

# COMMERCIAL SPEECH PROTECTION AS CONSUMER PROTECTION

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The Supreme Court has long said that “the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”<sup>1</sup> In other words, consumers—the recipients or listeners of commercial speech—are the ones the doctrine is meant to protect. In previous work, I explored the implications of taking this view seriously in three contexts: compelled speech, speech among commercial entities, and unwanted marketing.<sup>2</sup> In each of those contexts, adopting a listener-oriented approach leads to the conclusion that many forms of commercial speech regulation should receive far less First Amendment scrutiny than most courts have given them.<sup>3</sup>

In that earlier work, I distinguished those forms of regulation from the more classic case of a regulation that directly prohibits or restricts some form of commercial communication to consumers.<sup>4</sup> This Essay tackles that case. What if we reimagined commercial speech protection as a form of consumer protection, or at least as a doctrine aligned with consumer protection rather than opposed to it? That would mean that when government regulations do not impinge on the information available to consumer-listeners, courts should not apply the same kind of heightened scrutiny that they do when consumer-listeners are being kept in the dark, even if those regulations may harm the interests of the commercial speakers. Commercial speech doctrine cares primarily about informing consumers, and that is the lens through which courts should determine how much scrutiny to give to a commercial speech restriction.

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1. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel, Inc.*, 425 U.S. 748 (1976)).

2. See Felix T. Wu, *The Commercial Difference*, 58 WM. & MARY L. REV. 2005 (2017).

3. See *id.* at 2009–10.

4. See *id.* at 2031–32.

In commercial speech cases, courts should not be applying the kind of speaker-focused approaches they would be using in cases involving noncommercial speech.

This Essay begins by briefly reviewing the doctrinal and theoretical support for the proposition that commercial speech doctrine is about protecting consumers.<sup>5</sup> Then, using the example of state no-surcharge laws (which generally prohibit charging customers more to use a credit card but permit cash discounts), I will argue that laws such as these that do not restrict the information available to consumers should not be subject to heightened scrutiny under the First Amendment. Finally, I will discuss the broader implications of this perspective for other laws that regulate the framing of consumer information and thus regulate consumer “nudges.”

## I. CONSUMERS IN COMMERCIAL SPEECH THEORY AND DOCTRINE

The Supreme Court has long treated commercial speech, such as commercial advertisements and pricing information, as a distinct category for First Amendment purposes.<sup>6</sup> Initially, commercial speech fell outside of the protection of the First Amendment entirely.<sup>7</sup> Later, the Court determined that commercial speech did merit some protection under the First Amendment but not to the same extent as noncommercial speech.<sup>8</sup> In the decades since *Virginia Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.* in 1976, both the boundaries of the category of commercial speech and the conse-

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5. A more extended treatment can be found in my prior work. *See id.* at 2021–30.

6. While “commercial speech” has existed as a doctrinal category for quite some time, the boundaries of the category have never been clear. *See, e.g.,* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983) (describing three factors, none of which were individually dispositive, but the combination of which “provides strong support for the . . . conclusion that the informational pamphlets [at issue] are properly characterized as commercial speech”); *see also* Wu, *supra* note 2, at 2028. At its core, though, it is clear that speech that “does ‘no more than propose a commercial transaction’” is commercial speech. *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)). That core definition will be enough for purposes of the analysis that follows.

7. *See* *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“[T]he Constitution imposes no . . . restraint on government as respects purely commercial advertising.”).

8. *See Va. State Bd. of Pharmacy*, 425 U.S. at 770–73.

quences of falling within the category have been rather uncertain.<sup>9</sup> Commentators, too, have had widely varying views on both the scope and significance of the category.<sup>10</sup>

Despite the uncertainty and the difficulty in drawing lines, the Court has consistently described commercial speech protection in consumer-oriented terms. In *Virginia Board of Pharmacy*, the Court emphasized the “consumer’s interest in the free flow of commercial information,” an interest that may have been “as keen, if not keener by far, than his interest in the day’s most urgent political debate.”<sup>11</sup> In the context of that particular case, the Court described how suppressing prescription drug price information would hit hardest “the poor, the sick, and particularly the aged,” for whom “information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.”<sup>12</sup> At the aggregate level, the Court explained:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.<sup>13</sup>

Academic views on commercial speech have also largely centered around the value of such speech to consumers.<sup>14</sup> Even those arguing for strong protection of commercial speech under the First Amendment have often done so by focusing on the interests of listeners.<sup>15</sup> Those listener interests are the ones that

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9. See, e.g., *Matal v. Tam*, 137 S. Ct. 1744, 1763–64 (2017) (declining to decide whether “trademarks are commercial speech,” because even if they are and the intermediate scrutiny standard of *Central Hudson* applied, the restriction at issue would fail that test).

10. See Wu, *supra* note 2, at 2023.

11. *Va. State Bd. of Pharmacy*, 425 U.S. at 763.

12. *Id.* at 763–64.

13. *Id.* at 765 (citations omitted).

14. See Wu, *supra* note 2, at 2023–25.

15. See, e.g., Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 434 (1971) (“Since advertising performs a significant function for its recipients, its values are better viewed with the consumer, rather than the seller, as the frame of reference.”).

most justify protecting commercial speech across a wide variety of First Amendment theories.<sup>16</sup>

## II. A LISTENER/CONSUMER-ORIENTED APPROACH TO EVALUATING COMMERCIAL SPEECH RESTRICTIONS

The consistent historical and theoretical emphasis on protecting consumers as the rationale for protecting commercial speech deserves renewed attention as new First Amendment challenges arise beyond those involving the information content of commercial advertisements. The example of state no-surcharge laws provides a case study of a restriction on commercial speech, but one that should be regarded as unproblematic from the perspective of consumers. As a result, courts should not apply heightened scrutiny to such laws.

Consider the case of *Expressions Hair Design v. Schneiderman*.<sup>17</sup> In this case, a group of small businesses challenged a New York law that prohibits imposing a surcharge for using a credit card.<sup>18</sup> The Supreme Court held that what on its face appeared to be a pure commercial regulation was in fact a regulation of speech.<sup>19</sup> This was because, under the New York law, merchants are permitted to provide a discount for using cash even though they are not permitted to charge a surcharge for using a credit card.<sup>20</sup> Thus, the law permits merchants to effectively charge a higher amount for a credit card purchase as compared to a cash purchase. What the law does not permit is expressing that difference as a credit card surcharge rather than a cash discount. The law thus does not regulate how prices are set but instead regulates how those prices are described. Therefore, the Court held that the regulation was of speech, not conduct.<sup>21</sup>

The Court's holding is perfectly plausible as far as it goes, but the question, then, is what follows from it?<sup>22</sup> The Supreme

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16. See generally Wu, *supra* note 2, at 2026–27 (outlining different First Amendment theories and how, under each, commercial speech merits protection, if at all, only under a listener-centric approach).

17. 137 S. Ct. 1144 (2017).

18. *Id.* at 1148.

19. *Id.* at 1151.

20. *Id.*

21. *Id.*

22. See *id.* at 1152 (Breyer, J., concurring) (“When the government seeks to regulate . . . , it is often wiser not to try to distinguish between ‘speech’ and

Court itself was rather cautious about drawing any conclusions, noting simply that the parties disagreed about the appropriate level of scrutiny to apply even assuming the New York law was a speech regulation, and the Court sent the case back to the Second Circuit for further analysis.<sup>23</sup>

Two other circuit courts have struck down similar state no-surcharge laws, however.<sup>24</sup> In both cases, the courts first rejected the argument that the state law was merely a regulation of conduct, just as the Supreme Court did.<sup>25</sup> The circuit courts then proceeded to apply intermediate scrutiny under the *Central Hudson* test, the usual intermediate scrutiny test for commercial speech, and in both cases the courts found the challenged laws failed such scrutiny.<sup>26</sup> In the two instances in which circuit courts upheld no-surcharge laws, the courts did so under the reasoning that the laws were a regulation of conduct rather than speech.<sup>27</sup> This pattern strongly suggests that because the Supreme Court has now decided that such no-surcharge laws regulate speech, those laws are headed for heightened scrutiny and ultimately being struck down.<sup>28</sup>

But let's go back to the premise that commercial speech protection is about protecting consumers, not merchants. If that is the case, then it does not seem that the Constitution should have much to say about how information is communicated to consumers so long as no information is withheld and

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'conduct.' Instead, we can, and normally do, simply ask whether, or how, a challenged statute, rule, or regulation affects an interest that the First Amendment protects." (citation omitted)).

23. See *id.* at 1151.

24. See *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1168 (9th Cir. 2018); *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1240–41 (11th Cir. 2015).

25. See *Italian Colors Rest.*, 878 F.3d at 1176; *Dana's R.R. Supply*, 807 F.3d at 1245.

26. See *Italian Colors Rest.*, 878 F.3d at 1176–79; *Dana's R.R. Supply*, 807 F.3d at 1249–51.

27. See *Rowell v. Pettijohn*, 816 F.3d 73, 80 (5th Cir. 2016), *vacated*, 137 S. Ct. 1431 (2017); *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 131 (2d Cir. 2015), *vacated*, 137 S. Ct. 1144 (2017).

28. See *Rowell v. Paxton*, 2018 U.S. Dist. LEXIS 157574, at \*9–14 (W.D. Tex. Aug. 16, 2018) (applying the *Central Hudson* test and finding that the Texas no-surcharge law violates the First Amendment), *on remand from*, *Rowell v. Pettijohn*, 865 F.3d 237, 238 (5th Cir. 2017) (remanding to the district court for further proceedings in light of the Supreme Court's decision in *Expressions Hair Design*).

consumers have the information they need to make their decisions. In the case of no-surcharge laws, the merchants challenging the laws want to express prices as a credit card surcharge. The state insists that prices be expressed as a cash discount, as two separate prices, or anything else other than a “surcharge.” Either way, consumers have all the information about what price they will pay if they use cash and what price they will pay if they use a credit card.

If there is a difference, and indeed there is likely to be one, it is in how consumers process the information and how they will respond. Anchors and defaults have real effects.<sup>29</sup> If the cash price is the default price and consumers have to pay “more” to use a credit card, they may be more likely to use cash in order to avoid the “extra fee” for using a credit card. On the other hand, if the credit card price is the default price, then relatively fewer consumers may choose to pay cash in order to obtain the cash “discount.” This difference is one instance of the more general phenomenon, well-studied in the cognitive psychology and behavioral economics literatures, of consumers being more willing to expend time and money to avoid a loss than to obtain a gain, even when the ultimate economic consequences are the same.<sup>30</sup> In the credit card case, a “surcharge” frames the price difference as a loss, thereby driving more people towards cash, while a “discount” frames the price difference as a gain, thereby acting as a less powerful incentive for people to use cash.<sup>31</sup>

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29. Anchoring refers to the psychological phenomenon of focusing too much on a starting or reference point when assessing or estimating some quantity. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCIENCE* 1124, 1128–30 (1974). For example, in one experiment, a group of subjects were first asked to write down the last two digits of their Social Security numbers and whether they would be willing to pay that much for a particular bottle of wine. See Dan Ariely et al., “Coherent Arbitrariness”: *Stable Demand Curves Without Stable Preferences*, 118 *Q.J. ECON.* 73, 76–77 (2003). The subjects were then asked to write down, as a free-form response, how much they were willing to pay for the item. Subjects with Social Security numbers in the top quintile were, on average, willing to pay more than three times more for the same item as subjects with Social Security numbers in the bottom quintile. *Id.* With respect to credit card usage, the relevant anchor would be the posted price.

30. See Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 *J. ECON. BEHAV. & ORG.* 39, 45 (1980); see also Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 *Q.J. ECON.* 1039 (1991) (developing a model that explains how people’s choices depend on a starting or reference point).

31. See *Expressions Hair Design*, 808 F.3d at 122.

Apart from the decision whether to use cash or credit, the framing of prices may also influence the consumer's decision whether to buy in the first place. Specifying the price as a lower base price plus an additional fee, particularly an additional percentage fee, may lead consumers to focus on the base price rather than the total amount they would actually pay using a credit card, thereby causing them to underestimate the product's true cost.<sup>32</sup> This would potentially cause consumers to be marginally more willing to buy from those merchants than they otherwise would be, benefitting the merchants.

The influence of framing also explains why merchants stand to benefit from encouraging their customers to use cash. In theory, merchants could simply set their credit card surcharges to be high enough that they make as much money (or even more) from credit card customers as from cash customers. Then they would be agnostic as to whether any one customer uses cash or credit. Again though, there is presumably some set of customers who will make the purchase at the lower cash price but not at the higher credit card price, and it may be easier to attract those customers when the base price is the cash price, not the credit card price.

Commercial speech protection, however, originated in and is justified by protecting consumers' rights to receive commercial information, not in protecting merchants' rights to frame that information. Consider again the case that established commercial speech protection, *Virginia Board of Pharmacy*.<sup>33</sup> That case involved a regulation that prohibited pharmacists from advertising the prices of prescription drugs.<sup>34</sup> While the regulation was directly imposed on pharmacists, its effect was to make prescription drug price information unavailable to consumers.<sup>35</sup> The state's justification for the regulation was that allowing price advertising would lead consumers to unwisely choose pharmacists based on cost rather than quality.<sup>36</sup> Price

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32. See, e.g., Eric A. Greenleaf et al., *The Price Does Not Include Additional Taxes, Fees, and Surcharges: A Review of Research on Partitioned Pricing*, 26 J. CONSUMER PSYCHOL. 105 (2016).

33. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

34. See *id.* at 749–50.

35. *Id.* at 753–54.

36. See *id.* at 769.

competition would create a market for lemons<sup>37</sup>—that is, a market in which pharmacists would cut quality in order to offer lower prices.<sup>38</sup> Low-quality pharmacists would drive high-quality pharmacists out of business, and consumers' health would suffer as a result.<sup>39</sup>

Rejecting the state's justifications, the Court struck down the regulation as inconsistent with the First Amendment because it depended upon keeping consumers ignorant.<sup>40</sup> The state was essentially telling consumers that it was "not in their best interests" to be "permitted to know who is charging what."<sup>41</sup> Under the First Amendment, however, as between the "dangers of suppressing information" or the "dangers of its misuse if it is freely available," the latter is to be preferred.<sup>42</sup>

In a sense, the Court in *Virginia Board of Pharmacy* was protecting people's ability to be informed consumers against a state regulation ultimately designed to protect people's health by making them less informed consumers. As such, the effect of commercial speech protection was to privilege consumer protection, at least in the sense of protecting access to consumer information, over other forms of individual welfare.

A similar pattern can be seen in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the case that established the four-part test generally used to determine the constitutionality of a commercial speech restriction.<sup>43</sup> In *Central Hudson*, the challenged regulation, promulgated in order to conserve energy, prohibited electric utilities from promoting electricity consumption.<sup>44</sup> The Court recognized the social importance of energy conservation but ultimately found that a blanket ban on advertising was an excessive measure to advance that interest.<sup>45</sup> A blanket ban would limit consumers' access to information about all uses of electricity, including

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37. See generally George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (analyzing how asymmetric information can lead to markets in which only poor-quality products are sold).

38. See *Va. State Bd. of Pharmacy*, 425 U.S. at 767–68.

39. See *id.*

40. See *id.* at 769.

41. *Id.* at 770.

42. *Id.*

43. See 447 U.S. 557, 566 (1980).

44. See *id.* at 559.

45. See *id.* at 570–71.



efficient ones. And even though the electric utilities were monopolies, and thus consumers had no choice of providers, information about uses of electricity could help consumers be more informed in deciding how much electricity to consume, both in absolute terms and relative to other potential sources of energy.<sup>46</sup> Here again, commercial speech protection served to ensure that consumers were informed.<sup>47</sup>

Key commercial speech cases since *Central Hudson* have similarly emphasized the importance of informed consumers, even when informing consumers might come at the expense of other societal values. In *44 Liquormart, Inc. v. Rhode Island*, the Supreme Court struck down a state law prohibiting the advertising of prices for alcoholic beverages despite the state's substantial interest in temperance.<sup>48</sup> In *Greater New Orleans Broadcasting Ass'n v. United States*, the Court struck down a ban on broadcast advertising for private casino gambling in places where such gambling was legal.<sup>49</sup> In *Thompson v. Western States Medical Center*, the Court struck down a ban on advertising specific compounded drugs.<sup>50</sup> In each case, the Court described how, under the challenged law, information useful to consumers would be lost.<sup>51</sup>

In contrast, in the case of no-surcharge laws, consumers are not being kept "in the dark."<sup>52</sup> No price or other information is being suppressed. In striking down those laws, courts

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46. See *id.* at 567–68.

47. See *id.* at 567 ("Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment." (emphasis added)).

48. 517 U.S. 484, 504, 516 (1996).

49. 527 U.S. 173, 180, 195–96 (1999).

50. See 535 U.S. 357, 360, 377 (2002).

51. See *id.* at 376–77 (giving examples of the "beneficial speech prohibited" by the challenged law); *Greater New Orleans Broadcasting*, 527 U.S. at 184–85 ("[P]etitioners' broadcasts presumably would disseminate accurate information as to the operation of market competitors, such as pay-out ratios, which can benefit listeners by informing their consumption choices and fostering price competition."); *Liquormart*, 517 U.S. at 503 & n.13 ("[T]hese commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy . . . . Rhode Island seeks to reduce alcohol consumption by increasing alcohol price; yet its means of achieving that goal deprives the public of their chief source of information about the reigning price level of alcohol. As a result, the State's price advertising ban keeps the public ignorant of the key barometer of the ban's effectiveness: the alcohol beverages' prices.").

52. *Liquormart*, 517 U.S. at 503.

have lost sight of the consumer information rationale for protecting commercial speech. The Ninth Circuit, for example, simply went straight from finding that the no-surcharge law restricted speech to applying the *Central Hudson* test.<sup>53</sup>

By automatically applying the *Central Hudson* test, the Ninth Circuit “err[ed] in concluding that all commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression.”<sup>54</sup> In *Liquormart*, Justice Stevens used the idea of flexibility in the standard of review to argue that the *Central Hudson* test was not stringent enough in that case.<sup>55</sup> But *Liquormart* involved suppressing consumer information “for reasons unrelated to the preservation of a fair bargaining process,” namely, temperance, and in a way that would “all but foreclose alternative means of disseminating certain information.”<sup>56</sup> No-surcharge laws foreclose one method of conveying price information while leaving open others, and they do so in order to regulate the commercial transaction itself, not for some unrelated social goal. When the underlying rationale for protecting commercial speech is absent, there is no reason to reflexively scrutinize commercial speech regulations or to necessarily apply even the *Central Hudson* test, let alone something more stringent.

The Eleventh Circuit similarly applied heightened scrutiny to a no-surcharge law without explaining what consumer interests were at stake.<sup>57</sup> Instead, the court emphasized the interests of the commercial speakers, describing the merchants as

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53. See *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1176 (9th Cir. 2018).

54. *Liquormart*, 517 U.S. at 501. On this point, the principal opinion was joined by only two other Justices. Two additional Justices, however, expressed even greater skepticism about applying the *Central Hudson* test, while only four Justices argued for doing no more than applying the *Central Hudson* test. See *id.* at 518 (Thomas, J., concurring) (“In cases such as this, in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson* should not be applied, in my view.”); *id.* at 517 (Scalia, J., concurring) (“I share Justice Thomas’s discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it.”); *id.* at 532 (O’Connor, J., concurring) (“Because we need go no further, I would not here undertake the question whether the test we have employed since *Central Hudson* should be displaced.”).

55. See *id.* at 501.

56. *Id.*

57. See *Dana’s R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1246 (11th Cir. 2015).

“the constituency most impacted by the no-surcharge law,” and one that had been “deprived of its full rhetorical toolkit.”<sup>58</sup> In the commercial speech context, however, it is the consumers—not the merchants—that are the relevant constituency, and it is informational content—not rhetoric—that the doctrine seeks to protect.

In contrast, when the speech at issue is noncommercial, the First Amendment protects not only what someone has to say but also how the speaker chooses to say it. Speakers cannot be prohibited from saying “fuck the draft” and told that they should express their disagreement with the draft system using other words.<sup>59</sup> Both the message and its expression merit First Amendment protection.

A key rationale for protecting the specific words chosen in noncommercial speech, however, is that specific words can convey “inexpressible emotions.”<sup>60</sup> That rationale is inapplicable in the commercial speech context. Being unable to convey one’s emotions is not a concern about consumers—the targets of commercial speech protection—but a concern about speakers. The consumers’ interest is in the “free flow of commercial information,” not emotions.<sup>61</sup>

Alternatively, the choice of words in noncommercial speech is also protected in order to avoid “running a substantial risk of suppressing ideas” or serving as “a convenient guise for banning the expression of unpopular views.”<sup>62</sup> This concept of protecting the openness of the marketplace of ideas is potentially a more listener-oriented one, and yet it is equally inapt in the context of commercial speech. What makes commercial speech commercial is its role in communicating commercial information in order to facilitate commercial transactions. Thus, even if commercial speech is restricted, all the avenues of noncommercial speech remain available to convey ideas and views, and there is little risk of suppression and censorship. While a commercial speech restriction might prevent a particular commercial speaker from conveying a particular idea in a particular

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58. *Id.* at 1247.

59. *See* *Cohen v. California*, 403 U.S. 15, 16, 26 (1971).

60. *Id.* at 25–26.

61. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

62. *Cohen*, 403 U.S. at 26.

statement, it does not prevent that same idea from being conveyed in other ways or by other speakers and thereby being made available to listeners. And it is the listeners' access, not the speakers' rights, that matters in the context of commercial speech.

Consider again the no-surcharge laws, which the Eleventh Circuit went so far as to describe as "viewpoint based."<sup>63</sup> Restricting speech based on the views expressed is particularly disfavored under the First Amendment, and the Supreme Court has subjected such laws to particularly stringent scrutiny.<sup>64</sup>

But what is the relevant viewpoint that is potentially being suppressed by a no-surcharge law? It cannot simply be the "view" that this particular price difference should be called a surcharge rather than a discount. To call that a "viewpoint" is to drain the term of any relevant meaning since then every instance of noncompliance with a governmental regulation could be said to express the view that the regulation is wrong. The Eleventh Circuit characterized no-surcharge laws as viewpoint based because they "denie[d] the expression of one equally accurate account of reality in favor of the State's own."<sup>65</sup> Yet the same could be said for various rules about the format and methodology of a Nutrition Facts label, for example.<sup>66</sup> Requiring that fat, sugar, and protein be disclosed in a particular order seems to deny merchants who disagree with the relative importance of the categories the opportunity to express their "equally accurate account of reality."<sup>67</sup> To characterize such regulations as the "most insidious methods of eliminating unwelcome opinion" and to then subject them to "the highest form of scrutiny"<sup>68</sup> is to entirely collapse the hierarchy of different First Amendment categories into one. If restrictions on

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63. *Dana's R.R. Supply*, 807 F.3d at 1248.

64. *See Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring) ("A law found to discriminate based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995))).

65. *Dana's R.R. Supply*, 807 F.3d at 1248.

66. *See generally Changes to the Nutrition Facts Label*, U.S. Food & Drug Administration, <https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm> [<https://perma.cc/XU97-H5JU>].

67. *Dana's R.R. Supply*, 807 F.3d at 1248.

68. *Id.*

commercial labeling are viewpoint based, then virtually any speech restriction could be characterized as viewpoint based. And if all speech restrictions are viewpoint based, then the category has lost its significance and cannot be the basis for especially stringent review.

On the other hand, perhaps the relevant view that no-surcharge laws restrict is that credit card fees are too high or that consumers ought to use cash instead of credit. But these are views that merchants remain free to express, as many merchants do with signs that they post. Such views are not being suppressed when merchants can convey them using any method except the particular way in which they describe their prices. In the case of the New York law, after the Supreme Court's decision there perhaps remained some question as to whether the law did indeed restrict merchants' speech apart from how they described their prices; if so, heightened scrutiny might then have been warranted.<sup>69</sup> So long as the law restricts only the method of describing prices, however, concerns over

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69. See *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1154 (2017) (Sotomayor, J., concurring) (stating that the New York no-surcharge law “could be read more broadly” to “prohibit a merchant from characterizing the difference between the cash and credit card prices as a ‘surcharge,’ no matter how he displays his prices”); see also *Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 104–05 (2d Cir. 2017) (certifying to the New York Court of Appeals the question of “whether a merchant complies with [the New York law] so long as, when posting prices, the merchant discloses the total dollars-and-cents price charged to credit card users” at least in part because a lower standard of review may apply if the law does not bar a merchant from “conveying to its customers other information the merchant finds relevant”). The New York Court of Appeals has since determined that “so long as the total dollars-and-cents price charged for credit card purchases is posted, nothing in [the New York no-surcharge law] prohibits merchants from explaining the difference in price as a ‘surcharge’ attributable to credit card transaction fees they must bear.” *Expressions Hair Design v. Schneiderman*, 2018 N.Y. LEXIS 3000, at \*16 (N.Y. Oct. 23, 2018). So understood, the New York law may be merely a disclosure requirement triggered by commercial activity, to which no heightened First Amendment scrutiny should apply for that reason alone. See *Wu*, *supra* note 2, at 2040 (arguing that mandatory disclosures triggered by commercial activity should receive no special First Amendment scrutiny, not even the more relaxed scrutiny applied in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)). My claim in this Essay is that even if the New York law were interpreted to prohibit a merchant from stating a price difference as a surcharge, the law still should not be subject to heightened scrutiny so long as the merchant remains free to attribute any price difference to credit card fees, to directly encourage customers to use cash, and to convey any other information to consumers.

speaker autonomy and viewpoint suppression that apply to regulating noncommercial speech do not apply here.

In comparing no-surchage laws to the laws struck down in cases like *Cohen v. California* and *West Virginia Board of Education v. Barnette*, the Eleventh Circuit wrongly elided the distinction between commercial and noncommercial speech.<sup>70</sup> The court may have done so because it had doubts as to whether the speech regulated by no-surchage laws is indeed commercial speech.<sup>71</sup> There is no reason for doubt. What makes speech commercial is the extent to which the speech should be understood to be part of a commercial transaction.<sup>72</sup> Pricing information is quintessential commercial speech, because pricing is a key component of any commercial transaction.

The Eleventh Circuit's reasons for finding it difficult to categorize no-surchage laws were entirely unpersuasive. In part, the court emphasized the fact that no-surchage laws restrict speech and not conduct.<sup>73</sup> But a regulation of commercial speech is indeed a regulation of speech. If it were instead a regulation of commercial conduct, then it would be subject to no special First Amendment scrutiny at all, merely rational basis review.<sup>74</sup> The court also claimed that "the speech [that the no-surchage law] limits contains elements of core political

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70. See *Dana's R.R. Supply*, 807 F.3d at 1247–48 (citing *Cohen v. California*, 403 U.S. 15 (1971) and *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)). In *Cohen*, the Supreme Court held that it violated the First Amendment to criminalize wearing a jacket that said "Fuck the Draft" in the corridor of a county courthouse. See *Cohen*, 403 U.S. at 16, 26. In *Barnette*, the Court held that it violated the First Amendment to compel schoolchildren to salute and pledge allegiance to the flag. *Barnette*, 319 U.S. at 642. The speech in those cases was undoubtedly noncommercial.

71. See *Dana's R.R. Supply*, 807 F.3d at 1246 ("Florida's no-surchage law proves difficult to categorize, skirting the line between targeting commercial speech and restricting speech writ large.").

72. See Wu, *supra* note 2, at 2028.

73. See *Dana's R.R. Supply*, 807 F.3d at 1247 ("The statute goes to great length to avoid direct regulation of any actual conduct—that is, it fails to limit at all merchants' discretion to engage in dual-pricing—in favor of limiting speech alone."); *id.* at 1247–48 ("Moreover, its extraordinary breadth suggests the no-surchage law is more than a mere regulation of commercial speech. . . . [I]mposing a direct and substantial burden on disfavored speech—by silencing it—is the whole point.").

74. See, e.g., *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 133 n.9 (2d Cir. 2015) (noting that a rational basis challenge would be the only one available against a law regulating economic activity, but declining to address it because such a challenge had not been raised), *vacated*, 137 S. Ct. 1144 (2017).

speech.”<sup>75</sup> In support of this claim, though, the court cited to the fact that “[n]o-surcharge laws are not unique to Florida, and have a long and bitter political provenance.”<sup>76</sup> The fact that a law may be the subject of political debate does not make the law itself one that regulates political debate.

In sum, while no-surcharge laws may indeed restrict speech, the speech they restrict is commercial. Scrutiny of restrictions on commercial speech is and should be based on the extent to which such restrictions limit the availability of information to the consumer audience. No-surcharge laws, unless interpreted very broadly, do not restrict the availability of relevant consumer information. Instead, they regulate how that information is framed. Regulating the framing of consumer information rather than its availability has not been the basis for heightened scrutiny in the past, and no First Amendment interests would be served by imposing heightened scrutiny on such regulations going forward.

To be clear, the fact that no-surcharge laws do not merit heightened scrutiny under the First Amendment does not mean that such laws are necessarily good policy. Their effect is largely to limit merchants’ abilities to steer customers away from using credit cards.<sup>77</sup> Credit card companies are obvious beneficiaries of these laws, and the laws may represent little more than successful lobbying on their part with the consumer-protection rationale being merely a cover for economic protectionism.<sup>78</sup> Moreover, to the extent that no-surcharge laws push merchants not to engage in differential pricing at all, cash customers effectively end up subsidizing fees generated by credit card customers.<sup>79</sup> Because credit card holders generally obtain benefits from their use of credit cards, ranging from the credit itself to various rewards, and because credit card holders are generally wealthier than cash customers, the net economic

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75. *Dana’s R.R. Supply*, 807 F.3d at 1247.

76. *Id.* at 1247 n.9.

77. *See Expressions Hair Design*, 808 F.3d at 122 (noting that merchants impose credit card surcharges “in an effort to convince [consumers] to pay cash”).

78. *See id.* at 133 n.9 (describing the argument that the New York no-surcharge law “was passed at the behest of the credit-card lobby to encourage consumers to use credit cards as opposed to cash” and was “unadulterated economic favoritism” (citation omitted)).

79. *See* Dennis W. Carlton & Alan S. Frankel, *The Antitrust Economics of Credit Card Networks*, 63 ANTITRUST L.J. 643, 660–61 (1995).

effect of credit-card usage is regressive, resulting in a wealth transfer from poorer individuals to wealthier ones.<sup>80</sup> Perhaps then, society ought to be discouraging credit-card usage rather than encouraging it through no-surcharge laws.

But all of that is ordinary economics. It is a fact of our overall political system that large economic interests can lobby for laws that benefit them to the detriment of others and that some (many?) laws may benefit those who are richer over those who are poorer. The First Amendment is not designed to address such issues, not directly at least. Invoking the First Amendment against no-surcharge laws in a way that may seem progressive in this instance is likely to harm progressive aims in the long run. On average, commercial speakers are dominant, powerful entities. Giving them First Amendment rights in their own name rather than merely rights designed to protect the rights of consumers will only add to their power.

### III. A CODA ON NUDGING

One potential argument in favor of heightened First Amendment scrutiny of no-surcharge laws remains to be addressed: the argument that such laws are problematic because they are paternalistic.<sup>81</sup> The anti-paternalism argument is that if describing a price difference as a surcharge drives more people to use cash or drives more people to make the purchase, so be it. It is not for the government to decide what people should buy and how they should make those purchases.

The trouble with this argument is that it assumes the existence of a neutral, autonomy-respecting baseline from which the government regulation represents a deviation. There may be reason to question this assumption even when it comes to deciding whether to regulate what information consumers

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80. See Dennis W. Carlton & Alan S. Frankel, *Transaction Costs, Externalities, and "Two-Sided" Payment Markets*, 2005 COLUM. BUS. L. REV. 617, 640–41 (“The [credit card] interchange fee, therefore, may disproportionately harm minorities and the poor because it acts as a tax on cash customers.”); Scott Schuh et al., *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations* (Fed. Reserve Bank of Bos., Pub. Pol’y Paper No. 10-03, 2010), <https://www.bostonfed.org/publications/public-policy-discussion-paper/2010/who-gains-and-who-loses-from-credit-card-payments-theory-and-calibrations.aspx> [<https://perma.cc/96DJ-7LDD>].

81. See *Dana’s R.R. Supply*, 807 F.3d at 1251 (“Paternalistic efforts at social engineering are anathema to constitutional first principles.”).



receive. One could think that in the absence of government intervention whatever is most favorable to commercial interests will dominate the information marketplace. Limiting that commercial information could actually create more space for other voices to be heard, in a way that would ultimately enhance consumer autonomy.<sup>82</sup> Setting aside issues of attention and information overload, however, it is at least plausible to imagine full information as being better and more autonomy respecting than partial information. Thus, one can coherently take the view that restricting consumers' access to information for their own good is inappropriately paternalistic under the First Amendment.

When it comes to framing information, there is no equivalent to the full-information baseline. Information will be framed in some ways and not others. There is no sense in which it is possible to be inclusive and provide "more" framings rather than fewer. Nor can consumers really choose among framings.

The idea that the commercial speech doctrine is supposed to be antipaternalistic comes from *Virginia Board of Pharmacy*.<sup>83</sup> In that case, after describing the hypothesis that price competition among pharmacists would cause customers to focus only on price and drive the market to provide only low-quality, commodity services, the Court said:

All this is not in [the customers'] best interests, and all this can be avoided if they are not permitted to know who is charging what.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.<sup>84</sup>

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82. This is the egalitarian, rather than libertarian, perspective on the appropriate role of the First Amendment. See Kathleen M. Sullivan, *Comment: Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144–45 (2010).

83. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

84. *Id.*

In other words, the Court viewed making information available as a nonpaternalistic alternative to restricting information.

In the context of regulating the framing of information rather than its availability, though, there is no similar less paternalistic alternative. If describing a price difference as a surcharge drives more customers to use cash but describing it as a discount leads more customers to use a credit card, how could we determine which framing represents the better pathway to customers' "best interests"? Neither framing results in the customers being better "informed," the supposedly less paternalistic approach.<sup>85</sup>

More generally, no-surcharge laws can be characterized as government attempts to prohibit or regulate a certain form of commercial nudging. A nudge is any aspect of the environment or circumstances surrounding a choice that influences that choice without restricting options or significantly changing the decision-maker's economic incentives.<sup>86</sup> For example, the placement of food in a cafeteria line is a nudge because people may be more likely to select food that comes first or that is easier to reach even when other food items are available and at their usual prices.<sup>87</sup> In the consumer context more generally, the framing of prices can create nudges by influencing various consumer decisions, including whether to buy, what to buy, or whether to use a credit card.<sup>88</sup> Setting different prices for using cash or using a credit card is not a nudge because it actually changes the customer's economic incentives. Framing those prices as a credit card surcharge, however, is a nudge toward using cash. No-surcharge laws prohibit that nudge and potentially nudge in the other direction.

At first glance, government regulation of commercial speech that nudges might seem problematic under the First Amendment. After all, nudging is premised on the ways in which decision-making is influenced by factors other than a conscious weighing of the alternatives. This is not a model in which "people will perceive their own best interests if only they are

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85. *Id.*

86. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2008).

87. See *id.* at 1–2.

88. See *id.* at 36–37 (giving examples of the influence of framing, including in the context of credit card surcharges).

well enough informed.”<sup>89</sup> Regulation of nudging inevitably assumes that people may respond to their environment in ways that are not in their best interests. On its face, this seems to run counter to the Court’s exhortations in *Virginia Board of Pharmacy* against paternalism.

But unlike restrictions on information, nudges are inevitable. Choices do not happen in a vacuum. There is always an environment—a choice architecture, as Thaler and Sunstein call it—that invariably influences the choices people make.<sup>90</sup> Take the example of credit card versus cash prices. Perhaps one could try to avoid influencing consumers by posting both prices together, rather than just one or the other. But then one would have to decide which price to list first, and that decision would likely influence the consumer’s choice about whether to use a credit card.

Since nudging is inevitable, even in the absence of government regulation nudging would still occur. One cannot object to government regulation of nudging in the same way one might object to government restrictions on commercial information. In the absence of a restriction on commercial information, consumer choices would be better informed. In the absence of regulation of nudging, consumer choices would still be influenced. We can try to eliminate ignorance, but not influence.

Moreover, not only is some form of nudging inevitable, but in the absence of government regulation consumers will simply be nudged in whatever ways businesses decide to nudge them. In doing so, businesses will ultimately be guided by whatever is in their best interests, not necessarily the interests of their customers.<sup>91</sup> It is right to be concerned about the effects of nudging on autonomy, whether within the framework of the First Amendment or otherwise.<sup>92</sup> From the consumers’ perspective, however, restricting businesses from nudging them is no less autonomy respecting than being nudged by those businesses.<sup>93</sup>

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89. *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

90. See THALER & SUNSTEIN, *supra* note 86, at 3, 10.

91. See Richard H. Thaler, *The Power of Nudges, for Good and Bad*, N.Y. TIMES, Oct. 31, 2015, at BU6.

92. See Cass R. Sunstein, *The Ethics of Nudging*, 32 YALE J. ON REG. 413 (2015).

93. One could perhaps argue that government nudging is inherently problematic in a way that private nudging is not. See THALER & SUNSTEIN, *supra*

Regulating nudging may still be paternalistic, insofar as the government is trying to influence people to make what it regards to be better choices, but this paternalism is quite different from the one the Court worried about in *Virginia Board of Pharmacy* and other cases involving restrictions on commercial information.<sup>94</sup> Restricting information is a coercive form of paternalism.<sup>95</sup> Such restrictions limit the choices available to consumers by keeping them in the dark about those choices.<sup>96</sup> A consumer who does not know what different pharmacists charge will find it difficult to choose a low-cost pharmacist.<sup>97</sup> Although no choice has literally been foreclosed, the consumer's ability to choose has been significantly burdened.

In contrast, nudges influence choices without significantly limiting them.<sup>98</sup> Whether faced with a cash discount or a credit card surcharge, a consumer is equally free to pay with cash or pay with a card. Because nudges are in that sense "liberty-preserving,"<sup>99</sup> they should not face the same First Amendment objections as speech regulations that effectively restrict consumer choices.

All of this might look quite different from the commercial speaker's perspective. With respect to the speaker, regulating nudging is coercive and restricts the speaker's ability to influence and to nudge. Noncommercial speakers may have a First Amendment right to influence and to nudge.<sup>100</sup> Commercial speakers do not because commercial speech doctrine protects consumers rather than speakers.

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note 86, at 10. Under the First Amendment, though, there is nothing per se illegitimate about the government trying to influence consumer decisions, for example, through public service advertisements. *See, e.g.,* *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005) ("[G]overnment speech . . . is not susceptible to First Amendment challenge."). The First Amendment proscribes certain means of government influence, not the influence itself.

94. *See* 425 U.S. at 770.

95. *See* THALER & SUNSTEIN, *supra* note 86, at 5.

96. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.").

97. *See* *Va. State Bd. of Pharmacy*, 425 U.S. at 763–64.

98. Thaler and Sunstein refer to this as "libertarian paternalism." THALER & SUNSTEIN, *supra* note 86, at 5.

99. *Id.*

100. *See supra* notes 59–62 and accompanying text.

## CONCLUSION

It matters that under First Amendment commercial speech doctrine consumer listeners matter and commercial speakers do not. Taking an exclusively consumer-oriented perspective demonstrates why certain laws that do not restrict the information available to consumers, such as no-surcharge laws, merit far less scrutiny under the First Amendment than an unreflective application of precedent would give them. More generally, governments should have far freer rein under the First Amendment to restrict commercial nudging than to restrict the flow of commercial information.