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Volume 41

Number 1 *Symposium—Commercial Speech:  
Past, Present & Future - A Tribute to Steven  
Shiffrin*

Article 12

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9-1-2007

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### Recommended Citation

Rebecca Tushnet, *It Depends on What the Meaning of False Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 Loy. L.A. L. Rev. 227 (2007).

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## IT DEPENDS ON WHAT THE MEANING OF “FALSE” IS: FALSITY AND MISLEADINGNESS IN COMMERCIAL SPEECH DOCTRINE

*Rebecca Tushnet\**

*[T]he line between true and false speech is not bright. . . . Misleading speech is a half-breed, true in form and even in effect for many, but false in the impressions it creates for others. All language misleads some people to some extent. How many are too many and how much is too much are questions of policy and degree. The distinction between the true and the misleading is normative.<sup>1</sup>*

The Supreme Court’s commercial speech doctrine<sup>2</sup> is much debated, largely with a focus on the level of protection the doctrine allows for truthful, nonmisleading commercial speech. Some, including some on the Supreme Court, attack the distinction between commercial and noncommercial speech as theoretically unjustified and practically unmanageable.<sup>3</sup> Less often targeted by academic commentary is that the governing law excludes false or misleading commercial speech from any First Amendment protection whatsoever.<sup>4</sup> This relative lack of attention has obscured the practical difficulties that abolishing the commercial speech doctrine would pose.

This Article therefore attempts to contest the assumption in many discussions of commercial speech doctrine that, at the granular

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1. Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1218–19 (1983).

2. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring).

3. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part).

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

level, judgments about whether a particular advertisement is false are relatively easy to make. I do so by setting forth some examples of fact patterns in trademark and false advertising cases that make clear that falsity, misleadingness, and meaning itself are often debatable. Relatedly, substance and speech are intertwined. Regulation of commercial speech based on its capacity to mislead inevitably has market-shaping effects, and speech regulations implement substantive economic policies. Free speech libertarianism turns out to condemn certain types of economic regulation.

The murky boundary between true and false has significant consequences for commercial speech doctrine. Theorists who believe that commercial speech should be given full First Amendment protection often claim, either explicitly or implicitly, that we need not fear the consequences of such protection for ordinary consumer transactions.<sup>5</sup> A cause of action for fraud, they suggest, is not offensive to the First Amendment, and so the worst abuses of consumers' trust can still be redressed.<sup>6</sup> But the heightened scienter requirement for fraud—as compared to the generally strict liability that exists in trademark and consumer protection law—combined with the inherent flexibility of language means that the promise of continued protection is largely illusory. We cannot have much consumer protection law in a world that treats commercial speech like political speech. Consider, by way of comparison, how

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5. See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 651 (1990).

6. See *id.* (“[E]ven the most ardent libertarians agree that it is a legitimate role of government to prevent citizens from cheating one another. . . . [I]t should not be difficult to tailor a fraud statute narrowly to suppress no more speech than is necessary. Extending full protection to commercial speech, despite dire predictions from some quarters, will not give free rein to unscrupulous salesmen.”); see also John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 128–29 (1996) (arguing for regulation limited to bans against force or fraud, though also contending that counterspeech will be more effective than government bans on fraud); Daniel E. Troy, *Advertising: Not “Low Value” Speech*, 16 YALE J. ON REG. 85, 107–08, 142–44 (1999) (arguing that the division between regulable and unregulable speech should be falsity and truth, not commerciality and noncommerciality); Scott Wellikoff, *Mixed Speech: Inequities that Result from an Ambiguous Doctrine*, 19 ST. JOHN’S J. LEGAL COMMENT. 159, 192–93 (2004) (“Attaching full First Amendment protection to commercial speech does not prevent the government from punishing a commercial speaker for relaying false and misleading information. Fraud of this type is covered by a wide variety of rules and regulations that do not implicate First Amendment issues. . . . Creating a fraud statute is thus possible and should be considered as an alternative to distinguishing commercial and noncommercial speech.”).

much of a constraint libel law imposes on what politicians say about each other.

We must choose between the difficult line-drawing problems that the commercial speech doctrine creates and the consumer protection objectives served by modern commercial speech regulation.<sup>7</sup> Some will conclude that the law should treat drug advertisements just like electioneering, but at least the costs of doing so will be clear. My own view is that, though excluding false and misleading commercial speech from constitutional protection has significant costs when legislatures, agencies, or juries make mistakes about what is false, those costs are similar to the harms of other mistaken economic policies. We are better off overall in a system that regulates false and misleading commercial speech without heightened First Amendment scrutiny.

#### I. THE POWER TO DEFINE AND THE POWER TO DECEIVE

Sellers' speech affects buyers' decisions. False speech thus can cause harm. But how do we know when a claim is false or misleading? Underlying advertising regulation, or any inquiry into falsity, is a struggle over meaning. This section considers the relationship between definition and deception, which is often at the core of false advertising cases. I begin with two relevant examples of controversial attempts to define terms. First, Bill Clinton's notorious claim that "[i]t depends on what the meaning of the word 'is' is."<sup>8</sup> This statement seems inherently funny and evasive, not

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7. We could, of course, do something in between these two options: we could raise the standard required before commercial speech could be regulated but not give it full political speech-like protection. However, this approach would deprive us of many of the benefits of consumer protection law and leave us with similar line-drawing problems.

8. *Transcript of Videotaped Testimony of William Jefferson Clinton Before the Grand Jury Empanelled for Independent Counsel Kenneth Starr* (Aug. 17, 1998), <http://jurist.law.pitt.edu/transcr.htm>. Clinton gave this response to the question: "Whether or not Mr. Bennett knew of your relationship with Ms. Lewinsky, the statement that there was 'no sex of any kind in any manner, shape or form, with President Clinton,' was an utterly false statement. Is that correct?" *Id.* In the context of a deposition, a legal proceeding in which deponents are generally allowed to evade unless pinned down precisely, and in which the standard at issue is that governing perjury, Clinton's parsing may have made more sense. But in the court of public opinion, he came off badly. See, e.g., Timothy Noah, *Bill Clinton and the Meaning of "Is,"* SLATE, Sept. 13, 1998, <http://www.slate.com/id/1000162/> ("Years from now, when we look back on Bill Clinton's presidency, its defining moment may well be Clinton's rationalization to the grand jury about why he wasn't lying . . ."); *Notebook: Tom's War*, NEW REPUBLIC, Apr. 21, 2003, at 8 ("Bill Clinton's contention that 'it depends on what the meaning of the word "is' is' captured forever his evasiveness and moral relativism . . .").

least because he is using “is” the second time as if we all know what it means. Clinton was playing tricks with language, trying to justify an earlier lie by injecting some ambiguity into it. Clinton’s fancy footwork is an example of deceptiveness, if not outright falsity. It is an example of using definitions to obfuscate and deceive.

The second example is more complicated. It is a well-known quotation from *Through the Looking Glass*, featuring Humpty Dumpty and Alice:

“There’s glory for you!”

“I don’t know what you mean by ‘glory,’” Alice said.

Humpty Dumpty smiled contemptuously. “Of course you don’t—till I tell you. I meant ‘there’s a nice knock-down argument for you!’”

“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.

“When *I* use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”<sup>9</sup>

The key parts of this dialogue fit well with modern concepts of the power of language to produce substantive outcomes by shaping our understanding of the issues.<sup>10</sup> These lines are quoted hundreds of times in law review articles,<sup>11</sup> usually as a disparaging reference to some strained or counterintuitive interpretation of a term.

But Humpty is not engaged in an inherently illegitimate enterprise: it’s the combination of his undisclosed private meaning

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9. LEWIS CARROLL, *THE ANNOTATED ALICE: ALICE’S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS* 268–69 (Carkson N. Potter, Inc. 1960) (1872).

10. George Orwell’s *Politics and the English Language* is a foundational text here. See 4 GEORGE ORWELL, *Politics and the English Language*, in *THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL: IN FRONT OF YOUR NOSE, 1945–1950*, at 127 (Sonia Orwell & Ian Angus eds., 1968). See generally GEORGE LAKOFF, *DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE* (Chelsea Green Publ’g Co. 2004); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (2d ed. 2003).

11. A search for “just what I choose it to mean” in Westlaw’s JLR database on October 6, 2007, produced 343 results.

and Alice's pre-existing expectation that makes his use of "glory" infelicitous. Humpty's use of "glory" is not even misleading, because it obviously doesn't mislead Alice, but is simply a poor method of communication.<sup>12</sup> In other circumstances, it's perfectly reasonable to define a word for your purposes. Alice's interaction with Humpty, indeed, continues beyond this oft-quoted exchange: because he knows so much about words, she asks him to explain *Jabberwocky*, which is full of new words, and Humpty provides the now-standard definitions of Lewis Carroll's various coinages.<sup>13</sup> Not only does Alice think that Humpty can be a reliable source of meaning, we do too.

While Humpty's "there's glory for you!"<sup>14</sup> is a misstatement, "there's a TiVo for you!" or "there's a GPS receiver for you!" can be intelligible and even helpful. "Which is to be master" is an important question that must be answered, not dismissed. In regulations of commercial speech, the question is under what circumstances we will allow individual commercial speakers to define terms or use them without defining them, as we allow people to define and use terms like "Democrat" or "family values."

## II. DEFINITION OF TERMS IN ADVERTISING LAW

Some of the examples that follow came up in other presentations at the conference that produced this Symposium. Often, discussions at a high level of abstraction set aside problems of determining falsity in individual cases, presuming that some factfinder can determine deceptiveness with relative ease. In practice, however, many cases will not be that easy to resolve, even though we may want the government to step in and regulate.

### A. Individual Cases

Consumer and competitor lawsuits for false advertising are perhaps easiest to fit into the fraud model advocated by those who favor maximum protection for commercial speech. It should be

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12. Cf. *Royal Appliance Mfg. Co. v. Hoover Co.*, 845 F. Supp. 469, 480–83 (N.D. Ohio 1994) (finding a vacuum cleaner manufacturer's idiosyncratic "formula," concocted to measure the cleaning power of its vacuum cleaners, was likely to confuse consumers, but not necessarily to mislead them, because the information wasn't useful).

13. CARROLL, *supra* note 9, at 270–75.

14. *Id.* at 268.

noted, however, that doctrinal innovations have decreased a false advertising plaintiff's burden as compared to the plaintiff's burden in a common law action for fraud. These innovations range from relaxing reliance standards to imposing strict liability for untrue statements that cause harm. In the interests of brevity, I will not here focus on those aspects of consumer protection and unfair competition law, but they interact with the inherent difficulties of determining falsity. If they were abandoned in order to bring advertising law closer to core First Amendment fields like libel, that change would magnify the problems of determining the truth or falsity of the routine advertising statements at issue in these cases.

This section identifies a number of terms that have generated private lawsuits or controversies focusing on a particular seller. Contested terms regularly have at least two plausible meanings: one which makes an advertisement deceptive and another which renders it truthful. Deciding which meaning to accept as legally binding can be a difficult enterprise.

From trademark law comes the example of "Glass Wax," for a car polish that contains no wax.<sup>15</sup> What does it mean to wax your car? Can you wax your car without using wax, or is "Glass Wax" a deceptive name undeserving of trademark protection? Ultimately, trademark's answer is that the mark is valid,<sup>16</sup> but that's not obvious. The world of high-end wine brings different naming questions: grapes from a vineyard are used to make wine under a separate name; the vineyard becomes famous; is it truthful to re-label the wine with the vineyard's name?<sup>17</sup>

Many trademark doctrines are designed to select between competing meanings and fix one as legally truthful. The doctrine of descriptive fair use, for example, deals with terms that have both trademark and non-trademark meaning, such as SweetTarts candies.

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15. *Gold Seal Co. v. Weeks*, 129 F. Supp. 928 (D.D.C. 1955). *But see Hot Wax, Inc. v. S/S Car Care*, No. 97 C 6879, 1999 WL 966094, at \*5 (N.D. Ill. Oct. 14, 1999) (upholding a jury finding of explicit falsity when supposed "wax" product instead contained mineral seal oil).

16. *See Gold Seal*, 129 F. Supp. at 933-34 (finding that the mark "Glass Wax" was not deceptive).

17. *See Mike Steinberger, Excuse Me, Waiter, There's Fake Wine in My Glass*, SLATE, Sept. 12 2007, <http://www.slate.com/id/2173361/pagnum/2/> ("Sixty years ago, many now-venerable wineries such as Lafleur, Petrus, and Cheval Blanc sold much of their production in bulk to merchants and private clients who bottled the stuff themselves. . . . [One expert] suggests that some wineries are embarrassed by the fact that economic circumstances once obliged them to sell in bulk and are thus eager to disavow older wines that they didn't bottle themselves.").

Use of such a term on another product, such as a “sweet-tart” cranberry drink, can be literally true, yet also possibly confusing if consumers believe that the trademark owner endorses the second product.<sup>18</sup> In other cases, trademarks may be used in ways that are literally true but may falsely imply endorsement or sponsorship, such as a car ad that compares its repeated success in independent evaluations with a basketball player’s repeated success on the court.<sup>19</sup>

We could separate denotation and connotation; arguably, connotation is more problematic because it opens up many more possible meanings, such as the implicit claims of endorsement commonly alleged in trademark cases. Yet even denotation produces legal battles, because the conceptual line between denotation and connotation is less important to deception than actual consumer understanding.

For example, false advertising cases can pit technical versus lay definitions. “Catastrophic failure” can technically mean sudden failure,<sup>20</sup> but medical professionals think of it as involving serious equipment damage or patient injury.<sup>21</sup> When a medical equipment producer advertised that its competitor’s product suffered “catastrophic failure,” relying on the technical meaning, a court found this deceptive.<sup>22</sup> Another case required a court to evaluate the nature of “cashmere.”<sup>23</sup> If cashmere is “recycled”—the fibers torn apart and reprocessed, creating a cheaper product missing some of the characteristics of unrecycled cashmere—can it still be labeled “cashmere?” The answer depends on what the meaning of “cashmere” is, and the law—along with consumer expectations engendered by the law—establishes that meaning.<sup>24</sup>

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18. See *Sunmark, Inc. v. Ocean Spray Cranberries, Inc.*, 64 F.3d 1055, 1061 (7th Cir. 1995) (finding no actionable confusion).

19. See *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996) (finding material issues of fact on false endorsement claim).

20. *Energy Four, Inc. v. Dornier Med. Sys., Inc.*, 765 F. Supp. 724, 729 (N.D. Ga. 1991) (noting that technical dictionary definitions include “a sudden failure without warning, as opposed to degradation failure”).

21. *Id.*

22. *Id.* at 729–30, 733.

23. *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 315–16 (1st Cir. 2002).

24. See *id.* (finding that under a statute requiring “recycled” fabrics to be labeled as such, the unadorned word “cashmere” falsely indicated that the garments were made of virgin cashmere; but were it not for the set of expectations created by the statute, the “cashmere” label would be literally true, as the garments did contain recycled cashmere).



“Recycled,” in its more conventional sense, along with other “green” advertising claims, has generated substantial discussion and regulation.<sup>25</sup> Sometimes advertisers have idiosyncratic—even Clintonesque—definitions of terms like “recycling,” as with Lexmark’s contention that incinerating used printer cartridges constitutes “thermal recycling,” thus legitimating its ads claiming that Lexmark “recycles” cartridges.<sup>26</sup> If a substantial percentage of its customers (most courts accept 15–20 percent as a substantial percentage)<sup>27</sup> believe that “recycling” means something other than reducing plastic to ash, Lexmark is engaged in false advertising in violation of the Lanham Act.<sup>28</sup>

The Body Shop got in some hot water years back because of its interpretation of the phrase “not tested on animals.” The Body Shop touted its products with this phrase because they hadn’t been tested on animals. Some of their ingredients, however, were regarded as safe for cosmetic use because they had been tested on animals by others, and The Body Shop relied on that data.<sup>29</sup> Is the phrase “not tested on animals” true or false as applied to The Body Shop products?

Other interest groups have very different concerns, but they still face problems of definition when they try to promote their values with their consumption choices. A number of businesses advertise themselves as “Christian” or incorporate Christian symbols into their

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25. See 16 C.F.R. §§ 260.1–8 (2007); Guidance for the Use of the Terms “Recycled” and “Recyclable” and the Recycling Emblem in Environmental Marketing Claims, 56 Fed. Reg. 49,992 (Oct. 2, 1991); see also *Performance Indus., Inc. v. Koos, Inc.*, 18 U.S.P.Q.2d (BNA) 1767, 1771 (E.D. Pa. 1990) (“In today’s environmentally conscious world, [false claims regarding EPA approval] are serious misrepresentations. Consumers these days seem to favor products that are environmentally benign and to disdain those that are environmentally harsh.”). See generally E. Howard Barnett, *Green with Envy: The FTC, the EPA, the States, and the Regulation of Environmental Marketing*, 1 ENVTL. LAW. 491 (1995) (discussing the increased marketing of products using environmental claims and the varied regulations of that marketing, and arguing that only uniform regulation will be effective at furthering environmental policies).

26. See *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 487 F. Supp. 2d 861, 887 (E.D. Ky. 2007). Of course, Lexmark advertises that it “recycles” cartridges, not that it “thermally recycles” them, which suggests some doubt about whether its customers share its interpretation of the term.

27. *McNeil-PPC, Inc. v. Pfizer, Inc.*, 351 F. Supp. 2d 226, 249 (S.D.N.Y. 2005).

28. *Id.* at 889–90.

29. Judith Valente, *Body Shop Has a Few Aches and Pains*, WALL ST. J., Aug. 6, 1993, at B1.

advertising.<sup>30</sup> But as we know from political debates, not everyone agrees on the boundaries of Christianity. Some non-Mormons would exclude Latter-Day Saints from the fold, and James Dobson, the leader of Focus on the Family, stated that he didn't consider former presidential hopeful Fred Thompson a Christian, apparently because Thompson did not evangelize.<sup>31</sup> This is an instance in which current advertising law would probably refuse to find that "Christian" is a factual claim that could be falsified,<sup>32</sup> but substantial numbers of people feel competent to evaluate others' Christianity.<sup>33</sup> And courts have, despite the religious freedom issues, intervened in disputes over kosher certifications.<sup>34</sup>

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30. See, e.g., Amanda Greene, *Cross Promotion*, STAR-NEWS (Wilmington, N.C.), Aug. 26, 2006, at 1D ("[A]n increasing number of local businesses adorn[] their work trucks or newspaper advertisements with Christian symbols such as a fish or a cross to identify their religious philosophy. For many of these businesses, it's a way of saying they stand for the values in the 10 Commandments, such as honesty, integrity and loving kindness. It's also a bit of PR—attempting to change the public's sometimes tawdry view of some service workers such as plumbers or mechanics. And in the midst of the Bible-belted South, there's a niche to be captured.").

31. See Dan Gilgoff, *What Is a 'Real' Christian? And How Might This Question Affect the GOP Presidential Field?*, USA TODAY, May 21, 2007, at 15A.

32. Advertising law distinguishes fact from opinion, and, though the line can be unclear, a court would likely call "Christian" an opinion, since the dispute is generally about whether someone is a "real" or "good" Christian, and that is hard to prove false in a secular court. See, e.g., *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999) (holding that a statement of fact is a "specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact"); *Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 679 (5th Cir. 1986) ("A statement of fact is one that (1) admits of being adjudged true or false in a way that (2) admits of empirical verification.").

33. See Gilgoff, *supra* note 31 ("'Evangelicals have always had a pretty narrow understanding of who is a Christian in the proper sense of the term,' says University of Notre Dame historian Mark Noll. 'Catholics and most Lutherans and Episcopalians would say that anyone who has been baptized is a Christian, but most evangelicals would not agree. They see baptism as an initiation ceremony that may or may not indicate the presence of true faith.' That explains why it's commonplace today to hear evangelicals use the word 'Christian' to refer exclusively to fellow evangelicals, as opposed to Catholics or members of mainline Protestant churches. Indeed, when asked whether Focus on the Family considered 2004 Democratic nominee John Kerry, a Catholic, to be Christian, Focus spokesman Gary Schneeberger said he'd rather not answer.").

34. See *Levy v. Kosher Overseers Ass'n of Am.*, 104 F.3d 38, 39 (2d Cir. 1997) (dealing with accusations that one kosher certification group's mark infringed another's); *Donel Corp. v. Kosher Overseers Ass'n of Am.*, No. 92CIV8377DLCHBP, 2001 WL 1512589 (S.D.N.Y. Nov 28, 2001). On the other hand, state regulations defining "kosher" for purposes of consumer protection have been struck down as a violation of the First Amendment's protection against establishment of religion. See *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 425 (2d Cir. 2002) (invalidating New York's kosher fraud laws); *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1346 (4th Cir. 1995) (invalidating Baltimore's ordinance). I thank Eric Goldman for suggesting this point.

Sometimes definitions differ among groups, with consumers diverging from more specialized buyers.<sup>35</sup> *Kraft General Foods, Inc. v. Del Monte Corp.*,<sup>36</sup> for example, involved Kraft's challenge to Del Monte's use of the word "gelatin" to describe its carageenan-based snacks. Carageenan is a substance derived from seaweed that lacks some of the characteristics of traditional animal-based gelatin.<sup>37</sup> Industry definitions clearly preferred limiting the term "gelatin" to animal-based products.<sup>38</sup> The court enjoined the use of the term based on industry practice, despite the fact that the product was directed to ordinary consumers who, the court had explicitly found, could not be confused because they had no particular beliefs about the composition of "gelatin."<sup>39</sup> The court did find that carageenan and animal-based "gelatins" differed in taste, which might support a finding of falsity if consumers who had no expectations about the composition of gelatin nonetheless had unmet expectations about its taste.<sup>40</sup> To determine falsity, in other words, the inquiry must go beyond dictionary definitions and determine how audiences make meaning in their particular circumstances.

False advertising claims have increasingly become part of one of our most controversial public policy issues. The New Jersey Supreme Court recently decided a case about what a doctor must tell a patient before an abortion.<sup>41</sup> The plaintiff argued that, if she'd known that a fetus was a human being, she wouldn't have agreed to an abortion.<sup>42</sup> The doctor argued that requiring such a statement would force him to take a controversial moral and ethical position, and that in any event the patient must have known that a pregnancy

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35. See, e.g., *Plough, Inc. v. Johnson & Johnson Baby Prods. Co.*, 532 F. Supp. 714, 717–18 (D. Del. 1982) (where the falsity of a claim made to wholesalers and retail chains depended on the definition of "sunscreen," the court did not rely on the FDA's proposed definition, but accepted testimony about industry norms and found that the term was not false when directed at expert buyers).

36. 28 U.S.P.Q.2d (BNA) 1457 (S.D.N.Y. 1993).

37. Both gelatin and carageenan can be used to absorb water and suspend other ingredients in a firm matrix, but they differ chemically; gelatin is a protein and carageenan is a carbohydrate, with associated caloric differences; and gelatin dissolves below body temperature while carageenan dissolves above body temperature, causing taste differences. See *id.* at 1458.

38. *Id.* at 1459.

39. *Id.*

40. *Id.* at 1460.

41. See *Acuna v. Turkish (Acuna III)*, 930 A.2d 416 (N.J. 2007).

42. *Acuna v. Turkish (Acuna II)*, 894 A.2d 1208, 1210–13 (N.J. Super. Ct. App. Div. 2006), cert. granted, 902 A.2d 1234 (N.J. 2006), dismissed, 915 A.2d 1045 (N.J. 2006).

at term would produce a baby.<sup>43</sup> The court held that the disclosures the plaintiff sought addressed ethical, not factual, issues, and that therefore her doctor did not violate any duty to inform her.<sup>44</sup> Though the disclosures she sought were framed in factual terms—the embryo is a “human being,” abortion will kill a “family member”<sup>45</sup>—they were designed to suggest that women and their doctors are committing murder.<sup>46</sup> The court concluded, in essence, that the factual disclosures sought were really about affecting women’s preferences, and the common law did not require this.<sup>47</sup>

This lawsuit was not an isolated event, but rather part of an overall regulatory strategy designed to discourage abortion, in which consumer protection law is used as part of the anti-abortion toolset.<sup>48</sup> For example, South Dakota’s informed consent statute mandates that a doctor cannot perform an abortion without informing a patient that she is terminating the life of “a whole, separate, unique, living human being,” and that abortion may cause a significant risk of psychological trauma (a claim that is not representative of the medical consensus on the risks of abortion).<sup>49</sup> We don’t generally think of doctor-patient interactions as instances of commercial speech, but the problems of regulating what can be said about a service provided for money are very similar.<sup>50</sup> Though the preference-shaping effects of these particular disclosures are apparent, the inextricable link between facts and preferences recurs throughout advertising regulation.

This last example is also a useful reminder that liberal political bents are not the only source of commercial speech regulation.

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43. *Id.*

44. *Acuna III*, 930 A.2d at 427–28.

45. *Id.*

46. *Id.* at 418.

47. *Id.* at 427–28.

48. See generally Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (analyzing abortion regulations framed as patient protection measures).

49. S.D. CODIFIED LAWS § 34-23A-10.1 (2007); see Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 974–80 (arguing that such requirements violate doctors’ First Amendment rights and analogizing to commercial speech doctrine).

50. See Post, *supra* note 49, at 974–79 (analogizing doctor-patient speech to commercial speech); cf. *Planned Parenthood v. Casey*, 947 F.2d 682, 705 (3d Cir. 1991) (“This case involves commercial speech, and the clinics do not dispute this point.”), *aff’d in part, rev’d in part on other grounds*, 505 U.S. 833 (1992).

Prohibitions on false advertising can serve conservative ends, or even private interests (whether competitors' or consumers') that do not have readily identifiable political valences. Advertising claims come in infinite varieties, and so do false advertising claims.

### *B. Standard-Setting*

Where advertising implicates broader political issues, however, legislatures often step in to address it. A key issue in advertising law is whether regulation of deception can be wholesale or retail.

Restrictions on "Made in U.S.A." and similar labels offer a complex series of tradeoffs. California has a particularly restrictive law that bars labeling products as "Made in U.S.A." unless the overall product *and* the parts are substantially made in the U.S.<sup>51</sup> In a recent case, a California appeals court sustained this law against a First Amendment challenge.<sup>52</sup> The court ruled that the legislature could determine that, as a general matter, merchandise not meeting the statute's restrictive definition would be deceptively labeled if advertised as "Made in U.S.A."<sup>53</sup> Thus, though the plaintiff had to meet standing requirements showing that he'd been harmed by the misrepresentation, he could rely on the statutory definition to establish that the defendants violated the law by using "Made in U.S.A." and "All American-Made" on products using Taiwanese-made screws and parts sub-assembled in Mexico.

A dissenting judge pointed out that this interpretation of the labeling law might have counterproductive substantive effects.<sup>54</sup> If producers can't use some foreign parts—which may be unavailable or prohibitively expensive from U.S. sources—and still use the "Made in U.S.A." label to sell the product, they might as well move the entire production out of the country, where it will at least be cheaper. If, as seems likely, the law was designed both to protect consumers and to encourage U.S. manufacture, a restrictive interpretation of the law will disserve the latter goal.

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51. CAL. BUS. & PROF. CODE § 17533.7 (Deering 2007).

52. See *Benson v. Kwikset Corp.*, 62 Cal. Rptr. 3d 284 (Ct. App. 2007).

53. See *id.* at 294 (holding that the law "constitutes a legislative determination that representations suggesting merchandise was made in the United States are misleading unless the producer's manufacturing processes satisfy the strictures of the statute").

54. *Id.* at 307–08.

But, to the extent that the law is directed at consumer protection, calibrating it to promote domestic production will be extremely difficult. Producers who could use “Made in U.S.A.” if their products had 40 percent or even 10 percent U.S. content might also keep some jobs in the U.S. that would otherwise go overseas. Yet if consumers expect “Made in U.S.A.” products to be made entirely or almost entirely of U.S.-made parts, then a label that incentivizes producers to keep some jobs in the U.S. might still be deceptive. Because regulations on the advertising use of particular terms often aim both to protect consumers from deception and to encourage producers to make products with certain components, this problem is a recurrent one. If, however, legislatures choose definitions that protect consumer expectations, the fact that regulations might not be efficient is not a free speech argument against them. The First Amendment is not industrial policy.

By contrast to the California appeal court’s deference to legislative judgment, a recent Fifth Circuit case (the “Cajun case”) decided that it was not inherently misleading to label Chinese catfish “Cajun.”<sup>55</sup> The Fifth Circuit affirmed the district court’s finding that Louisiana’s Cajun Statute<sup>56</sup> was an unconstitutional regulation of commercial speech.<sup>57</sup> As a result, a seafood importer was free to use “Cajun” as a trademark for its catfish, even though they are from China, not Louisiana, and even though they are actually of a different species than the domestic fish known as catfish. Internationally, the trend is the other way—nations increasingly protect “geographical indications” or designations of origin on the theory that an essential component of many products, especially food products, is geographic origin, regardless of whether anyone can identify particular effects of origin on other qualities such as taste or ingredients.<sup>58</sup> Despite the widespread success of the proposition that fixing the meaning of

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55. *Piazza’s Seafood World, LLC v. Odom*, 448 F.3d 744, 753 (5th Cir. 2006).

56. LA. REV. STAT. ANN. § 3:4617(D) (2007) (“No person shall advertise, sell, offer or expose for sale, or distribute food or food products as ‘Cajun’, ‘Louisiana Creole’, or any derivative thereof unless the food or food product . . . [was] produced, processed, or manufactured in Louisiana . . .”).

57. *Piazza’s Seafood*, 448 F.3d at 752–53.

58. See generally Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299 (2006) (discussing the evidence that geography provides unique qualities to products, and concluding that it generally does not—certainly not in the view of the average consumer).

geographical indications protects and informs consumers, the Fifth Circuit did not give any weight to the Louisiana legislature's specific judgment about the meaning of "Cajun."

The Cajun case's refusal to accept blanket bans on terms is in tension with the "Made in U.S.A." decision, which accepted a legislative determination that "Made in U.S.A." and similar terms would invariably be misleading unless used according to the statutory definition.<sup>59</sup> Similarly, the Supreme Court, in *San Francisco Arts & Athletics Inc. v. United States Olympic Committee*,<sup>60</sup> accepted that "Congress reasonably could conclude that most commercial uses of the Olympic words and symbols are likely to be confusing,"<sup>61</sup> which justified upholding a special law giving complete control over commercial uses of the term "Olympic" to the U.S. Olympic Committee, regardless of whether confusion or other harm was shown in a particular case.<sup>62</sup>

These categorical determinations of misleadingness are far from isolated incidents. Regulation-by-definition is common, and requires lawmakers to endorse one meaning at the expense of others. Consider moral and environmental claims such as "dolphin-free tuna": one possible definition of dolphin-free tuna is tuna caught in a net that didn't happen to kill any dolphins. If the net brings up a dolphin, you throw out the whole catch. This understanding of "dolphin-free tuna" doesn't address the fundamental objection that the method of catching the tuna routinely and predictably kills a lot of dolphins. However, it remains the case that the cans of tuna don't have any dolphins in them and did not even need to have dead dolphins picked out of them.<sup>63</sup> Because of likely audience understanding, tuna caught this way is not "dolphin-free." In order to end semantic disputes, Congress passed a law defining dolphin-free tuna.<sup>64</sup>

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59. *Benson v. Kwikset Corp.*, 62 Cal. Rptr. 3d 284, 294 (Ct. App. 2007).

60. 483 U.S. 522 (1987).

61. *Id.* at 539.

62. *Id.*

63. See generally Julie Deardorff, *U.S. Loosens Definition of Dolphin-Safe Tuna; Environmentalists Will Fight Change*, CHI. TRIB., Jan. 1, 2003, at C11 (describing the Commerce Department's decision to allow tuna to carry the "dolphin-safe" label even when it was caught in nets that ensnared dolphins—provided that the dolphins were not injured or killed in the process).

64. See Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(b)(3) (2007).

There has also been substantial debate over the proper definition of “organic,” an official definition of which has now been adopted by the United States Department of Agriculture (“USDA”).<sup>65</sup> Historically, organic foods faced market difficulties because of a proliferation of standards, which led to consumer suspicion that the organic label was meaningless.<sup>66</sup> Currently, products not meeting USDA standards, but meeting some other definition of “organic,” cannot be labeled organic.<sup>67</sup> Organic products must have at least 95 percent organic content, but the remainder can be non-organic if it is on an approved list of ingredients without reasonably available organic substitutes.<sup>68</sup> That list is itself controversial, since interested parties dispute whether or not various ingredients are available in organic form.<sup>69</sup> In addition, “made with organic” is a separate standard, requiring at least 70 percent organic content.<sup>70</sup>

The overall effects of the organic regulations are hard to predict. One effect is to decrease producers’ incentives to make processed food with organic content *below* the threshold, because they can’t truthfully advertise the organic content and organic food is more expensive. At the same time, the “made with organic” rules may also encourage producers to make more products with 70 percent or

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65. Organic Production and Handling Requirements, 7 C.F.R. §§ 205.200–.299 (2007) (prescribing detailed requirements for the production and handling of food sold as “organic”); see also Chad M. Kruse, Comment, *The Not-So-Organic Dairy Regulations of the Organic Food Production Act of 1990*, 30 S. ILL. U. L.J. 501, 503–26 (2006) (describing the development of the organic dairy regulations).

66. Donald T. Hornstein, *The Road Also Taken: Lessons from Organic Agriculture for Market- and Risk-Based Regulation*, 56 DUKE L.J. 1541, 1550 (2007) (“The OFPA is a marketing-oriented statute designed to regularize what was at the time a potentially confusing Babel of competing standards with an official federal ‘organic’ label. [A] federal label [was] thought useful in promoting consumer confidence in the growing organic industry within the United States . . . .”); Elaine Marie Lipson, *One Nation, Organically Grown*, <http://www.organicvalley.coop/resources/reading-room/lipson/page-1> (last visited Oct. 6, 2007) (“[S]everal dozen different private and state organic certification bodies provided third-party organic certification . . . . While standards did tend to be similar, they were not uniform. And because not all organic foods were certified . . . it was sometimes said that organic ‘didn’t mean anything.’”).

67. Labels, Labeling, and Market Information, 7 C.F.R. § 205.300 (2007).

68. See *id.* § 205.301(b).

69. See Andrew Martin, *Nonorganic Exceptions Ruffle Enthusiasts of Organic Food*, N.Y. TIMES, June 11, 2007, at C2.

70. 7 C.F.R. § 205.301(c); see Consumers Union’s *NEW Survey Results on Consumer Perception of “Organic,”* Oct. 2005, <http://www.eco-labels.org/focus.cfm?FocusID=22> (“74% of consumers say they do not expect food labeled as ‘made with organic’ to contain artificial ingredients.”).



greater organic content, even if they cost more than a 60 percent organic product, and discourage them from adding a tiny bit of organic material to a conventional product. Consumers may well benefit from a fairly high threshold, since a 10 percent organic product may not satisfy consumer expectations for “organic.” Moreover, in the absence of a uniform definition, many people would find it too difficult to sort through varying claims and would either mistakenly discount all such claims or mistakenly accept them. In other words, the “market for lemons” problem<sup>71</sup> can be avoided in the market for organic lemons, but only if each consumer doesn’t have to parse the definition of organic.

Separately, the ability to use a small percentage of non-organic ingredients may encourage more makers of multi-ingredient, processed food to enter the organic market. However, it also risks confusing consumers who, for example, expect that their organic sausages will be made entirely from organic meat and not include inorganic casings.<sup>72</sup> Another specific example from the USDA’s proposed list of exempt ingredients<sup>73</sup> is hops. Exempting hops may make it more difficult for small producers of fully organic beer to compete against large firms that use the maximum amount of nonorganic hops, which cost half as much as organic hops,<sup>74</sup> even as it encourages the production of more “organic” beers.<sup>75</sup> Because both sets of producers can advertise “organic” beer, the regulation

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71. Cf. George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970) (positing that when product quality varies and consumers know that producers have superior quality information, good-quality products will be driven out of the market).

72. See, e.g., Organic Consumers Ass’n, *Alert: Another Sneak Attack on Organic Standards: USDA to Allow More Conventional Ingredients in Organics*, [http://www.democracyinaction.org/dia/organizationsORG/oca/campaign.jsp?campaign\\_KEY=11401](http://www.democracyinaction.org/dia/organizationsORG/oca/campaign.jsp?campaign_KEY=11401) (last visited Oct. 6, 2007) (criticizing proposed rules on casings from animal intestines); cf. *Consumers Union’s NEW Survey Results on Consumer Perception of “Organic,” supra* note 70.

73. See National Organic Program (NOP)—Proposed Amendments to the National List of Allowed and Prohibited Substances (Processing), 72 Fed. Reg. 27,252 (proposed May 15, 2007) (to be codified at 7 C.F.R. pt. 205).

74. See Organic Consumers Ass’n, *supra* note 72.

75. Similar tradeoffs abound throughout the production cycle: the more requirements imposed on the production of “organic” food, the more barriers there are to switching from conventional production methods, decreasing the supply but increasing the ideological purity of what makes it to the market. Producers who can’t use the organic label have few incentives to take half measures, for example by feeding their cows mostly on organic feed, because they can’t advertise their products as partly organic. See, e.g., Kruse, *supra* note 65, at 515 (noting that stricter organic standards create barriers to converting from conventional to organic production).

may either aid consumers or deceive them, depending on what they think organic means.

The issue of consumer response to standard-setting is worth further discussion to show just how hard the problem is. By setting a standard, the government establishes what “organic” means. If people misunderstand the term—in other words, if they continue to give a different meaning to it—there is an information problem that leads to inefficient results. If people do not understand the term but nonetheless rely on it, then a key question is whether the government has gotten the social policy producing the underlying definition right. Moreover, the correctness of the government’s definition has to be compared to the situation without regulation, in which producers could give the term multiple meanings as long as they were not intentionally fraudulent. If consumers still relied on the term without understanding it or understanding that different producers were using different definitions, the welfare effects would change, but not obviously in any particular direction. To this must be added the likelihood that consumers would discount the term “organic” if they believed it to be self-defined, moderating both the harms and benefits of varying definitions.<sup>76</sup> Only if consumers carefully research multiple meanings of unregulated terms—and only if they do this again and again, for each term that makes a difference to them—can we expect the unregulated market to beat the government systematically in shaping meaning.

Other food labeling rules have similarly complicated effects. USDA grades of meat are designed to standardize meaning, so the USDA does not allow alternative definitions of “prime,” “choice,” and the like.<sup>77</sup> There is some evidence that the grades help many consumers,<sup>78</sup> but there are other ways to evaluate beef characteristics

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76. See *supra* note 66.

77. U.S. DEP’T OF AGRIC., MEAT GRADING & CERT. BRANCH, REQUIREMENTS FOR GRADING TERMS ON MEAT PRODUCT LABELING (2006), available at <http://www.ams.usda.gov/Lsg/mgc/instructions/100docs/MGC107.htm> (“Uniform meat grade identification provides a standardized way of communicating values between buyers and sellers . . . . To identify and segregate product by attributes, only official standards . . . can be used.”).

78. See, e.g., J.M. Behrends et al., *Beef Customer Satisfaction: USDA Quality Grade and Marination Effects on Consumer Evaluations of Top Round Steaks*, 83 J. ANIMAL SCI. 662, 665 (2005) (grades generally correlated with average consumer satisfaction); cf. K.M. Killinger et al., *Consumer Sensory Acceptance and Value for Beef Steaks of Similar Tenderness, but Differing in Marbling Level and Color*, 82 J. ANIMAL SCI. 3294, 3294 (2004) (some consumers consistently prefer “lower” grades); John A. Miller et al., *USDA Beef Grading: A Failure in Consumer Information?*, 40 J. MARKETING 25, 27–29 (1976) (finding that women knew the USDA system,

and quality.<sup>79</sup> Standardizing beef grades competes with the presentation of other information and may create switching costs for consumers if producers try to differentiate their beef using other metrics.<sup>80</sup> Labeling may also indirectly shape consumer choice because retailers will only carry certain products, such as meat labeled “USDA Choice.”<sup>81</sup> Related disputes show up in the debate over whether all beef producers should be compelled to support generic beef promotion. Smaller producers often believe that not all beef is equal, and that generic promotions distort consumer perceptions about the variations in beef.<sup>82</sup>

Labels can also function as warnings, even without explicit evaluative statements. Dairy producers who use recombinant bovine growth hormone (“rBST”, also known as “rBGH”) convinced the Second Circuit to strike down a rBST labeling requirement for milk that, they argued, functioned as a scarlet letter.<sup>83</sup> Labeling may encourage otherwise uninterested consumers to think, mistakenly,

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at least when prompted with its categories, but did not necessarily use it to select higher-graded cuts of beef, perhaps because high grades did not correlate with taste preferences). *But see* T.R. Neely et al., *Beef Customer Satisfaction: Role of Cut, USDA Quality Grade, and City on In-Home Consumer Ratings*, 76 J. ANIMAL SCI. 1027, 1033 (1998) (finding that grade didn’t affect consumer satisfaction on every cut).

79. *See, e.g.*, Mark Schatzker, *Raising the Steaks*, SLATE, Nov. 1, 2006, <http://www.slate.com/id/2152674>.

80. *See* Miller, J. et al., *supra* note 78, at 29.

81. *See id.* Labeling’s effects on retail availability can be substantial, especially when the label acts as a warning. Some groceries will only carry milk produced without use of recombinant bovine growth hormone (discussed *infra* notes 83–86 and accompanying text). *See* Henry I. Miller, *Don’t Cry Over rBST Milk*, N.Y. TIMES, June 29, 2007 (referring to this as “pre-empting consumers’ ability to choose on the basis of price”). Many major retailers don’t stock music CDs with parental advisory stickers. *See* Kenneth A. Paulson, *Regulation Through Intimidation: Congressional Hearings and Political Pressure on America’s Entertainment Media*, 7 VAND. J. ENT. L. & PRAC. 61, 77 (2004). Likewise, many retailers refuse to stock M (mature) rated videogames, and almost none carry AO (adults only). *See* Allie Shah, “*San Andreas*” Gets Adult Rating, STAR TRIB. (Minneapolis), July 21, 2005, at A1; Mary Jane Irwin, *What’s So Wrong with the ESRB?*, Feb. 7, 2006, <http://www.1up.com/do/feature?cid=3147767>.

82. *See* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 556 (2005); *see also* *Cochran v. Veneman*, 359 F.3d 263, 266–67 (3d Cir. 2004) (discussing the divergence of opinion about milk between traditional and industrial dairy producers); *Mich. Pork Producers v. Campaign for Family Farms*, 229 F. Supp. 2d 772, 777 (W.D. Mich. 2002) (discussing hogs from family farms versus industrially farmed hogs).

83. *See* *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (finding “consumer curiosity” was insufficient justification to require retailers to label milk from cows given certain bovine hormones); *cf.* *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (finding statute requiring labels to disclose the presence of mercury and the environmental impact of recycling products containing mercury to “better inform consumers” did not violate the First Amendment).

that rBST involves health risks—they may reason that there would be no label if it didn't make a difference.<sup>84</sup> Thus, Monsanto, the major producer of rBST, resisted labeling and also brought false advertising claims against smaller dairies with non-treated cows who voluntarily labeled their own milk.<sup>85</sup> In addition, Monsanto recently asked the Food and Drug Administration (“FDA”) to act against other voluntary labeling.<sup>86</sup>

“Not treated with rBST” is a factual statement, but its truth or falsity is not the key question. The dispute is over whether the implications of “not treated with rBST” mislead consumers and distort their purchases.<sup>87</sup> It is for this reason that the FDA's voluntary draft guidance on food containing genetically modified organisms (“GMO”), released January 2001 and unchanged since then, not only does not mandate labeling of GMO foods, but also suggests that labeling non-GMO foods as such might be false advertising.<sup>88</sup> The FDA has determined that GMO foods generally

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84. See *infra* note 87.

85. See Douglas Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 579 (2004).

86. See Christopher Wanjek, *Crying over Labeled Milk*, LIVESCIENCE, Apr. 24, 2007, [http://www.livescience.com/health/070424\\_bad\\_labeling.html](http://www.livescience.com/health/070424_bad_labeling.html) (“Monsanto, the multinational biotechnology corporation and leading producer of genetically engineered seed with a near monopoly on many crops and annual revenue exceeding \$7 billion, is worried that you are being misled. For this reason, the company wants to ban shady dairy farmers like those rascally Amish and weirdo hippies from labeling their products free of artificial hormones. Earlier this month, Monsanto complained to the Food and Drug Administration and Federal Trade Committee about the proliferation of labels with language such as ‘Our Farmers’ Pledge: No Artificial Growth Hormones,’ as found on milk sold by Oakhurst Dairy in Portland, Maine. Monsanto says this scares consumers into thinking there’s something unhealthy about its human-made recombinant bovine growth hormone (rBGH) . . .”).

87. See Miller, *supra* note 81 (arguing that because milk from treated cows is safe and cheaper to produce and to buy, labeling distorts the market and harms the environment by inducing consumers to pay more for milk from untreated cows); see also *African-American Organization Urges FDA to Stop Deceptive Marketing of “No rBST” Milk*, PR NEWSWIRE, Dec. 14, 2006, <http://sev.prnewswire.com/health-care-hospitals/20061214/DCTH04914122006-1.html> (National Organization for African Americans in Housing argues that labeling allows exploitation of poor people who must choose between low prices and the appearance, but not the reality, of safer milk: “‘Not only does this deceptive practice impose a needless financial burden on low-income consumers, it is generating unnecessary confusion and anxiety,’ [Board Secretary Kevin] Marchman added. . . . Marchman is urging the FDA to put a halt to the ‘deceptive’ practice, saying that it ‘cheats consumers and raises unwarranted fears.’”).

88. See U.S. FOOD AND DRUG ADMIN., CTR. FOR FOOD SAFETY AND APPLIED NUTRITION, GUIDANCE FOR INDUSTRY VOLUNTARY LABELING INDICATING WHETHER FOODS HAVE OR HAVE NOT BEEN DEVELOPED USING BIOENGINEERING (2001), available at <http://www.cfsan.fda.gov/~dms/biolabgu.html>; see also Interim Guidance on the Voluntary Labeling of Milk and Milk Products from Cows That Have Not Been Treated with Recombinant Bovine

pose no special or different risks, and labeling non-GMO foods could mislead consumers to think otherwise.<sup>89</sup> Whether or not it is right, the FDA's position is typical of standard-setting in advertising: in assessing truth or falsity, it is wholesale, governing an entire category of products based on a single instance of factfinding about the safety of GMO foods. In assessing misleadingness, it is based on guesses (possibly informed) about consumer perception, including the general proposition that consumers usually think that labels communicate relevant information,<sup>90</sup> rather than on surveys assessing consumer understandings of specific terms at a particular time.<sup>91</sup>

One reason to criticize the FDA's guidance is that consumers might care about more than just food safety. Consumers with concerns over the increased industrialization of the food supply, the vulnerability of monocultures, and the environmental effects of GMO foods, among other things, might benefit from "non-GMO" labels even if GMO foods are just as safe for human consumption as non-GMO foods.<sup>92</sup> But it is important to acknowledge that even if this criticism is correct, labeling could mislead consumers, albeit differently. Establishing that some consumers wish to avoid GMO foods (or milk from rBST-treated cows) on non-safety grounds does

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Somatotropin, 59 Fed. Reg. 6279, 6280 (Feb. 10, 1994) (raising similar objections to "no rBST" labels).

89. See *Ben & Jerry's Homemade, Inc. v. Lumpkin*, No. 96 C 2748, 1996 WL 495554, at \*1 (N.D. Ill. Aug. 28, 1996) (raising this argument); cf. *Johnson & Johnson \* Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham Corp.*, 960 F.2d 294 (2d Cir. 1992) (rejecting a false advertising claim based on ads that touted Tums as "aluminum-free" in contrast to other antacids, but made no express representations that there was anything wrong with aluminum content).

90. See H.P. Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS 45 (P. Cole & J. Morgan eds., 1975). Grice proposed that we generally interpret conversations as cooperative endeavors, so that statements are by default relevant and truthful. Advertising law often assesses truth and misleadingness in Gricean terms, so that if an ad makes an explicit claim, consumers are entitled to infer that it is relevant to whether or not they should buy the advertised product. See Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565, 601-03 (2006).

91. This is not to say that individual word-specific surveys are more reliable. Not only are surveys highly manipulable, leading Judge Posner to describe them as products of the "black arts," *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. P'ship*, 34 F.3d 410, 416 (7th Cir. 1994), they are no better (and possibly worse) than regulations at responding to change in meaning over time.

92. See Dan L. Burk, *The Milk Free Zone: Federal and Local Interests in Regulating Recombinant bST*, 22 COLUM. J. ENVTL. LAW 227 (1997); Kysar, *supra* note 85; cf. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 75-78 (2d Cir. 1996) (Leval, J., dissenting) (arguing that similar concerns about milk from cows treated with rBST justified Vermont's labeling requirement).

nothing to refute either of the FDA's major premises: such foods are safe, and labeling will mislead some significant number of consumers about safety. If those consumers care about safety but not about industrialization, monocultures, and so on, then labeling hurts them while helping the consumers who do care about those things.<sup>93</sup> And I have even set aside the issue of preference formation, as free-speech libertarians would urge: the tradeoffs here come from mistakes of fact, not of value, though of course labels also serve as statements about what consumers ought to value.

Another example of label regulation with obvious costs comes from the FDA's refusal to distinguish between natural and artificially created trans fats. Because butter contains some natural trans fat, products made with butter have to bear a "trans fat" label, even though the research that led to warnings about trans fats seems to apply only to artificially created trans fats.<sup>94</sup> In order to avoid negative consumer reactions, some producers have switched from butter to margarine or other less healthy oils that do not require the "trans fat" label.<sup>95</sup> Of course, most consumers may be unable or unwilling in practice to distinguish between natural and artificial trans fats, even if the FDA were to allow the extra labeling. A more nuanced regulatory regime, while appealing logically, may be no better in an information-overloaded marketplace. Information processing abilities are distinct from preferences and create other fault lines between consumers.

Food is a rich source of examples of definitional problems, but there are many others. I will close this section by mentioning a few. To the FDA, a drug is safe and effective for a particular use, and can be labeled as such, if that is shown by two "'adequate and well-controlled' studies."<sup>96</sup> One study won't do, nor will anecdotal evidence.<sup>97</sup> Though individual doctors can prescribe and even proselytize based on their own experience with off-label uses of drugs, the drugs' manufacturers can't make claims unless they meet

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93. For what it's worth, my suspicion is that the more-than-safety consumers are wealthier than average, if only because they can afford to care about more than safety, which means that distributional concerns may also influence one's view of whose interests to honor.

94. See Kim Severson, *Trans Fat Fight Claims Butter as a Victim*, N.Y. TIMES, Mar. 7, 2007, at F1.

95. *Id.*

96. *Warner-Lambert Co. v. Heckler*, 787 F.2d 147, 151 (3d Cir. 1986).

97. *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 630 (1973).

the FDA's standards, lest they be deemed to have misbranded the drugs.<sup>98</sup> Is the FDA suppressing truthful information, or defining what "safe and effective" means, or both? Likewise, miles per gallon and milligrams of tar are measurement systems chosen by the government from various alternatives.<sup>99</sup> An advertiser can't simply use other measurements, even though the government standards have known flaws, and even if the advertiser tells the consumer that it isn't using the conventional measurement.<sup>100</sup>

### III. IMPLICATIONS: WHICH, THEN, IS TO BE MASTER?

#### *A. Links Between Deception and Public Policy Preferences*

The examples in the previous Part illustrate the vast range of situations in which truth and falsity, even for a single term, are hotly contested. Falsity aside, sometimes the government regulates out of a direct worry over the deceptive effects of literally true speech, or speech that is true from a certain point of view.<sup>101</sup> "Dolphin-safe"

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98. See *Ass'n of Am. Physicians & Surgeons v. U.S. Food & Drug Admin.*, 226 F. Supp. 2d 204, 206 (D.C. Cir. 2002) (explaining that the Federal Food Drug and Cosmetic Act requires FDA approval of the drug as "safe and effective" before it can be marketed for a particular use).

99. See 16 C.F.R. § 259.2(c)(1) (2007) (requiring car advertisers using unapproved fuel economy standards to include official miles-per-gallon estimates and give them "substantially more prominence" than the unapproved standard); *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 9 (Ill. 2005) ("[T]he FTC, in 1967, adopted the 'Cambridge Method' (FTC method) as the single acceptable means of measuring tar and nicotine yields in cigarettes. The record is clear that both the FTC and the cigarette manufacturers were aware at that time that no method of measurement, including the FTC method, could accurately predict the actual exposure of individual smokers who smoked any particular brand of cigarette. The variations in smoking habits, including the phenomenon of compensation, are simply too complex to account for in any uniform test. However, despite this awareness that the test data would not be accurate as to any individual smoker, the FTC found this concern outweighed by the need for a basis for comparison among brands. Thus, the FTC method was adopted for the purpose of providing a consistent benchmark, not as a means of measuring the actual exposure of individual smokers to tar and nicotine."); Craswell, *supra* note 90, at 588–90 (discussing tradeoffs in choosing a single measure) *Fueleconomy.gov, Your Mileage Will Still Vary*, [http://www.fueleconomy.gov/feg/why\\_differ.shtml](http://www.fueleconomy.gov/feg/why_differ.shtml) (last visited Oct. 6, 2007) ("EPA tests are designed [to] reflect 'typical' driving conditions and driver behavior, but several factors can affect MPG significantly . . .").

100. See, e.g., § 259.2(c)(1); *Price*, 848 N.E.2d at 9. This is a reasonable rule, since more information might not produce more consumer understanding. Adding clarifying information itself poses costs; it may be ignored by information-overloaded consumers, and it may even interfere with consumers' ability to evaluate other aspects of a product or service. See Craswell, *supra* note 90, at 581–84, 594–600.

101. Cf. *RETURN OF THE JEDI* (Lucasfilm 1983) ("Your father was seduced by the dark side of the Force. He ceased to be Anakin Skywalker and became Darth Vader. When that happened, the good man who was your father was destroyed. So, what I told you was true—from a certain

tuna provides an example.<sup>102</sup> It's possible that the tuna makers could eventually change the meaning of the term for consumers to include "tuna caught in nets that didn't happen to catch any dolphins," but that might take a lot of time and cause substantial confusion in the interim.<sup>103</sup> Moreover, reliance on changing consumer perceptions would also make it harder for producers who used safer fishing techniques to explain the advantages of *their* version of dolphin-safe tuna, which would have the added disadvantage of being more expensive because of the different production method. Because of those considerations, government regulation of the use of the term is the fairest and most efficient way of avoiding deception.

Other times, government regulates out of concern over communication itself, reasoning that a fixed standard—as long as it's reasonable—is in consumers' interests because fixed standards decrease "noise" regardless of deception.<sup>104</sup> Consumers often benefit when they can make comparisons knowing, or assuming, that all producers use the same standard, whether for organic food or car mileage or milligrams of tar.<sup>105</sup> This has costs in fixing meaning and

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point of view." Like Luke Skywalker, many of us feel deceived when we learn exactly what "point of view" a speaker (like Bill Clinton) has been using, unknown to us; others can learn to see the same way.

102. See Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(b)(3) (2007) ("[C]onsumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins.").

103. Cf. Hughes, *supra* note 58, at 336–37 (discussing the benefits of stable meaning for consumers, including greater payoffs from investing in learning what terms mean).

104. See Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Associations in United Foods, Zauderer, and Abood* 40 Val. U. L. Rev. 555, 562 (2006) ("[F]requently the disclosure of information is required in order to promote transparent and efficient markets." (citing David S. Rudner, *Balancing Investor Protection with Capital Formation Needs After the SEC Chamber of Commerce Case*, 26 PACE L. REV. 39, 64 (2005); 15 U.S.C. § 1601 (1982) ("It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him . . .")); *id.* at 584–85 & nn.133–36 (offering other examples of mandatory disclosures designed to improve consumer understanding and enhance market efficiency).

105. See, e.g., *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 9 (Ill. 2005) (explaining the FTC's decision to provide a "consistent benchmark" for consumers by regulating the means of measuring tar); cf. Promulgation of Trade Regulation Rule, 43 Fed. Reg. 59,614, 59,638 (Dec. 21, 1978) ("[B]y establishing a uniform, minimal set of required information, disclosure requirements enhance the efficiency of markets by facilitating comparison . . ."). Sometimes flexibility in meaning is appropriate. Eric Goldman, for example, discusses situations in which internet users' choice of trademarks as search terms have multiple meanings, arguing that the trademark owner should not control advertising targeted to such searches. See Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 521–25 (2005). I agree with Goldman



possibly deterring improvements that won't show up on the standard measures,<sup>106</sup> but it also has all the benefits that standardization usually allows.

Nor can deception and standard setting be neatly divided. In many instances, as with "Made in U.S.A." and "organic," the two objectives go together. Consumers have some idea of what "Made in U.S.A." means, and legislatures want to protect them from deception and simultaneously encourage U.S. manufacturing. The very presence of "Made in U.S.A." on a label is an implicit argument that U.S. manufacture is a desirable product characteristic, as is "organic," "rBST free," and other promotional phrases. Thus, even if government mandates succeed in fixing meaning such that consumers are not deceived by varying definitions of particular terms, they may be deceived about the *implications* of such terms, including whether milk produced without rBST is safer to drink, which is a matter of direct concern to virtually all milk consumers. Regulations of the meaning of terms simultaneously enforce and shape consumer preferences.<sup>107</sup> Protection against fraud and what some call paternalism are inseparable in practice.<sup>108</sup> This is one

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on trademark owners' rights, but I still believe that uniform definitions of terms used to describe products and services can aid consumers.

106. Cf. Hughes, *supra* note 58, at 338 (noting that regulation-backed stability of meaning in geographical indications deters innovation).

107. Labeling's preference-shaping effects are so significant that they are beginning to play an important role in international trade regulation. See Kysar, *supra* note 85, at 579 ("By influencing the amount of information that must or may be disclosed to consumers regarding product manufacturing practices, governments also influence the patterns of consumer preference that emerge following the regulatory decision."); Atsuko Okubo, *Environmental Labeling Proposals and the GATT/WTO Regime*, 11 GEO. INT'L ENVTL. L. REV. 599, 621 (1999) ("[S]ome producers are at risk of losing their positions in the market due to consumer behavior favoring labeled products. This leads to debate over whether voluntary environmental labeling or eco-labeling acts as a *de facto* non-tariff trade barrier. Despite their non-mandatory status, eco-labeling programs still potentially have a major influence on conditions of competition in a market; eco-labeling could create a situation where both final consumers and retailers prefer to buy and stock only labeled products, and as a result, producers have difficulty finding buyers for their non-labeled products.").

108. Mike Seidman suggested to me that the favorable connotations of these terms are social facts, and thus regulation is not paternalistic if it merely requires truthful use of the terms on products seeking to take advantage of those social facts. I am sympathetic to this perspective, but I think it unlikely that most consumers have a preexisting concept of "rBST free." The advertiser is using the labeling as a signal about what consumers should value. Even when consumers do have preexisting commitments, as with "Made in U.S.A.," regulators know virtually nothing about how they would define "Made in U.S.A." Does a product assembled in the U.S. with screws made in Taiwan count? What if some consumers think it does and others think it doesn't? Again, regulating use of the term creates a certain meaning, but it's unlikely that consumers know or endorse its precise contours.

reason that providing full constitutional protection to commercial speech would have far-reaching and, in my opinion, undesirable consequences—extirpating government attempts to shape citizens' preferences also requires leaving many of us vulnerable to deception.

Some consumers care about particular product characteristics already, whereas others may begin to care as the result of government-encouraged labeling. But that's not the only way in which consumers vary. Information, or lack of information, that helps some also hurts others. Many consumers benefit from the government's system of grades for meat, but more discerning consumers may suffer because they can't get information about the differences at the highest end.<sup>109</sup> We choose whom to help by regulating or by refraining from regulation.

Moreover, the substantive effects of advertising regulations inform our judgments about whether particular claims are true or false. That is one reason the judges interpreting "Made in U.S.A." considered the effects of their ruling on U.S. manufacturing jobs. Regulations of "Cajun" and other geographical indications affect, as well as enforce, expectations about whether a term identifies a regional origin or a type of product. Because tying products to particular locations can raise prices and make it harder for consumers to identify substitutes with identical or nearly identical qualities,<sup>110</sup> one's assessment of the wisdom of this practice will affect one's judgment of whether it's false to call cheese "feta" if it's not from Greece.<sup>111</sup>

### *B. Can Our Objectives Be Achieved Without Pervasive Commercial Speech Regulation?*

Critics of commercial speech doctrine might argue that we should carry out social policies through non-speech regulation such as subsidies for organic agriculture or bans on abortion (if otherwise

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109. See *supra* notes 77–82 and accompanying text.

110. See Hughes, *supra* note 58, at 345–47 (discussing protection for geographical indications as a form of subsidy to producers); *id.* at 352–54 (discussing the ways in which geographical terms come to designate product qualities rather than geographical origin, such that similar products are available from many sources).

111. See, e.g., Kal Raustiala & Stephen R. Munzer, *The Global Struggle over Geographic Indications*, 18 EUR. J. INT'L L. 337 (2007) (criticizing the scope of European demands for GI protection).

constitutional).<sup>112</sup> Sellers could use any definition of “organic” or “Made in U.S.A.” they wanted, short of deliberate fraud, but only approved producers would receive the subsidy, which would have to be large enough to offset the cost savings from cheaper production methods.<sup>113</sup> The government could also offer a voluntary certification for a term. Presumably, though, approved producers would be allowed to advertise their official imprimatur, whether it came in the form of qualifying for subsidy or qualifying for certification, and that would return us to paternalistic preference shaping through government definitions of terms.<sup>114</sup>

If consumers paid attention to the different labels, then the effects of a voluntary system would be quite similar to those of a mandatory one (which explains why milk producers who use rBST both fought government-mandated labeling and sued small dairies for labeling their milk “rBST free” on their own initiative). If consumers treated the different labels as the same, by contrast, they would be deceived, because there would be differences between government-approved and unapproved products. It is only if consumers don’t really care about the meaning of terms that varying labels are both ineffective and harmless. What is most likely, of course, is that different consumers react differently, making the tradeoffs harder to calculate, but still ever-present.

The libertarian response is simple: consumers should educate themselves, in a return to the old rule of *caveat emptor*.<sup>115</sup> Modern trademark law, which is steadily driving towards the conclusion that trademark owners can control every mention of their marks in the name of protecting consumers against confusion, offers an example

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112. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371–73 (2002) (discussing the Court’s preference for non-speech regulation to achieve the same ends as speech regulation).

113. The subsidy approach would make it difficult to further more than one policy per product; for example, an organic grape grower from Argentina would compete with a domestic grape grower.

114. The assumption here (probably accurate) is that government would be less likely to take any regulatory action at all in such a world, and that paternalism would decrease by shrinking government in general.

115. Critiques and defenses of paternalism in false advertising law are widespread, though they are beyond the scope of this article; there are several excellent articles on the overall wisdom of advertising regulation. See, e.g., Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1 (1992); Lee Goldman, *The World’s Best Article on Competitor Suits for False Advertising*, 45 FLA. L. REV. 487 (1993); Roger E. Schechter, *Additional Pieces of the Deception Puzzle: Some Reactions to Professor BeVier*, 78 VA. L. REV. 57 (1992).

of an overprotective legal regime that encourages consumers not to think for themselves, to our overall detriment.<sup>116</sup> And it is certainly true that protecting consumers against every form of misunderstanding is impossible, and that expansive interpretations of the Lanham Act can hamper free competition or suppress artistic and political speech.

Yet despite the risks of overprotection, we abandoned caveat emptor for good reasons. No one could possibly investigate every ambiguous claim about product composition or performance. When the claims are unverifiable by individual research (e.g., what mileage a make of car gets on average; whether a drug works), then in the absence of legal mandates the self-protective measure is to distrust any such claims. This is the problem of the market for lemons, where an inability to distinguish between valid and invalid claims means that the market for good products and truthful claims fails to develop.<sup>117</sup> This is both inefficient and unhelpful to the exercise of consumer autonomy.<sup>118</sup> Moreover, even libertarians generally accept the continued existence of a fraud action;<sup>119</sup> at some point, a seller who knows that many consumers interpret a claim in a particular way is committing fraud. The problems of interpretation discussed in this article are persistent even in the world of caveat emptor, for all that defendants are more likely to win in such a world.

Another solution to the problem would be to focus on who gets to decide what is false: a government agency, the legislature, a jury, or a judge. With a fraud statute or common-law claim, a jury, rather than an administrative agency or legislature, decides whether particular representations are false. A return to a fraud baseline solves the problem of definition by changing the question. That isn't a real answer, because the decision makers on whom we rely will have to decide whose meaning to endorse. My own suspicion is that juries may not be better at this, and may systematically be worse than agencies with experience evaluating a variety of advertising claims over time. Requiring individualized assessments could also create a substantial problem of verdict conflicts. For example, if one jury

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116. See Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721 (2004). I thank Mark McKenna for pressing me on this point.

117. See generally Akerlof, *supra* note 71.

118. *Id.*

119. See generally Kozinski & Banner, *supra* note 5.

defined “Made in U.S.A.” differently than another, or one jury found “no rSBT” labels on one brand of milk misleading, while another found the same label truthful on a different brand.<sup>120</sup>

#### IV. DEFENDING ADVERTISING LAW AGAINST FIRST AMENDMENT INROADS

Even people who advocate full constitutional protection for commercial speech usually want to preserve the cause of action for fraud.<sup>121</sup> Heightened scienter requirements—actual malice, in defamation’s terms, meaning knowledge or reckless indifference to falsity—will of course defeat many such fraud claims, even when advertising is false. But even assuming, as full-protection advocates might claim, that it will be relatively easy to establish the necessary mens rea when it comes to core factual claims about the composition or performance of a product, the problems of proof will not end there. Problems of definition, as set forth above, will remain. As a result, an advertiser who has a plausible claim that a word *could* mean what he says it means will have a strong defense against a suit for fraud.<sup>122</sup> The requirements of actual malice would only magnify the defendant-protective effects of uncertainty.

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120. Of course, opponents of the current commercial speech doctrine also usually oppose consumer class actions, which are often the only way to litigate consumer fraud claims for otherwise small amounts. Recent legislative and judicial trends make it extremely difficult to maintain such class actions, and a heightened focus on common law requirements like individual reliance and causation, which would seem to be implied by political-speech-like status for commercial speech, would make the situation even worse. As a practical matter, consumer fraud claims are not currently very robust mechanisms for deterring fraudulent speech, any more than libel or “political fraud” claims impose constraints on political speech.

121. Some critics of the commercial speech doctrine do essentially admit that fraud laws would have to contract or even disappear in a full-protection world. See Aaron A. Goach, Recent Developments, *Free Speech and Freer Speech: Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130 (1997), 21 HARV. J.L. & PUB. POL’Y 623, 635 (1995) (arguing that counterspeech is the solution to commercial fraud); see also Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1112–15 (2006) (discussing problems with punishing fraud in fully protected speech).

122. See, e.g., *Onyx Acceptance Corp. v. Trump Hotel & Casino Resorts, Inc.*, 2008 WL 649024 (N.J. Super. A.D.) (finding a consumer protection law violation, but not fraud, when a hotel’s undisclosed definition of “guaranteed” led to substantial damages when the plaintiff’s guaranteed reservations were not honored; although the hotel’s definition was unreasonable and “Orwellian,” it did not intend to dishonor the reservations at the time it promised a guarantee); cf. Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 156 (“Misleading commercial speech does not amount to the kind of fraud that warrants government intervention under standard libertarian theory.”).

Another way to look at the radical implications of ending the commercial/noncommercial divide is to compare false advertising law to other causes of action that have been fully enveloped by the First Amendment. Advertising persistently makes promises that will be nonmisleading or even helpful to some people, while misleading some other group. From a regulatory perspective, it may make sense to bar a claim when more people are misled than helped, or when the number of people misled is of sufficient absolute size regardless of the number helped. False advertising regulations and trademark law generally take the latter tack today.

But in regulating political speech, if speech informs a group of any size at all, it would generally be considered illegitimate to punish that speech. The Supreme Court has protected speech that a reasonable person might interpret as incitement to immediate violence when it deemed that the speech was not actually incitement.<sup>123</sup> Such speech can be useful to part of the audience even if it harms other listeners, for example by causing them to *leave* the audience for fear of violence. More recently, in *Federal Election Commission v. Wisconsin Right To Life, Inc.*,<sup>124</sup> the Supreme Court exempted “issue ads” from campaign finance regulation if a reasonable person *could* interpret them in a way that does not advocate voting for or against a particular candidate.<sup>125</sup> This standard, aside from allowing courts to avoid assessing actual audience perception, explicitly provides for the existence of multiple reasonable interpretations, one of which will always trump the others.<sup>126</sup> Some reasonable viewers will interpret an unregulable ad

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123. See *Hess v. Indiana*, 414 U.S. 105, 107–09 (1973) (holding that street protestor couldn’t be prosecuted for disorderly conduct for yelling “‘We’ll take the fucking street later (or again)’” when law enforcement was trying to clear the street of an antiwar protest because at worst it was a call for illegal action in the indefinite future); *id.* at 111 (Rehnquist, J., dissenting) (“Surely the sentence ‘We’ll take the fucking street later (or again)’ is susceptible of characterization as an exhortation, particularly when uttered in a loud voice while facing a crowd. . . . Perhaps, as [two] witnesses and the majority opinion seem to suggest, appellant was simply expressing his views to the world at large, but that is surely not the only rational explanation.”).

124. 127 S. Ct. 2652 (2007).

125. *Id.* at 2667.

126. For an example of the Court’s use of one interpretation to trump other possible interpretations in the service of speech suppression, see *Morse v. Frederick*, 127 S. Ct. 2618 (2007). *Morse* held that a student could be punished for displaying a banner marked “Bong Hits 4 Jesus” because his school’s principal interpreted this as advocacy of illegal drug use. See *id.* at 2646–47 (Stevens, J., dissenting) (“[I]t is one thing to restrict speech that *advocates* drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy. . . . To the

as urging them to vote for or against an identified candidate, even though that interpretation generates the harms the law was designed to avoid.

In the law of defamation, similarly, a statement is protected if it lacks defamatory meaning.<sup>127</sup> But courts do not inquire into the percentage of an audience that interprets challenged statements as defamatory, nor do they engage in anything approaching an empirical analysis of how meanings are made.<sup>128</sup> Indeed, the Supreme Court routinely fails to engage in any serious analysis of an audience's perceptions, relying instead on often unarticulated guesses about what the audience would understand. Many observers will regard flag burning as nothing more than an inarticulate grunt, but some will understand it as conveying a political message.<sup>129</sup> The Supreme Court engaged in no balancing of interests between groups whose interpretations of flag burning differed, but instead prioritized the interests of those who interpreted it as political speech, even though they may be a tiny minority.<sup>130</sup> In another case involving an anonymous political handbill, the Court simply concluded that there was nothing misleading about the handbill, even though the anonymity itself could be misleading.<sup>131</sup> By treating the audience as

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extent the Court defers to the principal's ostensibly reasonable judgment, it abdicates its constitutional responsibility. The beliefs of third parties, reasonable or otherwise, have never dictated which messages amount to proscribable advocacy.”)

127. See RESTATEMENT (SECOND) OF TORTS § 614 cmt. b (1977).

128. Courts routinely articulate a standard that requires them to assess how the audience would interpret an allegedly defamatory statement, but do not require any empirical evidence of audience reaction. See, e.g., *Romaine v. Kallinger*, 537 A.2d 284, 288 (N.J. 1988) (holding that in determining defamatory meaning, a court must identify the “fair and natural meaning which will be given [a statement] by reasonable persons of ordinary intelligence”).

129. The Supreme Court has held that expressive conduct's entitlement to First Amendment protection depends in part on whether an audience would understand the conduct as communicative. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 416 (1989) (flagburning is expressive conduct); *Spence v. Washington*, 418 U.S. 405, 415 (1974) (painting a peace sign on a flag is protected expression).

130. See, e.g., *Spence*, 418 U.S. at 413 (“[F]or the great majority of us, the flag is a symbol of patriotism . . . . For others the flag carries . . . a different message.”).

131. See *Hurley v. Irish Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 566, 580–81 (1995) (deciding that organizers of St. Patrick's Day parade's organizers could exclude a gay and lesbian group from marching because their overt participation would distort the parade's message, but failing to discuss why the audience would receive a distorted message); Lyriisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1546–47 (2007) (“[T]he audience for anonymous speech is essentially a construct. The Court did not consult poll data or experts before deciding that Margaret McIntyre's handbill would not mislead or fool the voters who received it. . . . The Court's theory of audience response to anonymous speech is a critical underpinning of the McIntyre decision,

if it would, as an empirical matter, perceive and respond to speech in a way obviating the need for government regulation, the Court has signaled indifference to the evidence about how audiences actually do interpret messages—which is to say, badly and inconsistently.

This imagined supremely competent audience may well be necessary in political speech doctrine because the government can't be trusted to regulate political speech, but it fits very poorly with modern consumer protection law, which is designed to protect average consumers, not ideal consumers. There plainly are risks of mistake, agency capture, and other public choice problems that make it unwise to assume that the government is always a superior factfinder. Yet modern advertising regulation depends on how a regulator—a jury or agency—expects real consumers to react to particular claims. If we did import into commercial speech regulation the normative, aspirational view of the audience found in political speech doctrine, there wouldn't be much left of fraud claims, let alone systematic government standard-setting.

First Amendment law tends to protect speech as soon as an audience benefit is identified, unless some other non-speech interest outweighs that benefit. But advertising regulation often affects both deceived consumers and informed consumers, in situations where advertising cannot be segregated so that it only reaches those who will interpret it correctly. Free speech doctrine has few tools to identify which is to be master in such situations. As a result, the consequence of turning false advertising law into a subtopic of First Amendment law would be a substantial, possibly near-total, contraction of its scope. Whether this is desirable or not, it needs to be acknowledged. At the least, advocates of full constitutional protection for commercial speech need to explain what they mean when they say that commercial fraud would still be actionable in their proposed constitutional regime.

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but the Court never spells out the full implications of the theory.”); Randall P. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983, 1013 (2003) (“[I]n order to make an educated guess about the likelihood of misattribution, the Court would have to consider the socio-political context in which the audiences viewed the parade, and would have to engage in a cultural analysis to determine whether GLIB’s participation in the annual parade would arguably hold symbolic significance for the relevant community. . . . [G]iven the variety of audience reactions to any single message—particularly cultural dramas unaccompanied by explicit, preexisting statements of intent or purpose—such an analysis strikes one as an unlikely project. . . . It is extraordinarily difficult to predict causation or audience reaction.”).



