

ARTICLES

Censorship and Sensibility: Does the First Amendment Allow the FDA to Change the Meanings of Words?

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ABSTRACT

The question of whether the Constitution allows the government to change the meanings of words is receiving renewed interest in the aftermath of the FDA’s announcement that it intends to examine whether it should begin enforcing milk “standard of identity” regulations. These restrict the use of the word “milk” to cow’s milk and thus ban almond milk and coconut milk from being labeled as almond milk and coconut milk. Even so, the government’s attempts to change our language stretch back a century. This article begins by discussing the relevant regulations before turning to the varying levels of First Amendment protection granted to commercial speech in general, and food labels in particular, throughout U.S. history. It concludes with an analysis of the likely results should the FDA follow through with these plans and face a First Amendment challenge in court, and the article finds that the proposed change in enforcement would likely violate the First Amendment.

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INTRODUCTION

“An almond doesn’t lactate.” With that memorable line, the FDA’s then-Commissioner Scott Gottlieb announced the agency’s intention to eventually begin enforcing “standard of identity” regulations that ban any product other than

cow's milk from describing itself as "milk."¹ Thus, Gottlieb explained, this new enforcement would likely align with his view that almond milk and coconut milk should stop calling themselves "almond milk" and "coconut milk," respectively.²

Often lost in the resulting media attention was an interesting constitutional question—does the Constitution allow the government to change the meanings of words? Put differently, does the First Amendment protect the right to use a common term on a food label, even when doing so conflicts with a regulatory definition created by the government?

In analyzing this question, this article begins by reviewing the relevant standard of identity regulations, finding that their text indeed supports then-Commissioner Gottlieb's view that the use of the word "milk" to describe nondairy products is technically banned. However, the bulk of this article will address whether enforcing this ban would violate the First Amendment. That analysis will begin with an abbreviated history of the Supreme Court's view of commercial speech, with special emphasis paid to the relatively recent reemergence of robust protections. With those trends in mind, this article will then analyze the likely litigation outcomes were the FDA to begin enforcing its standard of identity for milk. Having done so, the author concludes that, as currently interpreted by the U.S. Supreme Court, the First Amendment probably does not allow the government to ban almond milk and coconut milk from being called almond milk and coconut milk, nor is the Court likely to allow certain alternative approaches, such as forcing almond milk and coconut milk to include disclaimers as "imitation" products.

I. AN ALMOND DOES NOT LACTATE: THE FDA CONSIDERS WHETHER TO BEGIN ENFORCING MILK LABELING REGULATIONS

For years, giant dairy conglomerates have been asking the FDA to enforce already-existing regulations that ban almond milk and coconut milk, or any other product but cow's milk, from including the word "milk" in its description.³ And

1. Alexander Nieves, *Gottlieb: FDA to Crack Down on Labeling Nondairy Products as Milk*, POLITICO (July 17, 2018), <https://www.politico.com/story/2018/07/17/almond-lactate-nondairy-milk-scott-gottlieb-725974> [<https://perma.cc/5627-N5VF>]; Molly Roberts, *Commentary: If 'An Almond Doesn't Lactate,' Who Defines 'Milk'?*, CHI. TRIB. (July 25, 2018), <https://www.chicagotribune.com/news/opinion/commentary/ct-perspec-milk-big-dairy-almond-hemp-soy-rice-0726-20180725-story.html> [<https://perma.cc/C585-G4M8>]. Commissioner Gottlieb announced his resignation in March 2019, but it was not until after the FDA had completed the public comment period for the possible change in enforcement approach. See Susan Scutti et al., *FDA Commissioner Scott Gottlieb to Resign Next Month*, CNN (Mar. 5, 2019). Therefore, it remains likely that some change in enforcement approach will happen. Moreover, several state legislatures have begun pursuing similar changes on the state level. See *infra* p. 524.

2. Elaine Watson, *FDA Commissioner: 'An Almond Doesn't Lactate . . . We Have a Standard of Identity for Milk and I Intend to Enforce That'*, FOOD NAVIGATOR-USA, July 18, 2018, <https://www.foodnavigator-usa.com/Article/2018/07/18/FDA-commissioner-An-almond-doesn-t-lactate-we-have-a-standard-of-identity-for-milk-and-I-intend-to-enforce-that> [<https://perma.cc/V7C8-3XPY>].

3. See Letter from National Milk Producers Federation to FDA (April 28, 2010), <https://www.agweb.com/assets/import/files/nmpf%20misbranding%20letter%20to%20fda%204-28-10.pdf> [<https://perma.cc/4R6R-KN96>]; *On Milk and Sugar*, LAW BITES (May 15, 2014), <http://law-bites.com/2014/05/on-milk-and-sugar/> [<https://perma.cc/NMT7-68CZ>]; April McCullum, *Don't Call It Soy Milk, Rep. Welch Says*,

for years, the FDA has refused, likely because no reasonable consumer thinks almond milk, coconut milk, or any other nondairy milk⁴ comes from a cow.

But the dairy industry kept at it, and its persistence was rewarded. In July 2018, the FDA's then-Commissioner Scott Gottlieb announced that he agreed with their position, proclaiming with his now somewhat-famous words: "an almond doesn't lactate." That is true, of course, but what surprised many casual observers was that the FDA's regulations already technically banned any type of milk other than cow's milk from using the word "milk." Therefore, before this article turns to the more interesting topic of First Amendment analysis, this preliminary section will walk through the admittedly dry and complex standard of identity regulations to show that Commissioner Gottlieb was (not surprisingly) correct about the plain text of the regulations.

Before doing so, it should be pointed out that the industry's persistence has paid off in another way, as numerous state legislatures have introduced—and in at least one case, passed—bills that would create similar bans at the state level on the condition that other state legislatures do the same.⁵ Considering the rapidity with which these bills are progressing at the state level, it is possible that the types of First Amendment challenges contemplated by this article may be filed against one or more of these impending state laws before the FDA announces its new enforcement approach. That being said, many of the First Amendment arguments against such state laws would be similar to those asserted in a challenge against the possible change in FDA enforcement, so this article will simply focus on the FDA to avoid unnecessary redundancy.

This review of the FDA's regulations should begin with the point that food sold across state lines is considered by the FDA to be misbranded if "it is offered for sale under the name of another food" or if it "purports to be or is represented as a food for which the definition and standard of identity has been prescribed,"

BURLINGTON FREE PRESS (Dec. 16, 2016), <https://www.burlingtonfreepress.com/story/news/politics/2016/12/16/vermont-peter-welch-soy-almond-milk-fda/95522510/> [<https://perma.cc/8PNZ-A6DF>]. There are milk products unrelated to the issues in this article that have their own standards of identity, like concentrated milk, evaporated milk, types of dry milks (including nonfat dry milk and nonfat dry milk fortified with vitamins A and D), etc., but these are also based on cow's milk. See 21 C.F.R. §§ 131.115, 131.125, 131.127, 131.130 (2019).

4. For convenience, this article focuses on almond milk and coconut milk. Other types of nondairy milk obviously also exist, including, but certainly not limited to, soy milk and rice milk.

5. See John Breslin, *In North Carolina, Plant-Based Milk Isn't Milk, But Only If Other Southern States Agree*, FORBES (June 18, 2018), <https://www.forbes.com/sites/legalnewsline/2018/06/18/in-north-carolina-plant-based-milk-isnt-milk-but-only-if-other-southern-states-agree/> [<https://perma.cc/DN5P-7R28>]. In at least one other case, the state ban on nondairy milk terms does not take effect until the FDA begins enforcement. See La. R.S. § 40:881 (2019). And these are in addition to the related trend whereby state legislatures have started banning terms like "veggie burgers," "cauliflower rice," and "vegan butter," often at the request of large incumbent industries which fear competition from the sellers of these products. See Deena Shanker, Lydia Mulvany & Bloomberg, *Big Dairy Battling Vegan Industry in Butter-Labeling War*, FORTUNE (June 17, 2019), <https://fortune.com/2019/06/17/wisconsin-dairy-vegan-butter-labels-daily-alternatives-vegan-cheese/> [<https://perma.cc/UUM3-EZ4T>]; Nathaniel Popper, *You Call That Meat? Not So Fast, Cattle Ranchers Say*, N.Y. TIMES (Feb. 9, 2019), <https://www.nytimes.com/2019/02/09/technology/meat-veggie-burgers-lab-produced.html> [<https://perma.cc/HP9K-YPXA>].

unless it “conforms to such definition and standard” and “bears the name of the food specified in the definition and standard.”⁶ Violating this misbranding prohibition is a serious offense, with each individual offense punishable by imprisonment of up to one year, a fine of up to \$1,000, or both.⁷

As then-Commissioner Gottlieb correctly pointed out, the relevant regulations include a standard of identity for “milk,” which indeed requires that milk comes from a cow in order for its description to include the word “milk.”⁸ Thus, not only are plant- and nut-based products banned from using the term “milk,” but so too are any milks from animals other than cows. For example, the regulations technically ban goat’s milk from using the word “milk,” although as with non-dairy milk, the FDA has not typically enforced the regulations this way.

In addition to banning any use of a word in commercial speech⁹ that is in conflict with its regulatory standard of identity, the regulations also compel speech in certain situations. These regulations require that a product describe itself as “imitation” if it “is a substitute for and resembles another food but is nutritionally inferior to that food.”¹⁰ The FDA defines nutritional inferiority as having lower amounts of one or more of the FDA’s listed essential nutrients.¹¹

It almost goes without saying that nondairy milks tend to have different levels of nutrients than dairy milks. They are higher in some nutrients and lower in others. Since the definition of “milk” is based on the characteristics of cow’s milk, these nutritional differences could mean that, unless fortified, the nondairy milk would technically be required to use the term “imitation” in addition to being banned from otherwise using the word “milk.” However, to the extent that the seller’s principles do not prevent it from artificially injecting vitamins into the nondairy milk, fortification could allow it to avoid the “imitation” issue. Nevertheless, the ban would remain, as fortified nondairy milk would still not come from a cow.

It should also be noted that these regulations do not cover all U.S. sales of products using the word “milk.” The federal standards of identity typically only apply to products sold across state lines, leaving products that are not sold across state lines to the exclusive control of the relevant state government.¹² For this

6. 21 U.S.C. § 343(b), (g) (Westlaw through Pub. L. No. 116-16).

7. 21 U.S.C. §§ 331, 333 (Westlaw through Pub. L. No. 116-16).

8. 21 C.F.R. § 131.110 (2019).

9. Generally, speech proposing a transaction, including, but not limited to, product labels and advertisements.

10. 21 C.F.R. § 101.3(e)(1) (2019).

11. 21 C.F.R. § 101.3(e)(4) (2019) (definition of “nutritional inferiority”); 21 C.F.R. § 101.9(c)(8)(iv) (2019) (list of “essential nutrients”).

12. *See* FDA, GRADE “A” PASTEURIZED MILK ORDINANCE, at vii (2015), <https://www.fda.gov/downloads/food/guidanceregulation/guidancedocumentsregulatoryinformation/milk/ucm513508.pdf> [<https://perma.cc/U342-7UMZ>] [hereinafter PMO]. The FDA’s view of the term “interstate commerce” within its regulations should not be confused with the expansive view of this term employed by the Supreme Court when analyzing whether any limitations are imposed on the federal government by the U.S. Constitution’s Commerce Clause. *See, e.g.,* Wickard v. Filburn, 317 U.S. 111 (1942).

reason, the FDA (in a joint effort with the U.S. Public Health Service) has created a model voluntary state code known as the Grade “A” Pasteurized Milk Ordinance (“PMO”).¹³ Every state has adopted at least some portion of the PMO, but some states have chosen to carve out exceptions, including for the milk definitions addressed in this article.

One recent example is Pennsylvania. In 2016, a Maryland dairy creamery named South Mountain Creamery decided to expand its sales into Pennsylvania. When it contacted the Pennsylvania Department of Agriculture to obtain the necessary approvals, it learned that Pennsylvania could not approve the creamery’s proposed skim milk label. The label described the creamery’s pure, additive-free, pasteurized skim milk as skim milk, along with a statement explaining that no vitamins were added.¹⁴

Pennsylvania itself had no objection to the label and would have granted the request if the creamery had been located in Pennsylvania.¹⁵ However, Pennsylvania was not allowed to grant the creamery a permit because it qualified as an interstate seller, meaning the requested permit would violate the federal regulations.¹⁶ The federal regulations only allow skim milk to be called skim milk if vitamin additives are injected into the milk.¹⁷ Consequently, South Mountain Creamery filed a First Amendment challenge in 2018 against the FDA for the right to describe its additive-free skim milk as “skim milk.” As of the time of this article, the suit remains pending in federal district court.¹⁸

Even though the federal standards of identity do not cover every bottle of milk sold in the U.S., they cover the overwhelming majority of them. And even for milk sales that do not cross state lines, the result is often the same, as most states simply copy the federal regulations.

Of course, the fact that the federal regulations say something does not mean that what they say makes sense. In the case of the standard of identity for milk, not only do the regulations defy common sense, but their folly has been proven in court. In recent years, private class-action lawsuits have alleged that consumers were misled by nondairy milk labels that use the word “milk.” In these cases, the courts expressly rejected these claims, finding that no reasonable consumer would be confused by the use of the word “milk” on these nondairy products’ labels.¹⁹

13. See PMO, *supra* note 12, at vii.

14. Letter from Pennsylvania Department of Agriculture to South Mountain Creamery, South Mountain Creamery, LLC v. FDA, No. 18-CV-00738-YK (M.D. Pa. filed Apr. 5, 2018), ECF No. 1-3; Answer, South Mountain Creamery, LLC v. FDA, No. 18-CV-00738-YK (M.D. Pa. May 1, 2018).

15. See *supra* note 14.

16. *Id.*

17. *Id.*

18. South Mountain Creamery, LLC v. FDA, No. 18-CV-00738-YK (M.D. Pa. Mar. 31, 2019) (order denying FDA’s motion to dismiss).

19. Painter v. Blue Diamond Growers, No. CV-17-02235, 2017 WL 4766510 (C.D. Cal. May 24, 2017), *aff’d*, Painter v. Blue Diamond Growers, No. 17-55901, 2018 WL 6720560 (9th Cir. Dec. 20, 2018); Ang v. Whitewave Food Company, No. 13-CV-1953, 2013 WL 6492353 (N.D. Cal. Dec. 10, 2013); Gitson v. Trader Joe’s Company, No. 13-CV-01333, 2013 WL 5513711 (N.D. Cal. Oct. 4, 2013).

Still, FDA Commissioner Gottlieb decided that it was time to craft a solution for this non-existent problem, and the FDA is already preparing for the inevitable First Amendment challenge. Recognizing that courts are unlikely to believe that reasonable purchasers of almond milk are confused about whether it comes from a cow, the FDA has taken a more nuanced approach. It is asserting that consumers might not understand that almond milk has different nutrients than cow's milk, despite the required nutrition facts panel that already addresses this issue. The FDA further contends that this supposed lack of consumer understanding could justify banning nondairy milk sellers from using the word "milk."²⁰ For this reason, as well as the agency's recognition that it cannot suddenly change a long-established regulatory approach,²¹ the FDA announced a notice-and-comment period for the industry and the public, which has now ended. The FDA is expected to announce the specifics of its new approach in the near future.²²

Therefore, despite Commissioner Gottlieb's resignation, a new approach by the FDA appears probable.²³ For that reason, this article will now address the merits of the First Amendment challenge that would likely arise in response. In doing so, this article will begin with an abbreviated history of First Amendment protections for commercial speech, as well as an abbreviated history of standards of identity, before turning to an analysis of the potential legal challenge based on current First Amendment trends.

II. SPEECH IS SPEECH: THE ORIGINAL UNDERSTANDING OF THE CONSTITUTIONAL PROTECTIONS FOR COMMERCIAL SPEECH

In the beginning, things were relatively simple. For the first century of this nation's existence, the government's role regarding commercial speech was limited to preventing fraudulent speech and speech advertising illegal activities.²⁴ While speech advancing illegal activities was a crime, fraudulent speech could result in both criminal prosecutions and civil lawsuits.²⁵ Otherwise, the First

20. Press Release, FDA, Statement from FDA Commissioner Gottlieb, M.D., on Modernizing Standards of Identity and the Use of Dairy Names for Plant-Based Substitutes (Sept. 27, 2018), <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm621824.htm> [<https://perma.cc/TJ9F-7URR>].

21. *See id.* (explaining that "[w]e recognize that, as a regulatory agency, it's not appropriate to unilaterally change our regulatory approach if we have a history of non-enforcement").

22. *See* Use of the Names of Dairy Foods in the Labeling of Plant-Based Products, 83 Fed. Reg. 49103 (Request for Comments Sept. 28, 2018), <https://www.federalregister.gov/documents/2018/09/28/2018-21200/use-of-the-names-of-dairy-foods-in-the-labeling-of-plant-based-products> [<https://perma.cc/7W36-QYC3>].

23. The FDA has not foreclosed the possibility of changing the regulations themselves, but merely appears to prefer to implement a change in approach through guidance instead.

24. Daniel E. Troy, *Advertising: Not 'Low Value' Speech*, 16 YALE J. REG. 93 (1999).

25. *See, e.g.*, *Commonwealth v. Cutler*, 26 N.E. 855 (Mass. 1891) (indictment for selling horse without informing purchaser that the horse was mortgaged); *Hass v. Marshall*, 14 A. 421 (Penn. 1888) (civil suit alleging sale of adulterated whiskey); *Pleuler v. State*, 10 N.W. 481 (Neb. 1881) (describing penalty for crime of selling adulterated liquor); *Smith v. Grable*, 14 Iowa 429 (Iowa 1863) (civil suit over allegedly adulterated liquors).

Amendment barred censorship by the federal government, while many analogous state constitutional provisions barred censorship by state and local authorities.²⁶

Not only did the Founding generation value commercial speech for its own sake, but they viewed all forms of speech (other than that promoting criminal activity or involving fraud) as being interwoven with the rest of our inalienable natural rights. Indeed, the Constitution's primary architect, James Madison, considered commercial speech to be both an inalienable natural right in its own sake and also a form of property right.²⁷ In his view, people had inalienable property rights in their ideas, and this included the right to communicate those ideas, regardless of whether they were of a commercial or noncommercial nature.²⁸ This Lockean view also made its way into (or was in some cases preceded by) natural rights provisions (along with free speech protections) in state constitutions that were even more explicit than their federal counterpart.²⁹

Madison's compatriot, Benjamin Franklin, was fond of pointing out that the First Amendment's provision for freedom of the press protected commercial speech.³⁰ And he was not alone. Richard Henry Lee, a leading Anti-Federalist, once explained that a "free press is the channel of communication as to mercantile and public affairs."³¹

To understand why Franklin, Lee, and other members of the Founding generation associated freedom of commercial speech with freedom of the press, one must recognize that newspapers at the time looked very different than they do today. During the colonial period, "most English and American newspapers were not only supported by advertising but were, even primarily, vehicles for the dissemination of advertising."³² It was not unusual for issues of prominent newspapers to contain nothing but advertising.³³ Even when newspapers included articles addressing political events, that coverage would often be dwarfed by the commercial speech also found in the issue.³⁴ Many customers purchased newspapers for the principal purpose of accessing the commercial speech found therein.³⁵ In other words, separating commercial speech from freedom of the press would simply make no sense to our nation's Founding generation. For this reason, it is not surprising that Franklin wrote one of his earliest and most-famous

26. See Steven D. Calabresi, Sarah E. Agudo & Katherine L. Dore, *The U.S. and the State Constitutions: An Unnoticed Dialogue*, 9 N.Y.U. J. L. & LIBERTY 685, 701–11 (2015) ("[B]y 1868, thirty-two out of thirty-seven" state constitutions expressly protected freedom of speech.).

27. See John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHIC. L.R. 49 (1996).

28. See *id.*

29. See Steven D. Calabresi et al., *supra* note 26, at 689–91, 696–703.

30. Troy, *supra* note 24.

31. See *id.*

32. JAMES PLAYSTED WOOD, *THE STORY OF ADVERTISING* 85 (1958).

33. See *id.*

34. See *id.*

35. See *id.*

arguments for a free press in defense of a commercial advertisement in a newspaper.³⁶

Consequently, the Founding generation well understood that the First Amendment barred the federal government, as the state constitutions barred state and local authorities, from regulating commercial speech other than to prevent fraud or promote criminal activities. However, this still left plenty for the government to do, and state laws against mislabeling goods were common. These would typically involve situations in which the seller had secretly diluted the product being sold without disclosing the alteration on the label. These criminal and civil cases involved all manner of goods, and disputes over allegedly fraudulent milk sales were well-represented among them.³⁷

A review of the cases and related materials from this period reveals another interesting fact: the concept of vegetable milk was well-understood. For example, in an 1873 business dispute, the contract in question referenced, among other things, “[m]ilk and other juices of the corn,” and there does not appear to have been anything unusual in its doing so.³⁸ After all, as far back as the 15th century, recipes called for the ingredient “almondes mylk.”³⁹ In 1626, Francis Bacon noted that “there be plants, that have a Milk in them when they are Cut.”⁴⁰ And the 18th-century *Encyclopaedia Britannica* stated that “the emulsive liquors of vegetables may be called vegetable milks.”⁴¹ In fact, consumers so appreciated the idea that the term “milk” did not necessarily mean cow’s milk that when American inventor John Callen patented his new antacid in 1818, he named it Milk of Magnesia.⁴² None of this appears to have confused anyone.

III. THAT’S A NICE LANGUAGE YOU HAVE THERE: THE PROGRESSIVE MOVEMENT AND THE RISE OF STANDARDS OF IDENTITY

Then came the progressive movement. Beginning in the late 19th century, its proponents believed that central planners in Washington, D.C. could use science

36. See Benjamin Franklin, *Apology for Printers*, PENN. GAZETTE, June 10, 1731, <https://founders.archives.gov/documents/Franklin/01-01-02-0061> [<https://perma.cc/TB8P-A7H6>].

37. See, e.g., *Kneib v. People*, 6 Hun. 238 (Supreme Ct., General Term, N.Y. 1875) (fine imposed for crime of fraudulently selling adulterated milk); *Philips v. Meade*, 75 Ill. 334 (Ill. 1874) (civil suit over purchase of allegedly diluted milk); *State v. Smith*, 10 R.I. 258 (R.I. 1872) (criminal indictment for fraudulently selling or intending to sell adulterated milk); *Johnston v. Lance*, 7 Ired. 448 (N.C. 1847) (libel case involving published statements that one of the parties fraudulently sold diluted milk); *Dilley v. People*, 4 Ill. App. 52 (App. Ct. of Ill., 5th Dist. 1879) (indictment for crime of fraudulently selling milk that had been diluted with water); *Polinsky v. People*, 2 Cow. Cr. Rep. 469 (N.Y. 1878) (indictment for crime of fraudulently selling diluted milk); *Bainbridge v. State*, 30 Ohio St. 264 (Ohio 1876) (crime of fraudulently selling skim milk as whole milk).

38. *Jones v. Sewall*, 3 Cliff. 563 (Cir. Ct., D. Maine 1873).

39. See James L. Matterer, *A Boke of Gode Cookery Recipes* (2000), <http://www.godecookery.com/goderec/grec76.html> [<https://perma.cc/4WFX-3MLR>] (original recipe for “Frutowr for Lentyn” (Fritter for Lent)).

40. See Roberts, *supra* note 1.

41. See *id.*

42. See Michael Risch, *America’s First Patents*, 64 FLA. L. REV. 1279, 1312 (2002).

to socially engineer a better society.⁴³ Their views eventually came to dominate both the legislative and judicial branches, allowing federal standards of identity to be invented by the former and respected by the latter.

A. Extremely Different Groups Combine Forces to Create Legislative Reform

The national push for greater federal involvement in food regulation fit perfectly with the progressive agenda. “Muckraker” journalists, Upton Sinclair probably being the most notable, fueled this push. His 1906 novel, “The Jungle,” was a best-seller. Although fictional, it was understood (and perhaps correctly so) to contain a kernel of truth regarding misbehavior by food-processing companies.⁴⁴ The resulting outcry for reform contributed to the passage of numerous laws that the Progressives championed.⁴⁵

As to the specific topic of labeling regulations, two very different groups successfully capitalized on the general momentum for federally backed reform to persuade the Progressives to adopt the cause of food labels.⁴⁶ The first was a coalition of large national companies that felt hamstrung by the inconsistent tapestry of state regulations. The second was a small, relatively powerless subdivision within the U.S. Department of Agriculture known as the Bureau of Chemistry.

The national corporations’ involvement in these issues should surprise no one. Giant business organizations provided the impetus for such a large percentage of the Progressive Era’s legislation that historians studying the era have observed that “progressivism, as all admit, was largely a businessmen’s movement.”⁴⁷ Although the national conglomerates recognized that the possibility of federal regulation presented a threat to be minimized, they also saw that it provided an opportunity to be maximized.⁴⁸ On the one hand, new federal laws could

43. Of course, the most extreme example was the progressive policy of eugenics, whereby the government would attempt to create a “pure” society by forcibly sterilizing the members of society’s supposedly “inferior” segments (ethnic minorities, the physically or mentally disabled, and individuals with a family history of crime or poverty), aspects of which were eventually upheld by the U.S. Supreme Court in one of the most disturbing opinions in American legal history. See *Buck v. Bell*, 274 U.S. 200 (1927).

44. Much has been written of “The Jungle,” but for a discussion focusing on the contrast between the novel and the Department of Agriculture’s Bureau of Animal Husbandry report refuting the novel’s worst allegations, see Lawrence W. Reed, *Upton Sinclair’s ‘The Jungle’ Proved Regulation Was Required*, FOUND. ECON. EDUC. (Oct. 31, 2014), <https://fee.org/articles/29-upton-sinclair-the-jungle-proved-regulation-was-required/> [<https://perma.cc/LF9Z-VA5Y>].

45. One obvious example is the Federal Meat Inspection Act of 1906, which included among its provisions prohibitions on adulterating or misbranding meat or meat products. See 21 U.S.C. § 601 *et seq.* (Westlaw through Pub. L. No. 116-16).

46. This type of coalition containing seemingly adverse members is not an unusual occurrence. Public choice economists refer to it as the phenomenon of the Bootleggers and the Baptists, a reference to the groups whose combined efforts effectuated the passage of the Eighteenth Amendment, which neither could have accomplished on its own. See Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, AM. ENTER. INST. J. GOV’T & SOC’Y (1983).

47. See Robert H. Wiebe, *Businessmen and Reform: A Study of the Progressive Movement*, at viii–ix (1962).

48. See *id.* at 19, 42, 48–50, 66, 102, 216.

potentially harm them, but on the other, the new laws could create national uniformity, along with other benefits like lower railroad rates.⁴⁹ These new advantages would allow the national corporations' mass-produced, railroad-transported, refrigerated food products to better compete with those offered by local merchants.⁵⁰ Consequently, the national corporations were highly motivated to make sure any new federal food regulations were written in their preferred manner, and they tended to be successful in doing so.⁵¹

An ambitious young bureaucrat, Harvey Wiley, headed the Bureau of Chemistry. Of utmost importance for our purposes, Wiley's penchant for attracting media attention drew interest from the similarly spotlight-loving President Theodore Roosevelt.⁵² With Wiley whispering in Roosevelt's ear, the President soon came to support the view that greater federal involvement was needed, with Wiley to oversee the new powers.⁵³

The combination of powerful interests supporting reform was too much for opponents to overcome. In 1906, Congress passed, and President Roosevelt signed, the Pure Food and Drug Act.⁵⁴ Generally speaking, the Act did two relevant things. First, it created uniform national prohibitions on misbranding for any products sold across state lines.⁵⁵ These provisions largely mirrored the various state prohibitions already in existence.⁵⁶ Second, the Act granted enforcement authority to Wiley's Bureau of Chemistry, which saw its powers expanded and its name eventually changed to the U.S. Food and Drug Administration.⁵⁷

Although the Act made many of the giant corporations happy, the reformers soon noticed something that troubled them—the Act did not accomplish much in terms of protecting consumers.⁵⁸ This should have been expected, as the Act's misbranding regulations were mostly redundant to pre-existing state regulations. However, it caused consternation for the reformers, who noticed that Wiley's enforcement of the Act tended to focus on high-profile media spectacles rather than anything that meaningfully improved the lives of typical American

49. *See id.*

50. *See id.*; Ilyse D. Barkan, *Industry Invites Regulation: The Passage of the Pure Food and Drug Act of 1906*, 75 AM. J. PUB. HEALTH 18, 19–20 (1985).

51. *See* Wiebe, *supra* note 47, at 19, 42, 48–50, 66, 102, 216; Barkan, *supra* note 50, at 19–20, 24.

52. *See* Anthony Gaughan, *Harvey Wiley, Theodore Roosevelt, and the Federal Regulation of Food and Drugs* (2004) (unpublished note) (on file with the Harvard Law School Library), <https://dash.harvard.edu/bitstream/handle/1/8852144/Gaughan.html?sequence=2> [<https://perma.cc/G49U-E62Q>].

53. *See id.* Interestingly, although Roosevelt and Wiley were allies at the relevant moments, their relationship was often rocky, as each begrudged credit given to the other.

54. *See The Pure Food and Drug Act*, U.S. HOUSE REPS., <https://history.house.gov/Historical-Highlights/1901-1950/Pure-Food-and-Drug-Act/> [<https://perma.cc/74YK-Z7R3>] (last visited May 8, 2019).

55. *See* Federal Food and Drugs Act of 1906, Pub. L. No. 59-384, §§ 1–3, 7, 8, 34 Stat. 768 (1906).

56. *See id.*

57. *See* Ben Panko, *Where Did the FDA Come From, And What Does It Do?*, SMITHSONIAN.COM (Feb. 8, 2017), <https://www.smithsonianmag.com/science-nature/origins-FDA-what-does-it-do-180962054/> [<https://perma.cc/Y6EX-T8X3>].

58. *See* Clare Gordon, *Encouraging a Broader Narrative of American Pure Food Legislation: Understanding the Federal Food, Drug and Cosmetic Act of 1938*, 4 RETROSPECTIVES 33, 35–39 (2015).

consumers.⁵⁹ This dissatisfaction turned to outrage in 1937 when a new liquid preparation of the drug Sulfanilamide killed over 100 people, including children.⁶⁰

Rather than repeal the failed Act, the reformers decided that the solution was to create even more legislation, and they were again aided by interest groups from the business world. For years, giant canning companies had pushed for federal definitions for canned goods that would prevent the countless (and in their lobbyists' views, inferior) options provided by local merchants.⁶¹ Not coincidentally, the definitions that the national canning companies supported happened to coincide with their existing practices and exclude those of their smaller competitors.⁶² Of course, these national definitions for canned foods had little relationship to the Sulfanilamide drug scandal, but that did not stop the canning companies from seizing the moment.

This combination of interests helped lead to the passage of the Federal Food, Drug, and Cosmetic Act (the "FDCA") in 1938. The FDCA instituted an approach unfathomable to our nation's Founding generation—the federal government's creation of a glossary of defined terms from which businesses were banned from deviating.⁶³ These definitions were called standards of identity.⁶⁴

B. The Supreme Court Turns a Blind Eye to the Constitution's Protection of Commercial Speech

Although constitutional support for the federal standards of identity was dubious at best, another byproduct of the Progressive Era aided their defense against the resulting legal challenges. This was the rise of progressive judges, and they viewed the Constitution as an antiquated document containing proscriptions that were often no longer relevant.⁶⁵

This progressive judicial view eventually resulted in *Carolene Products*' infamous footnote four.⁶⁶ In it, the Supreme Court explained that those rights that the Court still respected would be deemed fundamental and would continue to receive "exacting judicial scrutiny."⁶⁷ But the Supreme Court relegated to non-

59. *Id.* at 36.

60. *See id.* at 38–39.

61. One nationally known example was "BRED-SPREAD," the sellers of which could not be successfully prosecuted under the Pure Food and Drug Act because it did not call itself jam or jelly and therefore was not misbranded. *See* NEAL D. FORTIN, *FOOD REGULATION: LAW, SCIENCE, POLICY, AND PRACTICE* 132–33 (2d ed. 2017).

62. *See id.*

63. 21 U.S.C. § 341 (Westlaw through Pub. L. No. 116-16). For a fascinating comparison of the prevailing views towards the Constitution and government during the 1930s with those of the Founding Era, *see* Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 828–45 (2019).

64. *See id.*

65. *See* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007).

66. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

67. *See id.*

fundamental status those that the Court decided no longer deserved respect, with the intentionally farcical “rational basis test” serving as their only protection.⁶⁸

For fans of free speech, the progressive judicial approach presented good news and bad. The good news was that the Supreme Court considered free speech to be one of the rights still deserving of meaningful judicial review. The bad news was that this only applied to certain types of free speech, and commercial speech was on the outside looking in.

The Supreme Court’s lack of respect for commercial speech eventually culminated in the Court’s outright rejection in 1942 of the idea that the First Amendment provided any protection for commercial speech.⁶⁹ The case, *Valentine v. Chrestensen*, involved a First Amendment challenge to a speech ban that prevented a New York businessman from handing out flyers advertising submarine tours.⁷⁰ In upholding the ban, the Supreme Court expressly held that “the Constitution imposes no [First Amendment] restraint on government as respects purely commercial advertising.”⁷¹

The first Supreme Court case reviewing the FDCA was that same year.⁷² The Court did not even mention the First Amendment in the opinion.⁷³ Nor was it discussed the next year in a much-publicized FDA case named *Quaker Oats*.⁷⁴ This is not to say that businesses could not successfully assert defenses against FDCA enforcement, but those defenses needed to be statutory, as was the case in a 1951 dispute involving conflicting regulatory provisions governing sixty-two cases of “imitation jam.”⁷⁵ The First Amendment, on the other hand, provided no assistance. That ship had sailed, so to speak. Or so everyone thought.

IV. PROTECTIONS FOR COMMERCIAL SPEECH GRADUALLY REEMERGE IN THE LATE TWENTIETH CENTURY

Thankfully, the Supreme Court’s decision to stop respecting commercial speech did not last forever—merely three decades. Ever since, commercial speech has enjoyed a gradual increase in protection. This trend has placed the burden on the government when it seeks to censor commercial speech. It has also invalidated government attempts to change the meanings of words. And although the Court has not yet applied this precedent to enforcement of a food standard of identity, a federal appellate court has.

68. See *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

69. *Valentine v. Chrestensen*, 316 U.S. 52 (1942), *overruled by* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

70. See *id.*

71. *Id.* at 54.

72. *Cloverleaf Butter v. Patterson*, 315 U.S. 148 (1942).

73. *Id.*

74. *Federal Security Adm’r v. Quaker Oats*, 318 U.S. 218 (1943).

75. *62 Cases, More or Less, Each Containing Six Jars of Jam v. U.S.*, 340 U.S. 593 (1951).

A. The Supreme Court Creates the Central Hudson Test

Valentine might still be good law today but for two U.S. Supreme Court cases arising out of Virginia in the 1970s. The first involved a newspaper advertisement for abortion services. The second involved a group of consumers who merely wanted to know the prices charged by pharmacies.⁷⁶

In July 1971, newspaper editor Jeffrey Cole Bigelow was convicted of the crime of publishing an advertisement for abortion services, a misdemeanor in Virginia.⁷⁷ The newspaper advertised that abortion was legal in New York and included information about the providers.⁷⁸

The case's interwoven issues of commercial speech, political speech, and freedom of the press threw the Supreme Court for a loop. It also illustrated the folly inherent in the Court's arbitrary line drawing between different classes of rights. But after remanding the case once in light of *Roe v. Wade*,⁷⁹ only to have the Virginia Supreme Court re-affirm the conviction, the Supreme Court finally wrestled with the merits in 1975.⁸⁰

In a 7-2 decision in favor of Mr. Bigelow, the Court voiced its discomfort with the position in which it had placed itself in *Valentine*.⁸¹ The Court reacted by limiting *Valentine*. In so doing, the Court made the remarkable, albeit questionable, claim that *Valentine*'s express holding that "the Constitution imposes no [First Amendment] restraint on government as respects purely commercial advertising" was less absolute than the Court had appeared to suggest and possibly just reflected the fact that *Valentine* was "a brief opinion."⁸² The Court's new view was that *Valentine* merely upheld "a reasonable regulation of the manner in which commercial advertising could be distributed."⁸³ Although the Court did not go further than it needed in *Bigelow*, the Court had unlocked the door to the potential of First Amendment protection for purely commercial speech.

The Virginia consumer groups then proceeded to open the door and walk through it.⁸⁴ Their members wanted to be able to compare the prices charged by competing pharmacies. Standing in their way was the Virginia State Board of Pharmacy, which had banned pharmacies from advertising their prices.⁸⁵

76. One cannot help but be reminded of the famous Frederick Douglass quote: "To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker." Frederick Douglass, *A Plea for Free Speech in Boston* (Dec. 9, 1860).

77. *Bigelow v. Virginia*, 421 U.S. 809, 811-13 (1975).

78. *Id.*

79. 410 U.S. 113 (1973).

80. *Id.* at 809.

81. *See id.* at 819.

82. *Id.*

83. *Id.*

84. With help, of course. The groups were represented by Public Citizen, a public interest group created by Ralph Nader.

85. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 749-50 (1976).

The government's asserted logic was paternalistic. It argued that if pharmacies were allowed to advertise their prices, then consumers might use this information, and the government did not think consumers should base their purchasing decisions on it.⁸⁶ Of course, this is precisely what the consumers wanted to do, and they argued that the First Amendment protected their right to receive this information from those sellers who, but for the ban, would provide it.

Virginia State Board of Pharmacy arrived at the Supreme Court one term after *Bigelow*, and the consumer groups' timing was perfect. With *Valentine*'s now-obvious flaws still fresh in the Justices' minds, the Court officially reversed *Valentine* and held in favor of the consumers by a 7-1 margin.⁸⁷ In doing so, the Court removed any doubt that "pure commercial speech" was protected by the First Amendment.⁸⁸ It even went so far as to list various benefits society receives from "the free flow of commercial information."⁸⁹

What the Court did not do in *Virginia State Board of Pharmacy* was espouse a test.⁹⁰ Rather, the Court was content to leave that task for another day and merely hold that, regardless of the specific aspects of whatever test should be applied to commercial speech challenges, Virginia's ban on price advertising failed it.⁹¹

Four years later, the Court would create this test in *Central Hudson*.⁹² There, New York State had banned commercial advertising by power companies in the hope that doing so would lead to increased conservation.⁹³ The ban was challenged by an electric company, and in 1980, the Supreme Court agreed with the electric company and ruled the ban unconstitutional by an 8-1 vote.⁹⁴ The Court also took the opportunity to lay out the now-famous test for reviewing censorship of commercial speech that is still used today, even if at a decreasing rate.⁹⁵

The *Central Hudson* test is an intermediate scrutiny test with four prongs. First is the threshold prong. This states that the rest of the test only applies to cases in which the speech is neither related to otherwise unlawful activity nor actually misleading.⁹⁶ Put differently, the government can ban inherently misleading speech or speech related to criminal activity without being required to meet the rest of its burdens under the *Central Hudson* test. Additionally, in cases of inherently misleading speech, the government can compel certain types of corrective supplemental speech.⁹⁷

86. *See id.*

87. *Id.* at 758-62.

88. *See id.* at 762-70.

89. *See id.* at 762-65.

90. *See id.* at 770-73.

91. *See id.*

92. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

93. *See id.*

94. *See id.*

95. *See infra* sections V.B-C.

96. 447 U.S. at 564. In addition to "inherently misleading" speech, "actually misleading" speech can also be banned, although disputes over this category of speech arise less often.

97. *See Zauderer v. Office of Disciplinary Council of Sup. Ct. Ohio*, 471 U.S. 626 (1985). Unfortunately, the Supreme Court's recent decision examining *Zauderer* expressly declined to address whether *Zauderer*'s application could be extended beyond corrections of inherently misleading speech.

It is important to remember that the threshold prong's exception for criminal activity does not mean that the government can take the circular approach of claiming that the speech in question constitutes criminal activity merely because the government has banned it. Instead, the threshold prong refers to speech in furtherance of activity that would otherwise be a crime. The Court explained:

This is why a ban on race-based hiring may require employers to remove "White Applicants Only" signs, why "an ordinance against outdoor fires" might forbid "burning a flag," and why antitrust laws can prohibit "agreements in restraint of trade."⁹⁸

Assuming the commercial speech is neither related to criminal activity nor misleading, the government bears the entire burden to overcome each part of a three-pronged test. These prongs require the government to prove that (i) the government possesses a substantial interest; (ii) the regulation directly and materially advances the interest; and (iii) the restriction is narrowly tailored.⁹⁹ If the government fails to meet its burden under any of the three prongs, then the restriction on free speech is unconstitutional.¹⁰⁰

B. *The Supreme Court Applies the Central Hudson Test to Beverage Labels and Regulatory Definitions*

In the aftermath of *Central Hudson*, countless subtopics have emerged, but two are particularly relevant here. The first is the line of precedent showing that the *Central Hudson* test applies to beverage labels. The second is the line of precedent showing that the *Central Hudson* test protects the right of businesses to use the common definitions of words, even when the government has defined those words differently. These will be addressed in turn. Since the Supreme Court has

thereby leaving in place the circuit split as to that aspect of *Zauderer*. See *Nat'l Inst. of Family and Life Advocates v. Becerra (NIFLA)*, 138 S.Ct. 2361, 2377 (2018) ("We need not decide whether the *Zauderer* standard applies to the unlicensed notice."); compare *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017) (applying *Zauderer* in case involving non-misleading speech), *cert. granted, judgment vacated by CTIA-The Wireless Ass'n v. City of Berkeley*, 138 S.Ct. 2708 (2018), with *Mason v. Fla. Bar*, 208 F.3d 952, 958 (2000) (holding that compelled commercial speech failed *Central Hudson* test and was therefore unconstitutional). Even so, the Court's earlier precedent would suggest otherwise. See *Ibanez v. Fla. Dept. of Bus. and Prof. Reg.*, 512 U.S. 136, 146–48 (1994) (applying intermediate scrutiny to hold compelled commercial speech unconstitutional); *Milavetz, Gallop & Millavetz v. U.S.*, 559 U.S. 229, 231 (explaining the reason *Zauderer* applied was because the underlying speech was "inherently misleading"); *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., dissenting, joined by Ginsburg, J.) (agreeing with Eleventh Circuit that *Zauderer* could not be applied, but dissenting from denial of *certiorari* because Eleventh Circuit had not been stringent enough in how it applied *Central Hudson* test to compelled commercial speech).

98. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664–65 (2011) (quoting *Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006); *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992); and *Giboney v. Empire State & Ice Co.*, 366 U.S. 490, 502 (1949), respectively).

99. *Id.* Although this last prong sounds similar to the tailoring requirement in strict scrutiny, it is slightly more lenient in practice. See *Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989).

100. *Ibanez*, 512 U.S. at 142–43.

not yet examined a case combining these two lines of precedent, a discussion of the only federal appellate case to address this combination will follow.

First, it has been clear from the *Central Hudson* test's earliest days that product labeling would fall within the Court's classification of commercial speech, which generally includes speech that proposes a transaction. This does not include speech (such as the contents of a book) that actually constitutes the good or service being sold.¹⁰¹ Of course, being classified as commercial speech is not necessarily a good thing, as noncommercial speech is typically protected by strict scrutiny instead of mere intermediate scrutiny.

Book stores provide a useful illustration of the difference between commercial and noncommercial speech. The contents of the books themselves are usually noncommercial speech, and laws regulating their content would likely be subject to strict scrutiny. But a sign in the window announcing "all books 50% off" would be commercial speech and would therefore only be protected by *Central Hudson*'s intermediate scrutiny test.

In any event, the Supreme Court removed any doubt as to the status of beverage labels in *Rubin v. Coors Brewing Company*.¹⁰² The case involved a federal law banning beer companies from displaying the alcohol content on their beer labels.¹⁰³ The government's asserted rationale was that consumers might use this information to choose beers with higher alcohol contents, thereby leading to an alcohol-content "strength war."¹⁰⁴

In ruling the ban unconstitutional, the Court explained that beverage labels were a form of commercial speech, which meant they were protected by the *Central Hudson* test, and that the government could not meet its burdens under the test.¹⁰⁵ The Court emphasized that Coors sought "to disclose only truthful, verifiable, non-misleading factual information about alcohol content on its beer labels."¹⁰⁶ Although the Court agreed that preventing alcohol content "strength wars" could be a substantial government interest,¹⁰⁷ the Court found that the ban on honest speech failed both of the test's final two prongs, as it neither advanced this interest in a direct and material way nor did so in a narrowly tailored manner.¹⁰⁸

From *Rubin*, we know that beverage labels are entitled to the same protections as other forms of commercial speech. We also know that this includes the right to provide truthful information on beverage labels. But those points do not fully answer the question of whether the FDA can change words' definitions. After all,

101. See *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65–67 (1983).

102. 514 U.S. 476 (1995).

103. *Id.*

104. *Id.* at 479.

105. *Id.* at 481–91.

106. *Id.*

107. *Id.*

108. *Id.*

the question then becomes not whether businesses are allowed to tell the truth (they clearly are), but who gets to decide what the truth is.

This question was answered in another line of cases. These held that the *Central Hudson* test does not allow the government to enforce regulatory definitions in such a way as to ban common words from being used pursuant to their common understandings. Two of the cases made it to the Supreme Court.

The first was *Peel*.¹⁰⁹ There, an Illinois attorney argued that he should be allowed to use the term trial “specialist” because he met the dictionary definition, even though he did not meet the standardized definition created by the American Bar Association and adopted by Illinois.¹¹⁰ After the Illinois Supreme Court held that Mr. Peel’s speech could be banned as inherently misleading, the Supreme Court took the case and reversed.

The U.S. Supreme Court’s holding in favor of Mr. Peel was divided between a four-justice plurality and a two-justice concurrence, although both opinions agreed on most of the points material to this discussion. Both opinions explained that speech cannot be considered inherently misleading if it complies with the common dictionary definition.¹¹¹ In the words of the plurality, the lower court had erred by “turning from Webster’s—which contains no suggestion of state approval of ‘specialists’—to the American Bar Association’s” rule adopted by the government.¹¹²

The primary difference between the plurality and concurring opinions was over Illinois’ alternative argument that, even if Mr. Peel’s speech were not inherently misleading, it could be banned for being potentially misleading.¹¹³ The plurality and concurring opinions disagreed as to whether Mr. Peel’s speech was potentially misleading. The plurality was not willing to expressly hold that the speech was potentially misleading, but pointed out that even if it were, the result would be the same, as potentially misleading speech (unlike inherently or actually misleading speech) could not be banned.¹¹⁴ The concurring opinion would have held that the speech was indeed potentially misleading and would have also held that potentially misleading speech cannot be banned “if narrower limitations could be crafted to ensure that the information is presented in a non-misleading manner.”¹¹⁵ Either way, the ban was unconstitutional.

The second case, *Ibanez*, involved a certified financial planner who wanted to keep referring to herself as a certified financial planner even though Florida had passed a law banning the use of the word “certified” to describe any certification

109. See *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91 (1990).

110. *Id.* at 97–98 (plurality).

111. *Id.* at 103–04 (plurality); *id.* at 111–12 (Marshall, J., concurring in judgment).

112. *Id.* at 104 (plurality).

113. Compare *id.* at 106–08, with *id.* at 111–12 (Marshall, J., concurring in judgment).

114. *Id.* at 111–12 (Marshall, J., concurring in judgment). The plurality also pointed out that the speech could possibly still be regulated (such as through a compelled disclaimer) if the government met all of its *Central Hudson* burdens, as did the concurrence. See *id.* at 106–10 (plurality), 112–17 (Marshall, J., concurring in judgment).

115. *Id.* at 111–27.

that had not been approved by the government.¹¹⁶ When challenged in court, Florida argued that using the term “certified” to describe an unapproved certification was inherently misleading because it conflicted with Florida’s definition limiting the term’s use to certifications approved by the State.¹¹⁷ The Supreme Court expressly rejected Florida’s argument in a 7-2 ruling¹¹⁸ and held that the government’s definition did not make the plaintiff’s advertisement of an unapproved certification inherently misleading.¹¹⁹ Therefore, the speech could not be banned.¹²⁰

The Supreme Court also rejected Florida’s alternative argument invoking compelled speech. Florida asserted that if Florida could not ban the speech, then it could compel a disclaimer.¹²¹ In rejecting this argument, the Court repeated its earlier admonition that the government cannot meet its *Central Hudson* burdens merely by stating hypothetical harms. In the words of the Court, “we cannot allow rote invocation of the words ‘potentially misleading’ to supplant the Board’s burden to ‘demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’”¹²²

From *Rubin, Peel, and Ibanez*, we know that (i) beverage labels are protected by the *Central Hudson* test just like other forms of commercial speech; (ii) the First Amendment protects the right to provide honest, accurate information on beverage labels; and (iii) when determining whether the use of a term is honest and accurate, what matters is the common understanding of the term, not the regulatory definition.

Unfortunately, the Supreme Court has yet to be presented with a case combining all of these points. In fact, so far, only one U.S. Court of Appeals has. That Court was the Eleventh Circuit, and the case involved a tiny, all-natural dairy creamery in the Florida Panhandle named Ocheesee Creamery.

C. The Eleventh Circuit Rules that Government Enforcement of a Food Standard of Identity Violates the First Amendment

Ocheesee Creamery’s owner, Mary Lou Wesselhoeft, felt like she was “banging her head against the wall.”¹²³ She had spent two years meeting with anyone who might be willing to listen to her concerns about what the Florida Department

116. *Ibanez v. Fla. Dep’t of Bus. and Prof. Reg.*, 512 U.S. 136 (1994).

117. *Id.* at 138, 144–45.

118. Technically, the two dissenters concurred in part, but their dissent included the issues addressed here.

119. *Id.*

120. *Id.* at 145–46.

121. *Id.* at 146.

122. *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). *see also*, *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1061–62 (8th Cir. 2014) (explaining that *Ibanez* did not apply *Zauderer* test because the speech in question was merely “potentially misleading”).

123. Wesselhoeft Declaration ¶ 6, *Ocheesee Creamery LLC v. Putnam*, No. 4:14-cv-00621, (N.D. Fla. Aug. 1, 2017).

of Agriculture and Consumer Services was doing to her business.¹²⁴ She even met with Florida’s Commissioner of Agriculture.¹²⁵

But it did not matter. The Department continued to insist that her refusal to inject additives into her creamery’s skim milk meant that she could not refer to the skim milk as “skim milk.”¹²⁶ And the fact that she was willing to explain on the label that her creamery’s skim milk did not contain the additives did not matter either.¹²⁷ Regardless of the explanations she added to the label, the Department insisted that her creamery’s label for additive-free skim milk could never include the words “skim milk.”¹²⁸

This was because Florida’s regulations for intrastate sales had copied the federal standard of identity regulations for interstate sales, and the federal regulations say that the product skim milk actually has three ingredients.¹²⁹ The first is skim milk. The other two are vitamin A and D additives.¹³⁰ Mary Lou was allowed to sell her perfectly safe, pure, pasteurized, additive-free skim milk, but only if she agreed not to call it skim milk.¹³¹

This she could not do. Mary Lou is extremely principled. She and her customers follow an all-natural food philosophy, and she would never lie, mislead, or

124. *Id.*

125. *Id.*

126. *See* *Ocheese Creamery LLC v. Putnam*, 851 F.3d 1228, 1231–33 (11th Cir. 2017).

127. *Id.*

128. *Id.*

129. *See* FLA. ADMIN. CODE ANN. r. 5D-1.001 (2019).

130. As is often the case, the way the federal regulations do this is complicated. The regulations start by saying that any product labeled as a type of “milk” that does not have its own separate standard of identity must not be “nutritionally inferior” to the standard of identity for “milk.” 21 U.S.C. § 343(b), (c), (g) (2019); 21 U.S.C. § 333 (2019); 21 C.F.R. § 131.110 (2019). The standard of identity for “milk” is based on cow’s whole milk. 21 C.F.R. § 131.110 (2019). “Skim” is considered a “nutrient content claim,” rather than a separate standard of identity. 21 C.F.R. § 101.62(b) (2019). Nutrient content claims can only be used if the product is not “nutritionally inferior” to the relevant standard of identity. 21 C.F.R. § 130.10(b) (2019). According to the regulations, nutritional inferiority includes any “reduction in the content of an essential nutrient that is present in a measurable amount, but does not include a reduction in the caloric or fat content” when compared to the relevant standard of identity. 21 C.F.R. § 101.3(e)(4) (2019). The regulations include a list of these “essential nutrients,” and the list includes vitamins A and D. 21 C.F.R. § 101.9(c)(8)(iv) (2019). Vitamins A and D are fat-soluble, which means they are removed with the cream when the cream is skimmed from the milk, as opposed to the water-soluble nutrients, like calcium, that remain in the skim milk. Consequently, a product consisting entirely of the ingredient skim milk can only lawfully be called “skim milk” if vitamin A and D additives are injected into the skim milk. It should also be noted that without the fat to protect them, the vitamin A additives injected into low-fat and skim milk will often dissipate before the supposedly fortified skim milk is consumed by a customer, particularly when stored in glass bottles, but the regulations nonetheless require the charade. *See* PMO, *supra* note 12, at 383 (Section titled “Problems Involved with Fortification”).

131. *Ocheese Creamery*, 851 F.3d at 1231–32. The Eleventh Circuit’s opinion focuses on vitamin A rather than vitamin D because the creamery was only cited as to vitamin A (most likely because of internal confusion within the Florida Department of Agriculture and Consumer Services over whether vitamin D additives were also required). *See* Complaint Ex. A, *Ocheese Creamery LLC v. Putnam*, No. 4:14-cv-00621 (N.D. Fla. Nov. 20, 2014), ECF No. 1 (Stop Sale Order).

confuse them.¹³² Left with no other choice, Mary Lou poured the skim milk down the drain rather than sell it with the misleading label required by the government.¹³³ She still sold cream, which meant she still had skim milk left over, but she refused to sell it unless she was allowed to use an honest, accurate label.¹³⁴ This caused substantial financial difficulty for Mary Lou's small, three-employee business, but she refused to violate her principles.¹³⁵

Mary Lou's only remaining recourse was to sue the government to obtain a legal ruling that the government could not prevent her from honestly labeling her skim milk as "skim milk." So that is what she did. And in 2017, the Eleventh Circuit panel¹³⁶ unanimously ruled that if it was legal to sell pure skim milk in Florida, then it was legal to call it "skim milk," regardless of Florida's regulatory definition to the contrary.¹³⁷ All the First Amendment allowed the government to require was an explanation on the label, which Mary Lou had already offered to provide.¹³⁸

The government argued that describing a type of food in conflict with its regulatory standard of identity made the speech inherently misleading, but the panel disagreed. It also took pains to explain the flaw in the government's logic:

It is undoubtedly true that a state can propose a definition for a given term. However, it does not follow that once a state has done so, any use of the term inconsistent with the state's preferred definition is inherently misleading. Such a per se rule would eviscerate *Central Hudson*, rendering all but the threshold question superfluous. All a state would need to do in order to regulate speech would be to redefine the pertinent language in accordance with its regulatory goals. Then, all usage in conflict with the regulatory agenda would be inherently misleading and fail *Central Hudson*'s threshold test. Such reasoning is self-evidently circular¹³⁹

Rather than summarily holding at that point in the analysis that the speech cannot be banned, as the Supreme Court did in *Ibanez*,¹⁴⁰ the panel addressed the remainder of the *Central Hudson* test.¹⁴¹ Nonetheless, the panel made quick work of the government's justification for the ban. In doing so, the panel expressly rejected the government's assertion that consumers might be confused about the characteristics of the pure skim milk and not realize that it had a different nutritional content than other skim milks that have the additives.

132. See Wesselhoeft Declaration ¶¶ 3–5, *Ocheese Creamery LLC v. Putnam*, No. 4:14-cv-00621 (N.D. Fla. Aug. 1, 2017).

133. *Id.* at ¶¶ 5, 10.

134. *Id.* at ¶¶ 4–12.

135. See *id.* at ¶ 5.

136. Senior D.C. Circuit Judge David Bryan Sentelle was sitting by designation on the panel.

137. *Ocheese Creamery*, 851 F.3d at 1237–40.

138. *Id.*

139. *Id.* at 1238.

140. *Ibanez v. Fla. Dept. of Bus. and Prof. Reg.*, 512 U.S. 136, 145–46 (1994).

141. The panel also noted that the restriction might be content-based, thereby requiring strict scrutiny instead of the *Central Hudson* test, but that the government could not meet its burdens under the *Central Hudson* test regardless. See *Ocheese Creamery*, 851 F.3d at 1235 n.7.

Jumping straight to *Central Hudson*'s final prong, the Court pointed out that the government's argument could not survive the test's tailoring requirement. As the Court explained, if the asserted concern is possible consumer confusion over the product's characteristics, then the solution is to expressly state those characteristics on the label, not completely ban a common usage of a word.¹⁴² If the government were concerned that customers would not know that Ocheesee's pure skim milk had no added vitamins, then an obviously better and far-less-burdensome solution would be to include a disclaimer informing consumers that no vitamins were added, precisely as Mary Lou had already offered.¹⁴³ In the Court's view, the availability of such an obvious less-burdensome approach meant the government's ban on the use of the term "skim milk" could never survive *Central Hudson*'s final prong.

Florida chose not to file a petition for a writ of certiorari, but even though Mary Lou's case did not reach the Supreme Court, a similar case might. Of course, if the FDA bans almond milk and coconut milk from being called almond milk and coconut milk, then that case would be a contender. Or it could be a challenge to the similar regulatory changes percolating at the state level. But another case has a head start.

That case is *South Mountain Creamery v. FDA*. As mentioned in Part I, the case is currently pending in federal district court, and it involves the same type of ban on pure skim milk at issue in the *Ocheesee Creamery* case, except for one key difference. Ocheesee Creamery did not sell across state lines (which meant the only relevant regulations were state regulations). South Mountain Creamery does.

South Mountain Creamery is located outside Frederick, Maryland. Its owners are much like Mary Lou in that they prefer to sell all-natural products rather than inject additives into them.¹⁴⁴ But South Mountain Creamery is slightly larger than Ocheesee Creamery.¹⁴⁵ Thus, it sells its dairy products in a handful of states instead of just one.¹⁴⁶

In 2017, South Mountain Creamery's owners decided to start selling its milk into nearby Pennsylvania. Upon contacting the relevant state agency for the necessary preapprovals, the creamery's founder, Randy Sowers, was greeted with good news and bad. The good news was that Pennsylvania did not object to labeling additive-free skim milk as skim milk. The bad news was that it did not matter.¹⁴⁷

Regardless of the Pennsylvania agency's disagreement with the federal regulations, Pennsylvania could not grant a license to sell skim milk that violated

142. *Id.* at 1240.

143. *Id.*

144. See Sowers Declaration, *South Mountain Creamery, LLC v. FDA*, No. 1:18-CV-00738 (M.D. Pa. Aug. 8, 2018), ECF No. 27.

145. See *id.*

146. See *id.*

147. See Letter from Pennsylvania Governor's Office of General Counsel to Sowers, *Ocheesee Creamery LLC v. Putnam*, No. 4:14-cv-00621 (N.D. Fla. Nov. 20, 2014), ECF No. 1.

federal law.¹⁴⁸ And the federal regulations required any skim milk sold across state lines to either include the required vitamin additives or not call itself skim milk.¹⁴⁹ So South Mountain Creamery filed a First Amendment challenge against the FDA.¹⁵⁰ As of the date of this article, the lawsuit is continuing to advance in the U.S. District Court for the Middle District of Pennsylvania.

V. LOOKING AHEAD: WHAT WOULD THE SUPREME COURT DO?

This final section will analyze the likely outcomes from the litigation that could result if the FDA were to begin enforcing the ban on nondairy milks using the word “milk.” This section will assume, *arguendo*, that neither *South Mountain Creamery* nor another similar case will arrive at the Supreme Court first.

In the event that this potential nondairy milk labeling case were to arrive at the Supreme Court with the current status quo relatively intact, then the Court could apply one of three approaches. First, the Supreme Court could apply intermediate scrutiny, as was done by the Eleventh Circuit in *Ocheese Creamery*. Second, recent trends regarding content- and speaker-based restrictions on speech indicate that the Supreme Court might instead apply strict scrutiny to this type of ban. Third, although it would not apply to an outright ban, this article will examine the possibility that, rather than institute a full ban, the FDA might craft a compelled disclaimer and argue that this should trigger the so-called *Zauderer* test used to review certain types of compelled commercial speech.

A. Will the Supreme Court Take the Same Approach as the Eleventh Circuit’s *Ocheese Creamery Decision*?

Although the use of strict scrutiny in cases involving commercial speech is increasing,¹⁵¹ the Court might decide that, since this type of ban cannot survive *Central Hudson* scrutiny, there is no need to reach the question of whether to apply strict scrutiny. Seeing as the relevant precedent involved commercial speech bans that failed the *Central Hudson* test, the Court might simply elect to take the same approach here.

Considering that the government has a substantial interest in reducing consumer confusion, thereby satisfying one of the test’s prongs, the Court’s application of the *Central Hudson* test could address three arguments. First, the Court would need to determine whether including the word “milk” in the description of nondairy milk is inherently misleading. After almost certainly finding that it is not inherently misleading, the Court could simply hold that this meant the speech cannot be banned, as it did in *Ibanez*.¹⁵² Or, if the Court were to follow the

148. See *id.*; *supra* Part I.

149. See *supra* note 130.

150. See Complaint, *South Mountain Creamery, LLC v. FDA*, No. 1:18-cv-00738 (M.D. Pa. Apr. 5, 2018).

151. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). However, it should probably also be mentioned that the application of *Sorrell* at the circuit level has been less than consistent.

152. See *Ibanez v. Fla. Dept. of Bus. and Prof. Reg.*, 512 U.S. 136, 145–46 (1994).

approach taken by the *Peel* concurrence and the Eleventh Circuit in *Ocheese Creamery*, the Court could examine whether the FDA can meet its burden to show both that the ban directly advances its interest in reducing consumer confusion and does so in a narrowly tailored manner.¹⁵³ Not only would the FDA probably fail this test, but it would probably fail both prongs. These three points will be addressed in turn.

1. Describing Almond Milk as Almond Milk Is Not Inherently Misleading

Although the FDA may attempt to argue that the banned speech is inherently misleading, it would not win this argument. To be clear, a finding that the speech is not inherently misleading does not mean that it cannot be regulated.¹⁵⁴ Instead, it means that the government likely cannot ban the speech and can only otherwise regulate it to the extent that the government can meet all of its burdens. On the other hand, speech shown to be inherently misleading speech can be banned without the government being required to meet any additional burdens at all.¹⁵⁵

Whether speech is inherently misleading is merely a question of “facial accuracy,” where the speech’s plain language is compared to the common understandings found in the dictionary.¹⁵⁶ Once speech survives this facial comparison to the dictionary definitions, any supposed confusion arising from a conflict between the speech and a governmental definition would at worst fall within the category known as “potentially misleading” speech, which likely cannot be banned and, at a minimum, requires application of the full *Central Hudson* test.¹⁵⁷

This distinction was explained at length in an interesting Eleventh Circuit case. *Abramson* involved a First Amendment challenge brought by unlicensed, but lawful, psychologists against an advertising restriction that prohibited them from using the term “psychologist.”¹⁵⁸ In Florida at the time, individuals who did not meet Florida’s regulatory definition for the term “psychologist” could still practice “what would commonly be referred to as psychology” but could not use the word “psychologist” in their advertisements.¹⁵⁹ The government in *Abramson* argued that the plaintiffs’ failure to meet the government’s definition for the term “psychologist” meant that the plaintiffs’ use of the term was inherently misleading.¹⁶⁰ Therefore, the government reasoned, the advertising restriction should be

153. See *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 111–17 (1990); *Ocheese Creamery LLC v. Putnam*, 851 F.3d 1228, 1240 (11th Cir. 2017).

154. See *Ibanez*, 512 U.S. at 145–46; *Borgner v. Brooks*, 284 F.3d 1204, 1210–15 (11th Cir. 2002) (upholding compelled disclaimer for dentists under *Central Hudson* test).

155. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

156. *Peel*, 496 U.S. at 101 (1990); *Borgner*, 284 F.3d at 1210; *Abramson v. Gonzalez*, 949 F.2d 1567, 1576–77 (11th Cir. 1992).

157. *Ibanez*, 512 U.S. at 146 (1994); *Borgner*, 284 F.3d at 1210.

158. *Abramson*, 949 F.2d at 1569–72.

159. See *id.* at 1572.

160. See *id.* at 1576.

upheld without the need to apply *Central Hudson*.¹⁶¹ But the Eleventh Circuit disagreed.

Much as it would years later in the *Ocheesee Creamery* decision, the Eleventh Circuit expressly held that “we are not bound by Florida’s definition.”¹⁶² The Court also observed that the plaintiffs did not “hold themselves out as ‘licensed psychologists,’” only as “psychologists.”¹⁶³ As the plaintiffs did not claim to be licensed by the State of Florida, their honest description of themselves as “psychologists” could not be categorized as “inherently misleading.”¹⁶⁴ Thus, the government could not ban them from using the term.¹⁶⁵

Abramson was not unique. In fact, the Eleventh Circuit in *Abramson* explained that it was relying on precedent from the Supreme Court and other circuits, including the Supreme Court’s decision in *Peel* and the Sixth Circuit’s in a case named *Parker*.¹⁶⁶ It appears extremely likely that the Supreme Court will continue to apply *Peel*, *Ibanez*, and other relevant precedent, which means that using the word “milk” to describe nondairy milk is unlikely to be deemed inherently misleading.

Just like *Ocheesee Creamery*’s skim milk label did at the Eleventh Circuit, the nondairy milk labeling case would fall directly within this precedent. Like the plaintiffs in *Peel*, *Ibanez*, *Ocheesee Creamery*, *Abramson*, and *Parker*, the sellers of nondairy milks are not claiming something untrue. For example, nondairy milk sellers do not claim that their products are the same as cow’s milk. To the contrary, they tend to be quite proud that their products are not cow’s milk, and many of their customers seek them out for that very reason. In other words, the nondairy milk sellers are merely using plain, common language to describe their lawful beverages. Moreover, this is confirmed by the dictionary, which includes nondairy milk in its definition of “milk.”¹⁶⁷

The nondairy milk sellers’ truthful use of the word “milk” is the same type of commonly understood speech the Supreme Court, the Eleventh Circuit, and the Sixth Circuit held not to be “inherently misleading.”¹⁶⁸ Therefore, terms such as “almond milk” and “coconut milk” are not inherently misleading, likely cannot

161. *See id.*

162. *Id.* at 1576–77.

163. *Id.* at 1575–77.

164. *Id.*

165. *Id.*

166. *See Parker v. Ky. Bd. of Dentistry*, 818 F.2d 504 (6th Cir. 1987). *Parker* involved a restriction on truthful advertising by a dentist. In Kentucky, dentists could perform certain types of orthodontics, but only licensed orthodontics were allowed to advertise those services using orthodontic terms. *See id.* at 505–07. The Sixth Circuit held that Mr. Parker’s truthful advertising of those services using orthodontic terms was not inherently misleading and could therefore not be banned. *Id.* at 509–11.

167. *Milk*, WEBSTER’S DICTIONARY (11th ed. 2014) (including as part of the definition of milk “a food product produced from seeds or fruit that resembles and is used similarly to cow’s milk” and listing as examples coconut milk and soy milk).

168. *See Ibanez v. Fla. Dept. of Bus. and Prof. Reg.*, 512 U.S. 136, 144–49 (1994); *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 100–10 (1990); *Abramson*, 949 F.2d at 1576–77; *Parker*, 818 F.2d at 510.

be banned, and likely can only be otherwise regulated to the extent the government can overcome the full gamut of *Central Hudson* scrutiny.

2. Banning the Word “Milk” Accomplishes Nothing of Value

It would be difficult for the FDA to meet its burden under *Central Hudson*’s penultimate prong to show direct advancement of its interest. As the Supreme Court has repeatedly explained, this prong requires more from the government than a proffer of hypothetical harms that the regulation would supposedly remedy.¹⁶⁹ Instead, the government bears the entire burden to “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹⁷⁰

Assuming the FDA continues to assert its publicly stated rationale that consumers might not understand the nutritional differences between milk from a coconut and milk from a cow, it is hard to see how banning the word “milk” would in fact alleviate that confusion at all, let alone to a material degree. This is true for at least two reasons.

First, almost all sellers who are large enough to sell across state lines are already bound by the FDA’s requirement that they include a nutrition facts panel as part of their labels.¹⁷¹ This panel lists the product’s nutritional content.¹⁷² Its existence places the FDA in a tactical quandary. On the one hand, if the FDA takes the position that the required panels are effective, then that means there is no “real harm” to be alleviated. On the other hand, if the FDA takes the position that the mandated panel specifically listing the actual nutritional content cannot successfully inform customers about this issue, then it is unlikely that the far more indirect approach of banning the word milk would make a material difference in this regard. Either way, the FDA should lose.

Second, a ban does not directly alleviate the complained-of hypothetical confusion “to a material degree.”¹⁷³ Even in a world where the nutritional facts panel did not exist, banning the word “milk” would not inform consumers as to differences in the nutritional contents between different products. All it would do is take away the public’s most commonly understood method of describing familiar items. When you remove the terminology that is best understood by customers, the result is to increase, not decrease, consumer confusion.

3. There Are Substantially Less-Burdensome Solutions

Although it may be difficult for the FDA to overcome its burden under the penultimate prong, that difficulty pales in comparison to the obstacle imposed by

169. *Ibanez*, 512 U.S. at 146 (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

170. *See id.*

171. *See* FDA, CHANGES TO THE NUTRITION FACTS PANEL (2016), <https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm> [https://perma.cc/CV3C-4WQ3].

172. *See id.*

173. *Edenfield*, 507 U.S. at 771.

Central Hudson's final prong. This prong requires that the remedy be narrowly tailored to a degree that is "not necessarily perfect, but reasonable."¹⁷⁴ Just like in *Rubin* and *Ocheesee Creamery*, there are obviously far-less-burdensome (and better) solutions available here, which means the FDA's proposed ban could never clear this hurdle.

If the FDA is concerned that consumers will not understand that nondairy milk has different vitamins than cow's milk, then a far-less-burdensome (and more effective) way to address this concern would be to require the nondairy milk labels to include a statement that the nondairy milk has different vitamins than cow's milk. This is not to say that this compelled disclaimer would be upheld by the Court either,¹⁷⁵ but to the extent the FDA's rationale could hypothetically support a regulation of speech here, it could at most only support this less-burdensome approach instead of the extreme approach of banning speech.¹⁷⁶ In other words, even in the best-case scenario for the FDA, the existence of this far-less-burdensome alternative would doom the ban in court.

It is for this reason that the Eleventh Circuit, upon determining that *Ocheesee Creamery*'s skim milk label was not inherently misleading, skipped right to *Central Hudson*'s final prong.¹⁷⁷ There, the state argued that it was concerned that customers might not know that *Ocheesee Creamery*'s additive-free skim milk did not have added vitamin A like other skim milk.¹⁷⁸ But this led to the obvious question of why the state could not merely require *Ocheesee Creamery* to say on the label that its skim milk had no added vitamin A.¹⁷⁹ In fact, this was something *Ocheesee Creamery* had already offered to do.¹⁸⁰ The state had no decent response there,¹⁸¹ and the FDA is unlikely to have one here.

When the Eleventh Circuit ruled in favor of *Ocheesee Creamery*, it was simply following the Supreme Court precedent established in cases like *Rubin*. There, the Supreme Court explained that the federal government's ban on listing alcohol content on beer labels failed both of *Central Hudson*'s final two prongs.¹⁸² Regarding the final prong, the Court explained that several alternative approaches existed to advance the government's stated concern in a manner less intrusive to the speaker's First Amendment rights, and thus the government had failed to meet its burden under *Central Hudson*'s final prong.¹⁸³ There is no reason to think the Supreme Court is ready to deviate from this solid logic.

174. See *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1240 (11th Cir. 2017) (quoting *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989)).

175. See *infra* section V.C.

176. See *Ocheesee Creamery*, 851 F.3d at 1238–40.

177. See *id.*

178. See *id.*

179. See *id.*

180. See *id.* at 1232.

181. See *id.* at 1240.

182. *Rubin v. Coors Brewing Co.*, 514 U.S. 486–91 (1995).

183. *Id.* at 490–91.

B. Should Strict Scrutiny Apply Instead?

Although the FDA's likely inability to overcome its *Central Hudson* burdens may obviate the need for the Court to determine whether strict scrutiny should apply instead, the Court might do so anyway. This is because of the recent increase in the Supreme Court's attention towards content- and speaker-based restrictions, which typically trigger strict scrutiny.¹⁸⁴

Generally speaking, the difference between content-neutral and content-based regulations of commercial speech turn on whether the government regulations "target speech based on its communicative content."¹⁸⁵ In the Supreme Court's words, the application of strict scrutiny to the latter "reflects the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, *or its content*."¹⁸⁶ This doctrine has been repeatedly invoked in commercial speech cases,¹⁸⁷ including in a Supreme Court opinion this past term where the Court held that prohibiting the registration of "immoral or scandalous" trademarks constituted improper viewpoint discrimination.¹⁸⁸

Although the case did not involve a ban, the Supreme Court recently addressed content-based speech regulations in *NIFLA*.¹⁸⁹ There, the Supreme Court reviewed a First Amendment challenge to different types of compelled disclaimers that California required for crisis pregnancy centers that did not provide abortions. Of particular relevance here was the Court's determination that the "government-scripted" disclaimer California required licensed clinics to use was a content-based regulation of speech.¹⁹⁰ The Court explained that, by "compelling individuals to speak a particular message, such notices alter the content of their speech."¹⁹¹

Granted, *NIFLA* involved a regulation that *required* speakers to say specific words instead of a regulation *banning* a speaker from saying specific words. But it is not a far leap from the first to the second. This is especially true given that the Court cited *Sorrell* in support of this aspect of the holding,¹⁹² and *Sorrell* did not

184. Indeed, even while applying the *Central Hudson* test, the Eleventh Circuit panel in *Ocheese Creamery* made this same observation. 851 F.3d at 1235 n.7.

185. See *NIFLA*, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)); see also *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011) (holding that law that disfavors "speech with a particular content" is content-based).

186. See *NIFLA*, 138 S. Ct. at 2371 (emphasis added).

187. See, e.g., *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011) (holding that mandated warning label for violent video games was content-based and therefore required strict scrutiny); *Sorrell*, 564 U.S. at 564 (holding that restriction on use of pharmacy records was content-based because it "disfavors marketing"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (finding that regulation of news racks distributing commercial handbills was content-based because "the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech").

188. *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

189. See *NIFLA*, 138 S. Ct. at 2371.

190. See *id.*

191. *Id.*

192. See *id.* at 2374.

involve compelled speech but instead addressed bans on disseminating certain information, which the Court held to be unconstitutional “content- and speaker-based restrictions.”¹⁹³

Along those lines, the Court could also treat this type of restriction as a speaker-based regulation, which the Court has described as “a more blatant and egregious form of content discrimination.”¹⁹⁴ The logic for doing so would be that some sellers of products commonly defined as milk are permitted to use this term, while others are not. But again, this type of ban would typically fail intermediate scrutiny, so it would be entirely up to the Court whether to go down this path. If the Court were to apply strict scrutiny, this would require the FDA to prove that the ban furthers a compelling government interest and is narrowly tailored.¹⁹⁵ This is an even heavier burden than *Central Hudson*’s intermediate scrutiny test, and the FDA would therefore fail to meet it for the same reasons listed above.¹⁹⁶

C. What About a Disclaimer?

There is one remaining possibility. Faced with precedents making it unlikely that banning the word “milk” would survive a constitutional challenge, the FDA might attempt to take a different approach. In doing so, it is important to remember that the FDA has indicated a preference for merely issuing guidance regarding a new enforcement policy rather than changing the regulations themselves.¹⁹⁷ As mentioned earlier,¹⁹⁸ the existing regulations include not only a ban on the word “milk” but also compelled speech mandating the use of the word “imitation.”

If the FDA were to forgo the ban and instead merely begin enforcing the compelled speech requirement, the outcome of the resulting litigation would be murkier than that over an outright ban. Even so, it would still be difficult for the FDA to prevail.

First, and foremost, the compelled “imitation” requirement states that the word must appear directly in front of the term for the product imitated. In other words, if the FDA were to faithfully follow this requirement, then the effect would be that the only time nondairy milk sellers would be allowed to use the word “milk” is when it is immediately preceded by the word “imitation.” But, functionally

193. *Sorrell*, 564 U.S. at 563–64.

194. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (internal quotations and citations omitted).

195. See *id.* at 2231–32.

196. See *supra* section V.A.

197. For example, FDA Commissioner Gottlieb has stated: “We recognize that, as a regulatory agency, it’s not appropriate to unilaterally change our regulatory approach if we have a history of non-enforcement Over the next year, we will be looking at next steps which will likely include issuing guidance for industry and a new compliance policy outlining our enforcement approach.” See Press Release, FDA, Statement from FDA Commissioner Scott Gottlieb, M.D., on the process FDA is undertaking for reviewing and modernizing the agency’s standards of identity for dairy products (July 26, 2018), <https://www.fda.gov/newsevents/newsroom/pressannouncements/ucm614851.htm> [https://perma.cc/6F8W-YGV3].

198. See *supra* Part I.

speaking, this is the same as a ban. Put differently, a regulation that only allows someone to say a word when that word is preceded by “not” (or a similar negation, like “imitation”) is functionally no different than a ban. This is very different than most forms of compelled disclaimers, which require additional information in ways that do not directly negate the speaker’s preferred phrasing.¹⁹⁹

Although the Supreme Court has not yet expressly addressed this twist, its precedents reveal that, at least as far as free speech is concerned, it focuses on what is actually going on rather than technical gimmicks created by the government.²⁰⁰ Moreover, when in doubt, the Court typically errs on the side of the speaker.²⁰¹ With that in mind, the Court is unlikely to be convinced by an argument that this approach would not constitute a ban.

But, for the sake of argument, this article will also examine the prospect that the FDA might overcome this hurdle, either by convincing the Court that this would not actually be a ban or by devising an enforcement approach that mandates speech without negating the word “milk.” In this scenario, the FDA’s chance of success could increase, depending on the approach taken and the resulting level of scrutiny, although the case would still be difficult for the FDA to win.

This would raise three possibilities. First, the Court could apply strict scrutiny to a requirement that the Court considers to be content-based. Second, the Court could apply *Central Hudson* scrutiny to non-content-based compelled speech. Third, the Court could apply a test known as *Zauderer*, which was originally designed for compelled corrections of inherently misleading speech, but has seen expanded use in some circuits.

1. A Scripted Disclaimer Could Receive Strict Scrutiny

As mentioned above, an enforcement approach that mandates that the seller include specific words on the label could be viewed as a content-based

199. Typically, this compelled information appears after the underlying speech and would serve to supplement and correct, rather than negate, the underlying speech. For example, in the seminal case *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, the compelled disclaimer required the legal advertisement’s promise that the client would owe no fees if the lawsuit were unsuccessful to be supplemented with an additional statement that the client might nonetheless be liable for costs. 471 U.S. 626, 650–53 (1985).

200. A recent example is the Court’s opinion in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017). There, New York State had banned merchants from imposing a credit-card surcharge on customers, but allowed the merchants to provide a cash discount. The practical effect was that merchants could charge different prices for credit-card and cash transactions, but were banned from describing the difference as a credit-card surcharge. The Supreme Court rejected the government’s argument that the law regulated conduct and not speech, and the Court did so because the law had the practical effect of “regulating the communication of prices.” *Id.* at 1151. In the interest of full disclosure, it should be noted that this article’s author co-authored an amicus brief filed with the Court advocating for the approach ultimately taken by the Court. See Brief for Institute for Justice, as Amicus Curiae Supporting Petitioner, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (No. 15-1391), 2016 WL 6873022.

201. See *Ibanez*, 512 U.S. at 143 (explaining that the government cannot meet its burden with “mere speculation or conjecture” (quoting *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993))).

restriction.²⁰² This, in turn, could lead the Court to apply strict scrutiny.²⁰³ Considering that nondairy milks have been using the word “milk” in the U.S. for decades, and other products, like Milk of Magnesia, have been using it for almost as long as this nation has existed,²⁰⁴ all without noticeable confusion, it defies logic to think the FDA would be able to survive strict scrutiny.

This is particularly problematic for the FDA’s plans because the regulations are quite specific on the words that must be used. The FDA would therefore need to stretch the regulations beyond recognition, or officially amend them, in order to reach a different type of enforcement approach compelling speech.

However, if the FDA were to decide to officially amend its regulations in order to require a different type of compelled speech, then *NIFLA* might allow that approach. *NIFLA*’s section on content-based regulations includes a disclaimer of its own. At the end of the section, the Court states that the analysis does not call into question “the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.”²⁰⁵ Unfortunately, the opinion does not explain whether this means that those warnings and disclaimers would survive the test applied to content-based restrictions or would simply not be treated as content-based restrictions. Time will tell. Nevertheless, if the FDA were to craft an approach that fits within those boundaries, then its chance of being upheld by the Court would greatly increase.

2. A Required Warning That Is Not Scripted by the Government Could Receive the *Central Hudson* Test

On the other hand, an unscripted, and thus likely content-neutral disclaimer requirement could receive intermediate review under the *Central Hudson* test. This would allow at least the possibility that the requirement would be upheld, as compelled disclaimers can and do sometimes survive intermediate scrutiny.²⁰⁶ That said, it would likely still be a tough row to hoe for the FDA, as its current rationale is less than convincing.

Ultimately, if the FDA is either able to come up with a stronger rationale or uncover evidence supporting its current one, then the FDA’s chance of success at that point would be inversely correlated to the burdensomeness of the requirement. If the FDA can find a way merely to impose a reasonable warning requirement, then it could be upheld by the courts.

202. See *supra* section V.B.

203. See *supra* section V.B.

204. See *supra* note 42 and accompanying text.

205. 138 S. Ct. 2361, 2376 (2018).

206. See *Borgner v. Brooks*, 284 F.3d 1204, 1208–16 (11th Cir. 2002) (holding that compelled disclaimer survived the *Central Hudson* test).

3. *Zauderer* Will Not Save the Requirement

In 1985, the Supreme Court created the *Zauderer* test to address the narrow situation when the government compels speech to correct inherently misleading speech.²⁰⁷ The speech in question was an advertisement for contingency-fee legal services which proclaimed that, unless the litigation was successful, the client would pay no legal fees.²⁰⁸ Unfortunately, the advertisement failed to mention that the clients would not be reimbursed their court costs.²⁰⁹ Recognizing that most listeners would not understand the difference between legal fees and legal costs, Ohio required the lawyer to add this information to the commercial.²¹⁰ The lawyer refused, but the Supreme Court eventually agreed with Ohio's position.²¹¹

In the three decades since, some circuits have taken liberties with *Zauderer*, either by reducing it to mere rational basis review, expanding its use beyond corrections to inherently misleading speech, or both. Others have remained faithful to its original narrow purpose.²¹²

Recently, in *NIFLA*, the Supreme Court provided clarification as to *Zauderer*'s burdens, and in so doing, minimized the impact of its overuse.²¹³ The Court explained that *Zauderer* is not rational basis review (which imposes all of the burdens on the challenger to negate all of the government's rationales), but instead imposes all of the burdens on the government, just like any other level of review in a free speech challenge.²¹⁴ This includes the requirement to show that the regulation is not "unjustified or unduly burdensome" and also that it is remedying a harm that is "potentially real not purely hypothetical."²¹⁵

In *NIFLA*, the Supreme Court expressly declined to address the question of whether to expand *Zauderer* beyond corrections of inherently misleading speech.²¹⁶ Nor would the Court's prior precedent support this approach.²¹⁷

But even if, assuming *arguendo*, the FDA were to persuade the Supreme Court to expand *Zauderer* beyond its original narrow scope, this would likely have little effect on the result. This is because *NIFLA* has turned *Zauderer* review into a test

207. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); see also *Milavetz, Gallop & Millavetz v. U.S.*, 559 U.S. 229, 250 (explaining that "essential features" of rule at issue in *Zauderer* were that the required disclosures were "intended to combat the problem of inherently misleading commercial advertisements").

208. 471 U.S. at 650.

209. *Id.*

210. *Id.*

211. *Id.* at 650–53.

212. Compare, *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017) (applying *Zauderer* in case involving non-misleading speech and treating it as mere rational basis review), *certiorari granted, judgment vacated by CTIA-The Wireless Ass'n v. City of Berkeley*, 138 S. Ct. 2708, with *Mason v. Florida Bar*, 208 F.3d 952, 958 (2000) (holding that compelled commercial speech failed *Central Hudson* test and was therefore unconstitutional).

213. *NIFLA*, 138 S. Ct. 2361, 2377–78 (2018).

214. *Id.*

215. *Id.*

216. *Id.* at 2377.

217. See *supra* note 97.

that bears a striking resemblance to the *Central Hudson* test.²¹⁸ Therefore, just as with *Central Hudson*, the FDA's ability to meet its burdens would turn in large part on the evidence it can produce and on the precise requirements imposed on the nondairy milk sellers, with less burdensome and more flexible requirements having a substantially greater chance of being upheld by the Court.

CONCLUSION

If the FDA were to follow through on then-Commissioner Gottlieb's proposed approach, banning nondairy milks from being called nondairy milks would almost certainly be held unconstitutional. Moreover, mandating that nondairy milks include the controversial term "imitation" on their labels would probably also fail to pass constitutional muster. Although there are other forms of compelled disclaimers that could be upheld, those may stretch the regulations further than the mere change in enforcement approach apparently preferred by the FDA.

Regardless of the FDA's eventual choice of tactics, this will not be the last time the government is tempted to tinker with our language. Thankfully, the precedent is now trending in a direction where commercial speakers and consumers alike will often be able to defend their rights to speak and to listen.

218. See *NIFLA*, 138 S. Ct. at 2377–78.