite elements of speech and association inherent in such transactions.”<sup>171</sup> However, subsequent cases made clear that mandatory funding did not avoid First Amendment scrutiny solely because the speech was “germane” to an “otherwise legitimate regulatory scheme; it must also be justified by vital policy interests of the government and not add significantly to the burdening of free speech inherent in achieving those interests.”<sup>172</sup> Justice Souter pointed out that fruit growers and the production of fruit could be regulated adequately without requiring the growers to pay for advertising.<sup>173</sup>

The dissenters disagreed as well with the majority's interpretation of *Abood* as meaning that mandatory funding of speech that is

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166. *See id.* (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

167. *Id.* Consumers have an interest in “receiving information” and advertisers' interests include promoting their products and providing information about them. *See id.* (citing *Virginia State Bd. of Pharmacy*, 425 U.S. at 748)).

168. *See id.* at 2144.

169. *See id.*

170. *See Wileman*, 117 S. Ct. at 2145 (Souter, J., dissenting); *see also supra* notes 146–51 and accompanying text.

171. *Wileman*, 117 S. Ct. at 2146 (Souter, J., dissenting).

172. *Id.* (citing *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991)); *accord Ellis v. Railway Clerks*, 466 U.S. 435, 456 (1984)).

173. *See Wileman*, 117 S. Ct. at 2146 (Souter, J., dissenting). Justice Souter drew a parallel between *Abood* and *Wileman*:

The advertising campaigns here suffer from the same defect as the public relations effort to stimulate demand for the teachers' product: a local union can negotiate a particular contract for the benefit of a shop's whole labor force without globally espousing the virtues of teachers, and . . . produce markets can be directly regulated in the interest of stability and growth without espousing the virtues of fruit . . . . In each instance, the challenged burden on the dissenters' First Amendment rights is substantially greater than anything inherent in regulation of the commercial transactions.

*Id.*

not “political or ideological” does not violate the First Amendment.<sup>174</sup> While earlier cases involving compelled speech considered only political and ideological speech, “nothing in those cases suggests that government has free rein to compel funding of nonpolitical speech.”<sup>175</sup>

The dissenters objected to the majority's finding that there was no reason to believe the respondents disagreed with the speech in the commercials, but stated further that it did not matter whether the fruit producers disagreed with the content of the commercials.<sup>176</sup> The mandatory funding cases did not require disagreement with the message as a basis for the prohibition on compulsory funding of it.<sup>177</sup> “One need not disagree with an abstractionist when buying a canvas from a representational painter; one merely wishes to support a different act of expression.”<sup>178</sup>

Part II of the Souter dissent, in which Justice Thomas did not join, applied the *Central Hudson* test to the advertising program.<sup>179</sup> It found that the government failed to meet any of the three prongs of that test.<sup>180</sup> While the purposes of the agricultural marketing programs “at a general level . . . are substantial government interests,” the narrow and arbitrary nature of the particular advertising program in question and the fact that it “is so random and so randomly implemented” led the dissenters to question “the reality of any public or governmental interest.”<sup>181</sup> The fact that there was no evidence that the generic advertising was any more effective than individual advertising, prevented a finding that the program “directly advance[d]” the interest in question.<sup>182</sup> Finally, the program was not “narrowly tailored,” because it did nothing to provide credit to growers for their independent advertising.<sup>183</sup>

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174. *See id.* at 2147.

175. *Id.*

176. *See id.* at 2148.

177. *See id.*

178. *Id.*

179. *See Wileman*, 117 S. Ct. at 2149–55 (Souter, J., dissenting).

180. *See id.* at 2149; *see also supra* notes 39–45 and accompanying text for further discussion of the three-prong test.

181. *Wileman*, 117 S. Ct. at 2150 (Souter, J., dissenting).

182. *See id.* at 2153–54. The dissent recognized that there is a presumption that advertising increases demand for a product, but pointed out that the appropriate comparison in this instance was not “something with nothing,” but of the effectiveness of generic advertising with the voluntary advertising of the growers. *Id.* at 2153.

183. *See id.* at 2154–55.

## D. Justice Thomas' Dissent

Part I of Justice Thomas's dissent<sup>184</sup> stated that he disagreed with the application of the *Central Hudson* test and “the discounted weight given to commercial speech generally.”<sup>185</sup> Justice Thomas would apply the same level of scrutiny to “all speech, whether commercial or not.”<sup>186</sup> He stated, however, that because the regulation in question would not pass even the more lenient standard of *Central Hudson*, it would certainly not pass strict scrutiny.<sup>187</sup>

Part II of Justice Thomas's dissent, joined by Justice Scalia, disagreed with the majority's finding that there was no speech issue in this case.<sup>188</sup> This dissent stated that the Court previously recognized that “paying money for the purposes of advertising involves speech,”<sup>189</sup> and that “compelling speech raises a First Amendment issue just as much as restricting speech.”<sup>190</sup> These dissenters stated, it makes no sense to find that the First Amendment would forbid a prohibition of the growers paying for this advertising campaign by allowing a requirement that they fund it.<sup>191</sup>

Justice Thomas concluded his dissent by stating:

What we are now left with, if we are to take the majority opinion at face value, is one of two disturbing consequences: Either (1) paying for advertising is not speech at all, while such activities as draft card burning, flag burning, armband wearing, public sleeping, and nude dancing are, or (2) compelling payment for third party communication does not implicate speech, and thus the Government would be free to force payment for a whole variety of expressive conduct it could not restrict. In either case, surely we have lost our

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184. Justice Thomas was alone in the first part of his dissent. *See id.* at 2155.

185. *Id.*

186. *Id.*

187. *See Wileman*, 117 S. Ct. at 2155 (Thomas, J., dissenting).

188. *See id.* at 2155–56.

189. *Id.* at 2156 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976)).

190. *Id.* (citing *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174 (1997); *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 8 (1986); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 74 (1980); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

191. *Id.*



way.<sup>192</sup>

#### IV. ANALYSIS: SHOULD COMMERCIAL SPEECH BE PROTECTED SPEECH UNDER THE FIRST AMENDMENT?

##### A. The Unequal Treatment of Commercial Speech in *Wileman Bros.*

The Supreme Court's decision in *Wileman Bros.* was a turn in the wrong direction. At a number of points during the past two decades, the Court treated commercial speech as somehow lesser than other forms of speech, granting it a more limited form of protection than most speech receives.<sup>193</sup> It seemed, prior to the *Wileman* decision, that the Court might be ready to abandon this differential treatment and provide commercial speech with the same, or close to the same, level of protection that most speech receives.<sup>194</sup> *Wileman Bros.* presented the Court with the opportunity to do so. Instead, in a decision reminiscent of the Court's opinion in *Valentine*, the Court refused to acknowledge that the commercial speech at issue in *Wileman* presented a First Amendment issue.<sup>195</sup>

The issue of whether the First Amendment prohibits the regulation the Court considered in *Wileman Bros.* was somewhat complicated by the fact that it was not a prohibition on speech, but a requirement that the growers fund speech. As the Court noted, "the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience."<sup>196</sup> However, the Court has made it clear that the First Amendment limits not only the power of the state to prohibit speech, but also its ability to compel it.<sup>197</sup>

The majority found this precedent inapplicable to the advertising requirement because the growers had no "political or ideological

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192. *Id.* (referring, in order, to *United States v. O'Brien*, 391 U.S. 367 (1968); *Texas v. Johnson*, 491 U.S. 397 (1989); *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981)).

193. *See supra* Part II.A.

194. *See supra* note 88 and accompanying text.

195. *See supra* note 159 and accompanying text.

196. *Wileman*, 117 U.S. at 2138.

197. *See supra* Part II.B.

disagreement with the content of the message.”<sup>198</sup> This reflects a different rule than is applied to non-commercial speech. There was nothing in *Abood*, or the mandatory funding cases that followed it, requiring disagreement with the message of the funded speech.<sup>199</sup> Further, requiring disagreement with the message in order for a funding requirement to implicate the First Amendment seems inconsistent with the clear message of the recent compelled speech cases: that the First Amendment protects the right to determine whether or not to speak at all.<sup>200</sup>

The inconsistency between the Court's treatment of the advertising program at issue in *Wileman Bros.* and the mandatory funding precedent is best seen by altering the facts of this case. Had the funding requirement involved a union rather than the fruit growers' marketing group, the Court's own precedent would require it to find differently. The union in *Lehnert* was allowed to require funding of collective bargaining, but not of public relations activities to promote the “product” the union was organized to represent: teachers.<sup>201</sup> Consistency with *Lehnert* would have required the Court in *Wileman Bros.* to allow the regulatory activities of the marketing group, such as quality controls and minimum size requirements, but not to permit mandatory funding for advertising. Just as advertisements in support of teaching as a profession are not “sufficiently related” to collective bargaining,<sup>202</sup> neither are advertisements of “California summer fruits” sufficiently related to the purpose of quality control of that product. The Court found in *Lehnert* that mandatory funding of the advertisements related to teaching “imposes a substantially greater burden on First Amendment rights” than collective bargaining does.<sup>203</sup>

What is the difference between the funding requirement in *Lehnert* and the funding requirement in *Wileman Bros.*? It is not, as the Court seemed to imply, that speech in the earlier case engendered in those required to pay for it any “crisis of conscience.”<sup>204</sup> The Court in *Lehnert* did not require disagreement with “speech in sup-

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198. *Wileman*, 117 S. Ct. at 2138.

199. *See supra* Part II.C.

200. *See supra* Part II.B.

201. *See supra* note 116 and accompanying text.

202. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991).

203. *Id.* at 529.

204. *Wileman*, 117 S. Ct. at 2139.

port of the teaching profession” as a precondition for the finding that union members could not be required to fund the speech.<sup>205</sup> Nor is the distinction found in the nature of the organization. While the product that unions are organized to represent is labor, it is a product nonetheless. Apparently, the only difference is that the speech in *Lehnert* was deemed “political,”<sup>206</sup> while the speech in *Wileman Bros.* was commercial. The implication from *Wileman Bros.* is that mandatory funding of most types of speech will be allowed only in certain very limited circumstances; however, when the funding requirement relates to commercial speech, the Court refuses to treat it as raising a First Amendment question. This is one more example of commercial speech receiving less First Amendment protection.

The *Wileman Bros.* Court did not imply that it was establishing a new standard with regard to commercial speech. However, given the existing mandatory funding precedent, the Court could have reached the conclusion that the advertising funding requirement did not present a First Amendment issue only by returning to the earlier standard of giving commercial speech no First Amendment protection. *Wileman Bros.* seems to provide commercial speech with the lowest level of protection since the Court stated in *Valentine* that “the Constitution imposes no . . . restraint on government as respects purely commercial advertising.”<sup>207</sup>

### B. The Dismal History of Commercial Speech

The Supreme Court's approach to commercial speech was flawed from its inception. Without stating that it was doing so, the Court in *Valentine* created another category of unprotected speech: commercial speech. At the time *Valentine* was decided, the Court had long recognized the First Amendment limitations placed on government restriction of speech.<sup>208</sup> Thus, although the *Valentine* Court did not set forth its reasoning, it could determine that the Constitution imposed such limits with respect to commercial speech only if it assumed that commercial speech was not speech, in the same way that obscenity and fighting words are treated as not being speech.

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205. *Lehnert*, 500 U.S. at 528–29.

206. *Id.* at 528.

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

208. *See id.*

While the Court granted greater protection to the advertisements in *New York Times* and *Bigelow*, it did so by treating the advertisements as something other than commercial speech. Although the civil rights advertisement involved in *New York Times* asked for financial support, the Court did not consider it a “commercial” advertisement.<sup>209</sup> The Court’s opinion in *Bigelow* acknowledged that the advertisement “propose[d] a commercial transaction,” by offering to perform abortions.<sup>210</sup> Nonetheless, in both cases, the Court protected the advertisements at issue without crafting a rule that applied to commercial speech in general.<sup>211</sup>

Even at the high-water mark of commercial speech protection in *Virginia State Bd. of Pharmacy*, the Court did not apply strict scrutiny to the price advertising restriction. However, the Court used the appropriate reasoning to evaluate commercial speech. The Court recognized that commercial speech, even if it does no more than propose a transaction, has value and thus deserves First Amendment protection.<sup>212</sup> While the Court did not go so far as to determine what level of protection commercial speech should receive, for the first time the Court did recognize that it is speech.<sup>213</sup>

It seems from examining the *Central Hudson* test that the test should have operated to provide a heightened level of scrutiny to commercial speech. While it did not require a “compelling interest” and “narrow tailoring,” the Court did require a “substantial interest” and “careful design.”<sup>214</sup> In particular, the Court’s discussion of the fourth prong requires that the limitation on speech “directly advance the state interest involved” and that the interest could not be as well served by a lesser restriction.<sup>215</sup> This seems to require something close to narrow tailoring, so that the *Central Hudson* test is actually close to strict scrutiny.

The cases narrowing the applicability of *Central Hudson* were a step backward, particularly the Court’s interpretation of the *Central Hudson* test in *Posadas*. There the Court restated the *Central Hud-*

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209. 376 U.S. 255, 266 (1964).

210. 421 U.S. 809, 822 (1975).

211. See *supra* notes 19–31 and accompanying text.

212. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 758 (1976).

213. See *id.*

214. *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980).

215. *Id.*

son test in such a way that it provided very little protection for commercial speech. The results in *Posadas*, *Fox*, *Went for It*, and *Edge Broadcasting* illustrated that the level of commercial speech protection was nowhere near that of other speech.

Furthermore, with the more lenient and more ambiguous *Central Hudson* test, it was very difficult to predict whether commercial speech would be protected.<sup>216</sup> The strict scrutiny test is quite protective of speech, and therefore fairly predictable in result; almost all speech, no matter how offensive, will be protected.<sup>217</sup> Following *Posadas*, however, the results that the Court reached in commercial speech cases were so unpredictable that they seemed almost random.<sup>218</sup>

With the *44 Liquormart* decision came suggestions that the confusion and unpredictability of commercial speech jurisprudence might be near resolution.<sup>219</sup> No Justice except for Justice Thomas seemed willing in the *44 Liquormart* decision to abandon entirely the differing treatment of commercial speech.<sup>220</sup> Nonetheless, it seemed from the opinions in *44 Liquormart* that a majority of the Court was willing to move toward either a stricter application of the *Central Hudson* test or an abandonment of it altogether. A number of commentators interpreted the decision as heralding a new direction in the Supreme Court's commercial speech jurisprudence.<sup>221</sup>

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216. See *supra* note 56 and accompanying text.

217. See *supra* notes 1–6 and accompanying text.

218. See *supra* note 56 and accompanying text.

219. See *supra* note 88 and accompanying text.

220. See *supra* notes 61–87 and accompanying text.

221. See, e.g., Field, *supra* note 7, at 79–80. Field states:

Whether commercial speech will be allotted full First Amendment protection is unknown. It is apparent, however, that the Court is providing commercial speech with more constitutional protection than it has received in the past . . . . The Court's dissatisfaction with *Central Hudson* has been building for years, and *44 Liquormart* finally signals the end of this test.

*Id.*; see also Mary B. Meadon, *Joe Camel and the Targeting of Minors in Tobacco Advertising: Before and After 44 Liquormart v. Rhode Island*, 31 NEW ENG. L. REV. 1011, 1057 (1997) (saying that, “it appears that the Court has significantly narrowed the scope of the *Central Hudson* test”); Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 564 (1997) (interpreting *44 Liquormart* as “a dramatic breakthrough in commercial speech theory”); Sean P. Costello, Comment, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 CASE W. RES. L. REV. 681, 748 (1997) (stating that the decision “represent[ed] a retreat from a long line of cases . . . in which the Supreme Court began chipping away at

The Court's decision in *Wileman Bros.*, however, makes it clear that this apparent move toward greater protection of commercial speech was just one more twist in the Court's convoluted treatment of commercial speech. In contrast to the steady progression toward greater protection of non-commercial speech, there does not seem to be any clear trend in the Supreme Court's commercial speech jurisprudence except confusion and inconsistency. Justice Thomas's metaphor was apt; the Supreme Court has indeed lost its way with respect to commercial speech.<sup>222</sup>

### C. The Appropriate Level of Protection of Commercial Speech

The Court's consideration of commercial speech has not recognized one of the fundamental principles of First Amendment analysis: The level of protection that speech will receive should not be based on a court or legislature's determination of that speech's value. If the Court were to apply this principle to commercial speech, it would recognize that restrictions on commercial speech should be subjected to strict scrutiny, just as restrictions on other forms of speech.

One of the most powerful statements of the philosophy behind the First Amendment was made by Justice Oliver Wendell Holmes in his dissent in *Abrams v. United States*.<sup>223</sup> Justice Holmes stated "that the best test of the truth is the power of thought to get itself accepted in the competition of the market."<sup>224</sup> That is, we as a nation do not allow the government or the courts to choose which speech to protect. Instead, we protect all speech, allowing the listeners to determine what value to assign to it. To do otherwise is to allow judges or legislators to substitute their judgment for that of the citizens they represent.

There are only a few categories of speech, such as obscenity, defamation, and "fighting words," that traditionally received no First Amendment protection.<sup>225</sup> These categories are considered to have so little value that they are, essentially, not speech.<sup>226</sup> Out

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constitutional protection for commercial speech").

222. See *Wileman*, 117 S. Ct. at 2156 (Thomas, J., dissenting).

223. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

224. *Id.*

225. See *supra* note 4 and accompanying text.

226. See *Roth v. United States*, 354 U.S. 476, 485 (1957); *Chaplinsky v. New Hamp-*

side these areas, the courts should not assign value to speech. Indeed, it is likely impossible for one person to determine how much value speech has for another person. One person will look at the photographs of Robert Mapplethorpe<sup>227</sup> and see art, while another sees only vulgarity. One listener hears the words of Rush Limbaugh<sup>228</sup> as trash, while another hears the truth. Some see *Huckleberry Finn*<sup>229</sup> or *Lolita*<sup>230</sup> as being among the great works of American literature, while others see the first as racist and the second as pornographic.

Instead of allowing censorship of controversial speech, our society allows it to take its place in the marketplace of ideas. If a person disagrees with Rush Limbaugh, that person is free to not listen to him, and to counter Limbaugh's arguments with his or her own. In that way, the listeners can determine for themselves what value they will place on speech, and to what speech they will give weight. It is neither necessary nor desirable for the state to involve itself in the determination of how much value to assign to a particular piece of speech.

The Court has used what it calls "commonsense differences" between commercial speech and other types of speech to justify the differential treatment that commercial speech receives.<sup>231</sup> Aside from the much-discussed lack of common sense of these distinctions,<sup>232</sup> the differing treatment of commercial speech is based on the Court's judgment of the value of commercial speech. The case-by-case nature of the determination of when commercial speech will be

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shire, 315 U.S. 568, 571-72 (1942).

227. See Richard Lacayo, *Keeping Cincinnati Clean: A Museum Director Is Tried on Obscenity Charges*, TIME, Oct. 8, 1990, at 50 (discussing the prosecution of a museum director on obscenity charges for displaying extremely controversial photographs taken by Robert Mapplethorpe); see also *Pictures in an Exhibition*, TIME, Oct. 15, 1990, at 47 (noting that Dennis Barrie, director of Cincinnati's Contemporary Arts Center, was cleared of obscenity charges stemming from exhibiting Robert Mapplethorpe's photographs).

228. See Steven V. Roberts, *What a Rush!*, U.S. NEWS & WORLD REP., Aug. 16, 1993, at 35 (discussing the popularity and influence of conservative talk show host Rush Limbaugh).

229. MARK TWAIN, *ADVENTURES OF HUCKLEBERRY FINN* (Charles Neider ed., Doubleday & Co. 1985).

230. VLADIMIR NABOKOV, *LOLITA* (1955).

231. See *supra* notes 35-37 and accompanying text.

232. See, e.g., Field, *supra* note 7, at 84-88; Helen McGee Konrad, *Eliminating Distinctions Between Commercial and Political Speech: Replacing Regulation with Government Counterspeech*, 47 WASH. & LEE L. REV. 1129, 1135 (1990); Whelan, *supra* note 9, at 1132-33.

protected and when it will not can only result from the Court's unstated assumption that the speech contained in certain of the advertisements is valuable and worth protecting, while the speech contained in other of the advertisements is not worth protecting. These are not appropriate judgments for the Court to make.

Unlike each of the other categories of unprotected speech, commercial speech makes a contribution to the marketplace of ideas. As Justice Souter pointed out, both consumers and advertisers have an interest in the information conveyed by commercial speech.<sup>233</sup> Further, advertisers have an interest in promoting their products and use advertising not only to convey the facts about their products, but also information about the product's image and target audience. The idea conveyed by the statement "I will sell you . . . X . . . at the Y price"<sup>234</sup> is an important one, and one that is valued by consumers. The slogan, "You've come a long way, baby,"<sup>235</sup> may not say anything about the characteristics of Virginia Slims cigarettes, but it does say quite a bit about the consumers that Virginia Slims targets.

In our consumption-driven society, many consumers would probably prefer to be exposed to advertising that tells them a product's price, or even that shows the Energizer Bunny<sup>236</sup> marching across the screen, than to speech clearly protected by the First Amendment, such as the burning of flags<sup>237</sup> or the Nazis marching through Skokie.<sup>238</sup> Of course, the preferences of those who receive the communication are not what determines whether it will receive First Amendment protection: If that were the case, a great deal of the speech that currently receives First Amendment protection would not. However, the fact that consumers often welcome the information contained in advertising indicates that there is some value to the speech. That fact alone is enough to justify commercial speech receiving full First Amendment protection.

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233. See *supra* note 167 and accompanying text.

234. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

235. *Emancipated or Manipulated?*, BOSTON GLOBE, Oct. 19, 1997, (special section), at 7 (discussing the tobacco companies' targeting of women smokers with their advertising during the late 1960s and early 1970s).

236. *Battery Production Battle Rages On*, HERALD (Rock Hill, S.C.), Mar. 22, 1998, at 6B (citing a new series of Energizer Bunny commercials as reason for a five percent increase in battery market share).

237. See *Texas v. Johnson*, 491 U.S. 397, 397 (1989).

238. See *Collin v. Smith*, 578 F.2d 1197, 1202 (7th Cir. 1978).



Furthermore, the distinction between commercial speech and “political or ideological”<sup>239</sup> speech is a false one. There is no bright line between commercial speech and political speech. Commercial speech often addresses, directly or indirectly, political, social, or ideological issues. Chevron Oil Corporation, for instance runs commercials highlighting the steps that it takes to minimize the harm that its operations do to the environment. While it may, and almost certainly does, engage in this sort of advertising to improve its image with the public, the advertisements have social and political significance. At least some part of Chevron's willingness to engage in these socially beneficial programs no doubt comes from the fact that the company knows that it will be able to benefit from advertising those programs to the public. The fact that Chevron does advertise these programs puts pressure on other oil companies to act in an environmentally responsible manner.

Perhaps even more importantly, the language of commerce and the language of politics and society are not as distinct as the Court's labels make them seem. Politicians are packaged just like any other product, determining what issues to attack and what positions to take based on telephone polls and focus groups. Advertising slogans enter the common discourse almost as soon as commercials are aired. The average person has probably heard the slogans: “Just do it,”<sup>240</sup> “Tastes great, less filling,”<sup>241</sup> “Don't hate me because I'm beautiful,”<sup>242</sup> “We're number two, so we try harder,”<sup>243</sup> and “Don't leave home without it,”<sup>244</sup> repeated more often in conversation than on the commercials in which they originated. This intermingling of the

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239. *Wileman*, 117 S. Ct. at 2138.

240. Tom Vanderbilt, *There's Less Oomph in the Swoosh*, WASH. POST, Mar. 29, 1998, at C2 (referencing Nike's switch from the “Just Do It” slogan to “I Can”).

241. James E. Causey, *Over a Barrel Brewers Forgot About Making Beer*, MILWAUKEE J. SENTINEL, Aug. 25, 1997, Monday Business, at 5 (citing the Miller Lite slogan as the catalyst for the advertising boom in the beer industry).

242. Jeff Harrington, *P & G Mastering Art of 'Globalization' Taking Crest into China Typifies How Proctor Will Give Global Sales a Local Feel*, CINCINNATI ENQUIRER, Apr. 13, 1997, at I1 (discussing how the popular Pantene commercials of the 1980s, starring actress Kelly LeBrock, were accepted by the Thai market, but bombed in Japan).

243. James Bernstein, *Avis Staying at No. 2 and They're Happy About It*, NEWSDAY, Jan. 13, 1997, at C3 (stating Avis's slogan may be jeopardized given Alamo Rent-a-Car's acquisition of National Rental System Inc.).

244. Kirsten Haukebo, *Thoroughbred Industry Plans Campaign to Boost Popularity*, COURIER-JOURNAL (Louisville, Ky.), Jan. 24, 1998, at 1E (referring to this American Express slogan as a “classic tag line[]”).

language of commerce and the language of politics was perhaps no better illustrated than a presidential candidate's use of Wendy's slogan, "Where's the beef?"<sup>245</sup> to question his opponent's policies.

In sum, the Court should extend the protection given to the "marketplace of ideas" and the marketplace itself. The Court should eliminate the *Central Hudson* test and any form of reduced protection of commercial speech. Commercial speech, like all other forms of speech, should receive the highest level of protection, strict scrutiny.

### V. CONCLUSION

The *Wileman Bros.* majority's refusal to protect commercial speech in circumstances when it protects other types of speech, took the Supreme Court's commercial speech jurisprudence for another confusing and unjustified turn. Justice Thomas was correct in pointing out the inconsistency between protecting "draft card burning, flag burning, armband wearing, . . . and nude dancing"<sup>246</sup> and finding commercial speech beneath First Amendment protection. The Court should instead have taken the opportunity to continue in the direction of *44 Liquormart*. The better approach is to afford commercial speech the same protection that all other speech receives. To do otherwise requires courts to assign a value to speech. This is contrary to the very purpose of the First Amendment. We protect all speech to avoid giving courts or legislators the power to find some speech more valuable than other speech, or to determine that some speech is more worthy of protection than other speech. The twists and turns that the Supreme Court's treatment of commercial speech has taken, and particularly its failure in *Wileman Bros.* to grant commercial speech First Amendment protection, indicate that the Supreme Court has indeed lost its way.

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245. James Morrison, *Where's the Beef? . . .*, WASH. TIMES, Aug. 26, 1997, at A10 (discussing how the phrase, originally used in Wendy's hamburger commercials, became a catch phrase in American political circles).

246. *Wileman*, 117 S. Ct. at 2156.