SUPREME COURT OF THE UNITED STATES

No. 93–1631

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, PETITIONER *v.* COORS BREWING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[April 19, 1995]

JUSTICE STEVENS, concurring in the judgment.

Although I agree with the Court's persuasive demonstration that this statute does not serve the Government's purported interest in preventing "strength wars," I write separately because I am convinced that the constitutional infirmity in the statute is more patent than the Court's opinion indicates. Instead of relying on the formulaic approach announced in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), I believe the Court should ask whether the justification for allowing more regulation of commercial speech than other speech has any application to this unusual statute.

In my opinion the "commercial speech doctrine" is unsuited to this case, because the Federal Alcohol Administration Act (FAAA) neither prevents misleading speech nor protects consumers from the dangers of incomplete information. A truthful statement about the alcohol content of malt beverages would receive full First Amendment protection in any other context; without some justification tailored to the special character of commercial speech, the Government should not be able to suppress the same truthful speech merely because it happens to appear on the label of a product for sale.

I

The First Amendment generally protects the right

not to speak as well as the right to speak. See *McIntyre* v. *Ohio Elections Comm'n*, ___ U. S. ___ (1995) (slip op., at 7); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); cf. *Wallace* v. *Jaffree*, 472 U. S. 38, 51–52 (1985). In the commercial context, however, government is not only permitted to prohibit misleading speech that would be protected in other contexts, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771–772 (1976), but it often requires affirmative disclosures that the speaker might not make voluntarily.[1] The regulation of statements about alcohol content in the statute before us today is a curious blend of prohibitions and requirements. It prohibits the disclosure of the strength of some malt beverages while requiring the disclosure of the strength of vintage wines. In my judgment the former prohibition is just as unacceptable in a commercial context as in any other because it is not supported by the rationales for treating commercial speech differently under the First Amendment: that is, the importance of avoiding deception and protecting the consumer from inaccurate or incomplete information in a realm in which the accuracy of speech is generally ascertainable by the speaker.

I am willing to assume that an interest in avoiding the harmful consequences of so-called "strength wars" would justify disclosure requirements

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[1]See *In re R. M. J.*, 455 U. S. 191, 201 (1982) ("a warning or disclaimer might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception"), citing *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 375 (1977); see also 15 U. S. C. §1333 (requiring "Surgeon General's Warning" labels on cigarettes); 21 U. S. C. §343 (1988 ed. and Supp. V) (setting labeling requirements for food products); 21 U. S. C. §352 (1988 ed. and Supp. V) (setting labeling requirements for drug products); 15 U. S. C. §77e (requiring registration statement before selling securites).

explaining the risks and predictable harms associated with the consumption of alcoholic beverages. Such a measure could be justified as a means to ensure that consumers are not led, by incomplete or inaccurate information, to purchase products they would not purchase if they knew the truth about them. I see no basis, however, for upholding a prohibition against the dissemination of truthful, nonmisleading information about an alcoholic beverage merely because the message is propounded in a commercial context.

II

The Court's continued reliance on the misguided approach adopted in *Central Hudson* makes this case appear more difficult than it is. In *Central Hudson*, the Court held that commercial speech is categorically distinct from other speech protected by the First Amendment. 447 U. S., at 561–566 and n. 5. Defining "commercial speech," alternatively, as "expression related solely to the economic interests of the speaker and its audience," *id.*, at 561, and as "`speech proposing a commercial transaction,'" *id.*, at 562, quoting *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978), the Court adopted its much-quoted four-part test for determining when the government may abridge such expression. In my opinion the borders of the commercial speech category are not nearly as clear as the Court has assumed, and its four-part test is not related to the reasons for allowing more regulation of commercial speech than other speech. See *Central Hudson*, 447 U. S., at 579–582 (STEVENS, J., concurring in judgment).

The case before us aptly demonstrates the artificiality of a rigid commercial/noncommercial distinction. The speech at issue here is an unadorned, accurate statement, on the label of a bottle of beer, of the alcohol content of the beverage contained therein. This, the majority finds, *ante*, at 4–5, is "commercial speech." The majority does not explain why the words "4.73% alcohol by volume"[2] are commercial. Presumably, if a nonprofit consumer protection group were to publish the identical statement, "Coors beer has 4.73% alcohol by volume," on the cover of a magazine, the Court would not label the speech "commercial." It thus appears,

[2]The 4.73 percent figure comes from an "independent laboratory analysis" of Coors beer cited in a Coors advertisement. App. 65.

from the facts of this case, that whether or not speech is "commercial" has no necessary relationship to its content. If the Coors label is commercial speech, then, I suppose it must be because (as in *Central Hudson*) the motivation of the speaker is to sell a product, or because the speech tends to induce consumers to buy a product.[3] Yet, economic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors and artists who sell their works would be correspondingly disadvantaged. Neither can the value of speech be diminished solely because of its placement on the label of a product. Surely a piece of newsworthy information on the cover of a magazine, or a book review on the back of a book's dust jacket, is entitled to full constitutional protection.

As a matter of common sense, any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead. See *Virginia Pharmacy*, 425 U. S., at 771–772; *Bates*, 433 U. S., at 383–384; *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 81–83 (1983) (STEVENS, J., concurring in judgment); see also *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. ___, ___-___ (1993) (slip op., at 15) (city's regulation of commercial speech bore no relationship to reasons why commercial speech is entitled to less protection). Although some false and misleading statements are entitled to First Amendment protection in the political realm, see, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974); *New York*

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[3]The inducement rationale might also apply to the consumer protection publication, if it is sold on a newsrack, as some consumers will buy the publication because they wish to learn the varying alcohol contents of competing products.

Times v. *Sullivan*, 376 U. S. 254 (1964), the special character of commercial expression justifies restrictions on misleading speech that would not be tolerated elsewhere. As Justice Stewart explained,

> "In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and its price substantially eliminates any danger that government regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction `some falsehood in order to protect speech that matters.'" *Virginia Pharmacy*, 425 U. S., at 777–778 (Stewart, J., concurring), quoting *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 341.[4]

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[4]Justice Stewart's reasoning has been the subject of scholarly criticism, on the ground that some speech surrounding a commercial transaction is not readily verifiable, while some political speech is easily verifiable by the speaker. See Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372, 385–386 (1979). Although I agree that Justice Stewart's distinction will not extend to every instance of expression, I think his theory makes good sense as a general rule. Most of the time, if a seller is representing a fact or making a prediction about his product, the seller will know whether his statements are false or misleading and he will be able to correct them. On the other hand, the purveyor of political speech is more often (though concededly not always) an observer who is in a poor position to verify its truth. The paradigm example of this latter phenomenon

See also *Bates*, 433 U. S., at 383.

Not only does regulation of inaccurate commercial speech exclude little truthful speech from the market, but false or misleading speech in the commercial realm also lacks the value that sometimes inheres in false or misleading political speech. Transaction-driven speech usually does not touch on a subject of public debate, and thus misleading statements in that context are unlikely to engender the beneficial public discourse that flows from political controversy. Moreover, the consequences of false commercial speech can be particularly severe: investors may lose their savings, consumers may purchase products that are more dangerous than they believe or that do not work as advertised. Finally, because commercial speech often occurs in the place of sale, consumers may respond to the falsehood before there is time for more speech and considered reflection to minimize the risks of being misled. See *Ohralik*, 436 U. S., at 447, 457–458 (distinguishing in-person attorney solicitation of clients from written solicitation). The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech.

In this case, the Government has not identified a sufficient interest in suppressing the truthful, unadorned, informative speech at issue here. If Congress had sought to regulate all statements of alcohol content (say, to require that they be of a size visible to consumers or that they provide specific information for comparative purposes) in order to prevent brewers from misleading consumers as to the

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is, of course, the journalist who must rely on confidential sources for his information.

true alcohol content of their beverages, then this would be a different case. But absent that concern, I think respondent has a constitutional right to give the public accurate information about the alcoholic content of the malt beverages that it produces. I see no reason why the fact that such information is disseminated on the labels of respondent's products should diminish that constitutional protection. On the contrary, the statute at issue here should be subjected to the same stringent review as any other content-based abridgment of protected speech.

III

Whatever standard is applied, I find no merit whatsoever in the Government's assertion that an interest in restraining competition among brewers to satisfy consumer demand for stronger beverages justifies a statutory abridgment of truthful speech. Any "interest" in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better-informed citizenry are among the central goals of the Free Speech Clause. Accordingly, the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good. See *Virginia Pharmacy*, 425 U. S., at 769–770; *Bates*, 433 U. S., at 374–375. One of the vagaries of the "commercial speech" doctrine in its current form is that the Court sometimes takes such paternalistic motives seriously. See *United States* v. *Edge Broadcasting Co.*, 509 U. S. ___, ___-___ (1993) (slip op., at 2–3) (STEVENS, J., dissenting); *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S. 328, 358 (1986) (Brennan, J., dissenting).

In my opinion, the Government's asserted interest, that consumers should be misled or uninformed for their own protection, does not suffice to justify restrictions on protected speech in *any* context, whether under "exacting scrutiny" or some other

standard. If Congress is concerned about the potential for increases in the alcohol content of malt beverages, it may, of course, take other steps to combat the problem without running afoul of the First Amendment—for example, Congress may limit directly the alcoholic content of malt beverages. But Congress may not seek to accomplish the same purpose through a policy of consumer ignorance, at the expense of the free-speech rights of the sellers and purchasers. See *Virginia Pharmacy*, 425 U. S., at 756–757. If varying alcohol strengths are lawful, I see no reason why brewers may not advise customers that their beverages are stronger—or weaker—than competing products.

In my opinion, this statute is unconstitutional because, regardless of the standard of review, the First Amendment mandates rejection of the Government's proffered justification for this restriction. Although some regulations of statements about alcohol content that *increase* consumer awareness would be entirely proper, this statutory provision is nothing more than an attempt to blindfold the public.

Accordingly, I concur in the Court's judgment.