# Why the Commercial Speech Doctrine Will Prove Toxic to the USDA National Organic Program

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## INTRODUCTION

This Article argues that the Supreme Court has expanded commercial speech rights too far. The current Court increasingly appears to view the government's power to regulate commercial speech as limited to only proscribing false or misleading commercial speech. Any attempt by the government to restrict truthful commercial speech, even if potentially misleading, is generally treated as unjustified paternalism in violation of the First Amendment. The evolving jurisprudence threatens reasonable economic regulations that restrict speech for important and non-paternalistic reasons. To make this case, this Article explores how the evolving commercial speech doctrine could invalidate the food-labeling regime established by the Organic Foods Production Act of 1990 ("OFPA") and its implementing regulations. That regulatory regime, often referred to as the National Organic Program ("NOP"), generally prohibits representing food as "organic" unless a United States Department of Agriculture ("USDA") licensed inspector has certified that the food was produced consistent with OFPA's implementing regulations. The National Organic Program: (1) provides assurance to the consumer that the product is indeed organic; (2) sets clear standards to define the organic market so that producers can enjoy a price premium for food produced consistent with those standards; and (3) incentivizes producers, through the price premium, to convert from conventional to organic production practices, resulting in substantial environmental benefits. Although the regulations facilitate the creation and growth of an organic market with integrity, the regulations are vulnerable to a First Amendment challenge because they restrict the use of the term "organic" to a very limited set of circumstances.

Consider the following hypothetical. A small farmer in upstate New York runs Vegetable Heaven Farm and sells approximately $40,000 worth of various specialty crops annually. The farmer has always raised her vegetables consistent with the USDA organic standards, but she has elected to forego USDA certification because of the cost and administrative burden.[1] As a result, she cannot

1. The farmer's concerns are not just hypothetical. Many farmers have chosen to forego certification for these reasons and attempt to market their products without the organic label. *E.g.*, Mary Esch, *Naturally Grown: An Alternative Label to Organic*, YAHOO! NEWS (Aug.

market her products as organic. Farmers' market customers repeatedly ask her whether her products are organically grown, and some customers choose to purchase from other producers because they are unsatisfied with her explanation of why she is not USDA certified. Because of a particularly good year for tomatoes, the farmer has been struggling to find customers. The local food cooperative consistently buys her tomatoes, but only to the extent that it cannot maintain its desired inventory levels with USDA certified organic tomatoes. The manager of the cooperative loves Vegetable Heaven's produce and told the farmer that the cooperative would buy all the tomatoes the farmer can grow if Vegetable Heaven were to obtain USDA certification. Currently, the manager buys certified organic tomatoes from the same national distributor who supplies the area Wal-Mart before purchasing any of Vegetable Heaven's tomatoes. The Vegetable Heaven farmer is outraged that the cooperative would purchase tomatoes grown in other parts of the country from unknown producers before purchasing tomatoes grown just a few miles away from the store.

Frustrated with her economic losses and her unjustified appearance as a second-rate steward of the land, the farmer unsuccessfully petitions the USDA to change its regulations to eliminate the certification requirement for producers to use the term "organic" in their advertising. The farmer's petition would only seek to eliminate the administrative certification process; the farmer would still have to comply with the substantive organic certification standards to use the term "organic" in advertising. The merits of the farmer's petition are irrelevant to its fate.[2] The

17, 2013, 2:57 PM), http://news.yahoo.com/naturally-grown-alternative-label-organic-160020483.html (noting that fees, record-keeping requirements, and philosophical objections prevent many farmers from obtaining certification); Jim Pathfinder Ewing, *A 'Sound, Sensible' Organics Program*, JACKSON FREE PRESS (Apr. 24, 2013, 5:34 PM), http://www.jacksonfreepress.com/news/2013/apr/24/sound-sensible-organics-program/ (explaining that many small farmers forego certification).

2. The farmer would petition for rulemaking to eliminate the certification requirement because any challenge to the original regulations would be untimely, as they were enacted in 2002. By petitioning anew for rulemaking, the farmer could make a timely appeal of final agency action upon denial of the petition. *See* Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007) (refusal to promulgate rules susceptible to narrow judicial review); *see also* Horne v. USDA, Case No. 09–cv–01790–OWW–SKO, 2011 WL 489166 (E.D. Cal. Feb. 7, 2011) (holding that raisin producer could seek judicial review of denial of a petition for rulemaking by the USDA), *rev'd on other grounds*, 494 F. App'x 774 (2012).

USDA lacks the authority to grant the farmer's petition because the elimination of the certification requirement would be inconsistent with OFPA, which specifically requires that produce represented as organic must be grown in accordance with a plan agreed to by a certifying agent.[3] Indeed, the statute bans even implied representations that the product is organic unless produced in accordance with OFPA.[4]

Seeking judicial review of the denial of her petition, the farmer claims that her First Amendment right to label and sell her products as "organic" has been violated by OFPA and its implementing regulations. Further, she claims that the ban against organic labeling as applied to her products is especially problematic because she does not use many of the more controversial synthetic products approved by the National Organic Standards Board and ratified by the USDA—over the objections of long-standing organic producers. The farmer insists that her agricultural products are "more" organic than those of many farmers who have obtained organic certification and represent their produce as organic. Thus, she maintains that her freedom to market them as such should not be infringed by a federally-mandated certification process.

Vegetable Heaven's hypothetical lawsuit would undoubtedly make a lot of people uncomfortable, and not just the certified organic farmers in the neighboring stalls at the farmers' market. The organic food industry has become attractive enough for large food companies to stake out significant positions, including Cargill, Coca-Cola, ConAgra, General Mills, Kellogg, Kraft, PepsiCo, and M&M Mars.[5] If the organic label were to become available to any producers whose production methods are arguably "organic enough" to deem the organic label truthful, organic food production, which is largely sustained by the premium price certified organic food currently demands, could be in jeopardy. Although organic foods still occupy a very small share of the overall market, demand is unquestionably rising.[6] If supply is to meet

3. 7 U.S.C. § 6504 (2012).

4. *Id.* § 6505.

5. Stephanie Strom, *Has 'Organic' Been Oversized?*, N.Y. TIMES, July, 7, 2012, at BU1, *available at* http://www.nytimes.com/2012/07/08/business/organic-food-purists-worry-about-big-companies-influence.html.

6. *See generally* CAROLYN DIMITRI & LYDIA OBERHOLTZER, USDA ECON. RESEARCH SERV., ECONOMIC INFORMATION BULLETIN NO. 58, MARKETING U.S. ORGANIC FOODS: RECENT

demand, which is desirable for the reasons explored in Part II.B, the premium at which certified organic food sells must be preserved.

To be sure, the NOP is not without its flaws. However, the unregulated use of the term would not better serve the interests of either consumers or industry. Consider the term "natural," which the farmer in our hypothetical may freely use in her marketing.[7] All sorts of food products, including products containing high-fructose corn syrup and genetically modified organisms, lay claim to the term.[8] Because food companies continue to call their foods "natural" even when facing lawsuits brought by consumers, the advertising likely has some appeal to consumers.[9] But unregulated usage of the term dilutes its meaning, and thus its value. Whatever appeal the "natural" label has, it would likely be greater if the term were meaningfully defined by binding federal regulations administered by the United States government. Indeed, the Grocery Manufacturers Association has recently indicated it will ask the FDA to issue a formal definition of the term.[10] The

TRENDS FROM FARMS TO CONSUMERS 1 (2009), *available at* http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib58.aspx#.Upovl43b0Sl.

7. The FDA does not have a regulation defining the term "natural" and provides limited guidance on its website concerning the use of the term:

> From a food science perspective, it is difficult to define a food product that is "natural" because the food has probably been processed and is no longer the product of the earth. That said, FDA has not developed a definition for use of the term natural or its derivatives. However, the agency has not objected to the use of the term if the food does not contain added color, artificial flavors, or synthetic substances.

*What is the meaning of "natural" on the label of food?*, U.S FOOD & DRUG ADMIN, http://www.fda.gov/aboutfda/transparency/basics/ucm214868.htm (last visited Jan. 25, 2014).

8. *See generally* Josh Ashley, *A Bittersweet Deal for Consumers: The Unnatural Application of Preemption to High Fructose Corn Syrup Labeling Claims*, 6 J. FOOD L. & POL'Y 235, 236 (2010); Erik Benny, *"Natural" Modifications: The FDA's Need to Promulgate an Official Definition of "Natural" that Includes Genetically Modified Organisms*, 80 GEO. WASH. L. REV. 1504, 1508–12 (2012).

9. *See, e.g.*, Holk v. Snapple Beverage Corp., 575 F.3d 329, 332 (3d Cir. 2009) (class action alleging Snapple's beverage products were not "All Natural" as advertised because they contained high-fructose corn syrup); Benny, *supra* note 8, at 1506 ("The FDA's lack of interpretation [of the term "natural"] has led to numerous lawsuits alleging that the food industry misleads consumers . . . .").

10. Stephanie Strom, *Group Seeks Special Label for Food: 'Natural'*, N.Y. TIMES, Dec, 19, 2013, at B3, *available at* http://www.nytimes.com/2013/12/20/business/trade-group-seeks-natural-label-on-modified-food.html. It should be noted that the Grocery Manufacturers Association's proposed definition of the term is so broad that it would remain essentially unregulated. However, if the FDA were to devise an official definition, it would presumably enact a more balanced and restricted definition as a result of the public notice-and-comment rulemaking process.

government's clear definition of "natural" would likely increase consumer confidence in the label and significantly curtail litigation over the meaning of the term.

If the organic representation were not affirmatively regulated (or if the NOP labeling regime were declared unconstitutional in response to a First Amendment challenge), use of the term would be similar to that of the term "natural" today—ensnared in a web of consumer confusion and litigation. The NOP labeling regime was intended to inspire consumer confidence, which in turn would support the price premium for the marketing of organic food.[11] If producers were permitted to use the term "organic" outside the current regulatory regime—or if that regime permitted unverified claims of "organic" production—consumers could lose faith in the organic label or simply lose the capacity to identify which products labeled organic were actually produced in accordance with the OFPA production standards.

In either case, the influx of additional so-called "organic" products could drive down prices to such an extent that producers could not justify implementing the more demanding "organic" production methods required by the regulatory regime. Without rigidly enforced labeling standards, at least some farmers and businesses would likely adjust their behavior to adopt the least expensive processes available that would still permit them to call their products "organic" without running afoul of consumer protection statutes that prohibit false representations. This could diminish both the market for organic food (which would adversely affect the profits of certain producers) and the amount of land farmed organically (which would adversely affect the environment and the ability to sustain productive agricultural land into the future).[12]

Regardless of whatever practical effects dismantling the NOP labeling regime might have on organic food production in the United States, the Vegetable Heaven farmer's hypothetical lawsuit raises a number of issues concerning the protections afforded commercial speech by the First Amendment. For over three decades, government restrictions on commercial speech have been subject to the intermediate scrutiny test established by *Central*

11. 7 U.S.C. § 6501 (2012) (stating purposes of OFPA).

12. *See, e.g.*, notes 60–61, 77 and accompanying text (discussing benefits of organic farming).

*Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[13] Despite significant criticism that intermediate scrutiny provides commercial speech with either too little or too much protection, the standard has survived to this day in the Court's commercial speech decisions.[14]

While the Supreme Court has declined to expressly overturn the *Central Hudson* four-part test, it has applied the test much more strictly in recent cases.[15] Governmental efforts to restrict the marketing of goods and services frequently no longer survive the test.[16] *Central Hudson*'s critics argue that the courts should apply strict scrutiny to regulations of commercial speech, just as they do for core political and religious speech.[17] Justice Thomas has been the leading advocate of this position on the Court. He argues that the line between core and commercial speech is too blurry to justify providing less protection to commercial speech that is only potentially misleading, as opposed to commercial speech that is outright false, or inherently misleading.[18] The opposing view, perhaps best illustrated by Chief Justice Rehnquist's dissent in *Central Hudson*, regards commercial speech restrictions as more akin to regulations of normal business activity, which have been subject to far less scrutiny since the demise of the *Lochner* approach to the regulation of commerce.[19] This view is far less concerned

13. Cent. Hudson Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 565–66 (1980). In *Central Hudson*, the Court struck down a New York agency's order that prohibited a state utility's advertisements promoting the use of electricity notwithstanding the state's interest in energy conservation. *Id.*

14. *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2674 (2011). Although *Sorrell* applied the *Central Hudson* intermediate scrutiny test, it did so only in the alternative to its primary holding, which applied, for the first time ever, heightened scrutiny to a commercial speech regulation. *Id.* at 2677 (Breyer, J., dissenting). Because the Court applied both tests, it is unclear whether the Court will continue to apply *Central Hudson* or "heightened scrutiny" in future commercial speech cases.

15. David C. Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1054–59 (2004) (chronicling the shift in *Central Hudson*'s application from giving "deference to government judgments [and] uphold[ing] restraints on commercial speech as long as they are reasonable and proportionate to the interests served" to the modern application which results in the "virtually automatic invalidation of laws restraining truthful commercial speech.").

16. *Id.*

17. *Id.*

18. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring) (doubting "whether it is even possible to draw a coherent distinction between commercial and non-commercial speech.").

19. Cent. Hudson Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 595 (1980) (Rehnquist, J., dissenting) (chiding the majority for equating core political speech with

with the blurry line between commercial and core speech than with the blurry line between commercial speech and economic activity.[20] Proponents of this view defend the intermediate scrutiny test set forth in *Central Hudson* as an upper bound on the level of scrutiny that should be afforded to restrictions on commercial speech.[21]

The application of the commercial speech doctrine to the NOP labeling regulations provides an unusual case study. It presents the usual challenges of distinguishing between core speech and commercial speech, and of discerning where economic regulation stops and speech regulation begins. However, it also has the unusual potential to reverse the customary anti-regulatory position of at least some industry members, specifically those food companies that have developed increasingly profitable organic food product lines. When a particular case study can cause some of the usual suspects to change sides in a doctrinal debate, it can likely provoke a more thoughtful and honest reflection on whether the particular doctrine should be modified to take into account some overlooked or undervalued concerns. In this case, the facilitation of a market for organic food might have appeal to industry because it promotes fair competition by requiring all producers to comply with the same standards in order to compete in the organic market. Without a uniform standard and certification regime, organic producers might face competition from purportedly "organic" producers that do not even approach compliance with the NOP regulatory standards, and consumers would be hard pressed to

commercial speech: "Nor do I think those who won our independence . . . would have viewed a merchant's unfettered freedom to advertise in hawking his wares as a liberty not subject to extensive regulation in light of the government's substantial interest in attaining order in the economic sphere.") (internal quotation marks omitted). Justice Rehnquist claimed the majority had "return[ed] to the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905), in which it was common practice . . . to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means of the State to implement its considered policies." *Id.* at 589.

20. For Justice Rehnquist, the Court's primary error was its failure to distinguish regulation of economic activity from a genuine speech restriction. *Id.* at 584 ("[T]he Court errs here in failing to recognize that the state law is . . . an economic regulation and that the speech involved (if it falls within the scope of the First Amendment at all) occupies a significantly more subordinate position in the hierarchy of First Amendment values . . . .").

21. *See, e.g.*, Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 394 (2012) ("[T]he *Central Hudson* test has proven to protect commercial speech against unwarranted government restrictions for decades despite the fact that its application has not been straightforward.").

differentiate among such products. Accordingly, a lawsuit that successfully challenged the labeling regime could have significant adverse economic, not just environmental, consequences.

This Article will not extensively re-hash these doctrinal arguments for and against the *Central Hudson* test, which already have been extensively and effectively articulated.[22] Because resolving a commercial speech dispute often involves drawing inherently unsatisfactory distinctions between two types of speech (commercial and core),[23] or between speech and conduct,[24] there will never be universal satisfaction with any doctrine that is ultimately adopted. Indeed, the survival of the *Central Hudson* test may in part reflect that it is sufficiently vague to be applied differently to different situations without violating any clear doctrinal principal. As intellectually unsatisfying as that may prove for lawyers who prefer bright lines, its flexibility has certainly played a significant role in its continued survival despite extensive criticism from all corners.

This Article considers how the courts would respond to a lawsuit that challenges the NOP labeling restrictions and the stakes that would be at issue in such litigation. Given the Supreme Court's latest pronouncement on the commercial speech doctrine in *Sorrell v. IMS Health Inc.*, a First Amendment challenge would likely dismantle the NOP labeling program.[25] In *Sorrell*, the majority indicated that it was comfortable applying "heightened" scrutiny to commercial speech regulations, and even imported some concepts

22. *See, e.g.*, *id.*; Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 565 (2012); Kate Maternowski, *The Commercial Speech Doctrine Barely Survives* Sorrell, 38 J.C. & U.L. 629, 640–46 (2012); Vladeck, *supra* note 15.

23. Vladeck, *supra* note 15, at 1049–51 (discussing long-standing criticisms of the commercial speech doctrine in the context of *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002)). In *Kasky*, a consumer challenged Nike's public statements concerning its treatment of foreign workers as false and misleading, and Nike unsuccessfully defended the case arguing that the speech, even if inaccurate, was protected core political speech, not commercial speech. *Id.*

24. Pomeranz, *supra* note 21, at 420–21 (discussing whether cases involving the type of law at issue in *Sorrell*, which restricts drug companies' access to information about physician drug prescribing practices collected pursuant to a regulatory program, should even be considered speech cases that implicate the First Amendment). The dissent in *Sorrell*, in the first instance, would have treated the Vermont law as mere regulation of commercial activity subject only to rational basis review, as did the First Circuit when considering similar Maine and New Hampshire laws. *Id.* This same debate over whether the challenged law regulates commercial activity or speech occurred in *Central Hudson* itself. *See supra* note 20 and accompanying text.

25. Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011)

from traditional core speech cases into commercial speech doctrine.[26] No previous decision had gone that far.[27] If rigorously applied, *Sorrell* threatens to dismantle the NOP labeling program and consequently jeopardize the continued growth of organic food production, which has significant environmental and economic benefits.

Because the NOP is an exemplary model of an essentially voluntary, market-driven regulatory program, this Article argues for a more cautious approach when considering whether to modify or abandon the *Central Hudson* test in favor of increasing the scrutiny applied to regulations of commercial speech as suggested by *Sorrell*. In Part I of this Article, I explain the current regulatory framework governing organic agriculture and how it creates a production model that is different from conventional agricultural production, with significant environmental and health benefits. In Part II, I examine the ways in which the NOP regulates commercial speech and, indirectly, agricultural production practices. In Part III, I examine the commercial speech doctrine and how it would apply to the NOP labeling regime. Specifically, I explain how the adoption of the heightened scrutiny test discussed in *Sorrell* deprives the courts of the flexibility provided by *Central Hudson*, and, as a result, could invalidate most commercial speech regulations, the NOP labeling regime notably among them. Finally, I conclude that the Court's apparent abandonment of *Central Hudson* was not only imprudent but also unnecessary: the Court had already transformed *Central Hudson* to an exacting form of scrutiny that had proved more than sufficient to invalidate any of the paternalistic commercial speech regulations that have driven critics of *Central Hudson* to demand more strict scrutiny of such regulations.

26. *Id.* at 2663–64 (2011).

27. *Id.* at 2677 (Breyer, J., dissenting) ("[N]either of these categories—'content-based' nor 'speaker-based'—has ever before justified greater scrutiny when regulatory activity affects commercial speech.").

## I. THE NATIONAL ORGANIC PROGRAM ESTABLISHES A COMPREHENSIVE ALTERNATIVE MODEL TO MODERN INDUSTRIAL AGRICULTURE WITH SIGNIFICANTLY FEWER NEGATIVE EXTERNALITIES

### A. The Substantive Standards Imposed on Organic Farmers

Congress granted the USDA the authority to promulgate regulations to implement the National Organic Program in the Organic Food Production Act of 1990.[28] The current regulations prohibit farmers seeking organic certification from utilizing pesticides, genetically modified organisms or GMOs (stemming from recombinant DNA technology, rather than traditional plant breeding), irradiation, and synthetic fertilizers (or sewage sludge as fertilizer).[29] Applicants must also take steps to prevent prohibited substances from coming into contact with organic production and handling operations. This includes ensuring that any fields used for organic crop production have clearly defined boundaries and buffer zones to reduce the potential for contamination from neighboring conventional farming operations.[30] Applicants cannot have applied prohibited substances to the land in the three years prior to certification.[31] The regulations also affirmatively require the implementation of practices designed to maintain or improve soil quality and minimize soil erosion.[32] Even the seeds must come from organic sources, though there are some exceptions.[33]

With respect to livestock operations, the regulations generally prohibit the use of antibiotics and hormones.[34] In addition, farmers must provide the animals with room to exercise and move,

28. 7 U.S.C. § 6503 (2012) (instructing the Secretary of Agriculture to "establish an organic certification program for producers and handlers of agricultural products that have been produced using organic methods as provided for in this chapter.").

29. 7 C.F.R. § 205.206(e) (2014) (generally, the farmer may not apply synthetic substances to control pests and diseases; however, if natural methods fail, the farmer may use synthetic substances permitted by the USDA provided the farmer documents the conditions evidencing the failure of the preferred natural methods); 7 C.F.R. § 205.2 (defining excluded methods of production to include genetic modification of organisms that could not happen "under natural conditions or processes" including recombinant DNA technology); 7 C.F.R. § 205.105(f)–(g) (excluding use of sewage sludge and ionizing radiation); 7 C.F.R. § 205.203(e)(1) (prohibiting use of fertilizer containing any synthetic substance unless it is on USDA list of approved synthetic substances).

30. 7 C.F.R. § 205.202(c).

31. 7 C.F.R. § 205.202(b).

32. 7 C.F.R. § 205.203.

33. 7 C.F.R. § 205.204.

34. 7 C.F.R. § 205.238(c).

clean and dry bedding, and conditions of confinement designed to minimize stress.[35] Ruminant animals, such as cattle, sheep, and goats, are also entitled to pasture for grazing.[36] In addition, the livestock feed must meet certain specified organic standards.[37] Most notably, it cannot contain any GMOs.[38] For both crops and livestock, pest control is addressed through various preventive techniques, such as eliminating pest habitat and food sources, blocking pest access to livestock handling areas, and implementing temperature and light controls to impede pest reproduction.[39]

All of these measures must be recorded in the organic system plan agreed to by the farmer and the government accredited certifying agent.[40] The certifying agent not only ensures that the plan complies with the organic regulations but also conducts annual inspections, including at the time of initial certification, to ensure that the farmer is faithfully adhering to the terms of the plan.[41] The USDA accredits certifying agents that can be private parties or state or local governmental entities.[42] Although farmers must pay for the certification process, the USDA has a cost share program that allows some farmers to recover up to 75% of the cost of their certification not exceeding $750.[43]

In essence, the NOP delineates between what producers may and may not do in order to compete in the organic market. As the title implies, the National List of Allowed and Prohibited Substances identifies which substances are allowed and which are prohibited in organic agricultural operations, as well as those substances that may be used in, or on, processed organic food products.[44] Generally,

35. 7 C.F.R. § 205.238(a); 7 C.F.R. § 205.239(a).

36. 7 C.F.R. § 205.239(a)(2).

37. 7 C.F.R. § 205.237(a).

38. *Id.* (requiring that feed be "organically produced and handled by operations certified to the NOP."); 7 C.F.R. § 205.2 (describing genetic modification of organisms as incompatible with organic production and among the "excluded methods" for organic production). Stated differently, livestock feed must be organic, and as a result, it may not be produced by any excluded method, including genetic modification of organisms.

39. 7 C.F.R. § 205.206 (crops); 7 C.F.R. 205.271(a) (livestock).

40. 7 C.F.R. § 205.400(b), (d).

41. 7 C.F.R. § 205.402; 7 C.F.R. § 205.403.

42. 7 C.F.R. §§ 205.502, 205.503. Foreign certifying agents are accredited by foreign governments with equivalent organic standards. 7 C.F.R. § 205.500(c).

43. 7 U.S.C. § 1524(b)(4)(C)(ii) (2012).

44. 7 C.F.R. §§ 205.601–205.606.

synthetic substances are prohibited unless specifically allowed,[45] and non-synthetic substances are generally allowed unless specifically prohibited.[46] Anyone can petition to add or remove substances from the list.[47] The National Organics Substances Board reviews such petitions and makes recommendations to USDA for purposes of rulemaking.[48] The Board also reevaluates each substance on the list every five years[49] and makes other recommendations regarding a range of issues relevant to the NOP.[50] Under OFPA, the Secretary of Agriculture appoints the fifteen member board which must include four farmers/growers, three environmentalists/resource conservationists, three consumer/public interest advocates, two handlers/processors, one retailer, one scientist (toxicology, ecology, or biochemistry), and one USDA accredited agent that certifies organic operations.[51]

### B. The Process-Based Regulations Meaningfully Distinguish Organic Agricultural Products from Conventional Agricultural Products

Most importantly, the organic standards do ensure that the production processes for organic food differ substantially from the conventional methods used in modern industrial agriculture, and not only with respect to the divergent approaches organic and conventional agriculture take toward GMOs and pesticides.[52]

45. 7 C.F.R. §§ 205.601, 205.603 (identifying permitted synthetic substances for organic crop and livestock production).

46. 7 C.F.R. §§ 205.602, 205.604 (identifying prohibited non-synthetic substances for organic crop and livestock production).

47. 7 C.F.R. § 205.607(a).

48. 7 U.S.C. § 6518(a), (k).

49. *Id.* § 6517(e).

50. *Id.* § 6518(k).

51. *Id.* § 6518(b)–(d).

52. The regulations are largely process-based. Indeed, originally, no testing of the organic food was required to ensure that the production controls were actually effective in achieving the desired end product unless the certifying agent had "reason to believe" that a particular agricultural input or product may have come into contact with a prohibited substance, or may have been produced by a prohibited method. 7 C.F.R. §205.670(b). As a result, a farmer could sell contaminated produce as organic so long as the farmer did not knowingly utilize the pesticide or GMO. Not surprisingly, some scholars have argued that these regulatory weaknesses have misled consumers and distorted industry incentives. Michelle T. Friedland, *You Call That Organic?–The USDA's Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379, 386 (2005). Pesticide and genetic drift are not uncommon, and most consumers likely believe that the organic food they purchase is entirely free from pesticides and GMOs. *Id.* at 398–99, 403–07. However, as of January 1, 2013, certifying agents are

Those differences are significant to environmental and health considerations.

Consider, for example, the differences between conventional and organic livestock operations. Today's confined animal feeding operations ("CAFOs") pollute our water and air, facilitate the growth of dangerous antibiotic resistant bacteria that pose an increasingly serious public health threat, produce a nutritionally inferior product, and impose such harsh conditions of confinement on the animals that the industry has lobbied for legislation that would make it unlawful to take photographs of such livestock operations.[53] By purchasing organic animal products, consumers can take comfort that their dollars will not support CAFO-like practices that threaten the environment and human health. In addition, the animals will not have been raised with GMO feed that was grown using conventional agricultural methods.

The production practices for organic crops also differ significantly from conventional crops. In addition to the avoidance of pesticides and GMOs, organic farmers must take steps to promote soil quality, minimize soil erosion, and abstain from the use of synthetic fertilizers.[54] Synthetic fertilizers depend on fossil fuels and create aquatic dead zones.[55] The negative environmental externalities that result from conventional crop production are not

generally required to test five percent of the farms that they certify on an annual basis, and the results of these tests will be publicly available. 7 C.F.R. §§ 205.670(d), (f). The regulations also contain some reporting requirements when test results exceed specific levels. *Id.* § 205.670(g). The product testing regime is not perfect. Although the USDA caps pesticide residues at levels up to five percent of the EPA's tolerance levels, there is no cap for GMO contamination. *Id.* § 205.671. Nonetheless, if the public testing results demonstrate significant contamination, there is no reason to believe that more regulatory reform would not follow.

53. *See generally* DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, *CAFOs Uncovered: The Untold Costs of Confined Animal Feeding Operations* (2008), *available at* http://www.ucsusa.org/assets/documents/food_and_agriculture/cafos-uncovered.pdf (discussing the threats to the environment and public health caused by the pollution and the increase in antibiotic resistant bacteria caused by CAFOs,); Cynthia A Daley et al., *A Review of Fatty Acid Profiles and Antioxidant Content in Grass-fed and Grain-fed Beef*, NUTRITION J., Mar. 2010, at 1. (identifying several nutritional advantages of beef from cows raised on pasture as compared to beef from cows fed grain); Editorial, *Eating with Our Eyes Closed*, N.Y. TIMES, April 9, 2013, at A22, *available at* http://www.nytimes.com/2013/04/10/opinion/eating-with-our-eyes-closed.html?_r=0 (identifying state "ag-gag" laws prohibiting the photographing of livestock operations).

54. 7 C.F.R. § 205.203; 7 C.F.R. § 205.203(e)(1) (prohibiting use of fertilizer containing any synthetic substance unless substance is on USDA list of approved synthetic substances).

55. David Biello, *Oceanic Dead Zones Continue to Spread*, SCI. AM. (Aug. 15, 2008), http://www.scientificamerican.com/article/oceanic-dead-zones-spread/.

concerns of a distant future. While the ever-increasing Gulf of Mexico dead zone is the most well-known here in the United States, scientists have identified over 400 dead zones world-wide and discovered a dramatic increase in the number of hypoxic dead zones in the past fifty years.[56] Not surprisingly, this coincides with the rapid growth of today's industrial agricultural production methods.[57] In addition, recent studies have suggested that soil erosion is occurring at an unsustainable rate[58] because of conventional agricultural practices.[59]

While the National Organic Program may very well be flawed, there can be little doubt that adhering to organic production standards alleviates some of the more pressing environmental and public health negative externalities associated with conventional agriculture.[60] These external costs are simply not reflected in the price of conventionally grown food because producers do not absorb these costs.[61] Although the NOP-approved production methods reduce negative externalities, they require a greater commitment of farm labor and the application of skilled management techniques.[62] Organic farmers recover these costs

56. *Id.*

57. *Id.*; *see also, e.g.*, Matt Ford, *Water Pollution: Dawn of the 'Dead Zones'*, CNN.COM (Apr. 21, 2008, 1:01 AM), http://www.cnn.com/2008/WORLD/asiapcf/04/20/eco.water pollution/index.html?_s=PM:WORLD (discussing United Nations report linking increase in dead zones to industrial agricultural methods).

58. CRAIG COX, ANDREW HUG & NILS BRUZELIUS, ENVTL. WORKING GRP., LOSING GROUND 4 (2011), *available at* http://static.ewg.org/reports/2010/losingground/pdf/losingground_ report.pdf.

59. *See* Adam J. Heathcote, Christopher T. Filstrup & John A. Downing, *Watershed Sediment Losses to Lakes Accelerating Despite Agricultural Soil Conservation Efforts*, PLOS ONE (Jan. 9, 2013), http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0053554 (explaining that agricultural intensification has worsened soil erosion and that erosion control subsidies are insufficient to address the problem).

60. Brian Halweil, *Can Organic Farming Feed Us All?*, WORLD WATCH MAG., http://www. worldwatch.org/node/4060 (last visited Jan. 25, 2014) (noting that studies have shown that organic farming reduces soil erosion, chemical pollution, and negative impacts on wildlife, and provides other benefits as well); *see also* Leo Horrigan, Robert S. Lawrence, & Polly Walker, *How Sustainable Agriculture Can Address the Environmental and Human Health Harms of Industrial Agriculture*, 110 ENVTL. HEALTH PERSP. 445, 445 (2002).

61. Erin M. Tegtmeier & Michael D. Duffy, *External Costs of Agricultural Production in the United States*, 2 INT'L J. AGRIC. SUSTAINABILITY 1, 1 (2004), *available at* http://www. organicvalley.coop/fileadmin/pdf/ag_costs_IJAS2004.pdf.

62. CAROLYN DIMITRI & LYDIA OBERHOLTZER, USDA ECON. RESEARCH SERV., MARKET-LED VERSUS GOVERNMENT-FACILITATED GROWTH: DEVELOPMENT OF THE U.S. AND EU ORGANIC AGRICULTURAL SECTORS 8 (2005), *available at* http://ers.usda.gov/Publications/WRS0505/ WRS0505.pdf ("Most organic products sell for a premium over comparable conventional

through higher prices.[63] Without a sufficient price premium incentive, farmers would suffer a significant competitive disadvantage by choosing to produce their food in a manner that is consistent with organic certification standards. Therefore, protecting the price premium created by a meaningful distinction between organic and conventional agriculture is essential to ensuring that farmers choose to maintain and convert to the more environmentally friendly and health conscious production processes required by the NOP.

### C. The NOP Has Resulted in both Economic and Environmental Benefits

Although organic foods make up only 4% of the overall market for food, organic fruits and vegetables now represent over 11% of all fruit and vegetable sales in the United States.[64] Moreover, the growth in organic food production and demand has been staggering. Retail sales of organic food were $3.6 billion in 1997.[65] By 2008, they exceeded $21 billion,[66] by 2010, $26 billion, by 2011, $31 billion, and by 2012, $35 billion.[67]

As of 2008, certified organic acreage represented only a small percentage of United States cropland, only 0.7%, and even less pastureland, only 0.5%.[68] However, the percentage of vegetable farmland that was certified organic was almost 5%.[69] Combined, there were over 4.8 million acres of certified organic acreage, including both pasture and cropland, which constitutes 0.57% of

products, likely due in part to higher production, processing, procurement, and distribution costs, relative to those of conventional products."); NATURAL RES. & ENV'T DEP'T, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, ORGANIC AGRICULTURE, ENVIRONMENT AND FOOD SECURITY CHAPTER 1 (Nadia El-Hage Scialabba & Caroline Hattam eds., 2003), *available at* http://www.fao.org/docrep/005/y4137e/y4137e01.htm#P0_0 ("Premiums compensate farmers for skilled resource management; higher labour costs, unit costs, and handling expenses; and administrative, inspection, and certification fees.").

63. NATURAL RES. & ENV'T DEP'T, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, *supra* note 62.

64. *U.S. Organic Industry Overview*, ORGANIC TRADE ASS'N, http://www.ota.com/pics/documents/2011OrganicIndustrySurvey.pdf (last visited Jan, 26, 2014).

65. DIMITRI & OBERHOLTZER, *supra* note 6, at iii.

66. *Id.*

67. *U.S. Organic Industry Overview*, *supra* note 64.

68. *Table 3: Certified Organic and Total U.S. Acreage,* U.S. DEP'T OF AGRIC. ECON. RES. BULL. (Oct. 24, 2013), http://www.ers.usda.gov/data-products/organic-production.aspx#25762 [hereinafter *USDA Table 3*].

69. DIMITRI & OBERHOLZER, *supra* note 6, at 10.

total United States agricultural acreage (approximately 844 million acres).[70] While those numbers are relatively small compared to overall agricultural production in the United States, the growth rates have been impressive.[71] In 2011, organic acreage climbed to approximately 5.4 million acres, or 0.64% of total United States agricultural acreage.[72]

There is room for more farmers to enter the organic production market. Because consumer demand is outpacing production capacity, organic "handlers" (those who move organic products from the farm to the retailer by adding value through processing or repackaging) have reported that supply shortages of organic ingredients have significantly constrained growth.[73] Farmers simply have not transitioned to organic production in sufficient numbers to meet the demand for organic ingredients.[74] There is little research that satisfactorily explains why unmet demand has not created sufficient price incentives for farmers to convert to organic production practices.[75] It could be that conventional farmers do not have the skills and experience to run an organic operation, or that they do not believe that the organic price premium will be sufficient to warrant changing their operations, or that the three year period to transition to organic farming is too great a financial sacrifice given that they will have to sell their products as conventional during that time even though they will be using organic production methods.[76] There are no clear answers. Nonetheless, if demand continues to rise as it has in the past decade, more farmers will probably convert to organic production methods.

The environmental and health benefits that arise from the conversion to organic production will similarly grow as the environmentally destructive conventional farming practices are gradually replaced by organic production methods. Those benefits include reducing pesticide residue in water and food to alleviate

70. *USDA Table 3*, *supra* note 68.

71. Organic cropland acreage grew at an average rate of fifteen percent annually between 2002 and 2008. *See Industry Statistics and Projected Growth*, ORGANIC TRADE ASS'N, http://www.ota.com/organic/mt/business.html (last visited Jan. 26, 2014). Between 1997 and 2005 organic acreage doubled. DIMITRI & OBERHOLZER, *supra* note 6, at iii.

72. *USDA Table 3*, *supra* note 68.

73. *Id.* at 8–9.

74. *Id.* at 11–13.

75. *Id.*

76. *Id.*

the unintended effects that pesticides have on people and other non-target species; reducing nutrient pollution; improving soil tilth, soil organic matter, and soil productivity; reduced energy usage; greater carbon sequestration; and enhanced biodiversity.[77]

## II. THE NATIONAL ORGANIC PROGRAM PROMOTES MARKET COMPETITION AND IMPLEMENTS ENVIRONMENTAL POLICY THROUGH THE REGULATION OF SPEECH

### A. The National Organic Program Directly Regulates Commercial Speech

Although the NOP has supported the adoption of certain agricultural practices with fewer negative external costs on the environment, the program works primarily through the regulation of commercial speech. It does so by determining when products can be represented as organic, expressly or implicitly.[78] The restrictions on commercial speech create price premiums that incentivize producers to voluntarily adopt organic production practices to meet market demand. Because processed foods with a variety of ingredients can be represented as organic in whole or in part if their ingredients were made consistent with organic production standards by a certified organic operation, food processors help drive demand for raw agricultural products.[79] Similarly, organic livestock producers drive the demand for organic livestock feed, which is subject to its own specific regulatory framework.[80] Consumer demand for organic raw agricultural products and organic processed foods completes the chain of factors that affect producers' decisions to obtain organic certification. Thus, the NOP does not contain any "command and control" regulations that mandate the adoption of certain "organic" practices by all farmers—it is strictly a voluntary regime which has grown in response to market demand. The program achieves a reduction in negative environmental externalities as more producers choose to adopt organic production methods.

77. Claire Kremen & Albie Miles, *Ecosystem Services in Biologically Diversified Versus Conventional Farming Systems: Benefits, Externalities, and Trade-Offs*, 17.4 ECOLOGY & SOC'Y 40, at 40 (2012); David Tilman et al., *Agricultural Sustainability and Intensive Production Practices*, 418 NATURE 671 672–74 (2002).

78. 7 U.S.C. §§ 6504, 6505 (2012).

79. 7 C.F.R. §§ 205.300–205.312 (2014).

80. *Id.* §§ 205.236–205.240.

With respect to the specific regulations on commercial speech, the statute itself expressly precludes the use of the term "organic" unless certified by an accredited USDA agent:

> To be sold or labeled as an organically produced agricultural product under this chapter, an agricultural product shall—
>
> . . .
>
> (3) *be produced and handled in compliance with an organic plan agreed to by the producer and handler of such product and the certifying agent.*[81]

The statute bans even implied representations that the product is organic unless produced in accordance with OFPA:

> no person may affix a label to, or provide other market information concerning, an agricultural product *if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods*, except in accordance with this chapter.[82]

OFPA's implementing regulations further identify a series of specific marketing terms and representations that require the use of certain production processes or ingredient composition, including: (1) "100 percent organic"; (2) "organic"; (3) "made with organic (specified ingredients or food group(s))"; (4) identification of particular ingredients as "organic" on the ingredient statement; and (5) the USDA organic seal.[83]

A product sold, labeled, or represented as "100 percent organic" must "contain (by weight or fluid volume, excluding water and salt) not less than 100 percent organically produced raw or processed agricultural products."[84] Such products can also display the official USDA organic seal.[85] If the representation is simply "organic," then generally the product must contain 95% organically produced agricultural products, and the remaining ingredients must be either: (1) produced organically unless commercially unavailable; (2) nonagricultural substances; or (3) non-agriculturally produced organic products that are produced consistent with the

81. 7 U.S.C. § 6504 (emphasis added).
82. *Id.* § 6505 (emphasis added).
83. 7 C.F.R. § 205.301.
84. *Id.* § 205.301(a).
85. *Id.* § 205.303(a)(4)

requirements of the National List.[86] These products may also use the official USDA organic seal.[87]

The official USDA seal is not available for products that do not meet the above standards for "100 percent organic" or "organic."[88] However, non-qualifying products may display the representation "made with organic [ingredient/food group]," provided that such products: (1) generally contain 70% of organically produced ingredients; and (2) the remaining ingredients must not be produced using a certain subset of specifically prohibited practices.[89] There are additional restrictions imposed by the regulations, which include that no more than three ingredients or food groups may be identified on the product display panel, and that the organic ingredients must be identified on the ingredient statement.[90] The regulations also permit products meeting these standards to display the percentage of organic ingredients in the product.[91] For those products that do not contain 70% of organically produced ingredients, the percentage of organic ingredients in the product can still be identified, but the label may only identify any organic ingredients in the ingredient statement on the product.[92]

The NOP labeling regulations significantly curtail the right to make any "organic" representations about food products. The statute does contain some limited exemptions, including for example, farmers selling less than $5,000 of product annually, or farmers participating in certain federal or state emergency pest or disease treatment programs.[93] Otherwise, the NOP generally precludes the marketing of products as organic, expressly or by implication, unless a USDA accredited agent certifies that the operation complies with the regulatory standards.[94]

86. *Id.* § 205.301(b)
87. *Id.* § 205.303(a)(4)
88. *Id.* § 205.304(c); *id.* § 205.305(b)(1).
89. *Id.* § 205.301(c).
90. *Id.* § 205.304(a)(1)
91. *Id.* § 205.304(a)(2).
92. *Id.* § 205.301(d), § 205.305.
93. *Id.* § 205.101 (annual sales exemption); *id.* § 205.672 (participation in pest or disease program).
94. *Id.* §§ 6504–6505.

## B. The National Organic Program Promotes Market Competition and Implements Environmental Policy

When discussing United States organic policy, it is almost always described as an economic policy designed to bolster the organic food industry.[95] It is rarely, if ever, described as an environmental or agricultural policy designed to promote a public good.[96] By contrast, European organic policy is often described as a form of environmental policy.[97] The difference stems more from the use of different regulatory mechanisms than from any serious evaluation of governmental objectives behind the adoption of the policies.[98] In reality, as explained below, the United States organic policy, especially in more recent years, has also served as a vehicle to achieve certain environmental objectives.

The United States has consistently relied on market forces, or, more specifically, consumer demand, to drive the growth of organic farming. Indeed, the Organic Food Production Act expressly states that its purpose is to: (1) "establish national standards governing the marketing" of organically produced agricultural products; (2) "assure consumers that organically produced products meet a consistent standard"; and (3) "facilitate interstate commerce in fresh and processed food that is organically produced."[99] Notably, environmental and health benefits are absent from the stated statutory objective.

Nevertheless, environmental and health concerns were among those behind the legislation, or at least were among the concerns of some legislators. The Senate bill precursor of OFPA explicitly included several legislative objectives that unambiguously viewed the NOP as a means to obtaining various environmental and health benefits, including to: (1) "assure consumers that products labeled organically produced are not produced with or handled with substances that cause adverse health or environmental effects"; (2)

95. DIMITRI & OBERHOLTZER, *supra* note 62, at 2.

96. *E.g.*, *id.*

97. *E.g.*, *id.*

98. In the United States, the federal government primarily plays the role of market facilitator for organic foods by incentivizing producers through consumer assurance. *Id.* Unlike the United States approach, the European approach includes a direct and substantial investment in programs that encourage farmers to convert to organic production practices for the express purpose of obtaining the environmental and health benefits associated with such practices. *Id.*

99. 7 U.S.C. § 6501 (2012).

"encourage environmental stewardship through the increased adoption of organic, sustainable farming methods"; and (3) "provide market incentives to encourage the use of organic, sustainable farming methods."[100] These provisions did not survive the conference process and were dropped from the statute's final text without any explanation or commentary in favor of the more limited set of objectives set forth in a House amendment.[101] Still, the legislative history demonstrates that environmental objectives were among the animating forces behind the legislation.

Shortly before OFPA's passage, the General Accounting Office ("GAO") provided a report on "alternative agriculture" to the House Agriculture Committee.[102] The committee had requested that the GAO "assess how current federal agricultural policies and programs may contribute to, or inhibit, the use of alternative farm production methods" because the committee wanted to "ensure that farmers have the flexibility to use a variety of management approaches, particularly those that emphasize low-input, sustainable agricultural methods."[103] The GAO report forthrightly identified the drawbacks associated with conventional agriculture. The report opened as follows:

> Farming in the United States is highly productive, yet several emerging health, environmental, and economic problems associated with conventional farming practices threaten its sustainability. Concerns about conventional farming have led to interest in alternative farming methods that may lower health risks, protect farm resources, reduce environmental damage, and improve long-term farm profitability and competitiveness.[104]

100. H.R. REP. NO. 101-916, at 1174 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 5286, 5699 (describing Senate Report); *see also* S. REP. NO. 101-357, at 1286–87 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 5220 ("The purpose of this bill, among other things, is to establish national standards governing the production of organically produced products and *to encourage environmental stewardship*.") (emphasis added).

101. H.R. REP. 101-916, at 1174–75 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5286, 5699–5700 (noting Conference drops findings in Senate bill and adopts the House amendment with regard to the purpose of the Act).

102. U.S. GEN. ACCOUNTING OFFICE, GAO/PEMD-90-12, ALTERNATIVE AGRICULTURE: FEDERAL INCENTIVES AND FARMERS' OPINIONS 1(1990), *available at* http://www.gao.gov/assets/150/148780.pdf.

103. *Id.* at 2.

104. *Id.*

Regardless of its original reasons for creating the NOP, Congress has directly promoted the NOP in the years since OFPA's enactment. Congress has enhanced the NOP through: (1) the expansion of two cost-share programs to help farmers pay for the transition to organic certification; (2) the improved integration of organic agriculture into the federal crop insurance program; and (3) greater investment in the Organic Agriculture and Extension Initiative and the Organic Production and Market Data Initiatives.[105]

More notably, Congress has also supported the NOP for the express purpose of obtaining the environmental and conservation benefits associated with organic farming practices. For example, in the Food, Conservation, and Energy Act of 2008 (commonly known as the Farm Bill), Congress cited "the potential benefits of organic farming" when "including provisions for financial support to farmers converting to organic production through USDA's conservation program, EQIP (Environmental Quality Incentives Program)."[106] The statute now provides that "[t]he purposes of [EQIP] . . . are to promote agricultural production, forest management, and environmental quality as compatible goals, and to optimize environmental benefits, by . . . assisting producers to make beneficial, cost effective changes to production systems (*including conservation practices related to organic production*)."[107]

In other cases, the Congressional objective is not expressly stated but the purpose is obvious given the nature of the legislative action. For example, Congress has expressly integrated the NOP into the Conservation Reserve Program, Conservation Stewardship

105. *See* 7 U.S.C. § 6523 (2012) (national organic certification cost-share program). The national organic certification cost-share program was not funded in Fiscal Year 2013 and beyond. *See National Organic Program: 2013 Organic Certification Cost Share Program*, USDA AGRIC. MKTG. SERV., http://www.ams.usda.gov/AMSv1.0/NOPCostSharing (last visited Jan. 28, 2014) (containing data for 2012 and 2013); *see also* 7 U.S.C. §§ 1502(b), 1522(c)(10) (2012) (coverage improvements for insurance contracts for organic production as defined by OFPA, pursuant to Federal Crop Insurance Act); 7 U.S.C. §1524(b)(4)(C)(ii) (describing risk management assistance cost share program pursuant to Federal Crop Insurance Act); 7 U.S.C. § 5925(b) (2012) (organic agriculture research and extension initiative); 7 U.S.C. § 5925(c) (organic production and market data initiatives).

106. CATHERINE GREENE ET AL., USDA ECON. RESEARCH SERV., ECONOMIC INFORMATION BULLETIN NO. (EIB-55) 36, EMERGING ISSUES IN THE U.S. ORGANIC INDUSTRY 1 (2009), *available at* http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib55.aspx#.UuhkZnco4y4.

107. 16 U.S.C. §3839aa(4) (emphasis added); *see also* 16 U.S.C. §3839aa-2(i)(2)(B) (2012) (describing EQIP payments for conservation practices related to organic production).

Contracts, Cooperative Conservation Partnership Initiative, Conservation Technical Assistance, and Conservation Loan and Loan Guarantee Program.[108] Through these amendments, Congress has interwoven the NOP ever more tightly into the web of conservation and environmental programs. As the USDA's Economic Research Service puts it, "federal organic policy has moved in new directions."[109]

Moreover, the NOP no longer merely facilitates markets for organically produced food. Helping farmers convert to organic agricultural practices simply plays no role in providing consumer assurance that organic food conforms to government specified production standards. These new statutory directives are not about making choices available to producers and consumers, but about increasing the conversion rate from conventional to organic farming practices. Although United States policy may not yet have reached the level of direct promotion and investment of European policy, there can be little doubt that Congress now treats the NOP as both an economic and environmental policy tool.

108. *See* 16 U.S.C. §§ 3835(c)(1)(B)(iii), 3835(f)(1)(A)(ii) (2012) (allowing retiring or retired farmers to modify conservation reserve program contracts to remove land from the program and transfer it to beginning or socially disadvantaged farmers to return the land to production and begin organic certification process); *see also* 7 U.S.C. § 1924(d)(2) (2012) ("In making or guaranteeing loans [as part of the Conservation Loan and Loan Guarantee Program] under this section, the Secretary shall give priority to . . . owners or tenants who use the loans to convert to sustainable or organic agricultural production systems . . . ."); 16 U.S.C. § 3838g(c) ("The Secretary shall ensure that outreach and technical assistance are available, and program specifications are appropriate to enable specialty crop and organic producers to participate in the [conservation stewardship] program."); 16 U.S.C. § 3838f(h) (2012) ("The Secretary shall establish a transparent means by which producers may initiate organic certification under the Organic Foods Production Act of 1990 . . . while participating in a [conservation stewardship] contract."); 16 U.S.C. § 3842(i) (ensuring that delivery of certain technical assistance addresses the concerns of organic producers); 16 U.S.C. § 3843 (2012) (creating a cooperative conservation partnership initiative with eligible third parties to provide assistance to producers enrolled in certain conservation programs with respect to, *inter alia*, the development and demonstration of innovative organic production practices and delivery methods); the USDA has an "organic crosswalk" program to assist farmers with conservation stewardship contracts to transition to organic production. *Conservation Stewardship Program's Contribution to Organic Transitioning—The Organic Crosswalk*, USDA NATURAL RES. CONSERVATION SERV., (Apr. 11, 2013), http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1097196.pdf;

109. GREENE ET. AL., *supra* note 106, at 1.

## III. COMMERCIAL SPEECH DOCTRINE APPLIED TO THE NATIONAL ORGANIC PROGRAM

As previously discussed, the central regulatory mechanism of OFPA is the labeling regime it imposes on organic food products. That regime precludes farmers, like the hypothetical operator of Vegetable Heaven, from making truthful claims that their products are produced using the organic agricultural practices required for USDA certification.[110] Unless the farmer's operation is actually certified by an accredited USDA certifying agent, the farmer cannot even imply that the product is organic.[111] But the labeling regime does not—indeed cannot—preclude the farmer from exercising core speech rights. For example, the farmer is free to write an editorial denouncing the NOP certification requirement as too burdensome or complaining that the National List is not "organic enough."

But where the subject of the promotional advertising is as an issue of public concern, the line between commercial and core speech blurs. This is often the case with commercial speech.[112] Consider, for example, what would happen if our hypothetical farmer were to display a sign on the table at the farmers' market, right next to her tomatoes, proclaiming: "Vegetable Heaven's Organic Tomatoes Are Just As Good As USDA Organic Tomatoes: Tell USDA to Eliminate the Certification Requirement and Stop Crushing Real Organic Farms." Arguably, the farmer is impermissibly marketing her tomatoes as organic even though the sign would unquestionably be considered core speech if it were displayed in a location where no commercial transactions occur. Although the NOP regulatory regime does restrict speech, it is generally much less restrictive of economic activity than constitutionally permitted alternatives, including universally imposed command and control regulations, e.g., limitations on the use of pesticides and chemical fertilizers on all farmers, or mandatory crop rotation.

Those—like Justice Thomas—who favor greater freedom for commercial speech think that the government must adopt these types of direct, non-speech regulations to accomplish its policy

110. 7 U.S.C. §§ 6504, 6505 (2012).

111. *Id.*

112. *See generally* Vladeck, *supra* note 15, at 1060 .

objectives.[113] Such proponents are not concerned with eliminating regulatory options that preserve greater freedom of commerce by only limiting commercial speech, which allow market participants to choose how to change their operations, if at all, to respond to the regulation. This "softer" form of economic regulation has no appeal to those seeking more expansive commercial speech rights commensurate with those afforded to core speech.[114] In their view, the Constitution demands such limitations on the government's regulatory power.[115] For those sharing Justice Thomas' view, any government restriction of truthful speech about a commercial product for fear of how consumers might respond is just as paternalistically inappropriate as it would be for the government to restrict the spread of information about religious or political matters to try to influence how a person worships or votes.[116]

Those, such as Justice Rehnquist, who hold the opposing view, find a significant distinction between core and commercial speech, and think that speech in a commercial context is just another form of commercial activity that should be as susceptible to regulation as any other form of commercial activity.[117] Those in Justice Rehnquist's camp point out that even Justice Thomas distinguishes between core and commercial speech in some contexts, and even he agrees that, sometimes, the two types of speech merit different levels of constitutional protection.[118] Moreover, there is no support

113. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 519–20 (1996) (Thomas, J., concurring) (describing regulatory alternatives to speech regulation to promote governmental objectives).

114. Indeed, in Justice Thomas's view, more direct restrictions on commerce itself, such as taxes on, or bans of, the sale of goods and services, would be more effective in achieving the government's goals than regulating the advertising for such goods and services. *Id.* at 524 ("But it would seem that directly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be . . . .").

115. *Id.* at 526 ("[A]ll attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.").

116. *Id.* at 487 (When the government's interest is to "manipulate [consumer] choices in the marketplace . . . such an 'interest' is *per se* illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech.").

117. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 595 (1980) (Rehnquist, J., dissenting).

118. Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 256, n.1 (2010) (Thomas, J., concurring) (indicating "no quarrel with the principle that advertisements that . . . propose an illegal transaction, may be proscribed."); *44 Liquormart*, 517 U.S. at 519–20 (Thomas, J., concurring) (indicating that commercial speech promoting illegal activity

for the idea that false or inherently misleading commercial speech should enjoy the same protection as false or inherently misleading core speech.[119] Those who favor less expansive commercial speech rights seize upon these universally accepted distinctions as support for their view that commercial speech really is a subset of economic activity and that any increased scrutiny of commercial speech regulations would bring back *Lochner*-like, heightened scrutiny of every economic regulation that somehow limits the power to speak about the regulated economic activity.[120] Today, Justice Rehnquist's view—that regulations of commercial speech are akin to economic regulation—has essentially disappeared from the jurisprudence and scholarship.[121] Rather, those who disagree with Justice Thomas and support commercial speech restrictions have fallen back on defending the intermediate scrutiny test set forth in *Central Hudson*—even though the test has been applied much more vigorously than they might deem appropriate.[122]

may be subject to lesser scrutiny). Unlike speech proposing an illegal transaction, no member of the Court would dispute that core speech in support of the legalization of any presently unlawful activity, such as marijuana usage, is entitled to anything but the strictest of scrutiny. *E.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2733 (2010) (noting that "the First Amendment protects advocacy even of unlawful action.") (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

119. *Milavetz*, 559 U.S. at 256 n.1 (2010) (Thomas, J., concurring) (indicating "no quarrel with the principle that advertisements that are false or misleading . . . may be proscribed."); *44 Liquormart*, 517 U.S. at 519–20 (Thomas, J., concurring) (contrasting restrictions on false and misleading speech with more paternalistic restrictions designed to influence consumer choice).

120. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2673 (2011) (Breyer, J., dissenting).

121. In Justice Rehnquist's dissent in *Central Hudson*, he strongly criticized the fourth prong of the *Central Hudson* test, arguing that it would unduly restrict governments from regulating commercial activity as they have done for many years. *Central Hudson*, 447 U.S. at 599–600 (Rehnquist, J., dissenting). Indeed, Justice Rehnquist accurately foresaw that the test could be applied so strictly that it could invalidate virtually any state regulation. Vladeck, *supra* note 15, at 1058 (noting that the more modern cases result in the "virtually automatic invalidation of laws restraining truthful commercial speech."). In more recent cases, such as *Sorrell*, the justices in favor of upholding commercial speech restrictions argue that the regulation either does not regulate speech at all or, alternatively, passes the *Central Hudson* test. *E.g.*, *Sorrell*, 131 S.Ct. at 2673 (Breyer, J., dissenting) (arguing that Vermont statute prohibiting pharmacies from selling prescriber-identifiable information passes the *Central Hudson* test). No justice in *Sorrell* critiqued or rejected the *Central Hudson* test as too protective of commercial speech or argued it should be abandoned in favor of rational basis review (as did Justice Rehnquist in *Central Hudson*). *See id.* at 2668 (affirming *Central Hudson* in the majority opinion); *id.* at 2674 (Breyer J., dissenting) (same).

122. *See, e.g.*, Pomeranz, *supra* note 21, at 394, 431 (critiquing the strict application of *Central Hudson* and noting that the "ability of the government to pass *Central Hudson* may be a thing of the past" but also arguing to retain the test because it "has proven to protect

Despite this controversy, the NOP's labeling regime is just one element of a larger regulatory agenda to promote both fair competition in the organic market and environmentally friendly farming practices.[123] Because Congress could mandate that all farmers use organic production practices—a requirement that does not regulate speech at all—one would expect that producers would prefer a regime that permits farmers to use whichever production practices they choose, but permits them to advertise their product as organically produced only if verified by a certifying agent. While the NOP precludes the use of the term "organic," it leaves producers an extensive selection of other representations to choose from that could adequately describe the manner in which the product was produced. For example, farmers are still permitted to indicate that chemical pesticides and fertilizers were not used. The NOP supplied a uniform definition for a representation that could have been defined in many ways in the absence of the regulatory regime. Given the freedom the producers have to label their products in other ways, the NOP restrictions on speech appear far less intrusive on market participants than alternative regulatory regimes that would directly restrict production practices. To invalidate the NOP on First Amendment grounds would be to improperly weigh the minimal intrusion on speech rights against the larger economic and environmental objectives of the NOP.

### A. The *Central Hudson* Test and Its Evolution

The "intermediate scrutiny" test announced in *Central Hudson*, which treats commercial speech as something more than mere economic activity but something less than core speech, balances these concerns.[124] The test has four prongs. First, the speech must concern lawful activity and not be misleading (thus distinguishing it from core political or religious speech).[125] Second, the asserted governmental interest animating the regulation must be substantial.[126] Third, the regulation must directly advance the

commercial speech against unwarranted government restrictions for decades despite the fact that its application has not been straightforward.").

123. *Supra* Part II.B.

124. *Central Hudson*, 447 U.S. at 564.

125. *Id.*

126. *Id.*

governmental interest asserted.[127] Fourth, the regulation should not be more extensive than necessary to serve the government's interest.[128]

The test is referred to as "intermediate scrutiny" because the regulation is not subjected to the higher level of scrutiny that is applied to non-commercial speech.[129] Under strict scrutiny, the government's interest must be "compelling," and the regulation must be "narrowly tailored" to promote that interest.[130] Notwithstanding the more relaxed standard, the Court has not upheld a commercial speech restriction since 1995, raising questions as to whether there is a meaningful difference between the two tests as they are applied.[131]

Two decisions of the United States Courts of Appeals illustrate the evolution of the application of the *Central Hudson* test in contexts that are directly relevant to an evaluation of the NOP labeling regime. In 1994, the Ninth Circuit considered a California law that proscribed the use of "green" marketing terms, such as "ozone friendly," "biodegradable," or "recycled," unless the products conformed to certain statutory definitions of the terms.[132] The court quickly concluded that the terms were potentially misleading and that California had a substantial interest in both environmental and consumer protection.[133] Most commercial speech regulations readily satisfy such requirements even today.[134]

In addition, the court held that the statute directly advanced the government's interest.[135] In applying this prong of the *Central Hudson* test, the Ninth Circuit emphasized that the statute need not be perfect, only reasonable, and that it need only provide more than "ineffective or remote support" of the government's interest.[136] Even in the absence of comprehensive economic data, the court found support for "the conclusion that ecological claims boost

127. *Id.*

128. *Id.*

129. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2679 (2011) (Breyer, J., dissenting).

130. *E.g.*, United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000).

131. Pomeranz, *supra* note 21, at 391 (citing Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995)).

132. Ass'n of Nat'l Advertisers, Inc., v. Lungren, 44 F.3d 726, 727 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995).

133. *Id.* at 731–32.

134. Pomeranz, *supra* note 21, at 426–27.

135. *Nat'l Advertisers*, 44 F.3d at 732–35.

136. *Id.* at 732.

consumer demand for products that do not always measure up . . . [and] the standardization of terms used in commercial representations about a product's environmental attributes is directly related to California's undisputedly substantial interests in truthful environmental advertising and conservation."[137] It also noted that the "rather modest minimum targets for the recycled content and decomposition periods of consumer products" would incentivize producers to enhance the environmental attributes of their products, which would "translate directly into less waste being dumped and dumped waste decomposing more rapidly."[138] Thus, the Ninth Circuit expressly found that the market-based, demand-driven environmental regulatory approach—the same regulatory approach at the heart of the NOP labeling regime—is sufficiently direct to advance the governmental interest. With respect to California's consumer interest, the court found that the statute provided greater certainty on both the supply and demand side of the market for ecologically friendly consumer products.[139] The language the court used could easily be applied to the NOP regulatory regime:

> [The statute] prevents the unscrupulous advertiser from capturing the green premium that ecologically-minded consumers are increasingly willing to pay for goods whose environmental bona fides they are ill-equipped to assess. To be sure, the statute does not require labels sufficiently specific to distinguish the most ecologically sound products from those whose "green" pedigree is less pure but statutorily adequate. Nevertheless, the ten-percent threshold for "recycled" content claims and one-year maximum period for "biodegradable" and "photodegradable" claims, for example, at least permit the ecologically-minded consumer to steer clear of products whose environmental attributes are de minimis. The statute thus sets forth "objective and consistently applied standards" of the sort whose existence has led the Court to overturn categorical bans on speech in order to prevent deception of the public . . . . In addition, the statute acts as a surrogate for monitoring functions which consumers cannot easily or comprehensively perform.[140]

137. *Id.* at 733.
138. *Id.* at 735.
139. *Id.* at 733.
140. *Id.* at 733–34.

On the supply side of the market, the court found the law was also favorable to scrupulous firms and merchants by shielding them from unfair price competition and by providing them with a "safe harbor," good faith defense to consumer fraud actions.[141] Thus, the California statute readily passed the third prong of *Central Hudson*.

Finally, the court found that the statute satisfied the "no more extensive than necessary" prong. The Ninth Circuit parsed the wording of the test and found that *Central Hudson* imposes not a least restrictive means test, but rather a "far less restrictive means test."[142] The existence of less restrictive alternative regulatory approaches, standing alone, would not invalidate the California statute. Accordingly, the court expressly rejected the argument that the law could simply require a disclaimer to any green marketing claims that would fully explain the basis of any environment-oriented representations.[143] The Ninth Circuit read Supreme Court precedent to preclude the court from "second guess[ing] a legislative decision to restrict speech rather than to require more speech."[144] Because the alternative regulatory approaches proposed by petitioners were considered as effective as the challenged California statute at issue, the Ninth Circuit held that the statute also passed the final prong of *Central Hudson*.[145] The court provided substantial deference to the legislature in applying the final two prongs of the *Central Hudson* test, significantly more deference than would be applied today, as explained further below.[146]

Twenty-five years later, the Sixth Circuit applied the same *Central Hudson* test to an Ohio Department of Agriculture regulation that banned representations that milk was "rbST free" and reached a different result.[147] Conventional milk producers had been using a genetically modified hormone called rbST to boost the cow's milk production.[148] Some milk processors who did not sell milk from

141. *Id.* at 734.
142. *Id.* at 735.
143. *Id.* at 736.
144. *Id.* (internal quotations and citations omitted).
145. *Id.* at 735–36.
146. *Id.* at 732–37. However, it should be noted that the dissent would have invalidated the statute for many of the reasons articulated by the majority in *Sorrell*, almost twenty years later. *Id.* at 737–40 (Noonan, J., dissenting).
147. Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 636 (6th Cir. 2010).
148. *Id.* at 632.

cows treated with rbST began to label their milk "rbST free."[149] The Ohio Department of Agriculture (and the Food and Drug Administration which had issued interim guidance on the subject) believed that such a representation was potentially misleading to consumers because there was no test that could detect whether the conventional milk even contained any rbST.[150] Stated differently, a consumer might be misled into believing that conventional milk contained rbST simply because the cow was treated with rbST, but that was actually impossible to determine.[151] As a result, Ohio adopted a rule prohibiting composition claims that milk was "rbST free."[152] Milk processors challenged the regulation, and the court applied the *Central Hudson* test.[153]

Although the court was unimpressed with the evidence of actual consumer confusion or deception, it did not reach the question of whether the state had a "substantial" interest in the regulation.[154] Rather, it found that the regulation did not directly advance the state's interest and was more extensive than necessary to advance the asserted governmental interest.[155]

The court held instead that the cure for any potential deception was simply more speech in the form of a disclaimer.[156] The district court had rejected that argument because it believed the disclaimer would only confuse consumers:

> [t]he label could contain contradictory information—it would say a [milk] product is 'free' of rbST, but at the same time state that there is no rbST in other [milk] products, which defeats the purpose of making the claim in the first place.[157]

The Sixth Circuit was not persuaded because, "[t]he claim 'rbST free,' when used in conjunction with an appropriate disclaimer, could assure consumers that the substance is definitively not in milk so labeled while also advising them that it has yet to be

149. *Id.* at 633.
150. *Id.* at 633–34.
151. *Id.*
152. *Id.*
153. *Id.* at 635–36.
154. *Id.* at 638–39.
155. *Id.*
156. *Id.* at 639.
157. *Id.* (citation omitted).

detected in conventional milk."[158] The court favored the disclaimer approach because it would impose less of a regulatory burden on commercial speech.[159] Unlike the Ninth Circuit's approach to the eco-labeling program, the Sixth Circuit did not defer to Ohio's regulatory decision and, instead, simply concluded, without any empirical evidence addressing the issue, that the disclaimer approach would be equally effective and less restrictive.[160]

The Sixth Circuit's analysis of the third and fourth prongs of *Central Hudson* is typical of the courts' approach to commercial speech in more recent years.[161] The Supreme Court has undoubtedly sent mixed messages when addressing how much evidentiary support is required to establish that a commercial speech regulation directly advances the government's interest.[162] The same could be said of the "not more extensive than necessary" prong.[163] Recent decisions certainly suggest that the fit between the interest and the regulation must be more than reasonable, even if not quite "precisely drawn" or "narrowly tailored" as required by strict scrutiny.[164] Yet it is unclear whether there must be evidence regarding the effectiveness of the less burdensome regulatory alternatives, or whether their mere existence and apparently comparable effectiveness would be sufficient to invalidate the regulation.[165] Rather than clarify the ambiguity surrounding these prongs of *Central Hudson*, a majority of the Court appears more inclined to abandon *Central Hudson* altogether without expressly overruling or modifying the four part test.[166]

158. *Id.*

159. *Id.*

160. *Id.*

161. Pomeranz, *supra* note 21, at 427 (noting that the third and fourth prongs of *Central Hudson* "have evolved through the years, becoming increasingly difficult to pass.").

162. *Id.* at 428–29.

163. *Id.* at 429–31.

164. *Id.*

165. *Id.*

166. In *Sorrell*, six justices of the Court applied heightened scrutiny to a commercial speech regulation and only addressed *Central Hudson* as an alternative basis for the holding. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667–68 (2011). The Court simply applied a new standard, much more akin to the strict scrutiny test applied in core speech cases, which focuses on issues of speaker, content, and viewpoint discrimination. *Id.* at 2662–64. The *Central Hudson* test does not concern itself with issues of discrimination, as the dissent pointed out. *Id.* at 2677 (Breyer, J., dissenting). Nonetheless, the Court did not overrule *Central Hudson* and instead sidestepped the issue by suggesting that the outcomes of the two tests would consistently yield the same results. *Id.* at 2667.

## B. The Arrival of *Sorrell v. IMS Health Inc.*

In *Sorrell*, the Court gave its strongest indication yet that it will soon apply strict scrutiny to at least some forms of commercial speech.[167] The Court applied "heightened judicial scrutiny"[168] without defining the term, but also indicated that the law at issue would fail even under a "special commercial speech inquiry."[169] The Court barely mentioned *Central Hudson*, and the opinion regularly interspersed decisions concerning traditional core speech regulations with decisions concerning commercial speech regulations—as if the two types of cases had always been decided using the same jurisprudential test.[170] Moreover, the Court in *Sorrell* implied that there was no meaningful difference in outcomes between *Central Hudson* and a more heightened form of scrutiny.[171]

*Sorrell* involved a Vermont law that prohibited pharmacies from sharing physicians' drug prescription information with pharmaceutical companies. The goal of the statute was to prevent the companies from using the information to improve their sales pitches to doctors and thereby boost sales of expensive brand name

167. *Id.* at 2644.

168. *Id.* at 2659.

169. *Id.* at 2667.

170. The majority focused on issues of content and viewpoint discrimination. *Id.* at 2663 ("The statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers . . . . In its practical operation, Vermont's law goes even beyond mere content discrimination, to actual view discrimination.") (internal quotation marks and citations omitted). However, *Central Hudson* does not concern itself with questions of discrimination and instead focuses on the importance of the government interest and the fit between the regulation and the government's interest. *Supra* Part III.A. As the dissent pointed out, these categories, discrimination based on content or speaker, are applicable in core speech cases, and have never "before justified greater scrutiny when regulatory activity affects commercial speech." *Sorrell*, 131 S. Ct. at 2677 (Breyer, J., dissenting). *See also* Pomeranz, *supra* note 21, at 423 ("[C]oncerns over content neutrality are traditionally relevant in core speech cases only and have not seriously been questioned in the commercial speech context because most regulations of commercial speech are content based.") (internal quotation marks and citations omitted).

171. *Id.* at 2667 ("As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.") (citations omitted). Notwithstanding the importation of core speech principles and the application of so-called "heightened scrutiny," some lower courts have held that the *Sorrell* decision did not modify *Central Hudson*. *See, e.g.*, Retail Digital Network, LLC v. Appelsmith, Case No. CV 11–9065 CBM (PJWx), 2013 WL 2139524, at *5 (C.D. Cal. May 13, 2013); King v. Gen. Info. Servs. Inc., 903 F. Supp. 2d 303, 308–09 (E.D. Pa. 2012); Demarest v. City of Leavenworth, 876 F. Supp. 2d 1186, 1194–95 (E.D. Wash. 2012).

drugs.[172] The law also expressly prohibited the pharmaceutical companies from using the information for marketing purposes.[173] Vermont believed that pharmaceutical companies' marketing campaigns directly increased doctors' prescriptions for expensive brand name drugs, which, in Vermont's eyes, was contrary to the interests of the state and its citizens who would be better served by low-cost generic alternatives.[174] Although the Court took issue with the Vermont law for a variety of reasons, the heart of the opinion was that the law impermissibly targeted a speaker (drug companies), speech content (marketing), and speech viewpoint (brand name prescription drugs are better than inexpensive generic alternatives).[175] All of these considerations play a significant role in the jurisprudence concerning regulations of core speech, but, until now, not commercial speech.[176]

In its decision, the majority expressly incorporated a variety of "core" speech doctrines into a commercial speech analysis for the first time, focusing on the law's discrimination on the basis of content, speaker, and viewpoint.[177] This marked a clear departure from *Central Hudson*, which held that regulations of commercial speech, unlike other speech, may discriminate on the basis of content.[178] Indeed, regulations of economic activity typically target select speakers and are obviously content driven—a point the dissent in *Sorrell* drove home.[179] Although the Court held that the result would be the same under a "special commercial speech inquiry," its conclusion that the statute did not survive intermediate scrutiny was largely based on the law's discrimination against speech based on its content—which had never before been embraced by a majority on the Court.[180]

172. *Sorrell*, 131 S. Ct. 2653 at 2659.

173. *Id.*

174. *Id.* at 2661 (discussing legislative findings).

175. *Id.* at 2663–64.

176. *See generally* Pomeranz, *supra* note 21, at 423–25.

177. *Id.*

178. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 n.6 (1980) (noting two features of commercial speech that regulate its content: commercial speakers have extensive knowledge of markets and products, and commercial speech is not "susceptible to being crushed by overbroad regulation.").

179. *Sorrell*, 131 S. Ct. at 2677–78 (Breyer, J., dissenting) ("Regulatory programs necessarily draw distinctions on the basis of content . . . . Nor, in the context of a regulatory program, is it unusual for particular rules to be 'speaker-based' affecting only a class of entities, namely, the regulated firms.").

180. *Id.* at 2667–72.

C. Applying Commercial Speech Doctrine to the NOP

Even before *Sorrell*, commercial speech doctrine was probably capable of dismantling the NOP's labeling regime. The Ninth Circuit's decision in *Ass'n of National Advertisers* represents the most favorable decision analyzing a regulatory regime similar to the NOP.[181] However, the statute at issue in that case merely placed substantive restrictions on when certain marketing terms could be used.[182] It did not require companies wishing to use those terms to pay for (and undergo) an administratively burdensome certification process before using the terms.[183] Because two obvious regulatory alternatives exist that would not restrict a farmer's right to truthfully indicate the use of organic production practices, the NOP labeling regime would likely fail one or both of the final two prongs of *Central Hudson* as it has been applied most recently. First, the NOP regulations could specify that the official USDA organic seal is reserved for only those foods that meet the NOP regulatory requirements, but that other foods may use the term organic without the USDA seal so long as they use the same organic production practices required by the regulations. This would still distinguish products of USDA certified organic operations from other products claiming to be organic. Second, the NOP regulations could simply require that a disclaimer accompany any organic representation made by an uncertified operation so that the consumer would know that the product was not USDA certified.

By enacting a much broader regulation than those two alternatives, the federal government monopolized the use of any and all organic food representations and avoided any potential for consumer confusion regarding the meaning of any organic advertising claim. There is now only one definition—organic products are only those products that have been produced consistent with the NOP regulations by a certified operation.[184] In

181. In *Ass'n of National Advertisers*, the Ninth Circuit applied the third and fourth prongs of *Central Hudson* in a manner very deferential to the state's regulatory interest, and it rejected arguments that there were alternative regulatory approaches, such as a disclaimer, that could advance the state's interest with less of a burden on speech rights. Ass'n of Nat'l Advertisers, Inc., v. Lungren, 44 F.3d 726 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995); *see also supra* Part III.A.

182. *Ass'n of National Advertisers, 44 F.3d 726* at 727.

183. *Id.*

184. 7 U.S.C. §§ 6504–6505 (2012).

exchange for absolute clarity, the government has sacrificed the speech rights of uncertified producers like our hypothetical farmer, the owner of Vegetable Heaven. Whether that tradeoff would pass constitutional muster, and whether a more watered down labeling regime (using one or both of the alternative regulatory approaches discussed above) would still be capable of driving the successful growth of the NOP, is an open question.

Empirical economic research to assess whether the alternative regulatory regimes would work as effectively as the current NOP program might be valuable, particularly if the Supreme Court were to endorse looking to the evidentiary record to determine whether a government restriction on commercial speech survives judicial scrutiny. Because the courts seem more and more inclined to find that effective alternative regulatory approaches exist without any empirical inquiry, an exploration of the economic evidence in support of competing regulatory regimes would likely be academic today. Even before *Sorrell*, the courts were largely unwilling to explore evidence-based arguments that a particular regulatory regime directly advanced the government's interests and was reasonably restrictive under *Central Hudson*.[185] Nonetheless, the government (and any interested private parties) would be well-served to conduct such research to preserve any arguments should the Court ultimately qualify *Sorrell* at some future point and move away from judicial pronouncements concerning the effectiveness of alternative regulatory regimes without regard to an evidentiary record.

However, if the Court continues down the path it announced in *Sorrell*, there is little hope that the NOP's labeling regime could survive a First Amendment challenge. First, the NOP directly regulates speech in order to influence the conduct of farmers (and food processors and manufacturers).[186] Specifically, the NOP program expressly prohibits the use of certain words, such as organic, except under certain circumstances—a far more speech-restrictive regulatory regime than the Vermont law in *Sorrell*.[187] That law proscribed the sale and use of information to drug companies to determine what to say in marketing their products,

185. *See generally* Pomeranz, *supra* note 21, at 428–31.

186. *See supra* Part II.A.

187. *Compare* 7 U.S.C. §§ 6504–6505, *with* VT. STAT. ANN. tit.18, § 4631 (2010), *invalidated by* Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2010).

which has a far more incidental effect on speech than an outright ban on specific words.[188] Second, the NOP regulations discriminate on the basis of content and speaker. The regulations only prohibit the use of the term "organic" when marketing food products (content) and only target those persons who sell such products (speaker).[189] As the dissent in *Sorrell* indicated, it is difficult to imagine any regulation of commercial speech that would not discriminate along these lines,[190] which may yet cause the Court to qualify *Sorrell* in subsequent decisions.

What is most puzzling about *Sorrell* is that the Court had already been quite successful in transforming the *Central Hudson* test into a much more demanding inquiry than when it was first adopted. The majority could readily have obtained the same result, as it expressly noted in *Sorrell*, using the traditional commercial speech inquiry.[191] The *Central Hudson* test is vague and flexible enough to invalidate many commercial speech regulations, regardless of the empirical evidence in support of the regulation. What seems to have driven the majority is the ideological interest in elevating commercial speech to enjoy the same privileged constitutional status as core political and religious speech.

If *Sorrell* does reflect a new standard, the commercial speech doctrine may lose all flexibility. This could have undesirable consequences. Armed with *Sorrell*, any disgruntled commercial actor may be well-positioned to seek invalidation of the most reasonable and empirically justifiable regulatory regimes if the regime entails even the slightest impact on speech. Lower courts, in turn, may feel that their hands are tied, and that they must apply heightened scrutiny to commercial speech regulations.[192] As a

188. VT. STAT. ANN. tit.18, § 4631.

189. *See supra* Part II.A.

190. *Sorrell*, 131 S.Ct. at 2677–88 (Breyer, J., dissenting).

191. *Id.* at 2667.

192. *See, e.g.*, Valle de Sol v. Whiting Inc., 709 F.3d 808 (9th Cir. 2013) (finding regulation prohibiting day laborer work solicitation discriminated on the basis of content in affirming preliminary injunction granted by district court); Wollschlaeger v. Farmer, 880 F. Supp. 2d 1251 (S.D. Fla. 2012) (applying strict scrutiny based on *Sorrell*); Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester, 851 F. Supp. 2d 311 (D. Mass. 2012) (finding city ban on outdoor tobacco advertising discriminated against non-misleading commercial speech in contravention of *Sorrell*). *But see* Retail Digital Network, LLC v. Appelsmith, Case No. CV 11–9065 CBM (PJWx), 2013 WL 2139524, at *5 (C.D. Cal. May 13, 2013) (rejecting argument that *Sorrell* "requires heightened scrutiny review of laws burdening non-misleading commercial speech . . . amending the *Central Hudson* test."); King v. Gen. Info. Servs. Inc., 903 F. Supp. 2d 303, 308 (E.D. Pa. 2012); (rejecting argument "that *Sorrell* marks a substantial

result, legislators and administrative agencies may be forced to adopt more burdensome regulations that avoid all regulation of speech but more directly and significantly restrict economic activity.

More restrictive regulations on agricultural practices—which do not impact speech rights—would no doubt be far less popular with industry than the NOP. Indeed, they would likely be so unpopular they could not be enacted. Accordingly, if a challenge to the NOP were successful, there might be no politically feasible government mechanism to promote organic agricultural practices.

That said, it may take a challenge to a regulation that is popular with both industry and consumers, like that of the NOP, for the Court to even consider qualifying *Sorrell*. The Court may need industry to explain that commercial speech regulations sometimes create valuable business opportunities and support competition, and that the government should be free to enact such regulations if an appropriate balance can be struck between speech rights and important government objectives, particularly if supported by empirical evidence. However, such a case might threaten a popular regulation if the Court remained convinced that there is no meaningful distinction between core speech and truthful commercial speech. If the Court adheres to this new approach, *Lochner* may indeed resurrect itself under the guise of the First Amendment, rendering numerous regulatory programs that previously seemed entirely rational (and constitutionally valid) vulnerable to judicial invalidation.

But it is not yet clear that *Sorrell* spells the demise of commercial speech regulations. The decision is sufficiently vague that it can be read as leaving *Central Hudson* intact, as some lower courts have

shift in the protection afforded to commercial speech and, consequently, overhauls the well-embedded *Central Hudson* test [because] [i]f the Court wished to disrupt the long-established commercial speech doctrine as applying intermediate scrutiny, it would have expressly done so."); Demarest v. City of Leavenworth, 876 F. Supp. 2d 1186, 1195 (E.D. Wash. 2012) (rejecting argument for heightened scrutiny based on *Sorrell* because "it is unlikely that the Supreme Court would directly overturn a prior holding and drastically alter the level of scrutiny afforded under a foundational constitutional analysis without a thorough and comprehensive discussion heralding such an elemental change to the long standing and well-established constitutional framework."); Fleminger, Inc. v. U.S. Dep't of Health and Human Servs., 854 F. Supp. 2d 192, 197 (D. Conn. 2012) ("The decision in *Sorrell* did not impact the traditional framework for evaluating commercial speech under the First Amendment.").

held.[193] Alternative readings are also possible. For example, *Sorrell* could be limited to cases in which the government is targeting a particular viewpoint with which it disagrees.[194] Indeed, *Central Hudson* itself invalidated a New York state agency's order that prohibited a utility from using advertisements that promoted the use of electricity, a message with which the conservation-minded regulator disagreed.[195] There remains sufficient ambiguity in the jurisprudence that the Court could still embrace *Central Hudson* or declare it overruled by *Sorrell*. Until the Court provides greater clarity, the lower courts will likely struggle to apply *Sorrell* even more so than they have with the vague and oft-criticized *Central Hudson* test.

## IV. CONCLUSION

The National Organic Program has produced considerable environmental and economic benefits without forcing any changes in agricultural practices on farmers. The NOP not only ensures that agricultural producers compete in the organic market using a uniform, verified standard, but also incentivizes other producers to convert to organic farming practices resulting in significant environmental benefits. It is difficult to imagine an alternative regulatory regime that would be both equally effective and politically feasible. Because consumers lack the ability to easily investigate and verify the claims on food labels, an unregulated organic market would likely constitute a significant setback to both consumers seeking to purchase organic food and producers seeking to capture a price premium for organic products. As evidenced by the NOP, the government can promote its objectives with a carrot in lieu of a stick by regulating speech in a commercial context. Such valuable regulatory tools are in jeopardy because of the apparent shift toward heightened scrutiny of commercial speech regulations under *Sorrell*. Eliminating the flexibility of the *Central Hudson* test could unreasonably limit government regulatory

193. *See supra* note 192 (collecting cases).

194. *See, e.g.*, *King*, 903 F. Supp. 2d at 308–09 (finding *Sorrell* is "particular to [its] facts" and that it would apply only to claims that the government is "restraining a certain form of speech communicated by a certain speaker solely because of the State's disagreement with it.").

195. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 558–60 (1980).

regimes even though commercial speech has never previously been considered worthy of full First Amendment protection.

Accordingly, before the Court embraces heightened scrutiny of commercial speech regulations, it should revisit whether *Central Hudson* must be abandoned in order to adequately protect the speech rights of commercial actors. Based on the relative paucity of commercial speech restrictions that have survived *Central Hudson* in recent years, there is little evidence that the jurisprudence is not capable of adequately balancing the competing values at issue. An ideologically driven shift in the jurisprudence could have unforeseen and undesirable consequences. As unsatisfying as *Central Hudson* may be from a purely doctrinal perspective, its flexibility preserves the government's ability to regulate speech that all Supreme Court justices agree is, at least in some circumstances, worthy of less protection than core political and religious speech.