

LIQUID HONESTY: THE FIRST AMENDMENT RIGHT TO MARKET THE HEALTH BENEFITS OF MODERATE ALCOHOL CONSUMPTION

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For several years, wine makers have sought to advertise and otherwise promote scientific research showing that moderate drinking can have beneficial health effects. The federal government, however, has largely blocked the wine makers' efforts, contending that advertisements or labels referring to alcohol's potential health benefits would almost invariably mislead consumers into discounting alcohol's numerous dangers. In this Note, Erik Bierbauer argues that wine makers and other alcohol producers have a First Amendment right to market the health benefits of moderate drinking, as long as they do so accurately and include certain limited disclaimers in their promotional materials.

INTRODUCTION

In February 1999, the Bureau of Alcohol, Tobacco and Firearms (ATF)¹ allowed wine makers to place two carefully worded statements referring to “the health effects of wine consumption” on bottle labels.² The statements, which suggest but do not explicitly say that drinking wine confers health benefits, were approved by ATF after

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¹ ATF, a bureau within the Treasury Department, has authority to regulate the advertising and labeling of alcoholic beverages. See *infra* notes 37-43 and accompanying text.

² Treasury Announces Actions Concerning Labeling of Alcoholic Beverages, press release (Feb. 5, 1999) (visited Sept. 1, 1999) <http://www.atf.treas.gov/press/label_ab.htm> [hereinafter ATF Press Release]; see also U.S. Government Approves Wine Institute's Dietary Guidelines Label Statement, press release (Feb. 5, 1999) (visited Sept. 1, 1999) <<http://www.wineinstitute.org/newstuff/communications/thelabel.htm>> [hereinafter Wine Institute Press Release] (praising ATF's decision to approve labels). The label statements themselves do not say what the health effects of wine consumption are; they merely direct consumers to other, independent sources of information. See ATF Press Release, *supra* (reprinting new label statements). For the full text of the approved statements, see *infra* Part II.B.

years of lobbying by the wine industry,³ which has long sought to popularize the results of scientific studies showing that moderate alcohol consumption reduces the risk of heart disease.⁴

The wine industry's success may be short lived, however, and there is little chance that ATF's approval of the new labels will lead to a more widespread loosening of the government's virtual ban on marketing the health benefits of moderate drinking. ATF, which until February 1999 consistently had denied alcohol producers permission to promote alcohol's potential health benefits,⁵ faced an intensely negative reaction from some advocacy groups⁶ and powerful politicians⁷ after it approved the new labels. This opposition led Treasury Secretary Robert Rubin to promise that ATF would reexamine its approval of the labels, and ATF may now begin a rulemaking process that could result in an even stricter policy against health-related advertisements and labels than the agency has followed in the past.⁸ Thus, the government probably will continue or even intensify its fundamentally paternalistic approach toward alcohol consumers, reasoning that the marketing of alcohol's potential health benefits would

³ A prominent wine industry trade group, the Wine Institute, said that "[t]he approved voluntary label language [was] at the center of a three-year inter-agency, congressional and national debate." Wine Institute Press Release, *supra* note 2 (quoting Dianne Nury, Institute's chairperson); see also Michael Doyle, *Winemakers Seek Balance in Labeling*, Fresno Bee, May 7, 1996, at E2, available in 1996 WL 6806357 (reporting that Wine Institute, acting on behalf of 400 wineries, had petitioned ATF to allow health-related statements on labels).

⁴ See, e.g., Thomas A. Pearson, *American Heart Association Medical/Scientific Statement: Alcohol and Heart Disease (1996)* (visited Aug. 11, 1999) <<http://www.americanheart.org/Scientific/statements/1996/1116.html>> [hereinafter *AHA Statement*] ("[A] large number of recent observational studies have consistently demonstrated a reduction in coronary heart disease . . . with moderate consumption of alcohol."). For a more detailed discussion of some studies' findings, see *infra* Part I; see also *infra* notes 29-31 and accompanying text (observing that distilled spirits, beer, and other alcoholic beverages have been shown to share most or all of wine's potential health benefits).

⁵ See *infra* Part II.A.

⁶ See, e.g., Paul Wood, *Wine Labels Mislead*, *N.Y. Times*, Mar. 7, 1999, § 4, at 14 (letter to editor from president of National Council on Alcoholism and Drug Dependence) (arguing that alcoholics and other heavy drinkers would use new labels to justify excessive drinking).

⁷ See David Stout, *Senator's Efforts Threaten Wine Makers' Celebration*, *N.Y. Times*, Mar. 1, 1999, at A14 (reporting that Senator Strom Thurmond of South Carolina proposed legislation to overturn ATF's approval of new wine labels, and that Surgeon General David Satcher had expressed "misgivings" to ATF about new labels).

⁸ See Carolyn Lochhead, *Rubin Retreats on Labels Touting Wine's Health Effects*, *S.F. Chron.*, May 15, 1999, at A1 (reporting that Secretary Rubin promised that ATF would issue "a new 'notice of proposed rule-making'" after Senator Thurmond blocked Senate confirmation of three Treasury Department nominees and threatened to block confirmation of Lawrence Summers as Rubin's successor). No such notice had been issued as of August 17, 1999.

confuse consumers and encourage them to adopt dangerous drinking habits.⁹

This Note argues that the federal government's paternalism toward alcohol consumers conflicts with a First Amendment free speech right that values the open dissemination of information important to consumer decisions. Under the Supreme Court's commercial speech doctrine,¹⁰ alcohol producers have a right to promote the health benefits of moderate drinking, so long as they do not affirmatively make false or deceptive claims, and include certain limited disclaimers to prevent consumer confusion. Part I of this Note provides background information on medical evidence of alcohol's health effects. Part II examines the federal government's policies toward marketing the potential benefits of moderate drinking. Part III discusses the relevant First Amendment precedents in the area of commercial speech, and goes on to consider what sort of health statements alcohol producers could make without overstepping the bounds of their First Amendment protection.

I

THE MEDICAL *TERROIR*¹¹

Medical research into the effects of alcohol consumption shows that drinking presents a mixed bag of health detriments and benefits. On the negative side, consumption of four or more drinks per day has been shown to increase sharply the risk of fatal cirrhosis of the liver, and may also contribute to cancers such as those of the mouth, liver,

⁹ See *infra* notes 44-67 and accompanying text (describing articulations of ATF's consumer protection rationale).

¹⁰ The Supreme Court defines commercial speech as speech that "does 'no more than propose a commercial transaction.'" *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)). An advertisement or bottle label linking moderate drinking to health benefits fits this definition. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) ("Both parties agree that the information on beer labels constitutes commercial speech."); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983) (holding that Food and Drug Administration restrictions on health-related marketing are evaluated under commercial speech doctrine, even if marketing in question "contain[s] discussions of important public issues"); *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 162-63 (7th Cir. 1977) (holding that egg industry group's ads, which sought to debunk claims that eggs are unhealthy, were commercial speech). To some extent, however, the debate over health-related alcohol marketing points out flaws inherent in the distinction between commercial and noncommercial speech. See *infra* note 102.

¹¹ The French word *terroir* refers to the characteristics of a vineyard, such as soil composition, rainfall, and sun exposure, that play a large part in determining the finished wine's texture and taste. See Stephen Tanzer, *Food & Wine Magazine's Official Wine Guide 1998*, at 25 (1997). Here, *terroir* refers to the background facts that will inform this Note's finished argument.

and esophagus.¹² Even one drink a day appears to increase the risk of breast cancer in women.¹³ In addition, drinking by a pregnant woman can increase the risk of birth defects,¹⁴ and even minimal drinking by a person on contraindicated medication may cause health complications.¹⁵ Drinking to the point of intoxication contributes to a variety of social ills,¹⁶ and the disease of alcoholism affects a small but signifi-

¹² See Michael J. Thun et al., *Alcohol Consumption and Mortality Among Middle-Aged and Elderly U.S. Adults*, 337 *New Eng. J. Med.* 1705, 1708-11 (1997). While there is no universal standard for the size of one "drink," a drink is often defined as 12 ounces of beer, 5 ounces of wine, or 1½ ounces of liquor. See, e.g., U.S. Dep't of Agric., *Nutrition and Your Health: Dietary Guidelines for Americans* 40 (4th ed. 1995) (visited June 28, 1999) <<http://www.nalusda.gov/fnic/dga/dga95/alcohol.html>> [hereinafter 1995 USDA Guidelines]. Because alcohol content differs among various beers, wines, and liquors, it can be difficult to convert a number of drinks to a precise measure of beverage alcohol (i.e., ethanol) consumption. Compare Thun et al., *supra*, at 1706 (assuming that each drink by survey participant contained 12 grams of alcohol), with International Ctr. for Alcohol Policies (ICAP), *Safe Alcohol Consumption: A Comparison of Nutrition and Your Health: Dietary Guidelines for Americans and Sensible Drinking* (visited June 27, 1999) <<http://www.icap.org/es/icapreport1.html>> (comparing government alcohol consumption guidelines in United States and United Kingdom, and observing that "standard drink" in U.S. contains about 14 grams of grain alcohol).

¹³ See Thun et al., *supra* note 12, at 1711-12 (reporting that women who had at least one drink daily had 30% higher risk of death from breast cancer than nondrinkers, although their overall rate of death was lower than nondrinkers' due to substantially decreased risk of death from heart disease).

¹⁴ Heavy drinking during pregnancy has been shown to increase the risk of fetal alcohol syndrome and other birth defects. It is not clear whether occasional drinking or regular light drinking increases these risks. See 1995 USDA Guidelines, *supra* note 12, at 40; see also Jennifer D. Thomas & Edward P. Riley, *Fetal Alcohol Syndrome: Does Alcohol Withdrawal Play a Role?*, 22 *Alcohol Health & Res. World* 47, 47-49 (1998) (describing symptoms of fetal alcohol syndrome, and also reporting on studies showing that maternal drinking, especially binge drinking, can cause damaging withdrawal symptoms in fetuses and newborns).

¹⁵ See 1995 USDA Guidelines, *supra* note 12, at 40 (stating that "[a]lcohol may alter the effectiveness or toxicity of medicines," and that some medicines can increase alcohol's intoxicating effect).

¹⁶ See, e.g., Senator Robert Byrd, *Proposed Amendment to the Revenue Reconciliation Act of 1997*, 143 *Cong. Rec.* S6442 (daily ed. June 26, 1997) (proposing Alcohol Advertising Responsibility Act of 1997 and listing congressional findings concerning alcohol use and its costs). Senator Byrd's bill, which has not been enacted, would prohibit corporations from taking tax deductions for expenses incurred in advertising alcoholic beverages. The factual findings section of the bill reported that there are about 100,000 alcohol-related deaths in the United States yearly; that 41.3% of traffic fatalities in 1995 were alcohol related; that alcohol is involved in approximately 30% of suicides, 50% of homicides, 68% of manslaughter cases, 52% of sexual assaults, and 62% of other assaults; and that about 30% of accidental deaths are attributable to alcohol abuse. See *id.*; see also James B. Jacobs, *Drunk Driving: An American Dilemma* 8-10 (1989) (observing that nearly "all types of emotional, psychological, social, and family problems can be exacerbated by alcohol," and reporting that one-fourth of hospital admissions involve alcohol abuse).

cant minority of drinkers.¹⁷

The general facts that excessive drinking can cause harm and that people can become addicted to alcohol have long been known.¹⁸ Nevertheless, widespread public awareness of certain specific alcohol-related problems, such as drunk driving, is a relatively recent development.¹⁹ Some of alcohol's possible negative effects, such as its role in increasing the risk of breast cancer, only recently have been investigated.²⁰ As with any field of scientific research, further study of alcohol may reveal other dangers.²¹

On the positive side, a growing body of scientific research shows that alcohol consumption reduces the risk of cardiovascular disease, and that moderate drinking—often defined as one or two drinks a day for men, and one drink for women—reduces overall death rates.²²

¹⁷ See Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 *Iowa L. Rev.* 909, 949 (1992) (citing 1984 national survey showing that seven percent of drinkers "experienced moderate levels of dependence symptoms in the past year").

¹⁸ See *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 388 (Tex. 1991) ("From ancient times, the danger of alcoholism from prolonged and excessive consumption of alcoholic beverages has been widely known and recognized."). The *McGuire* court also stated that the risks of intoxication and an impaired ability to drive are common knowledge. See *id.*; see also *Pemberton v. American Distilled Spirits Co.*, 664 S.W.2d 690, 693 (Tenn. 1984) (finding that it is commonly known that large doses of alcohol can cause death by poisoning); *Restatement (Second) of Torts* § 402A cmts. i, j (1965) (stating that alcohol is not unreasonably dangerous product, and that alcohol producers have no duty to warn of drinking's dangers, because dangers of excessive drinking and alcoholism are "generally known and recognized"). But see Wayne J. Carroll, *One Last Attempt at Liability for "Vice" Products: A Different Ending to the "Willie Story" Story?*, 99 *Com. L.J.* 108, 131-32 (1994), available in Westlaw, COMLJ database (arguing that significant portion of population is especially susceptible to alcoholism, and that this fact is not commonly known).

¹⁹ See Jacobs, *supra* note 16, at xiv-xviii (observing that drunk driving has become high-profile issue in United States largely in last 30 years).

²⁰ See W.C. Willett et al., *Moderate Alcohol Consumption and the Risk of Breast Cancer*, 316 *New Eng. J. Med.* 1174, 1174-80 (1987) (reporting early evidence of link between moderate drinking and breast cancer).

²¹ Of course, further research may also show that some currently perceived risks do not actually exist, or may reveal that alcohol has other benefits. See, e.g., *Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans to the Secretary of Health and Human Services and the Secretary of Agriculture* 35 (1995) [hereinafter *Report of the Dietary Guidelines Advisory Comm.*] (visited June 27, 1999) <<http://www.nal.usda.gov/fnic/Dietary/dgreport.html>> (noting that theory linking moderate drinking to increased risk of stroke has not been borne out by evidence).

²² See Thun et al., *supra* note 12, at 1710-11 (reporting that drinkers died of heart disease less frequently than nondrinkers, and that overall death rate of study participants who had one drink per day was 20% lower than death rate for nondrinkers); *AHA Statement*, *supra* note 4 (stating that many studies "have demonstrated a consistent, strong, dose-response relation between increasing alcohol consumption and decreasing incidence of [coronary heart disease], and also have shown that total mortality is lowest for those who consume one or two drinks per day); 1995 *USDA Guidelines*, *supra* note 12, at 40 (stating that studies have shown that moderate drinking reduces risk of coronary heart disease, and

Research in this area was first brought to the public's attention in the early 1990s, most famously by a *60 Minutes* segment about "the French paradox."²³ In this 1991 broadcast, the television news magazine reported the results of medical research showing that French men, despite a diet heavy in red meat and dairy fat, had an unusually low incidence of heart disease.²⁴ The researchers credited the test subjects' reduced rate of heart disease in part to their regular consumption of alcohol, often red wine.²⁵

The *60 Minutes* report caused wine sales—but not sales of other alcoholic beverages—to surge upward in the United States, as American consumers sought to follow the example of the French test subjects.²⁶ Despite this rise in wine sales, there is evidence that most Americans do not know that moderate drinking can have health benefits,²⁷ and that of those who do know, many believe that only wine has beneficial effects.²⁸

The weight of current scientific evidence, however, shows that any alcoholic drink—not just wine—can reduce the risk of cardiovascular disease. The red wine credited for creating "the French paradox" probably owes most or all of its beneficial effect to ethanol, beverage alcohol itself.²⁹ All other things being equal, a shot of

defining moderate drinking as no more than two drinks per day for men, and one drink per day for women).

²³ See Laura Shapiro, *To Your Health?*, Newsweek, Jan. 22, 1996, at 52-53 ("Americans' ideas about wine started to change in 1991, when Morley Safer went to Lyons, France, and came back with a '60 Minutes' story on 'the French paradox.'").

²⁴ See *60 Minutes* (CBS television broadcast, Nov. 17, 1991) (transcript available in Lexis, News Library, SCRIPT file).

²⁵ See *id.* While none of the researchers interviewed by *60 Minutes* specified that red wine in particular was the French beverage of choice, glasses of red wine were shown on camera, and correspondent Morley Safer linked Americans' high incidence of heart attacks with their being "among the lowest consumers of red wine in the world." *Id.*

²⁶ See Shapiro, *supra* note 23, at 53 (recounting statistic showing that wine sales in U.S. rose 44% in year after *60 Minutes* report).

²⁷ A 1995 survey commissioned by the Competitive Enterprise Institute (CEI)—which is currently suing ATF to relax its restrictions on health-based alcohol marketing—showed that fewer than half of the one thousand respondents knew that moderate drinking could confer cardiovascular benefits. See Amended Complaint ¶ 19, *Competitive Enter. Inst. v. Rubin* (D.D.C. filed Feb. 14, 1997) (No. 96-2476) [hereinafter *Amended CEI Complaint*] (on file with the *New York University Law Review*). For a description of CEI's suit, see *infra* Part II.A.

²⁸ See Amended CEI Complaint, *supra* note 27, ¶ 19 (stating that only 10% of survey respondents knew that research has shown that moderate drinking of any alcoholic beverage may reduce risk of heart disease).

²⁹ The American Heart Association reports that studies have shown that about 50% of the protective effect of moderate drinking stems from alcohol's ability to increase levels of HDL cholesterol in the blood. See AHA Statement, *supra* note 4. HDL cholesterol removes harmful cholesterol from arterial walls, and probably protects arteries in other ways as well. See *id.* The source of the other half of moderate drinking's protective effect

Scotch or a bottle of pale ale should confer similar health benefits as a glass of Merlot.³⁰ Significantly, the federal government itself, in nutritional guidelines published by the Department of Agriculture, has recognized that moderate alcohol consumption has been shown to reduce the risk of heart disease.³¹

An extensive study published in the December 1997 issue of the *New England Journal of Medicine* provides particularly compelling evidence of moderate drinking's benefits. Researchers polled 490,000 American men and women on their drinking habits in 1982,³² then examined the cause of death of the 46,000 poll participants who had died by the end of 1991.³³ After correcting for the incidence of smoking and other variables, the researchers found that both men and women who had at least one drink per day were thirty to forty percent less likely to die of cardiovascular disease than nondrinkers.³⁴ The study also showed that overall death rates were lowest for survey participants who consumed about one drink per day.³⁵ But while this study and others provide strong evidence that moderate drinking can

is difficult to pinpoint. It may come from ingredients other than alcohol, such as antioxidants that may exist in red wine and dark beer. See *id.*; see also Purple Grape Juice May Aid Heart Health, Study Finds, *Med. Industry Today*, Mar. 15, 1999, available in Lexis, News Library, ALLNWS file (reporting results of relatively small study showing that drinking dark grape juice helped to ward off heart disease by fighting harmful LDL cholesterol). On the other hand, some studies have traced this half of drinking's beneficial effect to a property of alcohol that appears to reduce harmful blood clotting. See AHA Statement, *supra* note 4.

³⁰ The caveat "all things being equal" reflects the observation of some researchers that the drinking habits and overall lifestyle of the average wine drinker are more conducive to good health than those of the average beer or liquor drinker (to the extent that these groups are separate). See Shapiro, *supra* note 23, at 54 (reporting that research suggests that alcohol may convey its greatest health benefit when drunk with meals, as is typical with wine, and that wine drinkers tend to exercise more, smoke less, and maintain healthier diet than other drinkers).

³¹ See 1995 USDA Guidelines, *supra* note 12, at 40 ("Current evidence suggests that moderate drinking is associated with a lower risk for coronary heart disease in some individuals."). For a more extensive quote from these Guidelines, and a discussion of their significance, see *infra* note 68 and accompanying text.

³² See Thun et al., *supra* note 12, at 1706.

³³ See *id.*

³⁴ The data used in the study were gathered through confidential mailed questionnaires distributed by American Cancer Society volunteers. Deaths were ascertained from the month of enrollment until December 1991 through personal inquiries by the volunteers, and then through linkage with the National Death Index. See *id.* at 1711.

³⁵ See *id.* Even very heavy drinkers—those who consumed at least six alcoholic drinks per day—were less likely to die of heart disease than nondrinkers. See *id.* at 1710. But because heavy drinkers were much more likely than nondrinkers to die from alcohol-related causes, such as cirrhosis or accidents, the total death rate among heavy drinkers was about as high as the total death rate for nondrinkers; in other words, even if heavy drinking reduces the risk of heart disease, its negative health effects cancel out any cardiovascular benefit that it may bring along. See *id.*; see also AHA Statement, *supra* note 4 (summariz-

have health benefits, no medical research has yet convinced the federal government to loosen its policy toward health-related alcohol marketing in a significant way. The next Part discusses the government's restrictive regulatory scheme.

II FEDERAL POLICY TOWARD HEALTH-RELATED MARKETING OF ALCOHOL

The federal government, primarily through ATF, generally has forbidden alcohol producers to refer to medical evidence of alcohol's potential benefits either on labels or in advertisements reaching beyond the point of sale.³⁶ This strict regulatory policy stems from a concern that health-related marketing would mislead consumers into ignoring or discounting alcohol's dangers.

A. ATF Develops a Virtual Ban on Health Statements

Shortly after the end of Prohibition, Congress granted the Secretary of the Treasury broad power to regulate the labeling and advertising of alcoholic beverages,³⁷ and the Secretary subsequently delegated this authority to ATF.³⁸ Several of ATF's regulations are relevant to health-related marketing. The agency reviews alcoholic beverage la-

ing results of studies finding strong correlation between increasing alcohol consumption and decreasing incidence of heart disease).

³⁶ States also regulate certain alcohol marketing. See, e.g., N.Y. Alco. Bev. Cont. Law § 107-a(1) (McKinney 1987) (authorizing state liquor authority to regulate "labeling and offering of alcoholic beverages bottled, packaged, sold or possessed for sale within this state"). State regulations may be stricter than those imposed by the federal government, see *id.* § 107-a(4)(c)(2)(ii) (McKinney Supp. 1999) (contemplating denial of state approval for label that has ATF approval); *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 91 (2d Cir. 1998) (observing that New York and three other states had denied brewer permission to use label that had been approved by ATF), although states are preempted from requiring health warnings other than the federally mandated Surgeon General's warning on alcohol labels. See 27 U.S.C. § 216 (1994) (forbidding states from requiring additional warnings on alcoholic beverage containers); see also *infra* note 42 (discussing Surgeon General's warning). This Note does not focus on state regulation of alcohol marketing. Preemption issues aside, however, the First Amendment arguments raised in this Note would apply to state as well as federal marketing restrictions. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996) (stating, in context of commercial speech case involving alcohol advertising, that First Amendment applies to states through Due Process Clause of Fourteenth Amendment).

³⁷ See Federal Alcohol Administration Act, ch. 814, tit. I, § 105, 49 Stat. 977, 981 (1935) (codified as amended at 27 U.S.C. § 205(e) (1994)) [hereinafter FAAA] (establishing federal authority to regulate labeling of alcoholic beverages, partly to prevent "deception of the consumer"); *id.* (codified as amended at 27 U.S.C. § 205(f)) (same for advertising).

³⁸ See *Treas. Dep't Order No. 221*, 37 Fed. Reg. 11,696 (1972) (delegating power to enforce FAAA to ATF director); see also 27 C.F.R. pt. 4 (1998) (setting forth ATF regula-

bels and advertisements case by case,³⁹ and forbids them from including:

Any statement that is false or untrue in any particular, or that, irrespective of its falsity, directly or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression.⁴⁰

ATF also prohibits labels and advertising from containing "any statement, design, representation, pictorial representation, or device representing that the use of [wine, distilled spirits, or malt beverages] has curative or therapeutic effects if such statement is untrue in any particular or tends to create a misleading impression."⁴¹ In addition, ATF enforces the statutory requirement that every alcoholic beverage label include a legible Surgeon General's warning.⁴² Although adver-

tions on labeling and advertising of wine); id. pt. 5 (same for distilled spirits); id. pt. 7 (same for malt beverages).

ATF regulates a wide variety of alcohol marketing techniques aside from health statements. See, e.g., 27 C.F.R. § 5.65(a)(3) (prohibiting distilled spirits advertising from including "[a]ny statement, design, device, or representation which is obscene or indecent"); id. § 7.55 (prohibiting beer ads that disparage competing product, and regulating use of taste-test advertising). Other C.F.R. sections apply this rule to wine, beer, and distilled spirits advertising and all alcohol labels.

³⁹ See Bureau of Alcohol, Tobacco and Firearms, Health Claims in the Labeling and Advertising of Alcoholic Beverages (Announcement 94-2, Industry Circular No. 93-8, Aug. 2, 1993), reprinted in Bureau of Alcohol, Tobacco and Firearms, Quarterly Bulletin, Dec. 16, 1993-Mar. 15, 1994, at 63 [hereinafter 1993 ATF Circular]. Alcohol producers must submit beverage labels to ATF for preapproval before they can enter into interstate commerce. See 27 U.S.C. § 205(e) (1994) (requiring alcohol producer to obtain "certificate of label approval" from Treasury before introducing beverage to interstate commerce); see also 27 C.F.R. § 4.40 (1994) (requiring preapproval of labels on imported wine); id. § 4.50 (same for domestic wine labels); id. § 5.51 (imported distilled spirits labels); id. § 5.55 (domestic distilled spirits labels); id. § 7.31 (imported malt beverage labels); id. § 7.41 (domestic malt beverage labels). *Advertisements* need not be preapproved by ATF, but alcohol producers sometimes seek ATF approval before running their ads to avoid having the agency order them to cancel an ad campaign that is already running. See 27 U.S.C. § 205(f) (1994) (authorizing Treasury to regulate alcohol ads, but not requiring preapproval); 1993 ATF Circular, *supra* (reminding advertisers "that they may obtain advance clearance of proposed advertising materials from ATF if they wish").

⁴⁰ 27 C.F.R. § 4.39(a)(1) (applying restriction to wine labels); id. § 5.42(a)(1) (same for distilled spirits labels); id. § 7.29(a)(1) (malt beverage labels); id. § 4.64(a)(1) (wine advertising); id. § 5.65(a)(1) (distilled spirits advertising); id. § 7.54(a)(1) (malt beverage advertising).

⁴¹ Id. § 4.39(h) (applying restriction to wine labels); id. § 5.42(b)(8) (same for distilled spirits labels); id. § 7.29(e) (malt beverage labels); id. § 4.64(i) (wine advertising); id. § 5.65(d) (distilled spirits advertising); id. § 7.54(e) (malt beverage advertising).

⁴² See id. §§ 16.20-16.22. The mandatory warning label reads: "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems." 27 U.S.C. § 215(a) (1994). Congress enacted the warning, which it has required on labels since 1989, see id., partly to "avoid the promulgation of incorrect or

tisements need not include the warning, ATF claims the authority to forbid advertisers from saying anything inconsistent with the warning.⁴³

In the wake of the *60 Minutes* 1991 report on “the French paradox,” several wine makers sought to include evidence of the health benefits of moderate drinking in their marketing materials.⁴⁴ ATF blocked most of these efforts,⁴⁵ although the agency did allow World Wine Estates, the producer of the popular Beringer wine brand, to quote several passages of the *60 Minutes* segment in tags that the wine maker planned to hang from the necks of its bottles.⁴⁶ The company decided not to use the neck tags after it encountered opposition from the Food and Drug Administration (FDA), Federal Trade Commission (FTC), and some consumer groups.⁴⁷

In 1993, ATF publicly articulated its position that tight restrictions on health-related alcohol marketing are needed to prevent harm to consumers’ health.⁴⁸ In an industry circular, the agency acknowledged that controversy surrounded the issue of using health statements to market alcohol, and solicited public comment on whether ATF should adopt specific, substantive standards for evaluating such statements.⁴⁹ The agency also reiterated its general opposition to

misleading information.” *Id.* § 213. Congress also directed the Treasury Secretary, in consultation with the Surgeon General, to monitor whether advances in “available scientific information” would require amendment, addition, or deletion of the warning. See *id.* § 217. The warning has remained the same since its enactment, however.

⁴³ See 1993 ATF Circular, *supra* note 39 (stating that 27 U.S.C. § 205(f)(5) prohibits alcohol advertising from saying anything inconsistent with any statement on product’s label, and taking position that health-related alcohol advertising that “does not present a balanced picture of the health risks associated with alcohol consumption” is inconsistent with Surgeon General’s warning); see also 27 C.F.R. § 4.64(b)(1) (“Advertisements shall not contain any statement concerning a brand or lot of wine that is inconsistent with any statement on the labeling thereof.”); *id.* § 5.65(b)(1) (same for distilled spirits); *id.* § 7.54(b)(1) (same for malt beverages).

⁴⁴ See Jacob Sullum, *BATF out of Hell, Reason*, May 1994, at 25, 29 (recounting efforts of three California wineries—Leeward, Robert Mondavi, and World Wine Estates—to market research findings reported by *60 Minutes*).

⁴⁵ See *id.* (noting that ATF stopped Leeward and Robert Mondavi from using marketing based on *60 Minutes* report).

⁴⁶ See *The Neckhanger Cliffhanger: Beringer Temporarily Holds Off*, *Food & Drink Daily*, Nov. 13, 1992, available in 1992 WL 2758593.

⁴⁷ See *id.*; see also Sullum, *supra* note 44, at 29 (noting that winery never used tags at issue). For a discussion of the authority of FDA and FTC to restrict health-related alcohol marketing, see *infra* note 49.

⁴⁸ See 1993 ATF Circular, *supra* note 39.

⁴⁹ See *id.* To date, ATF has not promulgated any substantive rules for how it evaluates health statements used in alcohol marketing.

ATF also stated in its 1993 Circular that it looks to federal food and drug policies for guidance on regulating alcohol producers’ health-related claims, see *id.*, and an examination of congressional and FDA policies on health marketing helps put ATF’s reasoning in

context. Such an analysis is also relevant because FDA might assert authority over a health statement on an alcoholic beverage label even if ATF approved it. See *supra* note 47 and accompanying text (observing that winery declined to use ATF-approved health statements after FDA and FTC considered opposing them).

Marketing that promotes alcohol's role in reducing the risk of heart disease could spur FDA to try to treat alcohol as a "drug." See 1993 ATF Circular, *supra* note 39 (stating that FDA had advised ATF that health marketing might bring alcoholic beverages under "drug" category); cf. David A. Rienzo, *About-Face: How FDA Changed Its Mind, Took on the Tobacco Companies in Their Own Back Yard, and Won*, 53 *Food & Drug L.J.* 243 (1998) (discussing FDA's assertion of jurisdiction over tobacco in 1996). Congress has defined a "drug" as any "article[] intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease." 21 U.S.C. § 321(g)(1)(B) (1994). FDA has broad power to regulate the development, testing, manufacture, marketing, and labeling of any drug. See *id.* § 355 (establishing requirements for application for approval of new drug); Nancy K. Plant, *Prescription Drug Promotion on the Internet: Tool for the Inquisitive or Trap for the Unwary?*, 42 *St. Louis U. L.J.* 89, 91-103 (1998) (describing framework of federal regulation of prescription drug marketing).

FDA's authorizing statutes, however, suggest that it would be more appropriate for FDA to treat alcohol as a "food" rather than a "drug." See 21 U.S.C. § 321(f) (1994) (defining "food" as, *inter alia*, "articles used for food or drink for man or other animals"). FDA can prohibit false or misleading labeling of any food or beverage. See *id.* § 343(a) (prohibiting food labeling that "is false or misleading in any particular"); *id.* § 321(k), (m) (defining "label" and "labeling" to include "written, printed or graphic matter" on product's container or accompanying product). Typically, a label may "characterize[] the relationship of any substance to a disease or health-related condition"—thus making what FDA calls a "health claim"—only if the label's claim is preapproved by FDA after an examination of the claim's scientific basis. See 21 C.F.R. § 101.14(a)(1), (c)-(e) (1998). There are ways to obviate the need for preapproval, but they are beyond the scope of this Note. See *Food and Drug Administration Modernization Act of 1997* § 303, Pub. L. No. 105-115, 111 Stat. 2296, 2350-51 (codified at 21 U.S.C. § 343(r)(3) (Supp. II 1998)).

FDA has approved some product labels that say, accurately, that a substance in the product "may help to reduce the risk" of a certain disease. See Stephen H. McNamara, *So You Want to Market a Food and to Make Health-Related Claims—How Far Can You Go? What Rules of Law Will Govern the Claims You Want to Make?*, 53 *Food & Drug L.J.* 421, 423 (1998) (noting that FDA has approved labels stating that adequate calcium intake may reduce risk of osteoporosis for some women). Like ATF, FDA probably would be reluctant to approve any label stating that moderate alcohol consumption can reduce the risk of heart disease, due to alcohol's other, well-documented negative effects. Cf. 21 C.F.R. § 101.14(a)(5) (1998) (prohibiting all health claims relating to food that contains more than certain level of fat, saturated fat, cholesterol, or sodium).

A less specific label, perhaps stating that "one or two drinks a day can benefit an adult's health," seemingly would not implicate the limitations on health claims, because such a statement does not characterize alcohol's relationship "to a disease or health-related condition." McNamara, *supra*, at 422 (quoting 21 C.F.R. § 101.14 (1997)). Still, FDA might very well prohibit this label on the ground that it misleadingly omits that drinking also may contribute to various health detriments.

Whereas FDA has authority over food and drug labeling, FTC regulates product advertising in general, see 15 U.S.C. §§ 41-64 (1994), and has suggested that it might use this authority to regulate health-related statements in alcohol advertising. See *supra* note 47 and accompanying text. FTC does not require preapproval of health-related advertisements, but insists that advertisers possess "competent and reliable scientific evidence" to back up their statements. *Enforcement Policy Statement on Food Advertising*, 59 *Fed. Reg.* 28,388, 28,393 (1994); *Policy Statement Regarding Advertising Substantiation Program*, 49 *Fed. Reg.* 30,999 (1984); see also *American Home Prods. Corp. v. FTC*, 695 F.2d

health-related marketing, saying it feared that members of the public would adopt dangerous drinking habits if alcohol producers told them that moderate drinking could be good for them.⁵⁰

According to ATF, health-related alcohol marketing would endanger consumers because it is almost invariably misleading. First, the agency said, a statement attributing health benefits to moderate drinking, "even if backed up by medical evidence, may have an overall misleading effect if [it] is not properly qualified, does not give all sides of the issue, and does not outline the categories of individuals for whom any such positive effect would be outweighed by numerous negative health effects."⁵¹ As a corollary to this point, ATF said that any health claim is likely to mislead and confuse customers to the extent that it is inconsistent with the Surgeon General's warning.⁵² Second, the agency expressed concern that there was no "significant agreement within the scientific and medical communities" about moderate drinking's good effects.⁵³ Third, ATF questioned "whether any type of health claim should ever be allowed in the labeling and advertising of alcoholic beverages, due to the inherent dangers associated with these products."⁵⁴

The agency went on to suggest that its policy, although applied to proposed labels and ads on a case-by-case basis, would operate as a de facto ban on health-related alcohol marketing. The only health statement that ATF said it would accept was a four-page report with thirty-four footnotes, which the agency said presented a balanced view of drinking's good and ill effects.⁵⁵ ATF announced that marketing

681, 692 (3d Cir. 1983) (holding that FTC could require substantiation of advertising claims made by producer of over-the-counter analgesics); *McNamara*, *supra*, at 434-35 (discussing FTC authority over health advertising).

Of course, government restrictions on health-related marketing are subject to First Amendment challenge whether they come from ATF, FDA, or FTC. In fact, the D.C. Circuit recently struck down FDA restrictions on certain health claims made on the labels of dietary supplements (a category that includes vitamin pills, herbal extracts, and other nonfood, nondrug products). See *Pearson v. Shalala*, 164 F.3d 650, 659 (D.C. Cir. 1999); see also Lars Noah & Barbara A. Noah, *Liberating Commercial Speech: Product Labeling Controls and the First Amendment*, 47 Fla. L. Rev. 63, 92-95 (1995) (attacking FDA's argument that unapproved health claims on food labels are inherently misleading and thus devoid of First Amendment protection).

⁵⁰ See 1993 ATF Circular, *supra* note 39.

⁵¹ *Id.*

⁵² See *id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *id.* The ATF-approved report, an "Alcohol Alert" published by the National Institute on Alcohol Abuse and Alcoholism, contains four paragraphs describing evidence that moderate drinking can confer health benefits, and devotes a considerably greater amount of text to discussing the harms related to alcohol. See Nat'l Inst. on Alcohol Abuse and Alcoholism, *Alcohol Alert*, No. 16 PH 315 (Apr. 1992) (visited July 6, 1999)

materials that only excerpted this report, or were based on any other source of information about alcohol's health effects, would "be closely scrutinized to determine if they present a balanced picture of the risks associated with alcohol consumption," and that their chance of withstanding this scrutiny was "very low."⁵⁶ Any permissible claim would be "extremely unlikely" to "fit on a normal alcoholic beverage label," ATF added.⁵⁷

ATF's policy toward health-related alcohol marketing has changed little since the agency issued its 1993 circular. Aside from the wine labels it approved in February 1999,⁵⁸ ATF consistently has rejected proposed ads and labels.⁵⁹ For example, in January 1997, ATF denied a petition by the Competitive Enterprise Institute (CEI) that asked the agency to adopt a rule that would categorically allow labels and ads to bear certain health-related statements.⁶⁰ CEI had requested approval of the statement, "There is significant evidence that moderate consumption of alcoholic beverages may reduce the risk of heart disease," and variations on it.⁶¹ After ATF denied its petition, CEI sued, claiming, *inter alia*, that the agency's restrictive policy on health-related alcohol marketing violates the First Amendment.⁶²

<<http://silk.nih.gov/silk/niaaa1/publication/aa16.htm>>; see also Jonathan Rauch, *Temperance Kills*, *Slate* (Aug. 13, 1998) (visited Aug. 11, 1999) <<http://www.slate.com/Features/BATF/BATF.asp>> (describing NIAAA report).

⁵⁶ 1993 ATF Circular, *supra* note 39.

⁵⁷ *Id.*

⁵⁸ See *infra* note 68 and accompanying text.

⁵⁹ See Sam Kazman, *Here's to Honesty in Liquor Labels*, *Wall St. J.*, Feb. 18, 1999, at A22 (opinion piece by general counsel of Competitive Enterprise Institute) ("Over the next few years [after issuing its 1993 Circular] ATF killed at least a dozen moderate-consumption label and ad proposals, ranging from detailed discussions of the French paradox to short statements about health benefits to simple phrases such as 'health giving.'"); Rauch, *supra* note 55 (reporting that as of August 1998 ATF had approved no health-related statements).

⁶⁰ See Letter from Gerard W. LaRusso, Chief, ATF Alcohol and Tobacco Programs Division, to Sam Kazman, General Counsel, CEI, 1, 12 (Jan. 13, 1997) [hereinafter *LaRusso Letter*] (on file with the *New York University Law Review*).

⁶¹ Petition of the Competitive Enterprise Institute to the Bureau of Alcohol, Tobacco and Firearms for a Rule Allowing Alcoholic Beverage Labels to Carry Statements on the Health Benefits of Moderate Consumption 1-2, 5 (May 9, 1995) (on file with the *New York University Law Review*).

⁶² See Amended CEI Complaint, *supra* note 27, at 12. CEI claims it represents consumers who want to be able to receive truthful information about alcohol's potential benefits from ads and labels. See *id.* at 2-3. In addition to claiming that ATF's policy violates the First Amendment, CEI argues that both the agency's general policy and its specific denial of CEI's petition violate the FAAA, Treasury regulations, and the Administrative Procedure Act. See *id.* at 12-13.

As of August 1999, the court had not ruled on the merits of CEI's claim that ATF's general policy toward health-related alcohol marketing violates the First Amendment. The parties completed briefing of their cross motions for summary judgment on this issue in March 1999. The court has held, however, that ATF acted within its authority when it

In its denial of CEI's petition, as well as its motion for summary judgment in CEI's suit, ATF reinforced and expanded on the reasoning of its 1993 circular. Its policy is designed only to prohibit misleading statements,⁶³ the agency said, and argued that CEI's proposed labels would mislead consumers "for whom there would be significant risks associated with moderate alcohol consumption," such as people prone to alcohol abuse and people with certain medical conditions.⁶⁴ ATF apparently reasoned that health-related marketing would make these vulnerable consumers more likely to rationalize that a drink or two would do no harm. Moreover, CEI's proposed labels would mislead "younger individuals already at low risk of heart disease," ATF alleged, because these consumers would gain "no appreciable benefits" from moderate drinking.⁶⁵ Finally, ATF said that health statements would need to "explain the significant risks associated with higher levels of alcohol consumption" to have a chance of approval,⁶⁶ reflecting the agency's fear that people who are told that moderate drinking is good for them might not draw a proper line between moderate and excessive drinking.⁶⁷

denied CEI's petition and rejected the specific health statement for which CEI sought approval. See *Competitive Enter. Inst. v. Rubin*, No. 96-2476 (D.D.C. May 27, 1998) (memorandum and order). The court reasoned that ATF was free to conclude that CEI's proposed statement was "potentially misleading" for "failing to mention" that "even moderate alcohol consumption may be deleterious." *Id.* at 2. The court thus did not address whether CEI's proposed statement could have been saved by the inclusion of a disclaimer discussing any of moderate drinking's potential risks. CEI has moved the court to reconsider its ruling upholding the denial of CEI's petition, arguing that under *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999), ATF could not deny CEI's petition without first considering whether CEI's proposed statement could be made nonmisleading by some means less drastic than an outright ban, such as by including disclaimers. See Plaintiffs' Motion for Reconsideration of this Court's Dismissal of Count III of the Amended Complaint, *Competitive Enter. Inst. v. Rubin* (D.D.C. filed Mar. 15, 1999) (No. 96-2476). *Pearson* is discussed *infra* note 168.

⁶³ See Memorandum in Support of Defendant's Motion for Summary Judgment at 18, *Competitive Enter. Inst. v. Rubin* (D.D.C. filed Oct. 7, 1998) (No. 96-2476) (stating that FAAA and ATF policy "target only misleading speech").

⁶⁴ LaRusso Letter, *supra* note 60, at 11.

⁶⁵ *Id.*

⁶⁶ *Id.* at 12.

⁶⁷ The concern that people will react self-destructively to information about alcohol's potential benefits is not unique to ATF, or to the government in general. Some researchers exploring the health benefits of moderate drinking have expressed similar concerns about consumers' ability to treat alcohol responsibly after they learn of its potential effects on cardiovascular health. Michael J. Thun, the lead author of an extensive study on alcohol's health effects, see Thun et al., *supra* note 12, has acknowledged that he downplayed alcohol's benefits in reporting the results of his study. See Rauch, *supra* note 55 (quoting Thun as saying: "People have a very hard time with complicated messages.").

B. The New Wine Labels: ATF's (Non) Change in Policy

Given ATF's strong, recent iteration of its restrictive policy in the CEI suit, it seems unlikely that the agency's February 1999 decision to allow wine labels to carry two particular statements about alcohol's health effects foreshadows any substantial relaxation of ATF's general opposition to health-related marketing. The wording of the permitted statements is narrowly cabined, and only directs the consumer to other sources of information about the "health effects" of drinking. The two statements read as follows:

The proud people who made this wine encourage you to consult your family doctor about the health effects of wine consumption.

To learn the health effects of wine consumption, send for the Federal Government's Dietary Guidelines for Americans, Center for Nutrition Policy and Promotion, USDA, 1120 20th Street, NW, Washington, DC 20036 or visit its website.⁶⁸

⁶⁸ ATF Press Release, *supra* note 2. The Dietary Guidelines referenced in the second of the approved labels are published by the Department of Agriculture in conjunction with the Department of Health and Human Services. See Report of the Dietary Guidelines Advisory Comm., *supra* note 21, at 3 (noting that Departments have issued Guidelines every five years since 1980). The Guidelines contain nutritional suggestions based on the Departments' assessment of medical research into the health effects of various foods, beverages, and lifestyle habits. The most recent edition, published in December 1995, attempts to report the state of scientific research into alcohol's potential health benefits while still reflecting the traditional (and partly accurate) view of alcohol as a medically and socially dangerous vice:

Alcoholic beverages supply calories but few or no nutrients. The alcohol in these beverages has effects that are harmful when consumed in excess. These effects of alcohol may alter judgment and can lead to dependency and a great many other serious health problems. Alcoholic beverages have been used to enhance the enjoyment of meals by many societies throughout human history. If adults choose to drink alcoholic beverages, they should consume them only in moderation.

Current evidence suggests that moderate drinking is associated with a lower risk for coronary heart disease in some individuals. However, higher levels of alcohol intake raise the risk for high blood pressure, stroke, heart disease, certain cancers, accidents, violence, suicides, birth defects, and overall mortality (deaths). Too much alcohol may cause cirrhosis of the liver, inflammation of the pancreas, and damage to the brain and heart. Heavy drinkers also are at risk of malnutrition because alcohol contains calories that may substitute for those in more nutritious foods.

1995 USDA Guidelines, *supra* note 12, at 40 (citation omitted). The Guidelines go on to advise some people—such as adolescents, pregnant women, and those who plan to drive afterward—not to drink at all, and also define "moderation" as no more than one drink a day for women, and no more than two drinks a day for men. See *id.* at 40 box 16.

Even the qualified acceptance of alcohol's benefits in the 1995 Guidelines marked a departure from the previous edition of the USDA Guidelines, published in 1990, which said that drinking "has no net health benefit" and "is not recommended." U.S. Dep't of Agriculture, Nutrition and Your Health: Dietary Guidelines for Americans (3d ed. 1990) (visited July 7, 1999) <<http://www.nal.usda.gov/fnic/dga/alcohol.html>>. Indeed, wine mak-

These merely directional statements lack the gloss and force of conventional marketing. Among other restrictions, the agency forbade wine makers from using the phrase “health benefits,” and replaced it with the more neutral “health effects.”⁶⁹ In addition, before approving the two statements, ATF examined a survey of wine drinkers conducted by the Center for Substance Abuse Prevention, an arm of the Department of Health and Human Services.⁷⁰ The Center found that the label statements would not influence the drinking patterns of most survey participants.⁷¹ Given that ATF approved these new labels only after assuring itself that they would not affect consumer choices, it does not appear that the agency is ready to let alcohol producers promote the benefits of moderate drinking in a more direct and prominent way.

Boding even worse for any relaxation of ATF’s policy against health marketing is the political fallout the agency faced after approving the new labels. A United States senator⁷² and groups that combat alcohol abuse⁷³ harshly criticized ATF for permitting the new labels. Saying that the statements on the new labels endanger the public, Senator Strom Thurmond proposed legislation that would prohibit labels from carrying the new language⁷⁴ and raise wine taxes to finance research into alcohol’s bad effects.⁷⁵ Senator Thurmond also pressured Treasury Secretary Robert Rubin into promising that ATF would issue a notice of proposed rulemaking on health-related alcohol label-

ers hailed the 1995 Guidelines as a breakthrough, and have used them as a lever to try to obtain ATF permission to promote wine’s health benefits. See Stout, *supra* note 7. Certainly, the 1995 Guidelines do attest implicitly that information about alcohol’s potential health benefits actually can help consumers make intelligent drinking decisions; such an idea scarcely appears in ATF’s discussion of health-related alcohol marketing. But the 1995 Guidelines, full of caveats, also tacitly support ATF’s view that no statement about moderate drinking’s benefits can be complete without extensive hedging.

⁶⁹ See Stout, *supra* note 7.

⁷⁰ See ATF Press Release, *supra* note 2.

⁷¹ See *id.* The 1995 USDA Guidelines hardly endorse moderate drinking over abstinence, see *supra* note 68, further suggesting that those few consumers who go through the trouble of obtaining and reading the USDA Guidelines—as they are advised to do by the second of the approved labels—will be unlikely to change their drinking habits. Indeed, the greatest benefit that the wine industry derives from the new labels may not be their effect on consumers at the point of sale, but the renewed news reporting about moderate drinking’s health benefits that followed the labels’ approval.

⁷² See Stout, *supra* note 7 (reporting that Senator Strom Thurmond “called the new labels ‘health statements’ that are a danger to the public”).

⁷³ See, e.g., Wood, *supra* note 6 (expressing opposition of National Council on Alcoholism and Drug Dependence).

⁷⁴ See Lochhead, *supra* note 8 (reporting that Senator Thurmond’s proposed Alcohol Beverage Label Preservation Act of 1999 had stalled in Congress).

⁷⁵ See Stout, *supra* note 7.

ing,⁷⁶ which would solicit public comment on “whether the negative health consequences of alcohol consumption or abuse disqualify these products entirely from entitlement to any health-related statements.”⁷⁷ Given the political climate that generated it, the rulemaking process seems likely to involve a stiffening, not a relaxation, of ATF’s restraints on health statements on labels. Without a dram of doubt, fear of political repercussions would cause ATF to shoot down any mass-media advertising campaign linking moderate drinking to health benefits.

As it stands, however, ATF’s restrictive policy violates the First Amendment. Under commercial speech doctrine, alcohol producers have a right to make truthful health statements in their advertising, as long as they include certain limited disclaimers to avoid misleading consumers about alcohol’s mixture of positive and negative effects.

III

HEALTH-RELATED ALCOHOL MARKETING AND THE FIRST AMENDMENT

Commercial speech often has been held to merit First Amendment protection because—and to the extent that—it helps people make autonomous economic and personal decisions. Consumers consciously or unconsciously use commercial speech to help themselves make countless decisions: whether to supplement their diets with vitamins; which lawyers they should hire to bring employment discrimination suits; how they should dress to impress their peers; and, most pertinent here, what sort of drinking habits they will adopt.

ATF argues that almost any type of health-related alcohol marketing would decrease, not increase, consumer autonomy by misleading people into adopting dangerously wrong ideas about the medical, personal, and societal risks attendant to drinking. Commercial speech jurisprudence, however, strongly suggests that ATF’s concerns, while partially valid, do not justify government restrictions nearly as stringent as those the agency currently places on advertisements and labels promoting the benefits of moderate drinking.

A. *Commercial Speech Law and Consumer Autonomy*

To give context to the First Amendment arguments in favor of health-related alcohol marketing, it is helpful to review the development of commercial speech law generally. From the 1940s until 1975,

⁷⁶ See Lochhead, *supra* note 8.

⁷⁷ Janelle Carter, Rubin Agrees to Review Wine Labels to End Thurmond Ire, AP Newswires, May 14, 1999, available in Westlaw, APWIREPLUS database.

the Supreme Court afforded little if any First Amendment protection to "purely commercial advertising."⁷⁸ In *Bigelow v. Virginia*,⁷⁹ the Court changed its tack and extended some protection to commercial speech, stating that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."⁸⁰

The Court expanded on the reasoning of *Bigelow* in 1976. In *Virginia State Board of Pharmacy, Inc. v. Virginia Citizens Consumer Council*,⁸¹ the Court struck down a ban on price advertising for prescription drugs, holding that speech that "does 'no more than propose a commercial transaction'" is entitled to First Amendment protection.⁸² The state had argued that price advertising would cause consumers to abandon "professional" pharmacists in favor of lower-quality discount pharmacies; the ensuing breakdown of the personal consumer-pharmacist relationship would endanger the health of the drug-taking public.⁸³ The Court rejected this "highly paternalistic approach" toward consumers and cast a disapproving eye on governmental attempts to influence consumer choices through commercial speech restraints.⁸⁴ It reasoned that "people will perceive their own best interests if only they are well enough informed," and that freedom of commercial speech was the best way to keep consumers informed.⁸⁵

The Court said in dicta that false or misleading commercial speech does not serve this goal of consumer autonomy.⁸⁶ An advertiser "presumably knows more about" its product "than anyone else,"

⁷⁸ *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (upholding constitutionality of New York ordinance that prohibited street distribution of advertising material); see also *Breard v. Alexandria*, 341 U.S. 622, 641-45 (1951) (upholding conviction under ordinance prohibiting door-to-door sale of magazine subscriptions). For an analysis of *Chrestensen* and an account of commercial speech law before 1942, see generally Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 *Tex. L. Rev.* 747 (1993).

⁷⁹ 421 U.S. 809 (1975).

⁸⁰ *Id.* at 825-26 (reversing conviction under Virginia statute that criminalized advertising of abortion services).

⁸¹ 425 U.S. 748 (1976).

⁸² *Id.* at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

⁸³ *Id.* at 766-70.

⁸⁴ *Id.* at 770. While the state could try to steer consumers toward low-volume pharmacists by means that did not implicate speech rights, such as by setting standards for the profession or subsidizing small pharmacies, it could "not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 771-72 (stating that First Amendment "does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely").

the Court observed,⁸⁷ while a consumer may have difficulty verifying the truth of commercial claims. The advertiser's informational advantage over the consumer can justify a governmental ban on misleading claims⁸⁸—although the Court suggested that it sometimes might be more appropriate to require “additional information, warnings and disclaimers,” rather than impose an outright ban.⁸⁹

The Court reviewed a state restriction directed at allegedly misleading commercial speech the following year, in *Bates v. State Bar of Arizona*.⁹⁰ Bates, an attorney, had placed a newspaper ad listing the fees for routine matters such as name changes and uncontested divorces.⁹¹ The Bar disciplined Bates for violating its prohibition on lawyer advertising, and Bates challenged this ban as a violation of his commercial speech rights.⁹² The Bar defended its ban partly on the ground that attorney advertising “inevitably” would mislead consumers by highlighting “irrelevant factors” and by failing to “provide a complete foundation on which to select an attorney,”⁹³ much as ATF reasons that ads and labels promoting the health benefits of moderate drinking would provide incomplete information about alcohol's blend of positive and negative effects.⁹⁴

The Supreme Court held in *Bates* that lawyer advertising was entitled to the commercial speech protections established in *Virginia Pharmacy*,⁹⁵ and found that the Bar had failed to prove either that

⁸⁷ Id. at 771 n.24.

⁸⁸ See Kathleen M. Sullivan, Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 *Liquormart*, 1996 Sup. Ct. Rev. 123, 135-36 (stating that *Virginia Pharmacy* left “intact vast state and federal regulatory schemes for the protection of consumers and markets through the suppression of false and misleading commercial speech”).

⁸⁹ *Virginia Pharmacy*, 425 U.S. at 772 n.24 (1976).

⁹⁰ 433 U.S. 350 (1977).

⁹¹ See id. at 354, 382 (observing that lawyer's ad stated that his legal clinics offered “legal services at very reasonable fees,” and noting that advertised price of uncontested divorce was \$175, plus \$20 court fee).

⁹² See id. at 355-56.

⁹³ Id. at 372, 374.

⁹⁴ See supra note 51 and accompanying text.

⁹⁵ See *Bates*, 433 U.S. at 383. Although the Court applied its general commercial speech doctrine in lawyer-advertising cases, it also reasoned that self-promotion by attorneys entails risks of abuse that justify stricter restraints than regulators may apply to other forms of commercial speech. See id. at 383 (“[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.”). Still, courts regularly look to lawyer-advertising cases when they review restrictions on allegedly misleading statements in other commercial speech contexts. See, e.g., *Pearson v. Shalala*, 164 F.3d 650, 655-58 (D.C. Cir. 1999) (relying on lawyer-advertising cases to assess FDA ban on health claims made on labels of dietary supplements); *Association of Nat'l Advertisers v. Lungren*, 44 F.3d 726, 731, 734 (9th Cir. 1994) (relying on lawyer-advertising cases to review state restrictions on advertising that used certain terms to describe products as environmentally sound).

attorney advertising is inevitably misleading, or that Bates's ad in particular misled consumers.⁹⁶ The Court rejected the Bar's argument that lawyer advertising would mislead potential clients by giving them irrelevant and incomplete information. The Bar was not entitled to assume "that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information."⁹⁷ Thus, the "preferred remedy" for incomplete information was not a ban on advertising, but "more disclosure,"⁹⁸ perhaps in the form of "some limited supplementation, by way of warning or disclaimer . . . so as to assure that the consumer is not misled."⁹⁹

The Court continued to define commercial speech doctrine in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹⁰⁰ The Court noted that because commercial speech is protected for its "informational function," commercial messages that are "more likely to deceive the public than to inform it" merit no First Amendment shield.¹⁰¹ But even as it reasserted the consumer-autonomy rationale for protecting commercial speech, the Court made clear that the government could, in some cases, suppress commercial messages solely to exert its own influence over consumer choices. *Central Hudson* held (in the context of assessing a ban on promotional advertising by a utility) that restraints on truthful, nonmisleading commercial speech merit only an intermediate level of scrutiny, not the strict scrutiny that courts apply to restrictions on political, journalistic, and artistic

⁹⁶ See *Bates*, 433 U.S. at 372-75, 381-82.

⁹⁷ *Id.* at 374-75. While an advertised price list might not take into account an individual client's complex legal needs, the Court acknowledged, the client would discover this at her initial consultation with the attorney and could then negotiate a fee just as though there were no advertising at all. See *id.* at 372-73, 373 n.28.

⁹⁸ *Id.* at 375.

⁹⁹ *Id.* at 384. Because the Court's primary reason for protecting commercial speech was to keep consumers well informed about products and services, the Court was not apt to protect commercial speech that it viewed as lacking informative, factual content. See, e.g., *Friedman v. Rogers*, 440 U.S. 1, 13 (1979) (upholding Texas law that prohibited use of trade names by optometrists because there was "a significant possibility that trade names [would] be used to mislead the public"). *Friedman's* holding was narrow: The Court emphasized that the ban on trade names had "only the most incidental effect on the content of the commercial speech of Texas optometrists," in that an optometry office was still free to advertise the factual information formerly associated with a trade name. See *id.* at 16; see also *Pearson*, 164 F.3d at 657 (stating that *Friedman's* holding was narrowly restricted to trade names). Nonetheless, Justice Blackmun faulted the Court for upholding a complete ban on trade names without seriously considering whether the addition of clarifying information to a trade name could cure its potential to mislead. See *Friedman*, 440 U.S. at 25 (Blackmun, J., joined by Marshall, J., concurring in part and dissenting in part).

¹⁰⁰ 447 U.S. 557 (1980).

¹⁰¹ *Id.* at 563.

speech.¹⁰² To conduct this intermediate scrutiny, the Court constructed a four-part test that became a standard gauge for the constitutionality of a commercial speech restraint.¹⁰³

¹⁰² See *id.* at 562-66. The Court said little in *Central Hudson* to justify its relegation of commercial speech to the status of a First Amendment also-ran, pointing primarily to “the ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” *Id.* at 562 (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978) (one set of internal quotation marks omitted)). In another case, four justices reasoned that “the State’s power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is linked inextricably to those transactions.” 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (Stevens, J., joined by Kennedy, Souter, and Ginsburg, JJ.) (internal quotation marks omitted). The Court further has suggested that giving commercial speech more protection “could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to” noncommercial speech. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (internal quotation marks omitted). The Court also has relied on *Virginia Pharmacy’s* suggestion that the objective verifiability of commercial speech means that there is less risk of inadvertently suppressing true commercial speech through regulation of false speech. See, e.g., *Central Hudson*, 447 U.S. at 564. How this would support giving less protection to demonstrably truthful commercial speech is unclear. Then too, the Court has argued that commercial speech merits less protection because the economic incentive to advertise makes commercial speech “a hardy breed of expression that is not ‘particularly susceptible to overbroad regulation.’” *Id.* at 564 n.6 (quoting *Bates*, 433 U.S. at 381).

The constitutional distinction between commercial and noncommercial speech has been criticized from both within and without the Supreme Court. See, e.g., 44 *Liquormart*, 517 U.S. at 518-24 (Thomas, J., concurring in part) (“I do not see a philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial speech.’”); Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 *Va. L. Rev.* 627, 634-50 (1990) (contending that distinction is artificial, partly because commercial and noncommercial speech often blur together). The strongest theoretical arguments in favor of the distinction rest on commercial speech’s tenuous link to traditional justifications for free speech, such as self-government and self-realization. See Sullivan, *supra* note 88, at 132 (commenting that attempts to equate consumer decisions with democratic decisions “substitute general social welfare for self-government as the First Amendment value”); see also Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 *Tex. L. Rev.* 697, 735-37 (1993) (contending that advertising exists not to inform, as commercial speech doctrine assumes, but to play on consumers’ emotions and exploit “a value system that equates acquisition with self-realization”).

The marketing of alcohol’s potential health benefits illustrates some of the shaky aspects of the commercial/noncommercial speech distinction. For instance, an alcohol producer who sought to promote the benefits of moderate drinking by advertising in a food and beverage magazine would receive, at most, an intermediate level of First Amendment protection. An article on drinking’s potential benefits in the same magazine would enjoy strict protection. If the alcohol producer is prevented by the government from running its ad, it would have an added incentive to use its advertising account to influence the magazine to publish the article—thereby infringing on editorial autonomy in a legal but disturbing way. Cf. Collins & Skover, *supra*, at 720 (“[W]hen advertisers wield their financial clout, they may enforce private economic censorship with as heavy a hand as that of the government.”).

¹⁰³ See *Central Hudson*, 447 U.S. at 566-71. The first prong of the *Central Hudson* test asks whether the speech in question markets an illegal activity, or is misleading; if so, it receives no constitutional protection. See *id.* at 566. If the speech passes the first prong,

Subsequent to *Bates* and *Central Hudson*, the Court refined its concept of how “misleading” a commercial message had to be to lose all constitutional protection and fall prey to complete government suppression. *In re R.M.J.*¹⁰⁴ dealt with a Missouri Supreme Court rule that listed about two dozen practice areas in which a lawyer was allowed to advertise a specialty; the appellant attorney had been disciplined for advertising specialties not on the list, and for deviating from the precise wording permitted by the rule.¹⁰⁵

The United States Supreme Court characterized the Missouri court rule as an “absolute prohibition” on the attorney’s speech, and held that the attorney’s advertising was not “misleading” in a sense that could justify such a ban.¹⁰⁶ The Court said that a ban was allowed “when the particular content or method of the advertising suggests that it is *inherently* misleading or when experience has proved that in fact such advertising is subject to abuse.¹⁰⁷ But commercial speech that is only “*potentially* misleading,” such as an ad listing unapproved legal specialties, cannot be banned “if the information also may be presented in a way that is not deceptive” through the use of “disclaimers or explanation.”¹⁰⁸ Restrictions on potentially misleading commercial messages “may be no broader than reasonably necessary to prevent the deception,” the Court held.¹⁰⁹ Thus, *In re R.M.J.* reaffirmed the principle, articulated in *Virginia Pharmacy* and *Bates*, that

the reviewing court next considers whether the government has a “substantial” interest in restricting the speech. See *id.* at 566, 568-69. Third, if the interest is substantial, the court determines whether the government’s restriction “directly advances” its asserted interest. See *id.* at 566, 569. Fourth, the court asks whether the speech restriction is “not more extensive than is necessary to serve” the government’s interest. *Id.* at 566, 569-71.

¹⁰⁴ 455 U.S. 191 (1982).

¹⁰⁵ See *id.* at 194-95, 195 n.6. The attorney had listed several specialties not included in the rule, such as “communication,” and had deviated from the rule’s wording by, *inter alia*, advertising specialties in “personal injury and real estate” rather than “tort law and property law.” *Id.* at 197. He also was disciplined for advertising, in capital letters, that he was admitted to practice before the United States Supreme Court. See *id.* The Court found the attorney’s emphasis on this fact to be “uninformative” and in “bad taste,” but saw no factual basis for finding it misleading. See *id.* at 205-06.

¹⁰⁶ *Id.* at 207.

¹⁰⁷ *Id.* at 203 (emphasis added).

¹⁰⁸ *Id.* (emphasis added) (citing *Bates v. State Bar*, 433 U.S. 350, 375 (1977)); accord *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 109 (1990) (Stevens, J., writing for four-justice plurality) (“Even if we assume that petitioner’s letterhead may be potentially misleading to some consumers, that potential does not satisfy the State’s heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public.”).

¹⁰⁹ *In re R.M.J.*, 455 U.S. at 203.

more disclosure, not less, is the preferred remedy for potential consumer confusion.¹¹⁰

Three years after *In re R.M.J.*, the Court examined the circumstances in which the government could require a commercial message to include disclaimers, and considered how extensive the required disclaimers could be without offending the First Amendment. In *Zauderer v. Office of Disciplinary Counsel*,¹¹¹ an attorney in Ohio had run a newspaper ad saying that he represented product liability plaintiffs on a contingency basis, and adding that “[i]f there is no recovery, no legal fees are owed by our clients.”¹¹² The State argued that Zauderer’s ad misled the public because it failed to disclose that Zauderer’s clients would be liable for costs (as opposed to fees) even if they lost.¹¹³

The Court upheld Ohio’s disclosure rule.¹¹⁴ It found that the State was free to conclude that Zauderer’s ad would mislead “substantial numbers of potential clients”—even though the State did not produce any surveys or other extrinsic evidence showing that the ad was misleading—because it was “self-evident” that laypersons were likely to misunderstand the difference between fees and costs.¹¹⁵ Moreover, the Court found that the State could force an advertiser to disclose any additional information that was “reasonably related to the State’s interest in preventing deception”¹¹⁶ and did not constitute an undue

¹¹⁰ See *id.* (“Thus, the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation.”). The Court’s preference for disclaimers over suppression also accords with *Central Hudson*’s fourth prong, which requires narrow crafting of commercial speech restrictions. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644 (1985); see also *Shapiro v. Kentucky Bar Ass’n*, 486 U.S. 466, 472 (1988) (“Since state regulation of commercial speech ‘may extend only as far as the interest it serves,’ state rules that are designed to prevent the ‘potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the’ perceived evil.” (alteration in original) (quoting *Central Hudson* and *R.M.J.*)); *Pearson v. Shalala*, 164 F.3d 650, 655-58 (D.C. Cir. 1999) (applying final three prongs of *Central Hudson* test to FDA’s suppression of potentially misleading dietary supplement labels, and holding that suppression failed fourth prong because agency could have used “far less restrictive” measures—disclaimers—to try to cure speech of its potential to mislead).

¹¹¹ 471 U.S. 626 (1985).

¹¹² *Id.* at 631.

¹¹³ See *id.* at 633-36.

¹¹⁴ See *id.* at 655.

¹¹⁵ *Id.* at 652-53.

¹¹⁶ *Id.* at 651. Justice Brennan criticized the Court’s “somewhat amorphous ‘reasonable relationship’ inquiry,” stating that he could agree with that formulation only if it meant that government disclosure requirements “‘may be no broader than necessary to prevent the deception.’” *Id.* at 657-58 (Brennan, J., joined by Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)). Justice Brennan emphasized that disclosure requirements are a form of com-

burden on the advertiser.¹¹⁷ *Zauderer* thus gave regulators considerable leeway to require a commercial message to bear disclaimers, suggesting that ATF can constitutionally force alcohol producers to temper health-related marketing with some reference to alcohol's risks. As argued below,¹¹⁸ however, *Zauderer's* holding does not mean that ATF can require the voluminous disclaimers described in the agency's 1993 Industry Circular.¹¹⁹

It is also worth bearing in mind that *Zauderer* was decided during a period when the Court was becoming increasingly deferential toward government regulation of commercial speech in general. *Posadas de Puerto Rico Associates v. Tourism Co.*,¹²⁰ decided a year after *Zauderer*, exemplified this trend. In *Posadas*, the Court voted five-to-four to allow Puerto Rico to ban casino gambling advertisements that were directed at the island's residents (as opposed to tourists).¹²¹ Applying the *Central Hudson* test,¹²² the Court found that Puerto Rico had a substantial interest in reducing gambling by its citizens, and deferred to the legislature's judgment that the advertising ban was the best way to reduce demand.¹²³ A majority of the Court

pelled speech that require scrutiny nearly as careful as that applied to outright suppression of commercial speech. See *id.* at 657 & n.1.

¹¹⁷ See *id.* at 651, 653 n.15. The Court suggested that Ohio could go so far as to require *Zauderer* to disclose his contingent-fee rate structure in future ads, saying that such a requirement did not "seem[] intrinsically burdensome." *Id.* at 653 n.15. Justice Brennan took strong issue with this observation as well, pointing out that *Zauderer's* contingent fee contract extended over "several pages" and "would fill far more space than the advertisement itself." *Id.* at 662-63 (Brennan, J., joined by Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part). Such disclosure "would obviously be so 'unduly burdensome' as to violate the First Amendment . . . and would be entirely out of proportion to the State's legitimate interest in preventing potential deception." *Id.* at 663-64.

¹¹⁸ See *infra* Part III.B.

¹¹⁹ See *supra* notes 55-57 and accompanying text.

¹²⁰ 478 U.S. 328 (1986).

¹²¹ See *id.* at 330-31. The Court seemed particularly willing to uphold the ban in *Posadas* because it affected advertising for a perceived vice, gambling, which could "produce serious harmful effects on the health, safety, and welfare of the Puerto Rican citizens." *Id.* at 341; see also *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) (upholding North Carolina advertising ban intended to reduce participation in lotteries). See generally Kathryn Murphy, Note, Can the Budweiser Frogs Be Forced to Sing a New Tune?: Compelled Commercial Counter-Speech and the First Amendment, 84 Va. L. Rev. 1195, 1198-99 (1998) (examining Court's deference to government commercial speech restriction in *Posadas*). But see *infra* notes 127, 137 (observing that later cases effectively disowned any lower standard of First Amendment protection for commercial speech that promotes "vice" activity).

¹²² See *supra* note 103.

¹²³ See *Posadas*, 478 U.S. at 341-44. An alternative ground for the *Posadas* decision was even more restrictive of commercial speech. The Court said that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling," *id.* at 345-46, suggesting that only commercial speech about protected

appeared to have forsaken *Virginia Pharmacy*'s principle that the government should not prohibit commercial speech merely to influence consumer choices.¹²⁴

If *Posadas* had stood the test of time, even nonmisleading alcohol marketing would be subject to strict government restraint. In the mid-1990s, however, the Court reversed the trend illustrated by *Posadas* and became more protective of commercial speech. In 1995, the Court in *Rubin v. Coors Brewing Co.*¹²⁵ invalidated a federal statute, administered by ATF, that barred beer labels from displaying alcohol content.¹²⁶ Applying the *Central Hudson* test, the Court faulted the federal regulatory scheme for internal inconsistencies and found that the government could serve its interest—preventing “strength wars” among brewers—through means that were not restrictive of speech, such as directly limiting the alcohol content of beer.¹²⁷ By showing little deference to the government’s judgment about the need for la-

activities would have a First Amendment shield. Dissenting justices and many commentators denounced this reasoning, arguing that banning commercial speech about a lawful activity can be more intrusive than banning the activity outright, essentially because the speech ban represents a form of thought control that the First Amendment is meant to prevent. See *id.* at 354 n.4 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting); Arlen W. Langvardt & Eric L. Richards, *The Death of Posadas and the Birth of Change in Commercial Speech Doctrine: Implications of 44 Liquormart*, 34 *Am. Bus. L.J.* 483, 502 & n.101 (1997) (observing that legal commentators “[r]oundly criticized” this aspect of *Posadas*). A four-justice plurality expressly rejected the “greater-includes-the-less” argument of *Posadas* in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510-11 (1996) (stating that “greater-includes-the-less” reasoning “is inconsistent with both logic and well-settled doctrine” and “reject[ing] the assumption that words are necessarily less vital to freedom than actions”).

¹²⁴ See Sullivan, *supra* note 88, at 140 (stating that *Central Hudson*, *Posadas*, and *Edge* were “fundamentally at odds with the anti-paternalism premise” of *Virginia Pharmacy*).

The Court’s increased deference to government regulation of commercial speech was also apparent in *Board of Trustees v. Fox*, 492 U.S. 469 (1989). In *Fox*, the Court reexamined the fourth prong of the *Central Hudson* test, which requires a commercial speech restriction to be “not more extensive than is necessary” to serve the government’s asserted interest. *Id.* at 475 (quoting *Central Hudson*, 447 U.S. at 566). The *Fox* Court held that this prong does not require a commercial speech restraint to be the “least restrictive measure” that would achieve the government’s interest; rather, the prong requires only a reasonable fit between the restraint and the government’s goal. See *id.* at 476, 480 (quoting *Central Hudson*, 447 U.S. at 566); *supra* note 103.

¹²⁵ 514 U.S. 476 (1995).

¹²⁶ See *id.* at 480.

¹²⁷ See *id.* at 487-91 (holding that statutory inconsistencies—such as existence of provisions requiring wine and spirits labels to display alcohol content—caused beer labeling provision to fail *Central Hudson*’s “direct advancement” prong, and that presence of less speech-restrictive alternatives to label restraint caused provision to fail “not more extensive than necessary” prong). *Coors* also severely undercut the premise, illustrated in *Posadas* and *Edge*, that “legislatures have broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption.” *Coors*, 514 U.S. at 482 n.2. Rather, the Court stated that neither *Edge* nor *Posadas* “compels . . . an exception [for ‘vice’ activities] to the *Central Hudson* standard.” *Id.*

being restrictions, *Coors* implied that that the Court was developing “a greater appreciation for the value of commercial speech.”¹²⁸

A year after the *Coors* decision, the Court in *44 Liquormart v. Rhode Island*¹²⁹ hinted that it might be ready to adopt altogether new, and stricter, standards of scrutiny for restraints on commercial speech.¹³⁰ Rhode Island had prohibited advertising of liquor prices¹³¹—a truthful, nonmisleading form of commercial speech.¹³² The state argued that its ban discouraged liquor price competition, thereby reducing consumer demand for liquor and serving two state interests: fighting intemperate drinking and exerting “reasonable con-

¹²⁸ Langvardt & Richards, *supra* note 123, at 516. *Coors* did not represent an abrupt shift away from *Posadas*. The Court had displayed decreasing deference toward commercial speech regulation in some cases preceding *Coors*. See *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (emphasizing, in context of overturning state ban on in-person solicitation by accountants, that “a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree”); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417-18, 425-26 (1993) (holding that ban on commercial newsracks did not directly advance city’s interests in safety and aesthetics because ban would leave large numbers of noncommercial newsracks on sidewalks); see also Langvardt & Richards, *supra* note 123, at 507-10 (discussing *Edenfield* and *Discovery Network*).

In the term before it decided *Coors*, the Court turned a skeptical eye on a governmental attempt to classify a commercial message as misleading, emphasizing that regulators must not be allowed to hide policy reasons for restricting commercial speech behind a claim that the speech is “potentially misleading.” See *Ibanez v. Florida Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146 (1994) (“[W]e cannot allow rote invocation of the words ‘potentially misleading’ to supplant the Board’s burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” (internal quotation marks omitted)). The *Ibanez* Court warned that failing to make the government prove that a commercial message really did have the potential to mislead “would be to risk toleration of commercial speech restraints in the service of objectives that could not themselves justify a burden on commercial expression.” *Id.* at 149 (internal quotation marks omitted).

Despite the increased distrust of commercial speech regulation that the Court has displayed since the mid-1990s, the Court recently upheld an advertising restriction. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624-35 (1995) (applying *Central Hudson* test to uphold narrow ban on targeted mail sent by attorneys to accident victims within 30 days of accident).

¹²⁹ 517 U.S. 484 (1996).

¹³⁰ See Langvardt & Richards, *supra* note 123, at 537-59 (assessing implications of *44 Liquormart* and concluding that decision discredited *Posadas*; possibly altered role of *Central Hudson* test; hinted that Court would soon recognize different levels of protection within category of commercial speech; and relaxed distinction between commercial and noncommercial speech). The Ninth Circuit took “special note” of *44 Liquormart*’s speech-protective reasoning in striking down a federal ban on broadcast advertising of casinos. See *Valley Broad. Co. v. United States*, 107 F.3d 1328, 1334 (9th Cir. 1997) (“While *44 Liquormart* fails to present a coherent framework for reviewing these claims, one point is clear: the government’s asserted interest in reducing demand for casino gambling seems less likely to succeed following the Court’s decision.”).

¹³¹ See *44 Liquormart*, 517 U.S. at 489-90.

¹³² See *id.* at 493.

·trol" over alcohol commerce.¹³³ All nine justices concluded that the price-advertising ban violated the First Amendment.¹³⁴

Although the Court's judgment was unanimous, its analytical framework was fractured.¹³⁵ The point of contention was whether the Court should continue to apply the *Central Hudson* test or whether it should create a new rule that would be more protective of commercial speech. Justice Stevens, joined by Justices Kennedy and Ginsburg, relied on *Central Hudson's* intermediate scrutiny only as a second-best ground for striking down Rhode Island's price-advertising prohibition.¹³⁶ These three justices preferred to impose "the rigorous review that the First Amendment generally demands" on any law that banned "commercial messages for reasons unrelated to the preservation of a fair bargaining process."¹³⁷ Restrictions intended to "protect consumers from misleading, deceptive, or aggressive sales practices, or requir[ing] disclosure of beneficial consumer information" still should be subject to "less than strict review," Justice Stevens wrote.¹³⁸ Justice Thomas argued that it was "per se illegitimate" for the government to attempt "to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace,"¹³⁹ and went on to question whether there should be any constitutional distinction between commercial and noncommercial speech.¹⁴⁰ Justice Scalia, meanwhile, criticized the *Central Hudson* test as having "nothing more than policy intuition to support it," but did not believe that the Court had "the wherewithal" to replace it.¹⁴¹

Four justices backed the *Central Hudson* test. Justice O'Connor, joined by Chief Justice Rehnquist, Justice Souter, and Justice Breyer, argued that because Rhode Island's advertising restriction "clearly fail[ed]" *Central Hudson's* intermediate scrutiny, the Court had no justification to jettison the *Central Hudson* test and create a more

¹³³ See *id.* at 490 & n.4.

¹³⁴ See *id.* at 488-89, 528.

¹³⁵ See Langvardt & Richards, *supra* note 123, at 519-53 (analyzing various opinions in *44 Liquormart*); Sullivan, *supra* note 88, at 141-44 (same).

¹³⁶ See *44 Liquormart*, 517 U.S. at 504-08.

¹³⁷ *Id.* at 501. The same three justices, joined also on this point by Justice Thomas, rejected *Posadas's* suggestion that commercial speech related to a "vice" activity such as drinking alcohol should receive less First Amendment protection than other commercial speech. See *id.* at 514 ("[T]he scope of any 'vice' exception to the protection afforded by the First Amendment would be difficult, if not impossible, to define.").

¹³⁸ *Id.*

¹³⁹ *Id.* at 518.

¹⁴⁰ See *id.* at 522-23, 523 n.4.

¹⁴¹ *Id.* at 517-18.

speech-protective rule.¹⁴² In reaching this conclusion, Justice O'Connor observed that in recent cases such as *Coors*, the Court had turned away from the deferential attitude toward government regulation of commercial speech that was embodied in *Posadas*, and had made it more difficult for a commercial speech restriction to pass the *Central Hudson* test.¹⁴³

In June 1999, the Court again voted to strike down a government restriction on commercial speech. But in this most recent case, *Greater New Orleans Broadcasting Ass'n v. United States*,¹⁴⁴ every member of the Court except for Justice Thomas reaffirmed the primacy of the *Central Hudson* test.¹⁴⁵ At issue in *Greater New Orleans* was a federal law prohibiting broadcast advertising of private casino gambling.¹⁴⁶ The government claimed that the ban was reasonably necessary to directly advance two substantial policy interests: reducing the social costs associated with casino gambling, including the problem of compulsive gambling; and helping shield states with laws against gambling from out-of-state casino ads.¹⁴⁷

The Court accepted the government's asserted interests as substantial, but held that the advertising ban was not a constitutionally sound device for serving the government's ends.¹⁴⁸ As in *Coors*, the Court complained that the government's speech-restrictive scheme was "pierced by exemptions and inconsistencies":¹⁴⁹ The law barred gambling advertising by privately owned casinos, but not by tribal, nonprofit, or government-owned casinos.¹⁵⁰ Moreover, even though the Court found it "fair to assume" that allowing more advertisements would increase overall demand for gambling, it pointed out that the

¹⁴² See *id.* at 531-32 (O'Connor, J., joined by Rehnquist, C.J., and Souter and Breyer, JJ., concurring).

¹⁴³ See *id.*

¹⁴⁴ 119 S. Ct. 1923 (1999).

¹⁴⁵ See *id.* at 1930 (majority opinion); *id.* at 1936 (Rehnquist, C.J., concurring). The seven-justice majority opinion in *Greater New Orleans*, written by Justice Stevens, echoed Justice O'Connor's reasoning from *44 Liquormart* as to why the Court should continue to use the *Central Hudson* test. The *Greater New Orleans* majority stated that the Court ought not "make novel or unnecessarily broad pronouncements on constitutional issues" if a case can be decided on a narrower and more established ground, and concluded that the rule of *Central Hudson*, as applied in the Court's recent, speech-protective cases, could fully resolve the issues at hand. See *id.* at 1930.

¹⁴⁶ See *id.* at 1926.

¹⁴⁷ See *id.* at 1931.

¹⁴⁸ See *id.* at 1931-36.

¹⁴⁹ *Id.* at 1933.

¹⁵⁰ See *id.* As the Court pointed out, even the restrictions on ads for private casinos were pocked with puzzling exceptions. For example, casino ads that skirted mention of actual gambling had been permitted, including an ad saying that the "'odds for fun are high'" at the advertiser's casino. *Id.* at 1933 & n.7.

government had failed to draw a connection between compulsive gambling and the particular category of ads that the law prohibited.¹⁵¹ The Court concluded that the government could not “overcome the presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct.”¹⁵²

From *Virginia Pharmacy* to *Greater New Orleans*, the Supreme Court’s commercial speech doctrine has largely been designed to foster consumer autonomy. As interpreted in the Court’s most recent cases, the First Amendment gives government little latitude to restrain commercial speech, except for speech that hurts, rather than helps, consumers’ ability to make informed choices. Indeed, *Coors* and *44 Liquormart* make this point in the specific context of alcohol marketing. These cases show that it is rarely permissible for government to try to combat the dangers related to alcohol consumption by striking out against alcohol marketing that is informational, truthful, and accurate.

Thus, it is unsurprising that ATF’s argument for restricting health-related alcohol marketing hinges on classifying ads and labels that promote the benefits of moderate drinking as inaccurate and less-than-truthful—in other words, as misleading and therefore harmful to consumers’ decisionmaking ability. The constitutional limits of the government’s power to label commercial speech as misleading, and then regulate it, have been defined in cases such as *Bates* and *R.M.J.*, in which the Court expressed its preference for more disclosure rather than less. In keeping with this goal of full disclosure, the Court in *Zauderer* affirmed the government’s power to require advertisers to include reasonable disclaimers in their advertisements. These cases and their progeny provide guidelines for analyzing ATF’s policy toward health-related alcohol marketing.

¹⁵¹ See *id.* at 1932, 1933 (citing opinion below, 149 F.3d 334, 339 (5th Cir. 1998)). This aspect of *Greater New Orleans* undermines the argument that health-related alcohol marketing should be restricted because it allegedly might exacerbate the problem of alcoholism. See *infra* note 181.

¹⁵² *Greater New Orleans*, 119 S. Ct. at 1935-36. The Court stated that the casino gambling ads at issue were not only likely to inform consumers’ choices by disclosing facts such as relative payout ratios among casinos, but also “would convey information—whether taken favorably or unfavorably by the audience—about an activity that is the subject of intense public debate in many communities.” *Id.* at 1930. “Thus,” the Court reasoned, “even if the broadcasters’ interest in conveying these messages is entirely pecuniary, the interests of, and benefit to, the audience may be broader.” *Id.*

B. *Constitutional Protection for the Marketing of Moderate Drinking's Health Benefits*

ATF's policy on health-related alcohol marketing is difficult to define. The agency does not ban claims of health benefits outright, but instead reviews them case by case.¹⁵³ It says it will allow alcohol producers to make health statements as long as they are accompanied by adequate disclaimers, but observes that the sort of disclaimers it wants would be "extremely unlikely" to fit on a label.¹⁵⁴ The agency complicated matters in February 1999 when it approved two wine labels that direct consumers to find out about the "health effects" of wine consumption from independent sources—but only after ATF determined that the labels would not affect people's drinking habits.¹⁵⁵ Finally, Treasury Secretary Robert Rubin promised in April 1999 that ATF would begin rulemaking on the issue of alcohol ads and labels that make health statements, a move that may culminate in an even stricter policy against such marketing.

The following discussion analyzes the constitutional implications of ATF's policy in two steps. First, it argues that there are only limited circumstances under which ATF may ban a health-related alcohol message outright. Second, it contends that while ATF may require health-related messages to include some disclaimers, the disclaimer requirements enumerated in the agency's 1993 Industry Circular are too burdensome to comply with the First Amendment.

1. *Few Health-Related Ads or Labels Should Be Subject to Complete Suppression*

The government may ban a commercial message when (1) "experience has proved that in fact such advertising is subject to abuse" (meaning that it is *actually misleading*); or (2) "the particular content or method of the advertising suggests that it is *inherently misleading*."¹⁵⁶ If, on the other hand, a court decides that the speech in question is only "*potentially misleading*," it will force the regulator to show

¹⁵³ See *supra* note 39 and accompanying text.

¹⁵⁴ See *supra* notes 55-57, 68 and accompanying text.

¹⁵⁵ See *supra* notes 1-4, 68-71 and accompanying text.

¹⁵⁶ *In re R.M.J.*, 455 U.S. 191, 203 (1982) (emphases added). The government also may ban commercial speech that is objectively false. See *Virginia Pharmacy*, 425 U.S. 748, 771 (1976). For example, an alcohol producer that cited a discredited research study or affirmatively misrepresented a scientific finding about its product's potential health benefits would get no constitutional cover. False advertising cases under section 43(a) of the Lanham Act provide a helpful analogy. See *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1548-49 (2d Cir. 1991) (describing Lanham Act and stating that plaintiff must demonstrate that scientific tests used by competing advertiser "are not sufficiently reliable to permit one to conclude with reasonable certainty that they established the claim

why outright suppression, rather than a mandatory disclaimer or other less drastic remedy, is needed.¹⁵⁷

Determining whether an ad or label actually misleads consumers is quintessentially an issue of fact. To convince a court that a health-related commercial message about alcohol is actually misleading, ATF would need to produce experiential or empirical evidence showing that the message causes consumers to adopt false beliefs about the effects of drinking.¹⁵⁸ The agency could, of course, gather this evidence by allowing the ad or label to reach the public and then investigating whether it misled people, but ATF also could try to show that the message was misleading by testing it with a sample of consumers before permitting it to run.¹⁵⁹ In either case, ATF could not justify suppressing the message unless its survey was methodologically sound and showed that a significant fraction of consumers was misled.¹⁶⁰

made" in order to show that competitor's advertisement is false (internal quotation marks omitted)).

¹⁵⁷ *In re R.M.J.*, 455 U.S. at 203 (emphasis added).

¹⁵⁸ See *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 106-11 (1990) (Stevens, J., writing for four-justice plurality) (striking down rule prohibiting attorney from promoting fact that he was certified as civil trial specialist by National Board of Trial Advocacy after pointing to lack of "empirical evidence" that statement actually misled people); *id.* at 111-12 (Marshall, J., joined by Brennan, J., concurring) (finding that statement was not actually misleading where "record contains no evidence that any recipient . . . ha[d] been misled by the statement"); *In re R.M.J.*, 455 U.S. at 201 n.11 ("If experience proves that certain forms of advertising are in fact misleading, although they did not appear at first to be inherently misleading, the Court must take that into account." (internal quotation marks omitted)).

¹⁵⁹ ATF did, in fact, examine the results of a consumer survey before deciding in February 1999 to approve wine labels that mention the health effects of moderate drinking. See *supra* notes 70-71 and accompanying text.

As observed *supra* note 39, alcohol labels are not permitted to enter interstate commerce unless they have been preapproved by ATF, but no ATF preapproval is required for alcohol advertisements. Allowing ATF or another agency to withhold a commercial message from the public while conducting surveys to determine whether it is actually misleading could enable the agency to delay the message's release for so long that it effectively would be censored. This risk may be especially acute given ATF's long delay in approving the new wine labels described in Part II.B, *supra*. See Amended CEI Complaint, *supra* note 27, at ¶ 13 (stating that original versions of labels approved by ATF in February 1999 were submitted to agency in May 1995 and May 1996). The Supreme Court has suggested that preapproval schemes for commercial messages are constitutionally valid, as long as they include "adequate procedural safeguards." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 571 n.13 (1980); cf. *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 131 (2d Cir. 1998) (stating that difficulty of distinguishing some commercial speech from noncommercial speech "convinces us that the requirement of procedural safeguards in a system of prior restraints should not be loosened even in the context of commercial speech").

¹⁶⁰ Again, false advertising cases under the Lanham Act provide useful analogous reasoning, as plaintiffs in these cases often use survey evidence to try to show that their competitors' ads mislead consumers. See *Coors Brewing Co. v. Anheuser-Busch Cos.*, 802 F. Supp. 965, 970-74 (S.D.N.Y. 1992) (refusing to give probative weight to survey answers

Because a determination of actual consumer deception is fact specific, it would be difficult for ATF to prove that health-related alcohol marketing *as a category* is actually misleading. If the evidence showed that a particular ad or label did in fact mislead consumers, that would not justify banning another ad or label that used different language. Indeed, if an alcohol producer's ad were found to be actually misleading, the producer could add disclaimers or edit its message and try again.¹⁶¹

If a regulator such as ATF cannot marshal the factual evidence required to prove that a commercial message actually misleads consumers, it can still justify suppressing the message by showing that it is inherently misleading. A regulator need not point to extrinsic evidence to support its determination that a commercial message is inherently misleading,¹⁶² but “[w]hether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law” that courts review *de novo*.¹⁶³

that came in response to leading questions, and observing that answer to open-ended question is statistically significant only if it is given by at least 10% of respondents); see also *American Home Prods. Corp. v. Barr Labs., Inc.*, 834 F.2d 368, 371 (3d Cir. 1987) (holding that district court did not err by giving little weight to methodologically flawed survey purporting to show that 20% of respondents were deceived by defendants' marketing).

¹⁶¹ The First Amendment preference for disclaimers over outright suppression, see *supra* notes 107-10 and accompanying text, would have little meaning if regulators automatically could ban a commercial message, which the advertiser has altered in an attempt to make it less misleading, on the ground that consumers found the message misleading before the alterations were made. Cf. *Taucher v. Born*, No. CIV A 97-1711 RMU, 1999 WL 431065, at *20 (D.D.C. June 21, 1999) (holding that First Amendment does not permit prior restraint of commercial speech “based solely on a fear that someone may publish advice that is fraudulent or misleading, regardless of whether or not the information published actually is fraudulent or misleading”).

The Seventh Circuit described how an advertiser might alter a commercial message to make it nonmisleading in *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992). *Kraft* involved ads stating, *inter alia*, that Kraft Singles processed cheese slices were “made from five ounces” of milk per slice, and thus gave children’s “little bones” the “calcium they need to grow.” *Id.* at 314. The FTC enjoined Kraft’s use of the ads on the ground that they misled consumers into thinking that each slice contained all of the calcium contained in five ounces of milk, when in fact 30% of the calcium was lost in processing. See *id.* at 314-15, 317. The FTC also found that a small disclaimer acknowledging that each slice contained only 70% of the calcium in five ounces of milk was insufficient to cure the ads’ deception. See *id.* at 314-15. The Seventh Circuit upheld the FTC’s ban, but emphasized that Kraft could run redesigned ads that accurately said “each Kraft Single contains the calcium equivalent of 3.5 ounces of milk,” or that included “prominent, unambiguous disclosures about calcium loss in processing.” *Id.* at 326.

¹⁶² See *Joe Conte Toyota, Inc. v. Louisiana Motor Vehicle Comm’n*, 24 F.3d 754, 756 (5th Cir. 1994) (stating that determination of message’s inherently misleading character is made “notwithstanding a lack of evidence of actual deception in the record”).

¹⁶³ *Peel*, 496 U.S. at 108; see also *Pearson v. Shalala*, 164 F.3d 650, 655 (D.C. Cir. 1999) (showing no deference to FDA’s determination that health claims on labels of dietary supplements were inherently misleading); cf. *Joe Conte Toyota*, 24 F.3d at 755 (stating that

There is no clear test for determining whether a commercial message is so inherently misleading that it may be suppressed entirely.¹⁶⁴ Justice Marshall suggested that commercial speech is inherently misleading when the *method* of speech, such as high-pressure, face-to-face sales tactics, leaves the consumer with little “time to reflect on the information provided to him.”¹⁶⁵ He also observed that the Court might consider commercial messages inherently misleading if they were “devoid of intrinsic meaning,” like trade names, and were manipulated by advertisers “to deceive the public.”¹⁶⁶ In sum, the “inherently misleading” category of commercial speech seems designed to catch those messages that have virtually no chance of helping consumers make autonomous decisions—either because they

“[i]n cases raising First Amendment issues,” including commercial speech cases, appellate court “must ‘make an independent examination of the whole record’” developed at trial (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964))).

There is some tension between *Peel*, which categorizes a statement’s inherent capacity to deceive as a question of law, and the line of cases that involve judicial review of FTC determinations that an advertisement is misleading. See, e.g., *FTC v. Colgate-Palmolive*, 380 U.S. 374, 385 (1965) (holding that FTC’s findings of deception are entitled to “great weight” due to agency’s expertise in advertising cases); *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 686-88 (3d Cir. 1983) (stating that FTC’s impressionistic determination that ads were deceptive was “akin to a finding of fact,” and was due considerable deference (internal quotation marks omitted)); cf. *Kraft*, 970 F.2d at 316-18. The *Kraft* court distinguished *Peel* and declined to apply de novo review to FTC’s determination that an ad was misleading. See *id.* Rather, the court said that FTC’s “expertise in the field of deceptive advertising” justified review under the highly deferential “substantial evidence” standard. See *id.* at 317, 318. As observed *supra* note 161, however, the regulation upheld in *Kraft* was more akin to a narrow disclaimer requirement than an outright ban on an inherently misleading commercial message. Cf. *supra* notes 114-17 and accompanying text (discussing considerable leeway that government has to require disclaimers under *Zauderer*). The *Kraft* court also noted that the FTC order it upheld was narrowly directed at “a particular set of deceptive ads,” unlike the restriction struck down in *Peel*, which was designed to prohibit “an entire category of potentially misleading commercial speech.” *Kraft*, 970 F.2d at 317.

¹⁶⁴ See *Snell v. Engineered Sys. & Designs, Inc.*, 669 A.2d 13, 19 n.9 (Del. 1995) (“The United States Supreme Court has not defined with any specificity the concept of ‘inherently misleading’ commercial speech.”).

¹⁶⁵ *Peel*, 496 U.S. at 112 (Marshall, J., joined by Brennan, J., concurring).

¹⁶⁶ *Id.* (citing *Friedman v. Rogers*, 440 U.S. 1 (1979)). The Fifth Circuit, in holding that car dealers’ use of the term “invoice” was inherently misleading, recounted witness testimony that the term had “no fixed meaning” even among car dealers, and noted that the district court had found that the plaintiff’s ad conveyed “no useful information to the consumer.” *Joe Conte Toyota*, 24 F.3d at 757 (internal quotation marks omitted). The Ninth Circuit has extrapolated from Supreme Court opinions a four-part test for whether a commercial message is unprotectably misleading. See *Association of Nat’l Advertisers v. Lungren*, 44 F.3d 726, 731 (9th Cir. 1994) (listing factors: (i) whether the speech restricted is devoid of intrinsic meaning; (ii) the possibilities for deception; (iii) whether experience has proved that in fact such advertising is subject to abuse; (iv) the ability of the intended audience to evaluate the claims made).

aim to overbear consumers' will, or because they convey negligible useful information and considerable misleading information.

Ads and labels that promote the health benefits of moderate drinking would not, as a general matter, fit the description "inherently misleading." A mass-media commercial message, unlike the in-person sales pitches that worried Justice Marshall and other justices, leaves its target consumer with time to step back and evaluate the marketing claim she has just seen.¹⁶⁷ Labels seen at the point of sale likewise lack the force of personal solicitation.¹⁶⁸ Nor is it fair to say that health-related alcohol marketing categorically would lack intrinsic meaning.¹⁶⁹ Certainly, one can envision individual ads and labels that would capitalize on the link between moderate drinking and a reduced risk of heart disease without conveying any nonmisleading information about alcohol's potential health benefits.¹⁷⁰ These individual ads and labels might be inherently misleading and subject to suppression. Accurate messages about alcohol's potential benefits, on the other hand, would convey information of interest and use to consumers. Their danger lies in the fact that they might not provide consumers with a balanced picture of alcohol's positive and negative

¹⁶⁷ See *Bates v. State Bar*, 433 U.S. 350, 366 (1977) (stating that in-person solicitation suggests "dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising").

¹⁶⁸ See *Pearson*, 164 F.3d at 655. The *Pearson* court held that it is not inherently misleading for the label of a dietary supplement (such as a pill containing vitamins, minerals, amino acids, or botanical extracts) to state a health claim that lacks significant scientific agreement to back it up. See *id.* The court dismissed as "almost frivolous" the FDA's argument that health claims on labels would "have such an awesome impact on consumers as to make it impossible for them to exercise any judgment *at the point of sale.*" *Id.* Although *Pearson* solidly supports the argument that ATF cannot completely suppress health-related alcohol marketing, dictum in the case does note that the government would have had a stronger argument for suppression if the dietary supplements at issue threatened consumers' health or safety. See *id.* at 656.

¹⁶⁹ See *id.* at 657 (observing that FDA did not dispute that health claims conveyed factual information, and rejecting argument that health claims resembled trade names that were banned in *Friedman v. Rogers*); see also *Association of Nat'l Advertisers*, 44 F.3d at 732 (holding that "recycled" and other environmental terms "may be imprecise, but they are not altogether fanciful or inherently uninformative," and thus are not devoid of constitutional protection).

¹⁷⁰ Imagine a wine label that displayed a drawing of a human heart and the statement, "Make every sip a toast to your health," but contained no other information about the health benefits of moderate drinking. The label says nothing literally false, but the nebulous association that it draws between drinking and good cardiac health is largely uninformative and might be inherently misleading. The possibility that some health-related alcohol messages might not merit protection does not mean, however, that other such messages should lose their constitutional shield. Cf. *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) ("[M]erely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech.").

effects,¹⁷¹ and that consumers might lack access to other sources of information about alcohol's effects on health. In such cases, where consumers may lack access to information needed to make a thoughtful decision, courts hold commercial speech to be potentially—not inherently—misleading,¹⁷² and require more disclosure, not complete suppression, as the primary remedy for consumer confusion.¹⁷³

2. *Limited Disclaimers Are Sufficient to Prevent Consumers from Being Misled*

Thus, the Constitution would allow ATF to require commercial messages about alcohol's benefits to disclose enough information about alcohol's risks to enable consumers to make thoughtful decisions about drinking.¹⁷⁴ The agency's power to mandate disclosure has its own First Amendment limits, however. The government may impose disclosure requirements that are "reasonably related" to its "interest in preventing deception of consumers," but cannot set requirements that are "unjustified or unduly burdensome."¹⁷⁵

ATF has opined that any disclaimers sufficient to cure a health-related alcohol message of its capacity to mislead would be impossible to fit on an ordinary label.¹⁷⁶ Requiring such a detailed disclaimer is unquestionably "burdensome," as it effectively prevents alcohol producers from promoting the health benefits of moderate drinking in most typical marketing formats.¹⁷⁷

¹⁷¹ See 1993 ATF Circular, *supra* note 39.

¹⁷² See *Pearson*, 164 F.3d at 655 (addressing FDA's argument that health claims made on dietary supplement labels were potentially misleading because consumers "would have difficulty in independently verifying" them); *Association of Nat'l Advertisers*, 44 F.3d at 731 (stating that commercial speech is only potentially misleading where it may be either misleading or informative, depending on "circumstantial factors objectively ascertainable, with some difficulty, by the consumer").

¹⁷³ See *Bates*, 433 U.S. at 375 ("Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less."); *Pearson*, 164 F.3d at 658 (requiring FDA to use disclaimers, not suppression, as first resort against potentially misleading dietary supplement labels).

¹⁷⁴ Naturally, the government cannot constitutionally impose disclaimer requirements on an ad or label that merely directs consumers to consult a disinterested, credible, and balanced source, such as a family doctor or the federal government's nutritional guidelines, about the health effects of moderate drinking. Thus, the government could not force advertisers to attach disclaimers to the wine labels approved by ATF in February 1999. See *supra* note 68 and text accompanying notes 68-69.

¹⁷⁵ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

¹⁷⁶ See 1993 ATF Circular, *supra* note 39.

¹⁷⁷ See *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146-47 (1994) (suggesting that disclaimer requirement was unduly burdensome where "[t]he detail required . . . effectively rule[d] out" placement of Ibanez's desired message "on a business card or letterhead, or in a yellow pages listing").

But is it *unduly* burdensome? It might be that ATF's lengthy disclaimers really are all reasonably related to preventing consumers from being misled by health statements. Many of alcohol's hazards, however—such as the dangers of drunkenness, the risk of alcoholism, and the possibility of liver damage and other health problems from prolonged heavy drinking—are commonly known.¹⁷⁸ So is the fact that younger people are at lower risk for heart disease than older people. Three other hazards—alcohol's potential to cause birth defects, impair driving, and “cause health problems” in general—are included in the Surgeon General's warning.¹⁷⁹

An ad or label that promotes the health benefits of moderate drinking should not be considered incomplete solely because it does not reiterate dangers that are common knowledge, or that are printed, in the form of a government warning, on every alcoholic beverage container sold.¹⁸⁰ Moreover, alcohol marketing that discusses the benefits of clearly defined *moderate* drinking need not be accompanied by a list of the many problems that stem from *excessive* drinking. Rather, any finding of incompleteness should stem from an ad or label's failure to mention lesser-known risks that are present at moderate levels of drinking. Thus, the government legitimately could require a disclaimer warning consumers of the apparent link between moderate drinking and breast cancer, and also a statement warning

¹⁷⁸ Cf. Restatement (Second) of Torts § 402A cmt. j (1965) (excusing seller from duty to warn about product's dangers that are “generally known and recognized,” and listing alcohol as example of product with commonly known dangers).

¹⁷⁹ See *supra* note 42. ATF's argument that health-related alcohol marketing would somehow negate the effect of the Surgeon General's warning in consumers' minds likely would require some level of empirical support to be entertained by a court. Cf. *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 100 (2d Cir. 1998). In *Bad Frog*, the state regulator sought to prohibit beer labels that, *inter alia*, depicted a cartoon frog “giving the finger” near the Surgeon General's warning. See *id.* at 91. One of the state's arguments was that the frog's gesture encouraged consumers to dismiss the warning. See *id.* The Second Circuit, however, rejected this argument as mere “speculation.” *Id.* at 100.

¹⁸⁰ Indeed, requiring an alcohol producer to display a laundry list of alcohol's well-known risks alongside any statement of alcohol's potential health benefits might implicate the producer's First Amendment right against compelled speech. If the government mandates warnings that go beyond what is necessary to prevent consumer confusion, and instead veer into redundancy, the government is arguably forcing advertisers to express an anti-alcohol viewpoint at their own expense. Cf. *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 15-17 & n.12 (1986) (plurality opinion) (stating that government is not free to compel advertisers to carry messages of third parties that contradict advertisers' own views); *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1978) (holding that FTC violated First Amendment by requiring trade association to include views of opponents in advertisements discussing health effects of eggs, and that FTC's requirement was “a remedy broader than . . . necessary to prevent deception” that improperly forced trade association “to argue the other side of the controversy, thus interfering unnecessarily with the effective presentation of the pro-egg position”).

certain vulnerable consumers that it might be harmful for them to drink at all.¹⁸¹

The goal of these disclosures is to provide consumers with information about the health effects of moderate drinking that they would not necessarily find out for themselves. This purpose is not well served if the government requires disclaimers to describe a broad array of dangers that are both commonly known and not directly relevant to moderate alcohol consumption. Conversely, this goal of informing consumers is impossible to achieve unless alcohol producers present these disclaimers in clear language and display them prominently enough not to be overlooked by consumers.¹⁸² The commercial

¹⁸¹ Among those who should not drink at all are alcoholics. ATF and other opponents of health-related alcohol marketing argue that ads and labels promoting the health benefits of moderate drinking would cause alcoholics and those prone to alcoholism to believe that they could drink moderately without risk, when in fact moderate drinking would almost inevitably lead them into patterns of excessive drinking. See Wood, *supra* note 6 (arguing that alcoholics and other heavy drinkers would see health-related alcohol marketing as justifying their harmful drinking habits); *supra* text accompanying note 64 (describing ATF's concern that health-related alcohol marketing would mislead alcoholics and others who should not drink at all).

A rational person, seeing an ad or label that clearly defines the limits of "moderate drinking" and warns alcoholics not to drink at all, would not conclude that alcoholic drinking patterns convey health benefits. The problem is that alcoholics may not respond rationally to alcohol marketing. In fact, Professor Sylvia Law has contended that the consumer autonomy rationale for protecting commercial speech should not necessarily be applied to alcohol advertising because a significant minority of people who use alcohol become dependent upon it, and thus become incapable of making truly autonomous choices about drinking. See Law, *supra* note 17, at 945-46, 949. Law's argument raises the question of whether, and when, the government should be able to restrict the public's receipt of accurate commercial information on the ground that a fraction of the public may react irrationally to it.

The Supreme Court's most recent commercial speech decision touched on this issue in the context of casino advertising and compulsive gamblers. In *Greater New Orleans Broadcasting Ass'n v. United States*, 119 S. Ct. 1923, 1932 (1999), the government argued that "compulsive gamblers are especially susceptible" to broadcast advertising for gambling at private casinos, and that the long list of social costs associated with compulsive gambling helped to justify a ban on this type of advertising. The Court stated that the government had failed to produce evidence establishing a direct causal link between broadcast casino advertising and compulsive gambling. See *id.* at 1933. *Greater New Orleans* thus suggests that when the government seeks to base a commercial speech restriction upon the susceptibility of irrational consumers, it must at least show that the specific prohibited speech actually causes the feared irrational reaction. This in turn suggests that ATF's mere belief that health-related ads and labels would contribute to alcoholism cannot justify their suppression; the agency would need to produce hard evidence that health-related marketing actually misleads alcoholics into believing that they can drink without harm.

¹⁸² See *Pearson v. Shalala*, 164 F.3d 650, 658-59 (D.C. Cir. 1999) (offering examples of "prominent" disclaimers that could cure dietary supplement labels of their potential to mislead); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 44-45 (D.C. Cir. 1985) (discussing how advertiser could present information about tar content of cigarettes so that consumers would not be misled); see also R. George Wright, *Selling Words: Free Speech*

speech doctrine's approach to potentially misleading messages, such as health-related ads and labels for alcohol, rests on the knowledge that consumers are best informed if advertisers are allowed to extol their products' virtues accurately, while at the same time the government retains the power to fill in the informational gaps that tend to spring open in speech that is designed to sell.

*C. Health-Related Alcohol Marketing in Practice:
Possibilities and Pitfalls*

To stay within the bounds of their First Amendment protection, ads and labels that promote the health benefits of moderate drinking would have to be a relatively circumspect form of advertising. The more straightforward, dispassionate, and strictly informational an ad or label is, the more likely it will be to enjoy the protection of the First Amendment. The paradigmatic ad might involve a "talking head," perhaps a well-known actor, who accurately sums up the latest research into alcohol's potential health benefits, then gently delivers the required disclaimers before his forty-five second television spot fades out. Ads that dramatize information about the health benefits of moderate drinking would constitute a riskier move for alcohol producers. As the following script for a fictional television advertisement illustrates, a dramatic marketing campaign might veer into constitutionally unprotected territory if it makes implied claims¹⁸³ about alcohol's benefits that go beyond what medical research has shown:¹⁸⁴

[A wide-angle camera shot shows a smallish, white country farmhouse, flanked by a well-maintained lawn. The time is sunset. Two men are walking together across the lawn, toward the house. The camera closes in on the two men. One is a white-haired old gentleman (GRANDPA), his face wizened but tan and hearty looking. The other (MICHAEL) is about thirty-five. Both are casually, but nicely, dressed.]

in a *Commercial Culture* 64 (1997) (observing that "phrasing, prominence, and clarity" of disclaimers can be areas of controversy).

¹⁸³ It is unclear how much power ATF would have to decide that an alcohol advertisement makes a particular implied claim. FTC, which traditionally has received great deference from courts in deceptive advertising cases, see *supra* note 163, can find that an ad implies a claim on the basis of FTC's "own impression" of what the ad says, without resort to extrinsic evidence such as consumer surveys. See *Kraft, Inc. v. FTC*, 970 F.2d 311, 315-16 (7th Cir. 1992).

¹⁸⁴ A broadcast advertisement that promotes the health benefits of moderate drinking might be more vulnerable to regulation than a label or print ad. See generally *Virginia Pharmacy*, 425 U.S. 748, 773 (1976) (noting that "special problems of the electronic broadcast media" were not present in case).

GRANDPA: Michael, I'm so glad you came all the way out here. [He has a vaguely European accent, but it is impossible to trace it to any particular country.]

MICHAEL: [affectionately] Would I miss my granddad's ninetieth birthday party? [He has no appreciable accent.]

[The camera follows as Grandpa puts his arm around Michael's shoulders and leads him, slowly but with dignity, through the front door of the house. Cut to a comfortable sitting room.]

GRANDPA: We have fifty guests coming tomorrow. I was just doing some last-minute gardening before you arrived.

MICHAEL: [admiringly] You never slow down, do you, Grandpa?

GRANDPA: [chuckles] I always get my exercise. Will you join me in a glass of wine? [He begins uncorking a bottle of white wine; the label is that of a large American wine maker.]

MICHAEL: No wine for me, thanks. I'm on a bit of a health kick.

GRANDPA: All the more reason to join me. You know, your grandmother and I have had a little wine with a good dinner every night since we came here from the old country sixty years ago. [He swirls the wine in his half-full glass, then raises the glass to his nose to inhale the bouquet.]

MICHAEL: I've heard that a glass or two a day can be good for your heart . . .

GRANDPA: [smiles] I say that wine is one of the great pleasures of life. [laughs] And if we both enjoy a glass with dinner, maybe someday I'll visit you in the city for *your* ninetieth birthday.

MICHAEL: [smiles] Food for thought, Grandpa, food for thought. [He pours himself a glass of wine.]

[The picture fades out. The wine maker's logo appears on the black screen. Beneath it, in white lettering, appears a statement:

"Studies show that moderate wine drinking—no more than two glasses a day for men, and one glass a day for women—can reduce the risk of fatal heart disease. While moderate drinking has been shown to have a net health benefit for both men and women, it can contribute to certain health risks, including an increased risk of breast cancer in women. If you take medication, or if you may have any other special susceptibility to alcohol, please consult your doctor before drinking. Enjoy our fine products responsibly, and please do not drink if you have trouble controlling your level of alcohol consumption."

An announcer reads the statement. The commercial ends when she finishes reading.]

High art it is not, but this model ad illustrates some of the possibilities and pitfalls of health-related alcohol marketing. The ad's suggestion that regular, moderate wine drinking will enable the viewer to lead an active life at the age of ninety is troublingly hyperbolic. While courts trust consumers to take advertising images with a grain of salt,¹⁸⁵ Grandpa's longevity might constitute a misleading exaggeration of moderate drinking's demonstrated benefits. Making Grandpa younger, and turning Michael into his son rather than grandson, would help defuse the ad's implied longevity claim. Together with the ad's closing disclaimers, as well as the Surgeon General's warning that the consumer would encounter on the wine bottle label, the change in Grandpa's age would leave the ad with little potential to mislead.

A final question, though, is whether this ad's disclaimers and explanations also leave it with little capacity to promote its product. Would an alcohol producer really want to spend advertising money to remind consumers of drinking's bad effects, even if the producer also gets to market drinking's potential benefits? The association between drinking and breast cancer, in particular, could cause many female consumers to pause before drinking their next glass of wine. Then too, there is a tension between the ad's depiction of wine drinking as a relaxed, enjoyable activity and its emphasis on drinking's medical effects. Alcohol may best be marketed as an element of a carefree, happy life, without reference to health effects good or bad.¹⁸⁶

The fact that health-related alcohol marketing would generate considerable public and political opposition also raises the question of whether alcohol producers would retain a net benefit from winning the First Amendment battle examined in this Note. So does the possibility of increased product liability. Suits by alcoholics and others harmed by alcohol abuse are rarely successful, partly because alcohol producers can defend against failure-to-warn claims by arguing that alcohol's dangers are well known.¹⁸⁷ These suits might gain new life if

¹⁸⁵ Cf. *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 478-79 (1988) (noting, in context of direct mail solicitation by attorneys, that pitch, style, and "subjective predictions" are more attention-getting than "a bland statement of purely objective facts," and stating that eye-catching tactics do not turn ad into "overbearing solicitation").

¹⁸⁶ This may be the opinion of beer and liquor producers, which so far have largely eschewed attempts to market the health benefits of moderate drinking. An analysis of a beer commercial by the late director Stanley Kubrick suggests that the prevailing tone of much alcohol marketing would not be complemented by health statements: "Have you seen those Michelob commercials? They're just boy-girl, night-fun, leading up to pouring the beer, all in thirty seconds, beautifully edited and photographed." Francis X. Clines, *The Silent Celebrity and the Quotable Recluse*, N.Y. Times, Mar. 14, 1999, § 4 (Week in Review), at 3 (quoting 1987 interview with Kubrick).

¹⁸⁷ See, e.g., *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 388 (Tex. 1991) (holding that alcohol producer had no duty to warn consumer that excessive drinking

alcohol producers affirmatively claim that drinking can be good for a consumer's health.¹⁸⁸ In short, economic and legal realities suggest that an alcohol producer should proceed carefully before embarking on a campaign to promote alcohol's potential health benefits. The First Amendment's role is to ensure that this decision is left to the alcohol producer's business judgment, not a government regulatory scheme.

CONCLUSION

Alcohol producers have a First Amendment right to market, within limits, the health benefits of moderate drinking. This right follows from the concept, central to our economic and political system, that the government should not prevent people from hearing truthful information that will affect their decisions.

This Note has discussed the constitutional argument in favor of health-related alcohol marketing, but the implications of such marketing for the cultural role of alcohol remain a thorny and intriguing issue. Evidence of alcohol's potential health benefits does not change the fact, learned from centuries of hard experience, that alcohol abuse often leads to severe personal and societal damage. It does give us an

could foster alcoholism); see also Restatement (Second) of Torts § 402A cmt. j (1965) (stating that alcohol need not be accompanied by producers' warnings because dangers of excessive and prolonged drinking are generally known). The Restatement also classifies alcohol, along with tobacco and butter, as a product that has recognized dangers but is not unreasonably dangerous. See *id.* § 402A cmt. i. In addition, although no court appears to have published an opinion on the issue yet, the congressionally mandated Surgeon General's warning might preempt damages suits brought under state law that are based on the inadequacy of alcohol producers' warnings. See 27 U.S.C. § 216 (1994) (preempting states from requiring alcohol warning labels other than Surgeon General's warning); cf. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524-31 (1992) (holding that 1969 federal law requiring current Surgeon General's warning on cigarette labels preempts state law damages suits alleging that cigarette manufacturers failed to warn of smoking's dangers after 1969, as well as suits claiming that cigarette marketing nullifies required warning); Carroll, *supra* note 18, at 120-21 & n.99 (citing pre-*Cipollone* commentary discussing possible preemptive effect of Surgeon General's warning for alcohol).

¹⁸⁸ Consider an alcohol producer that launches a health-related ad campaign that is subsequently adjudged misleading. The misleading ads would not only fall outside the protection of the First Amendment, but also open the alcohol producer to potential tort liability. Assuming that plaintiffs do not run afoul of the preemption issue addressed *supra* note 187, they could claim that the defendant's health-related alcohol marketing both undermines the body of common knowledge about alcohol's dangers and nullifies the Surgeon General's warning. Cf. *Hon v. Stroh Brewery Co.*, 835 F.2d 510, 515 (3d Cir. 1987) (holding that jury could infer from defendant's ads associating moderate drinking with "healthy, robust activities" that public was unaware of moderate drinking's possible hazards, and going on to cite cases holding that advertising can neutralize warnings and lead to product liability).

opportunity to reassess our culture's complex and problematic relationship with drinking, and to change it for the wiser.

Personally and through our elected government, Americans often seem to assume that alcohol presents a choice between teetotalism and recklessness, with little ground in between. Writ small, this attitude finds its expression in weekday abstinence followed by Friday night binges. Writ large, it was evidenced by a decade of Prohibition followed by years of laughing off the horrors of drunk driving. Stifling truthful information about drinking is a sure way to propagate the simplistic notion that alcohol must be treated, by both its drinkers and its opponents, as a recreational drug. Conversely, recognizing that the public can in fact understand and appreciate nuanced messages about the good and bad effects of drinking is a step toward understanding that moderate alcohol consumption can be a minor but enjoyable accompaniment to everyday life.