PEACHES, SPEECH, AND CLARENCE THOMAS: YES, CALIFORNIA, THERE IS A JUSTICE WHO UNDERSTANDS THE RAMIFICATIONS OF CONTROLLING COMMERCIAL SPEECH

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> When it comes time to interpret the Constitution's provisions, such as, for instance, the Speech or Press Clauses of the First Amendment, reasonable minds can certainly differ as to their exact meaning. But that does not mean that there is no right or correct answer; that there are no clear, eternal principles recognized and put into motion by our founding documents. This was the mistake of the legal realists, and it continues to be the mistake of the critical theorists: law is something more than merely the preferences of the power elites writ large. The law is a distinct, independent discipline, with certain principles and modes of analysis that yield what we can discern to be correct and incorrect answers to certain problems.[1]

In April 1996, Justice Clarence Thomas of the United States Supreme Court spoke at the University of Kansas School of Law as part of the Stephensen Lectures in Law & Government Series.[2] His address focused on his philosophy of judging. The above quote from Justice Thomas's speech, as well as a few that will follow, exemplifies how Justice Thomas's jurisprudence concerning Constitutional issues, including those surrounding commercial speech, has been built on the belief that a correct interpretation of the law exists.[3] This article focuses on Justice Thomas's short but pointed dissent in *Glickman v. Wileman Bros. & Elliott, Inc.*,[4] and how it reflects his jurisprudence on commercial speech and the First Amendment. The dissent itself is straightforward and forms a framework to examine Justice Thomas's jurisprudence section by section.

The first section of this article will address the majority opinion in *Glickman* and why the majority came to the conclusion that speech was not an issue. Second, Justice David Souter's dissenting opinion, with whom Chief Justice William Rehnquist and Justice Antonin Scalia

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1 Hon. Justice Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 5-6 (1996) (This is an excerpt from a speech given by Justice Thomas at the University of Kansas School of Law on Apr. 8, 1996).

2 *See id.*

3 *See id.*

4 521 U.S. 457, 504 (1997).

joined, will be examined because Justice Thomas joined it except for part II, to which he strongly objected. Third, the remainder of the article will focus on Justice Thomas's commercial speech jurisprudence against the backdrop of his separate dissenting opinion. The quotes from Justice Thomas's speech provide an understanding about the strength of his convictions.

I. WHY THE MAJORITY SAYS THAT SPEECH IS SPEECH EXCEPT WHEN IT IS NOT

On June 25, 1997, the Supreme Court upheld a Federal marketing program that forces agricultural producers to pay for generic fruit advertising.[5] In doing so, the majority rejected the lower court's holding that this requirement was tantamount to compelled speech and thus violated the First Amendment.[6] The majority emphasized that simply because "an economic regulation may indirectly lead to a reduction in a handler's individual advertising budget does not itself amount to a restriction on speech."[7]

The case in question, *Glickman v. Wileman Bros. & Elliott, Inc.*,[8] was brought by Wileman Bros. and other fruit producers in California to challenge regulations and requirements under the Agricultural Marketing Agreement Act of 1937 (AMAA).[9] Wileman Bros.' claim included a First Amendment challenge to the requirement that fruit growers in the area subsidize generic advertising.[10] The regulations challenged were Marketing Orders 916 and 917 that regulate nectarines, peaches, pears and plums in California.[11] Amendments to both of these orders over the years have authorized generic advertising of each of these fruits.[12] Wileman Brothers & Elliott, Inc. is a large fruit producer in California.[13] In 1987 and 1988, Wileman Brothers had problems with the maturity and minimum size requirements of some of their fruit varieties and refused to pay the assessments, subsequently filing a challenge of the order's standards.[14] In 1988, the fruit producers filed a

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5 *See* Linda Greenhouse, *Agricultural Marketing Effort is Ruled Constitutional*, N.Y. TIMES, June 26, 1997, at D25.

6 *See id.*

7 *Glickman*, 521 U.S. at 470.

8 *Id.* at 460.

9 "Congress enacted the Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 601 *et seq.*, in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities." *Id.* at 461 (citation omitted).

10 *See id.* at 462-63.

11 *See id.* at 463.

12 *See id.*

13 *See id.*

14 *See id.*

second petition including a challenge to the generic advertising regulations claiming that it violated their First Amendment right to free speech because it compelled them to render financial aid to support commercial speech to which they objected.[15] The United States Court of Appeals for the Ninth Circuit rejected the fruit producers' statutory claims but upheld their First Amendment claim and found that the generic advertising regulations violated the First Amendment.[16] Specifically, the court found that the right to freedom of speech, as protected by the First Amendment, includes the right not to be compelled to pay for others' speech.[17] The court also applied "the test for restrictions on commercial speech set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*."[18]

The *Central Hudson* test is a

> four-part test to determine the constitutionality of commercial speech regulation: (1) was the speech false or misleading ([i]f so, it could constitutionally be regulated); (2) does the government regulation further a substantial interest; (3) does the regulation directly advance that interest; and (4) could the governmental interest be equally served "by a more limited restriction on commercial speech[?]."[19]

The Ninth Circuit Court of Appeals, applying this test, held that the regulations violated the First Amendment.[20] The court held that the speech was neither misleading nor untruthful, and that the government did have substantial interests in regulating the market and increasing returns to the fruit producers.[21] The government's interests were to increase demand for the various fruits and, by spreading the cost of advertising among all of the fruit producers, also to increase the profit margin.[22] However, the Court of Appeals further held that the government's actions failed the second prong of the *Central Hudson* test because it could not prove that forced generic advertising was more effective than individual advertising to meet that goal.[23] Finally, the court held that the government's program was not sufficiently "narrowly tailored" under the fourth prong of the test.[24]

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15 *See id.* at 463-66.

16 *See id.* at 465-67.

17 *See id.* at 466.

18 *Id.* (quoting Wileman Bros. & Elliot, Inc. v. Espy, 58 F.3d 1367, 1378 (9th Cir. 1995), *referring to* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n., 447 U.S. 557 (1980)).

19 Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 559 (1997) (citing and quoting in part *Central Hudson*, 447 U.S. at 563-64).

20 *See Glickman*, 521 U.S. at 465.

21 *See id.* at 466.

22 *See id.* at 464-66.

23 *See id.*

24 *See id.*

In reviewing the case, the Supreme Court never reached the validity of the analysis employed by the Court of Appeals.[25] The issue, as articulated by Justice Stevens, was "whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve."[26] According to Justice Stevens, speech restraints must reach one of three levels to be viewed under the higher scrutiny standard attached to First Amendment issues: First, they must impose "restraint on the freedom of any producer to communicate any message to any audience[;]" or second, they must "compel any person to engage in any actual or symbolic speech[;]" or third they must compel a person to endorse or fund political or ideological views.[27] Justice Stevens wrote that the restraints must be viewed under the same standard as all "anticompetitive features of the marketing orders" if none of these levels are implicated.[28]

The Supreme Court rejected the producers' argument that the government had essentially deprived them of the opportunity to finance their own advertisements by forcing them to subsidize generic advertisements, thereby restricting their ability to "communicate any message to any audience."[29] According to Justice Stevens, "[T]he First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget."[30]

The Supreme Court also rejected the argument that the subsidy assessments compelled speech as it had previously been defined. The producers were not required to repeat "objectionable message[s] out of their own mouths; use their own property to convey an antagonistic ideological message; . . . respond . . . when they 'would prefer to remain silent;'" or publicly identify themselves as associated with the message.[31] Justice Stevens pointed out that while the First Amendment prohibits the compulsion of anyone to render financial support for others' speech, the appellate court misread the Court's holding in *Abood*.[32] *Abood* recognizes the right not to be forced to fund "an organization whose

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[25] *See id.* at 468.

[26] *Id.*

[27] *Id.* at 469-70 (footnotes omitted).

[28] *Id.* at 470.

[29] *Id.* at 469.

[30] *Id.* at 470.

[31] *Id.* at 471 (citing West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943); Wooley v. Maynard, 430 U.S. 705 (1977); Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 18 (1986) (plurality opinion); and PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).

[32] *See Glickman*, 521 U.S. at 471 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977)).

expressive activities conflict with one's 'freedom of belief.'"[33] According to Stevens and the majority opinion, the subsidy assessments did not rise to those levels because they did not interfere with "the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[34] In the Court's opinion, Stevens wrote,

> [R]equiring [producers] to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit. Neither the fact that [producers] may prefer to foster that message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message.[35]

Justice Stevens concluded by pointing out that a majority of producers in the area had to approve the advertising and that these decisions, acceptable for other regulatory programs, should be no less acceptable for promotional advertising.[36] The promotional advertising programs, dubbed a "species of economic regulation," should "enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress."[37] The dissatisfaction with the program by "one or more producers . . . is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial."[38] Therefore, the producers' suit was summarily dismissed and the Court ruled in favor of the government.[39]

II. WHY JUSTICE SOUTER PARTED COMPANY WITH THE COURT

Justice Souter dissented from the majority because it decided that there was "no First Amendment right to be free of coerced subsidization of commercial speech."[40] Justice Souter wrote early in his dissenting opinion that the "very reasons for recognizing that commercial speech falls within the scope of First Amendment protection" should also afford protection against being compelled to subsidize speech as well.[41] He

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33 *Id.*
34 *Id.* at 472 (quoting *Abood*, 431 U.S. at 234-35) (internal quotations omitted).
35 *Id.* at 472.
36 *See id.* at 476.
37 *Id.* at 477.
38 *Id.*
39 *See id.*
40 *Id.*
41 *Id.* at 477-78.

believed that the Court should have examined the coerced payments under the same scrutiny used to examine restrictions on commercial speech.[42]

While Justice Souter agreed with the majority that a proper understanding of its holding in *Abood* was necessary to review this case, he pointed to two more fundamental basics from which the Court should start in any speech analysis.[43] The first basic principle of First Amendment law is that speech should be allowed some form of protection unless it is part of a category beyond the scope of the First Amendment.[44] Second, speech subject to this protection may not become either "the subject of coercion to speak or coercion to subsidize speech."[45]

Justice Souter explained that fundamentally, the Court has always recognized that "[a]ll ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties" of the First Amendment.[46] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[47] the Supreme Court addressed the issue of commercial speech and determined that truthful, non–misleading commercial speech should be granted the same protection as non–commercial speech.[48] Not only should it be granted protection, but it deserves protection because the claim that commercial speech is socially unimportant fails when the court weighs the interest a consumer has in obtaining information with the value of economically promoting one's "wares."[49] Commercial speech in its persuasive nature yields a power to inform, and the link between commercial speech and the resulting commercial transactions greatly increases the importance of its message to those involved.[50] Souter pointed out that if the First Amendment protects commercial speech from suppression, it should also provide compelled commercial speech the same level of suspicion and scrutiny.[51] Justice Souter cited cases that have recognized that First Amendment guarantees include "decision[s] of both what to say and what *not* to say."[52] Souter accused the majority of drawing the wrong conclusions

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42 *See id.* at 478.

43 *See id.*

44 *See id.* (False or misleading advertisements and illegal speech are all beyond the scope of the First Amendment).

45 *Id.*

46 *Id.* at 478-79 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)) (internal quotations omitted).

47 425 U.S. 748 (1976).

48 *See Glickman*, 521 U.S. at 479.

49 *Id.*

50 *See id.* at 479-80.

51 *See id.* at 480-81.

52 *Id.* at 481 (quoting Riley v. National Fed'n of the Blind, Inc., 487 U.S. 781, 796-97 (1988), and citing Hurley v. Irish–American Gay, Lesbian and Bisexual Group, Inc., 515

from *Abood*.[53] The majority held that *Abood* stood for limits on compelled financing of speech only where the speech is ideological, political, or "not germane to an otherwise lawful regulatory program."[54] Justice Souter pointed out that later decisions, such as *Lehnert v. Ferris Faculty Ass'n*,[55] have clarified the holding in *Abood*[56] and shown that in order for a mandatory fee to survive analysis it "must not only be germane to some otherwise legitimate regulatory scheme; it must *also* be justified by vital policy interests of the government *and not add significantly to the burdening of free speech inherent in achieving those interests*."[57]

Justice Souter then analogized the compelled fruit advertising to the Court's treatment of compelled public relations effort espousing the virtues of teachers in *Lehnert*.[58] Just as teachers cannot be compelled to fund generic advertisements intended to increase the public's image of teachers, fruit producers should not be compelled to fund generic advertisements that are intended to increase the public's demand for fruit.[59] Having a legitimate interest in regulating the market for fruit or increasing the public's perception of teachers does not mean that the most narrowly tailored means to accomplish these ideals is to advertise the virtues of either fruit or teaching.[60] If the First Amendment rights of teachers protect them from having to subsidize public relations efforts that are generically focused on promoting teachers, then the rights of fruit producers should be similarly protected.[61] Because Congress has been able to regulate the agricultural industry with no advertising schemes in the past, Congress should be able to continue such regulation without forcing the fruit producers to fund advertisements with which they do not agree.[62] In comparing the fruit producers to the teachers in *Lehnert*, Justice Souter wrote, "In each instance, the challenged burden on dissenters' First Amendment rights is substantially greater than anything inherent in regulation of the commercial transactions."[63]

U.S. 557 (1995); Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943)).

53 *See id.* at 483-84.

54 *Id.* at 483.

55 500 U.S. 507 (1991).

56 *See Glickman*, 521 U.S. at 485.

57 *Id.* (citing *Lehnert*, 500 U.S. at 519) (emphasis added).

58 *See id.* at 485. In *Lehnert*, the Court held "that a teachers' union could not constitutionally charge objecting employees for a public relations campaign meant to raise the esteem for teachers in the public mind and so increase the public's willingness to pay for public education." *Id.* at 485 (citations omitted).

59 *See id.*

60 *See id.*

61 *See id.*

62 *See id.*

63 *Id.* at 486.

The second reason that Justice Souter dissented from the majority is the majority's proposition that compelled subsidization is proper when the speech is not political or ideological.[64] Souter asserted that the majority erred when it failed to recognize that producers still may "disagree" with the generic ads even if the speech was neither political nor ideological.[65] The producers did not agree with the portion of the ads that suggested that all fruit is equal.[66] Each producer believed that his fruit warranted "more particular claims about the merits of their own brands."[67] Justice Souter argued that compelled funding deserves the same level of scrutiny (which in his opinion means the application of the *Central Hudson* test) afforded restrictions on commercial speech or at very least to the same analysis used to test the compulsion of non–commercial speech.[68]

Justice Souter's scrutiny of the orders requiring subsidies by the producers followed the same *Central Hudson* test that the lower court used. Under the analysis, Justice Souter concluded that the Secretary of Agriculture failed to meet three of the four prongs of the *Central Hudson* test because the government's interest was not "substantial," the regulations did not necessarily advance the government's interest, nor did the government sufficiently narrowly tailor the regulations.[69] Justice Souter undertook a lengthy and detailed analysis of each prong of the *Central Hudson* test in reaching his conclusion. However, Souter's use of the *Central Hudson* test is where he and Justice Thomas part company and his analysis of the test reaches a similar conclusion as the appellate court.[70] Therefore, that analysis will not be discussed in this article.

III. JUSTICE THOMAS'S VERY SHORT DISSENT

This dissent is one of the shortest opinions that Justice Thomas has written in his tenure on the Supreme Court. Yet, in this very short space, he succinctly makes his point. His dissent makes two statements. First, while he agrees with part one of Justice Souter's dissent, he sharply disagrees with part two and the use of the *Central Hudson* Test.[71] Second, he is alarmed with the majority's conclusion that this case does not raise a First Amendment Issue.[72]

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64 *See id.* at 487.
65 *See id.* at 488.
66 *See id.*
67 *Id.* at 489.
68 *See id.* at 489-90.
69 *See id.* at 491-92.
70 *See id.* at 504.
71 *See id.*
72 *See id.*

This section of the article examines Justice Thomas's statements in his dissent. First, the article focuses on Justice Thomas's express opinions on commercial speech and the First Amendment. Second, the article demonstrates Justice Thomas's jurisprudence through his opinions and the cases he relied on for support.

A. I join Justice Souter's dissent, with the exception of Part II. My join is thus limited because I continue to disagree with the use of the Central Hudson balancing test and the discounted weight given to commercial speech generally. Because the regulation at issue here fails even the more lenient Central Hudson test, however, it, a fortiori, would fail the higher standard that should be applied to all speech, whether commercial or not.[73]

In April 1996, Justice Clarence Thomas of the United States Supreme Court spoke at the University of Kansas School of Law as part of the Stephensen Lectures in Law & Government Series.[74] His address focused on his philosophy of judging. This excerpt, as well as a few that will follow, build a foundation for his jurisprudence concerning Constitutional issues, including those surrounding commercial speech.[75] Justice Thomas, in his speech, talked about the use of balancing tests by the Supreme Court:

> It is always tempting to adopt balancing tests or to rest one's decision on the presence or absence of various factors. Judges can then say that they decided the case on its facts, thereby preserving some degree of flexibility for future cases. While this may be appropriate for trial courts, or for state courts, it is not always the best approach for the Supreme Court or an appellate court. Whenever possible, the Court and judges generally should adopt clear, bright-line rules that, as I like to say to my clerks, you can explain to the gas station attendant as easily as you can explain to a law professor. Rules not only provide private parties with notice, they also limit judicial discretion by narrowing the ability of judges in the future to alter the law to fit their policy preferences. If the Court holds broadly today, for example, that all anonymous leafleting is to be given First Amendment protection, then a future Court will not have wiggle room to reverse course to remove that protection for leaflets that turn out to be written by an unpopular group, like the Nazis. Broader rules are more likely to be impartial in their impact on and application to specific parties. Thus,

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[73] *Id.* at 504 (emphasis added and citations omitted) Justice Thomas's dissent, in full, will be used for point headings in this section of the article.

[74] *See* Thomas, *supra* note 1.

[75] *See id.*

> clear rules—along with life tenure and an irreducible salary—encourage judges to maintain their impartiality.[76]

In 1980, the Court adopted the four part *Central Hudson* balancing test that was used by the appellate court and by Justice Souter.[77] The adoption of this test rather than the application of traditional tests was based on the "'common sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[78] The Court held that while commercial speech that is neither misleading nor related to unlawful activities is protected by the Constitution, other forms of expression are afforded greater protection.[79] Also, protection for commercial speech from governmental regulation depends on the nature of the speech and the nature of the governmental interests served by that regulation.[80] Limited protection for commercial speech does not apply to speech that is more likely to deceive than inform the consumer. Therefore, the limited protection circumscribes only the government's power to regulate speech that "is neither misleading nor related to unlawful activity."[81] This need to evaluate the limitations on the power of the government to regulate lawful, informative speech led to the adoption of the *Central Hudson* test.[82]

Thomas, writing for the majority in *Rubin v. Coors Brewing Co.*,[83] faithfully applied the *Central Hudson* test in determining that restrictions prohibiting alcohol levels to be displayed on beer bottles violated the First Amendment.[84] In that case, Justice Stevens concurred in the judgment but held that the *Central Hudson* test should have been inapplicable because the government sought neither to regulate misleading speech nor to protect consumers from incomplete or inaccurate information.[85] Justice Stevens questioned the rationale behind the *Central Hudson* test by suggesting that the test itself "is not related to the reasons for allowing more regulation of commercial speech than other speech."[86] Yet, at that time, Justice Thomas held firmly to the *Central Hudson* test.[87]

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[76] *Id.* at 7.

[77] 447 U.S. 557 (1980).

[78] *Id.* at 562 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978) (internal quotes omitted)).

[79] *See id.* at 563.

[80] *See id.*

[81] *Id.* at 564.

[82] *See id.*

[83] 514 U.S. 476 (1995).

[84] *See id.*

[85] *See id.* at 492.

[86] *Id.* at 493.

[87] *See id.* at 491.

Just slightly over a year later, however, Justice Stevens delivered the opinion of the Court and applied the *Central Hudson* test in *44 Liquormart, Inc. v. Rhode Island.*[88] Justice Thomas concurred in the judgment but denounced the use of the test.[89] *44 Liquormart* concerned a ban on the use of prices in liquor advertisements in a state effort to temper the use of alcohol.[90] Justice Stevens recognized that the main reason commercial speech is more susceptible to government regulation is because the state has a vested interest in protecting consumers from "commercial harms."[91] Therefore, when a ban targets speech that is not misleading it can be presumed that the underlying reason is a government fear not that the public will be misled or deceived but "that the public will respond 'irrationally' to the truth."[92] On this basis, Justice Stevens determined that Rhode Island's ban on truthful, non–misleading information required evaluation under the strict *Central Hudson* analysis.[93] After applying the analysis, the Court held that Rhode Island failed to meet the burden required by the *Central Hudson* test: that a complete ban on advertising was justified to meet a compelling interest and that it also advanced that interest to a material degree.[94] In this case, Rhode Island was not justified in placing a complete ban on liquor price advertisements in an effort to promote temperance. Further, there was no satisfactory proof to show that such a ban was successful in promoting temperance through decreased liquor sales.[95]

Justice Thomas's concurrence began with a bold, straightforward statement:

> 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 Gas & Electric Corp. v. Public Service Commission of New York,*[96] should not be applied, in my view. Rather, such an "interest is *per se* illegitimate and can no more justify regulation of commercial speech than it can justify regulation of non–commercial speech.[97]

Rhode Island's stated interest was to promote temperance, an act they purported to achieve through eliminating "sale" prices in ads, which

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88 517 U.S. 484 (1996).

89 *See id.* at 518.

90 *See id.* at 490.

91 *Id.* at 502. *See* Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993).

92 *Id. See* Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 96 (1977).

93 *See id.* at 508.

94 *See id.*

95 *See id.*

96 447 U.S. 557 (1980).

97 *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring in part and concurring in judgment).

would result in an increase in noncompetitive retail price levels.[98] Justice Thomas explained that this type of regulation on the part of the states is paternalistic in nature and deprives consumers of the right to evaluate the information themselves and make informed choices.[99] Justice Thomas lauded the cases that have stressed the need to protect commercial speech and the importance of freely available consumer information after the Court first recognized the right to protection in *Virginia Pharmacy*.[100]

On the other hand, Justice Thomas also recognized that there seemed to be a trend to allow the suppression of information if, in fact, the government can show that its regulations were successful.[101] This trend is based on the assumption that commercial "speech was in a 'subordinate position in the scale of First Amendment values.'"[102] Justice Thomas wrote, "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech. Indeed, some historical materials suggest to the contrary."[103] According to Thomas, the Court has never raised a valid explanation to justify restricting commercial speech that is neither misleading nor connected with illegal activities.[104] Therefore, Justice Thomas believes that applying the *Central Hudson* test to cases where the state's interest is to manipulate the marketplace by "keeping consumers ignorant" contradicts the "rationale for protecting 'commercial' speech."[105]

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98 *See id.* at 504.

99 *See id.* at 519.

100 *See id.* at 520. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). *Accord* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985) (stating that "[t]here is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'"); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 69 (1983) (advertising of contraceptives protected because it "implicates 'substantial individual and societal interests' in the free flow of commercial information, but also relates to activity which is protected from unwarranted state interference."); Friedman v. Rogers, 440 U.S. 1 (1979) (recognizing that even a commercial advertisement is possible in generating public interest.); Bates v. State Bar, 433 U.S. 350, 351 (1977) (ruled that blanket advertising ban on attorneys would deprive consumers of "at least some of the relevant information needed for an informed decision"); Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (holding that a ban on "for sale" and "sold" real estate signs violated First Amendment because state was trying to prevent white homeowners from "irrationally" leaving the town).

101 *See 44 Liquormart*, 517 U.S. at 521 .

102 *Id.* (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

103 *Id.* at 522.

104 *See id.* at 523.

105 *Id.* at 523-24.

Although a stricter application of the test would yield results consistent with Thomas's views, he would still adhere to the principle found in *Virginia Pharmacy*, "that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible."[106] According to Thomas, the test leads to the use of individual judicial preferences.[107] These preferences, Thomas fears, simply become inserted for those preferences being exerted by the legislature when restrictions are originally placed on commercial speech.[108] The *Central Hudson* test, according to Thomas, asks courts to determine if the legislature was correct in its assumption that its citizens cannot be trusted to determine for themselves, based upon the free flow of information, that consumption of a product is harmful enough to be avoided.[109] Justice Thomas would avoid the paternalism associated not only with the legislature's actions but also with the *Central Hudson* test by returning to the decision of *Virginia Pharmacy*. [110]

B. I write separately to note my disagreement with the majority's conclusion that coerced funding of advertising does not involve "speech" at all and does not even raise a First Amendment "issue." It is one thing to differ about whether a particular regulation involves an "abridgment" of the freedom of speech, but it is entirely another matter—and a complete repudiation of our precedent—for the majority to deny that "speech" is even at issue in this case.[111]

In his opinion in *Rubin v. Coors Brewing Co.*,[112] Justice Thomas traced the development of the recognition of commercial advertising as speech.[113] Prior to *Virginia Pharmacy*,[114] the Court's position was that paid advertising did not constitute protected speech under the First Amendment.[115] The opinion in *Virginia Pharmacy* repudiated that position when the Court held that the "free flow of commercial information [was] 'indispensable to the proper allocation of resources in a free enterprise system.'"[116] Since *Virginia Pharmacy*, the Court has

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106 *Id.* at 526.

107 *See id.* at 527.

108 *See id.* at 528.

109 *See id.*

110 *See id.*

111 *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 504 (1997) (emphasis added).

112 514 U.S. 476 (1995).

113 *See id.* at 481-82.

114 425 U.S. 748 (1976).

115 *See* 514 U.S. at 481.

116 *Id.*

recognized that payment for advertising constitutes commercial speech that is worthy of protection by the First Amendment.[117]

1. "In numerous cases, this Court has recognized that paying money for the purposes of advertising involves speech."[118]

In Justice Thomas's dissenting opinion, he relies on four cases for the proposition that the Court had "recognized that paying money for the purposes of advertising involves speech."[119] As early as 1976, the same year that *Virginia Pharmacy* was decided, the Court held that contributions and acts of expenditures were more than conduct, they were forms of speech.[120] The Court recognized that some forms of communication, involving speech or conduct or both, are made possible by "the giving and spending of money."[121] However, the Court has "never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."[122] The Court in *Buckley v. Valeo* held that individual contributions to campaigns could be limited.[123] However, limiting expenditures, such as those for campaign advertising, was unconstitutional because it abridged the First Amendment's protection of such "speech."[124]

A year later, in *Abood v. Detroit Board of Education*,[125] the Court dealt with the use of union dues or service fees used to finance political or ideological advertising.[126] The fact that the issue was their payment for the "speech," and not the actual "speech" itself, did not deter the Court from finding that First Amendment issues were implicated.[127] In *First National Bank v. Bellotti*,[128] the Court recognized the right of a corporation to use its resources to commercially fight a proposed constitutional amendment.[129] The Court rejected the theory that in order for commercial speech to be protected, it had to be pertinent to the corporation's business interests.[130] The Court held that the implications

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117 *See* 521 U.S. at 505.
118 *Id.* (Thomas, J., dissenting).
119 *Id.*
120 *See* Buckley v. Valeo, 424 U.S. 1 (1976).
121 *Id.* at 16.
122 *Id.* at 16-17 (citing Bigelow v. Virginia, 421 U.S. 809, 820 (1975)).
123 *See id.* at 143.
124 *Id.*
125 431 U.S. 209 (1977).
126 *See id.* at 234.
127 *See id.*
128 435 U.S. 765 (1978).
129 *See id.* at 767.
130 *See id.* at 783.

of the First Amendment are not limited solely to the expression of the individual but also to the free flow of information available to the public.[131] Commercial speech is protected because of the societal benefit it bestows as much as because of an individual's right to express himself.[132]

Finally, in *Central Hudson*, the Court recognized that advertisements promoting the use of electricity qualified as speech under the First Amendment.[133] The Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience."[134] The state had a legitimate interest, due to an energy shortage, in discouraging the use of electricity.[135] The Court maintained that its acceptance of First Amendment protection was to reject the view that the government has the "complete power" to regulate this type of commercial speech.[136] Because of the high cost of mass media, from the distribution of pamphlets to the production of television commercials, virtually all forms of commercial speech must be monetarily financed.[137] The Supreme Court's decisions since 1976 have consistently held that monetary support of commercial advertising involves protected speech.

2. "The Court also has recognized that compelling speech raises a First Amendment issue just as much as restricting speech."[138]

Justice Thomas cited several cases that outline the history of the Court's recognition that compelled speech is a First Amendment issue.[139] The Supreme Court addressed the problem of compelled speech within the context of the First Amendment in *West Virginia State Board of Education v. Barnette*.[140] In that case, the Court decided that compelling elementary school children to salute the flag was unconstitutional.[141] The Court defined the issue not as whether the ideology being expressed was good or bad, nor whether the noncompliance with the mandate to salute was for religious reasons, but whether the First Amendment protected the children's right not to salute.[142] The Court held that the

131 *See id.*
132 *See id.*
133 447 U.S. 557 (1980).
134 *Id.* at 561.
135 *See id.*
136 *See id.* at 562.
137 *See Buckley*, 424 U.S. at 19.
138 *Glickman*, 521 U.S. at 505.
139 *See id.* at 505 n.2.
140 319 U.S. 624 (1943).
141 *See id.* at 642.
142 *See id.* at 641-42.

First Amendment protected against compelled speech as strongly as it protected against suppressed speech.[143]

In 1974, the Court in *Miami Herald Publishing Co. v. Tornillo*[144] again addressed the issue of compelled speech when a Florida newspaper refused to print replies by a candidate for office after the newspaper had critically cited him in its editorials.[145] The candidate then sued the paper under a statute that required newspapers to provide an opportunity for candidates to reply to unfavorable press.[146] The Supreme Court held that the statute was unconstitutional because compelling a newspaper to print what it believes is against "reason" to print is a violation of the protections afforded the press under the First Amendment.[147] The Court noted that even if the Florida statute did not create any added burden upon the newspapers, it still failed the test under the First Amendment because it intruded upon the choice of what to publish, how much to publish, which ideas to publish, and all other essential elements of the editorial function.[148]

In 1977, the Court addressed the issue of compelled speech when it held that the state of New Hampshire could not compel its citizens to display the state motto, "Live Free or Die," on license plates.[149] The defendants were prosecuted for violating a statute by covering up the words on their license plate.[150] The Court held that the statute in question compelled its citizens to "use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty . . . ."[151] Because the First Amendment protects individuals' rights to their own ideologies and points of view, it also protected their right not to support a view to which they objected.[152]

In *Pacific Gas and Electric Co. v. Public Utilities Commission*,[153] the Supreme Court held that a gas company could not be compelled to include a third party's literature in the company's billings to customers.[154] For 62 years, the gas company distributed a monthly newsletter of its own.[155] However, when a group objected to that practice, the commission found that the space in the envelopes left over after all

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143 *See id.* at 642.
144 418 U.S. 241 (1974).
145 *See id.* at 243.
146 *See id.* at 244.
147 *See id.* at 256.
148 *See id.* at 258.
149 *See* Wooley v. Maynard, 430 U.S. 705 (1977).
150 *See id.* at 708.
151 *Id.* at 715.
152 *See id.* at 715.
153 475 U.S. 1 (1986).
154 *See id.* at 20-21.
155 *See id.* at 5.

necessary materials were included belonged, not to the gas company, but to the "rate payers."[156] The commission then ordered the gas company to include newsletters published by a third party four times a year, only allowing the gas company to distribute its own newsletter if there was enough space left or if they added postage.[157] The gas company objected to being forced to distribute literature that contradicted its beliefs.[158]

The Supreme Court held first that the company's own newsletter was protected speech under the First Amendment and not subject to suppression.[159] Second, the Court held that compelling the gas company to include the newsletters of a group whose views were in opposition to those of the gas company infringed upon the company's rights under the First Amendment.[160] This type of compelled speech would force the gas company to either appear to agree with the opposing view or respond.[161] The commission's order required the gas company to associate with the views of others who were chosen on the basis of their viewpoints. Therefore, the Court held that the commission's decision must have been designed to fulfill a compelling state interest through a regulation of "time, place, or manner" and that the order must have been narrowly tailored to fulfill the interest.[162] These cases, as well as many others, support the contention that governmental compulsion of speech is antithetical to the First Amendment.[163]

C. *Given these two elemental principles of our First Amendment jurisprudence, it is incongruous to suggest that forcing fruit-growers to contribute to a collective advertising campaign does not even involve speech, while at the same time effectively conceding that forbidding a fruit-grower from making those same contributions voluntarily would violate the First Amendment. . . . Yet, that is precisely what the majority opinion does.*[164]

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[156] *Id.* at 5-6.

[157] *See id.* at 6.

[158] *See id.* at 7.

[159] *See id.* at 8.

[160] *See id.* at 14-17.

[161] *See id.* at 15-16.

[162] *Id.* at 20-21.

[163] *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (holding that compulsion of speech "works no less an infringement of . . . constitutional rights" than prohibition of political contributions); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (holding that compelling the use of private property for the distribution of leaflets violates the First Amendment).

[164] *Glickman*, 521 U.S. at 505 (Thomas, J., dissenting) (emphasis added).

Justice Thomas's constitutional interpretation is simple: look to the text and then, only if it is not clear, look to the Framers.[165] In his speech at the University of Kansas, he said, "[W]hen interpreting the Constitution, judges should seek the original understanding of the provision's text, if that text's meaning is not readily apparent."[166] The text of the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[167] The amendment does not specifically include or exclude commercial speech. Yet, the Court has traditionally maintained that commercial speech either has had no protection or only limited protection. From Justice Thomas's opinions, it is apparent that he believes the Court in *Virginia Pharmacy* was accurate in its determination of how the First Amendment should apply to commercial speech.[168]

Virginia Pharmacy was a suit brought by Virginia consumers who challenged a law making it illegal for licensed pharmacists to advertise the prices of prescription drugs.[169] In that case, the Court addressed several concerns about applying the First Amendment to commercial speech. The Court held that commercial speech was protected by the First Amendment and that it could not lose that protection simply because it is in paid advertising; in a form sold for profit (like a magazine); or in a solicitation.[170] In fact, the Court specifically stated that "[i]f there is a kind of speech that lacks all First Amendment protection, . . . it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject."[171]

Commercial speech, like all speech, may lose some of its First Amendment protection in certain ways. The Court defined those ways by

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[165] *See* Thomas, *supra* note 1, at 6.

[166] *Id.*

[167] U.S. CONST. amend. I.

[168] *See generally Glickman*, 521 U.S. at 504-06 (Thomas, J., dissenting) (disagreeing with the majority giving discounted weight to commercial speech); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995) (recognizing that *Virginia Pharmacy* repudiated earlier beliefs that commercial speech deserved no protection); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518-23 (1996) (Thomas, J., concurring in part and concurring in the judgment) (using the holding in *Virginia Pharmacy* to show how courts "can no more justify regulation of 'commercial' speech than it can justify regulation of 'non-commercial' speech.").

[169] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[170] *See id.* at 761.

[171] *Id.*

stating, first, that there may be regulations placed upon commercial speech that restrict the time, manner, and place of the speech.[172] The Court had previously allowed for these restrictions only under certain provisions.[173] Namely, the restrictions must not be content based, they must serve a significant governmental interest, and they must leave alternative means for communication.[174]

Second, regulations, affecting not only commercial speech but also all other types of speech, may be used to suppress false or misleading statements.[175] The Court, citing earlier cases, noted that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake."[176] The Court even allowed for regulations that curtail the use of deceptive, though not completely false, advertising.[177] These regulations, according to the Court, could take the form of requiring disclaimers and warnings "as are necessary to prevent its being deceptive."[178] The Court relied on the fact that the truthfulness of commercial speech is very easily verified and controlled since deceptive advertising would ultimately have a very chilling effect on profits.[179]

Finally, the Court acknowledged that a State has the authority to control and suppress speech that is illegal or that deals with illegal activity, whether it is commercially based or not.[180] Justice Stewart, in his concurring opinion, stated, "There is . . . little need to sanction 'some falsehood in order to protect speech that matters.'"[181] Indeed, the Supreme Court has recognized that the only difference between commercial speech and noncommercial speech is that commercial speech is based on factual representations and therefore does not operate with the ideological freedom that is found in non–commercial speech.[182] So, where the falsity of non–commercial speech is tempered through the give and take of ideas, commercial speech has a heightened responsibility to provide truthful, non–misleading information.[183]

The Court in *Virginia Pharmacy* concluded by holding that a State could not suppress "concededly truthful information about entirely

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[172] *See id.* at 771.

[173] *See id.*

[174] *See id.*

[175] *See id.*

[176] *Id.* at 771 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); Konigsberg v. State Bar, 366 U.S. 36, 49 (1961)).

[177] *See id.* at 771-72.

[178] *Id.* at 772.

[179] *See id.* at 772 n.24.

[180] *See id.* at 772.

[181] *Id.* at 777-78 (Stewart, J., concurring) (quoting *Gertz*, 418 U.S. at 341).

[182] *See id.* at 778 (Stewart, J., concurring).

[183] *See id.*

lawful activity . . . ."[184] The fear that the information will negatively impact the speakers or the consumers or recipients does not justify the deprivation of this fundamental right of self–expression.[185] While the Court allowed for regulation of commercial speech because, as Justice Stewart put it, "Commercial price and product advertising differs markedly from ideological expression . . . ."[186] Those exceptions applied only to untruthful, misleading, deceptive and/or illegal communications.[187]

In *Glickman*,[188] however, the Court addressed speech that fell into none of the excepted categories. The commercials were truthful, generic advertisements not designed to deceive or mislead.[189] There was no indication that non–participation by fruit growers would lead to deceptive advertisements or that consumers would be misled by specific, non–generic advertisements by growers who believe that their fruit is the best. Yet, the government still sought to regulate the dissemination of commercial speech about the virtues of fruit. By stating that this regulation does not implicate speech, the Court allowed Congress' power to regulate the agricultural industry to preempt First Amendment protections.

D. What we are now left with, if we are to take the majority opinion at face value, is one of two disturbing consequences: Either (1) paying for advertising is not speech at all, while such activities as draft card burning, flag burning, armband wearing, public sleeping and nude dancing are, or (2) compelling payment for third party communication does not implicate speech, and thus the Government would be free to force payment for a whole variety of expressive conduct that it could not restrict. In either case, surely we have lost our way.[190]

It seems absurd that in an age where the activities Justice Thomas describes are all considered protected "speech" under the First Amendment, the Court would say that coerced payment for advertising is not speech.[191] As Justice Thomas said, "We as a nation adopted a written Constitution precisely because it has a fixed meaning that does

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184 *Id.* at 773.

185 *See id.*

186 *Id.* at 778 (Stewart, J., concurring).

187 *See id.* at 773.

188 521 U.S. at 477-482 (Souter, J., dissenting).

189 *See id.*

190 *Id.* at 506 (Thomas, J., dissenting) (emphasis added).

191 *See id.* at 506 n.4 (citing Texas v. Johnson, 491 U.S. 397 (1989); Clark v. Community for Creative Non–Violence, 468 U.S. 288 (1984); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968)).

not change."[192] Simply because Congress enacted regulations for decades that control the agricultural market does not mean that its use of power gives it the ability to undermine the clear written expression of the Constitution and its amendments. In *Glickman*, the regulations do not serve *compelling* state interests nor are they designed to protect citizens from the abuse of the right to freedom of expression. To stop short of recognizing the speech implicated in this case is to deny the protection afforded by the First Amendment. As Thomas recognized, the Court, loyal to a balancing test that it adopted and blind to its implications, has "surely lost [its] way."[193]

[192] Thomas, *supra* note 1, at 7.
[193] *Glickman*, 521 U.S. at 506.