COMMENT

Sobriety Test: The Court Walks the *Central Hudson* Line Once Again in *44 Liquormart*, but Passes on a New First Amendment Review

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I. INTRODUCTION

If one were to consider the intermediate-level scrutiny given commercial speech as a straight line, the Supreme Court has barely been able to walk it without tripping over its precedents during the past fifteen years. The Court's paper trail at best indicates an inconsistent application of the relevant standard; since the Court adopted the *Central Hudson*[1] test in 1980, its decisions have been anything but predictable. In its 1996 Term, the Court had an opportunity to steady itself and discard *Central Hudson* in favor of an absolute, less-manipulable test, similar to that used for noncommercial speech: content-based regulations on commercial speech must pass strict scrutiny muster. Unfortunately, in *44 Liquormart, Inc. v. Rhode Island*,[2] while the Court unanimously supported First Amendment protection for commercial speech, no majority emerged to lead the Court from its shakiness.

The current commercial speech doctrine is of recent origin. Political speech and speech relating to individual ideas or beliefs come under the protective wing of the First Amendment in most instances. This "core" speech is fully protected by the Constitution, and although the Court reviews government regulation of core speech through a strict scrutiny analysis, this review has been coined "strict in theory and fatal in fact" because the government regulation seldom survives.[3] Other types of speech are "categorized," resulting in lower levels of scrutiny. Some speech categories, like obscenity, receive no protection. Others, like indecent speech and commercial speech, receive some protection, but not the full force of the First Amendment.

There are several reasons intermediate scrutiny is inappropriate to commercial speech. Doctrinally, commercial speech is in isolation. While the Court generally strikes down content-based restrictions directed at specific messages, the commercial speech doctrine allows just that. Also, the *Central Hudson* test is too complicated and manipulable to provide any certainty of protection. The test focuses on the final two prongs, a reasonableness prong and a limitation prong, both subjective in the eyes of any court. Finally, as society becomes more commercialized, the distinction between commercial and noncommercial becomes obscure. Today's political statement is tomorrow's Web-page endorsement. The nature of

1. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

2. *44 Liquormart*, 116 S. Ct. 1495 (1996).

3. Gerald Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court*, 86 HARV. L. REV. 1, 8 (1972).

speech is one of multiple meanings, and it would be contrary to the intent of the First Amendment to reduce speech to its lowest common denominator.

The *44 Liquormart* case offered the Court a perfect opportunity to revise its doctrine. The conflict involved pure commercial speech of an activity not protected by the Constitution, which eliminated one distinguishing feature of the commercial speech doctrine. The regulation totally banned certain speech, which offered the Court more leeway than past cases involving only partial bans. Finally, the state's purpose was poorly supported by the evidence presented at the district court, and instead relied mainly on unsupported beliefs relating advertising and consumption. While *44 Liquormart* provided the Court an easy analysis under *Central Hudson*, the Court's decision leaves open the doors on the periphery, doors of which the Court had knowledge and precedential force to close. The commercial speech doctrine remains on the line, having failed to reach strict scrutiny solidity.

This Comment discusses the history of the commercial speech doctrine and the Court's decision in *44 Liquormart*. It analyzes the Court's approaches in this case and suggests alternatives the Supreme Court should and could have applied.[4] This Comment then concludes by discussing the decision's effect on the Federal Communications Commission (FCC or Commission) in the broadcast media.

II. BACKGROUND OF THE COMMERCIAL SPEECH DOCTRINE

A. *The Early Doctrine*

The Court first considered its commercial speech doctrine in *Valentine v. Chrestensen*.[5] Chrestensen had purchased a submarine and attempted to capitalize on the public interest in the war effort by docking the sub at Battery Park in New York City. He then distributed a handbill advertising this attraction. City officials prevented Chrestensen from remaining in Battery Park and also informed him of a city ordinance prohibiting the distribution of commercial handbills in public places. The ordinance did permit individuals to distribute leaflets as a form of public

4. For purposes of this Comment, commercial speech is truthful and nonmisleading, and concerns lawful activity. Therefore, tobacco advertising restrictions will not be discussed in detail, as the Federal Trade Commission regulates this field under its jurisdiction for inherently dangerous products. This Comment also does not discuss the related question of what constitutes commercial speech. On this issue, see Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993).

5. *Valentine*, 316 U.S. 52 (1942).

protest. Chrestensen, after relocating his submarine, distributed a new, double-sided handbill advertising the submarine on one side and protesting the official's denial of permission to dock it at Battery Park.[6] Chrestensen was convicted of violating the city ordinance. The Court reversed the Second Circuit and rejected Chrestensen's First Amendment argument. Justice Roberts, in his majority opinion, simply stated: "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."[7]

The Court must have developed this clarity only several weeks after its decision in *Chaplinsky v. New Hampshire*.[8] In *Chaplinsky*, the Court was "certain" that there were "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[9] The Court only mentioned "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[10] The exclusion of commercial speech in this list is important in that it characterizes the Court's view, or rather its overlook, of typical First Amendment speech; commercial speech was not even considered "speech" before the Court had reason to consider the question.

More than thirty years later, the Court brought commercial speech back under the protective wing of the First Amendment, but distinguished the value of commercial speech from that of core political speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[11] the Court reviewed a situation in which the state had banned pharmacies from advertising prices of prescription drugs to consumers, based on an interest in upholding the professionalism of licensed pharmacists. The Court held that this interest did not outweigh the consumer interest in the "free flow of commercial information."[12] The Court noted that the

6. *Id.* at 52-53.

7. *Id.* at 54. The Court considered that Chrestensen's "political protest" on the alternate side of the leaflet was merely an attempt to circumvent the city ordinance. *Id.* at 55.

8. *Chaplinsky*, 315 U.S. 568 (1942).

9. *Id.* at 571-72.

10. *Id.* at 572.

11. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). This case followed on the heels of the Court's decision in *Bigelow v. Virginia*, 421 U.S. 809 (1975), in which the Court struck down an advertising ban on out-of-state abortions. *Virginia Citizens Consumer Council* broadened this holding by extending First Amendment protection to activities which are not constitutionally protected. *Bigelow* has since been reaffirmed in *Carey v. Population Services International*, 431 U.S. 678 (1977), and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

12. *Virginia Citizens Consumer Council*, 425 U.S. at 763.

"consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[13] However, Justice Blackmun indicated that commercial speech would receive "a different degree of protection . . . to insure that the flow of truthful and legitimate commercial information is unimpaired."[14] He noted that commercial speech differed in two ways from noncommercial speech: first, that commercial speech is more "objective" than other types of speech, in that the speaker is more likely to know "the truth" about the subject of the speech than anyone else; and second, that commercial speech is "more durable," since economic incentives make it more likely to find a way into the information marketplace.[15] Despite these differences, the Court's new approach toward commercial speech was dramatically different than that under *Valentine*.

B. The New Commercial Speech Doctrine: Central Hudson

The Court "quantified" the commercial speech doctrine in *Central Hudson*.[16] At issue in *Central Hudson* was the New York Commission's total prohibition on promotional advertising placed upon a utility company. The Commission wanted to prevent advertising which urged consumers not to conserve energy. The Court established a four-part test to determine the validity of a regulation restricting commercial speech. First, the commercial speech must be truthful and not misleading. Second, the government must have a substantial interest in regulating the commercial speech. Third, the restriction must directly advance the government's asserted interest. Finally, the restriction should be no more extensive than necessary to achieve the interest.[17]

The Court found that while the state had a substantial interest in conserving resources, and that restricting advertising would advance that interest, the total prohibition the Commission placed on Central Hudson was more extensive than necessary. The prohibition would prevent Central Hudson from promoting products that would increase consumer efficiency or alternative products that would not increase inefficiency. The Commission had not demonstrated that alternatives to a total prohibition would be ineffective.[18]

While the case was a victory for the speech interest, the concurring

13. *Id.*
14. *Id.* at 771-72 n.24.
15. *Id.*
16. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n., 447 U.S. 557 (1980).
17. *Id.* at 566.
18. *Id.* at 570.

opinions by Blackmun and Stevens expressed concern that the test would allow too much regulation of truthful advertising. Both Justices argued that the state could not proscribe such communication without a clear and present danger that unlawful activity would occur. They stressed that legislatures should regulate activities, not the speech regarding those activities.[19]

The Court, in the commercial speech cases following *Central Hudson,* did not live up to the expectations many had of the intermediate scrutiny afforded in *Central Hudson*. In *Metromedia, Inc. v. City of San Diego*,[20] the Court struck down an ordinance restricting billboards containing commercial and noncommercial speech. The plurality and dissent clearly indicated, however, that an ordinance banning commercial billboards would be constitutional.[21] The problem in *Metromedia* was that too much noncommercial speech was also restricted. Applying the *Central Hudson* test, the Court found that the ban, applied to commercial advertising, met the first, second, and fourth prongs of the test. The major question the Court had was whether the ban "materially advanced" the alleged governmental interests in aesthetics and traffic safety. In agreeing that the ban also passed this prong of the test, the Court applied only a deferential analysis.[22] This deference would continue to resurface in future applications of the *Central Hudson* test.

The commercial speech interest fared no better in the Court's next application of *Central Hudson*. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[23] Chief Justice Rehnquist wrote the majority opinion holding that a ban on advertising casinos to residents did not unconstitutionally infringe on the First Amendment. The Court deferred heavily to the legislative determination that excess gambling would be detrimental to the residents' health, safety, and welfare, and the legislative determination that banning advertising would reduce those harms.[24] The

19. *Id.* at 573 (Blackmun, J., concurring, Brennan, J., joining); *Id.* at 579 (Stevens, J., concurring, Brennan, J., joining). Justice Rehnquist dissented, as he did in *Virginia Citizens Consumer Council*, arguing that commercial speech was undeserving of extensive First Amendment protection; he believed that the four-prong test elevated commercial speech to the same level of protection as core political speech. He also believed that the test returned judicial analysis to the *Lochner* era. *Id.* at 589. Commentators suggest that Rehnquist's later adoption of the *Central Hudson* test allowed him to undermine much protection of commercial speech. *See* Albert P. Mauro, Jr., Comment, *Commercial Speech After* Posadas *and* Fox*: A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931, 1944-58 (1992).

20. *Metromedia*, 453 U.S. 490 (1981).

21. *Id.* at 512, 553.

22. *Id.* at 508-12.

23. *Posadas*, 478 U.S. 328 (1986).

24. *Id.* at 341.

majority was similarly deferential in applying the fourth prong of the test—that the regulation be no more extensive than necessary.[25] Perhaps even more disturbing than the rational basis-type scrutiny was the Chief Justice's enunciation of a broader limit on First Amendment protection for commercial speech. He stated:

> [T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . . It would surely be a Pyrrhic victory for casino owners . . . to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity . . . .[26]

While the greater-includes-the-lesser argument has found its way into subsequent opinions, the Court has only recited it after going through the motions of the *Central Hudson* test.

The Court continued its deferential analysis in *Board of Trustees of State University of New York v. Fox*.[27] Here, the Court upheld a university's ban of commercial speech occurring on campus. The challengers to this ban had attempted to sell Tupperware-like goods to students living in the campus dormitories. After concluding that the speech in question satisfied the first prong and that the state had a substantial interest in promoting education, protecting student security, and preventing commercial exploitation, the case turned on the fit between the means and the interest under the fourth prong of the test. Justice Scalia indicated that this fit does not have to meet a least-restrictive-means standard, but rather it only needs to be reasonable and narrowly tailored to meet the state's objective.[28]

The Court rejuvenated its *Central Hudson* analysis in *City of Cincinnati v. Discovery Network, Inc.*[29] The Court struck down a city ordinance

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25. *Id.* at 343.

26. *Id.* at 345-46. Taken literally, Chief Justice Rehnquist's approach would allow states to ban all commercial speech for all products not constitutionally protected, since *Carolene Products Co. v. United States*, 323 U.S. 18 (1944), and *Williamson v. Lee Optical*, 348 U.S. 483 (1955), hold that the Court will defer to the legislature in economic matters. Of course, Rehnquist disregards an important point; although almost any product could be banned by legislatures if they are not protected, commercial speech about these products is protected by the First Amendment. The only thing "strange" about such a doctrine is that Rehnquist did not admit that it would be constitutionally correct. *See also Posadas*, 478 U.S. at 355 (Brennan, J., dissenting).

27. *Fox*, 492 U.S. 469 (1989).

28. *Id.* at 479-81.

29. *Discovery Network*, 507 U.S. 410 (1993).

which barred public property newsracks containing commercial handbills but not newsracks containing ordinary newspapers. Cincinnati claimed that it had a legitimate interest in decreasing sidewalk impediments and the unattractiveness associated with newsracks. It also feared that a total ban would be unconstitutional, and therefore limited the ban to the lesser-protected commercial speech.[30] Justice Stevens, writing for a six-to-three majority, rejected the discrimination against commercial speech. Applying the last two prongs of the *Central Hudson* test, the majority found that the "fit" between the city's interests and the regulation were not close.[31] In reaching this conclusion, the Court stated: "The benefit to be derived from the removal of 62 newsracks while about 1,500-2,000 remain in place was considered 'minute' by the District Court and 'paltry' by the Court of Appeals. We share their evaluation of the 'fit' between the city's goal and its method of achieving it."[32] The Court rejected the city's argument that the ordinance was a content-neutral restriction advancing the city's interests in safety and aesthetics, because "the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech."[33]

This stricter application of *Central Hudson* continued in *Edenfield v. Fane*.[34] In *Edenfield*, the Court struck down a Florida ban on in-person solicitations by certified public accountants. Florida asserted that it had a substantial interest in protecting its citizens from fraud and protecting the standards of the accounting profession. The eight-to-one majority did not believe the ban advanced the state's interests "in any direct and material way."[35] The state could not produce any empirical evidence that indicated the link between the state's interests and its regulation.

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30. *Id.* at 415. In his dissent, Chief Justice Rehnquist argued that the majority decision placed municipalities across the country in a double bind. He stated:

> One would have thought that the city, perhaps even following the teachings of our commercial speech jurisprudence, could have decided to place the burden of its regulatory scheme on less protected speech (*i.e.* commercial handbills) without running afoul of the First Amendment. Today's decision, though, places the city in the position of having to decide between restricting more speech—fully protected speech—and allowing the proliferation of newsracks on its street corners to continue unabated. It scarcely seems logical that the First Amendment compels such a result. . . . "[L]ittle can be gained in the area of constitutional law, and much lost in the process of democratic decisionmaking, by allowing individual judges in city after city to second-guess . . . legislative . . . determinations" on such matters of esthetics.

Id. at 445 (quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 570 (1981) (Rehnquist, J., dissenting)).

31. *Discovery Network*, 507 U.S. at 417.

32. *Id.* at 417-18.

33. *Id.* at 429.

34. *Edenfield*, 507 U.S. 761 (1993).

35. *Id.* at 771.

Only two months later, the Court reviewed a federal ban on lottery advertisements in nonlottery states and returned to a more *Posadas*-type interpretation of the *Central Hudson* test. In *United States v. Edge Broadcasting Co.*,[36] the seven-to-one majority concluded that the federal regulation of a "vice" such as gambling satisfied the *Central Hudson* requirements. After referring to the greater-includes-the-lesser argument of *Posadas*,[37] the Court granted deference to Congress in its analysis of the third prong of *Central Hudson*. Applying the fourth prong of the test, the Court determined that Congress's solution was reasonable. The majority rejected Appellant Edge's argument that the statute was ineffective because the North Carolina residents still received Virginia lottery advertisements from other sources.[38]

Nearly two years later, the Court rejected the "vice" argument in allowing regulation of commercial speech. In *Rubin v. Coors Brewing Co.*,[39] the Court ruled that a federal regulation on beer labels did not meet *Central Hudson* scrutiny. A unanimous Court ruled that the regulation did not directly and materially advance the government's interest.[40] In fact, beer manufacturers could circumvent the regulation merely by using descriptive terms to indicate alcohol content, rather than numerical terms.[41] The Court indicated that even if the government established the "direct advancement" prong, the regulation was not "sufficiently tailored to its goal."[42] Other options existed which would not infringe as much on the commercial speech interest.

The Court's most recent application of *Central Hudson* was its decision in *Florida Bar v. Went For It, Inc.*,[43] involving lawyer solicitation. The Court, in a five-to-four decision written by Justice O'Connor, upheld the regulation. After agreeing that the Florida Bar's interest in protecting accident victims' privacy was substantial, the majority considered whether a thirty-day ban on direct solicitation advanced this interest in a direct manner. Unlike the case in *Edenfield*, the majority found that the 106 page study of lawyer solicitation sufficiently established the invasions of privacy the Florida Bar sought to regulate. The Court also found that because the Bar's interests were individual privacy and the upholding of the legal profession, the public could not avoid the harm merely by "'averting their

36. *Edge*, 509 U.S. 418 (1993).
37. *Id.* at 426.
38. *Id.* at 432-33.
39. *Coors Brewing*, 514 U.S. 476 (1995).
40. *Id.* at 488.
41. *Id.* at 488-89.
42. *Id.* at 490.
43. *Went For It*, 515 U.S. 618 (1995).

eyes.'"[44] The majority then moved on to the fourth prong of *Central Hudson* and gave deference to the State Bar's determinations. The dissent argued that even if the Bar's interests were substantial, the ban did not assert the interest in "a direct and material way."[45] Additionally, the dissent argued that the study was "noteworthy for its incompetence" and was not sufficient to show "the reality of the asserted harm."[46] Nor did the dissent believe that the ban met the fourth prong of *Central Hudson*.

III. *44 LIQUORMART, INC. V. RHODE ISLAND*

Petitioner 44 Liquormart, Inc. was a Rhode Island corporation and a licensed retail alcohol dealer.[47] In December 1991, 44 Liquormart placed an advertisement in the *Providence Journal-Bulletin* entitled "Thanksgiving Harvest." The ad included the names and prices of various snacks, nonalcoholic drinks, and cigarettes. In addition, the ad displayed bottles of several brands of liquor; by these, the word "WOW!" appeared in a "burst form."[48]

On December 17, 1991, Kate F. Racine, the Liquor Control Administrator, initiated a hearing to determine whether 44 Liquormart had violated Rhode Island General Laws section 3-8-7, which proscribes the off-premises advertising of alcoholic beverage prices. This has been interpreted to include descriptive terms such as "wow."[49] Section 3-8-7 does not proscribe in-store displays or price tags.[50] Racine found that 44 Liquormart

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44. *Id.* at 630 (Kennedy, J., dissenting) (quoting Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 72 (1983) (quoting Cohen v. California, 403 U.S. 15, 21 (1971))).

45. *Id.* at 640 (citing Edenfield v. Fane, 507 U.S. 761, 771 (1993)).

46. *Id.*

47. *44 Liquormart*, 39 F.3d 5 (1st Cir. 1994), *rev'g* 44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993), *rev'd*, 116 S. Ct. 1495 (1996).

48. 44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543, 545 (D.R.I. 1993).

49. R.I. GEN. LAWS § 3-8-7 (1994).

50. *Id.* The section provides:

> No manufacturer, wholesaler, or shipper from without this state and no holder of a license issued under the provisions of this title and chapter shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordials, wine or distilled liquor offered for sale in this state; provided, however, that the provisions of this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises in accordance with rules and regulations of the department.

Id. In addition, "[r]egulation 32 of the Rules and Regulations of the Liquor Control Administrator was enacted to 'enforce' the provisions of § 3-8-7." *44 Liquor Mart*, 829 F. Supp. at 544 n.3. Regulation 32 proscribes placards and signs which make "reference to the price" of alcoholic beverages and which are visible from the exterior of a liquor store. Liquor Control Admin. Reg. 32; *see also* R.I. GEN. LAWS § 3-8-8.1 (1994) (proscribing newspapers from printing advertisements which make "reference to the price of any alcoholic beverage").

had violated section 3-8-7 by placing the ad, and fined the store four hundred dollars.

Instead of appealing the decision through administrative channels,[51] 44 Liquormart filed suit in federal district court, alleging that section 3-8-7 and related laws unconstitutionally restricted its First Amendment rights. The district court found in favor of 44 Liquormart, but the First Circuit reversed.[52] The Supreme Court granted certiorari limited to the question of whether Rhode Island may, in accordance with the First Amendment, "prohibit truthful, non-misleading price advertising regarding alcoholic beverages."[53]

Justice Stevens delivered an eight-part opinion, which garnered the majority for Parts I, II, VII, and VIII. Unfortunately, the real substance of Justice Stevens's opinion was in Parts III-VI, and this opinion was joined by Justices Ginsburg and Kennedy, Souter (for Parts III and V), and Thomas (for Part VI).[54] Justice O'Connor concurred in the judgment, and her opinion was joined by Chief Justice Rehnquist, Justice Souter, and Justice Breyer. Justices Thomas and Scalia also had separate concurrences.[55]

A. *The Court's Decisions*

Both parties stipulated that price advertising is truthful and nonmisleading. The parties further agreed that Rhode Island has a significant interest in "regulating the sale of alcoholic beverages."[56] This case would then seemingly have turned on the application of the third and fourth prongs of the *Central Hudson* test, and a unanimous Court found that the Rhode Island regulation unconstitutionally infringed petitioner's First Amendment rights. However, Justices Stevens and O'Connor came to that result from two distinct approaches.

1. Justice Stevens's Opinion

Justice Stevens began Part IV of his opinion by differentiating between a complete ban on the dissemination of truthful information and a

51. *See* R.I. GEN. LAWS § 3-3-5 (1994) (allowing parties to appeal the Liquor Control Administrator's decision to the Liquor Control Hearing Board).

52. *44 Liquormart*, 39 F.3d 5.

53. *44 Liquormart*, 514 U.S. 1095 (1995). Although petitioner People's Super Liquor Stores, Inc. had additionally argued in district court that § 3-8-8.1 also violated the Commerce Clause, it focused solely on the First Amendment argument during the appeal. The First Circuit considered the argument waived. *44 Liquormart*, 39 F.3d at 9.

54. *44 Liquormart*, 116 S. Ct. 1495, 1501 (1996).

55. *Id.*

56. *44 Liquormart*, 39 F.3d at 6-7.

partial ban on such information.[57] Rather than starting his analysis with *Central Hudson*, Stevens described the Court's earlier decisions on commercial speech, stating that cases like *Bigelow* and *Virginia Pharmacy* had rejected broad-based bans on advertisements.[58] He noted that the Court had always looked upon complete bans with more scrutiny, and concluded that "when a State entirely prohibits the dissemination of [commercial speech], there is far less reason to depart from the rigorous review that the First Amendment generally demands."[59]

Even in *Central Hudson*, Stevens noted that the Court had acknowledged "special concerns" for "'regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy.'"[60] Stevens also articulated a more stringent standard of review for when the state purpose is not related to preserving the fair bargaining process, but instead is based on a belief that the public consumer will act "'irrationally' to the truth."[61]

Stevens asserted that with these two conditions met—a complete ban and a purpose not related to consumer protection—*Central Hudson* requires, and has always required, the Court to view this kind of state regulation with "'special care.'"[62] At least for complete bans on truthful commercial speech, Stevens's "special concern" prompted using an analysis heightened above *Central Hudson*; Stevens would apply a standard akin to strict scrutiny, and as such, the regulation fails.

However, possibly sensing that the rest of the Court was not willing to go so far, Stevens also applied *Central Hudson* to the Rhode Island ban and found that the ban failed to meet the third and fourth prongs of the test.[63] First, while Stevens gave deference to the state's position that a ban would tend to reduce alcohol consumption, he found that the ban did not advance this interest "'to a material degree.'"[64] Stevens regarded the con-

57. *44 Liquormart*, 116 S. Ct. at 1507.

58. *Id.* at 1505-07. At the same time, Stevens differentiated commercial speech concerning illegal activity, which the First Amendment does not protect. *Id.* at 1505 n.7 (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)).

59. *Id.* at 1507.

60. *Id.* at 1506 (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980)).

61. *Id.* at 1507-08 (quoting Linmark Assoc. v. Willingboro, 431 U.S. 85, 96 (1977)). *Linmark* involved a ban against "For Sale" signs, which the Court found unconstitutional because it proscribed too many opportunities for communication. The city's purpose in creating the ban was to prevent "white flight" from a neighborhood increasingly populated by minorities.

62. *Id.* at 1508 (quoting Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 477 U.S. at 557, 566 n.9 (1980)).

63. *Id.* at 1508–10.

64. *Id.* at 1509 (quoting Edenfield v. Fane, 507 U.S. 761, 771 (1993)).

nection between the asserted interest of "temperance" and the ban "speculative."[65] He also found that the state failed to satisfy the fourth prong, because other nonspeech options existed that would have achieved the state's goal.[66]

While Stevens and several other Justices seemed willing to apply strict scrutiny to regulations on truthful advertising, a majority seemed content to continue down the path *Central Hudson* created. The strongest reading drawn from *44 Liquormart* may be that as to complete bans on commercial speech, the Court will strictly apply *Central Hudson* so that in those cases, the analysis resembles strict scrutiny.

2. Justice O'Connor's Concurring Opinion

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Souter and Breyer, concurred in declaring the Rhode Island statute unconstitutional. Unlike Stevens's position, the concurrence was content to apply *Central Hudson*; their application here was arguably more strict than the Court's application in previous cases. O'Connor focused only on the fourth prong of *Central Hudson*, ignoring the materiality aspect of the case.

O'Connor began by citing the Court's opinions in *Fox* and *Went For It* to indicate that the requisite fit under the fourth prong is that which is "reasonable."[67] In those cases, however, the First Amendment interest was outweighed by the government interest in regulating the commercial speech. Nevertheless, O'Connor stated that "[t]he fit between Rhode Island's method and this particular goal is not reasonable."[68] Is it really, if the Court is following *Fox* and *Went For It*? Is the Rhode Island legislature's belief that increasing search times, and hence the cost for alcohol, by not allowing price advertising that unreasonable against this backdrop? As a reminder, the Court in *Fox* found that prohibiting commercial speech reasonably fit with the Board's goal of preventing naive college students from buying inordinate amounts of Tupperware. Although O'Connor uses the word, the standard is something more than "reasonable."

The concurrence makes this clear by stepping into the shoes of a legislative body and declaring: "If the target is simply higher prices generally to discourage consumption, the regulation imposes too great, and unnecessary, a prohibition on speech in order to achieve it. The state has other

65. *Id.* at 1510.

66. *Id.*

67. *Id.* at 1521 (O'Connor, J., concurring) (citing Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) and Florida Bar v. Went For It, Inc., 515 U.S. 618, 632-33 (1995)).

68. *Id.* at 1521.

methods at its disposal . . . . [Including] '"establishing minimum prices and/or by increasing sales taxes on alcoholic beverages."'"[69] Rhode Island argued that *Posadas* supported the Court's acquiescence in cases involving the state's regulation of commercial speech of a "vice" activity, of which alcohol sales are, and when the prohibition on speech was designed to protect state residents.[70] O'Connor noted that the Court, subsequent to *Posadas*, has considered such regulations on speech with a "closer look" to ensure that the statute directly advances the state's interest (the third prong of *Central Hudson*) and is narrowly tailored.[71]

While the concurrence undoubtedly reached the correct result, its discussion of its reasoning is indicative that *Central Hudson* should be discarded. Justice Thomas, in his separate concurrence, wrote that "the Court's holding will in fact be quite sweeping if applied consistently in future cases."[72] But this is precisely the point: the Court does not, has not, and most likely will not apply *Central Hudson* consistently.

3. *Posadas* and the Greater-Includes-the-Lesser Argument

In *Posadas*, the majority concluded that the greater power to completely ban casino gambling necessarily included the lesser power to prohibit advertising the activity.[73] Rhode Island adopted this analysis here and argued that because it could ban the sale of alcohol altogether, it could also regulate price advertising. Stevens, joined by three Justices, rejected the analogy and the entire *Posadas* deferential approach. Stevens discounted the greater-includes-the-lesser "syllogism" as one mentioned in majority opinions when an alternate doctrinal theory explains the outcome.[74]

Stevens distinguished regulation of sales of goods and regulation of the information surrounding those goods, stating that this distinction was clearly "incompatible with the absolutist view" of the state's power to ban commercial speech due to its power to regulate conduct.[75] Although Stevens did not carry a majority, his strong language against the *Posadas*

69. *Id.* at 1521-22 (quoting 44 Liquormart v. Rhode Island, 39 F.3d (1st Cir. 1994) (quoting the State's expert witness)).

70. *Id.* at 1521 (citing Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 (1986)). Note that Rhode Island's reasoning is initially in error, as its statute prevented Rhode Island liquor retailers from advertising prices even in out-of-state media, contrary to *Posadas*.

71. *Id.*

72. *Id.* at 1519 (Thomas, J., concurring).

73. Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 (1986).

74. *44 Liquormart*, 116 S. Ct. at 1512; *see also supra* notes 23-26 and accompanying text.

75. *44 Liquormart*, 116 S. Ct. at 1512-13.

logic will likely dissuade future attempts to base regulation on its faulty logic.

Stevens also went on to discuss the "vice" argument Rhode Island made in attempting to validate its regulation. The Court in *Posadas* and *Edge Broadcasting* upheld commercial speech regulations involving "vice" activities.[76] However, in *Rubin v. Coors Brewing Co.*, the Court made it clear that similar to the greater-includes-the-lesser argument, the vice "exception" to typical commercial speech doctrine was subject to the regulation meeting the *Central Hudson* requirements; unless it did, there was no "exception."[77] Together with *Coors Brewing*, *44 Liquormart* clearly supports no special treatment for regulations involving legal but "socially harmful activities."

4. Consideration of the Twenty-First Amendment

Rhode Island also argued that its regulation was entitled to an additional presumption of validity based on the Twenty-First Amendment.[78] Because the Twenty-First Amendment grants states the exclusive power to regulate alcohol, Rhode Island believed that it also had the power to regulate the advertising of alcohol. It found support in *Queensgate Investment Co. v. Liquor Control Commission*[79] and *California v. LaRue*.[80] In *Queensgate*, the Court let stand an Ohio decision which found that the Twenty-First Amendment supported the State's position under *Central Hudson*. The Ohio Supreme Court applied this presumption to the state interest prong of the test.[81] The First Circuit applied *Queensgate Investment* in supporting the regulation.[82] The Court in *LaRue* upheld the regulation of nude

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76. *Posadas* involved casino gambling, while *Edge* concerned a neighboring state's lottery.

77. *Coors Brewing*, 514 U.S. 476, 482 n.2 (1995), *cited in 44 Liquormart*, 116 S. Ct. at 1512.

78. *44 Liquormart*, 116 S. Ct. at 1514. The amendment provides: "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

79. *Queensgate Inv.*, 433 N.E.2d 138 (Ohio), *cert. denied*, 459 U.S. 807 (1982).

80. *LaRue*, 409 U.S. 109 (1972).

81. *Queensgate Inv.*, 433 N.E.2d at 141.

82. 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 8 (1st Cir. 1994), *rev'g* 44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993), *rev'd*, 116 S. Ct. 1495 (1996). The Circuits have differed in applying *Queensgate Investment*. The Tenth Circuit, in *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691 (1984), found that the Twenty-First Amendment gave states greater power to regulate liquor advertising. However, the Fifth Circuit distinguished *Queensgate Investment*. Dunagin v. Oxford, 718 F.2d 738 (5th Cir. 1983).

dancing in bars licensed to serve alcohol. A majority held that the Twenty-First Amendment added a presumption of validity to the regulation. Again, the First Circuit adopted this reasoning in upholding the Rhode Island statute.

In reversing the First Circuit, the Court in *44 Liquormart* reversed itself. The majority stated that while it did not question its holding in *LaRue*, it no longer believed that the Twenty-First Amendment was necessary in deciding that case.[83] It found that the Twenty-First Amendment did not supersede other constitutional provisions such as the Supremacy Clause, the Establishment Clause, or the Equal Protection Clause.[84] Similarly, it now does not supersede the Free Expression Clause of the First Amendment.

Despite its clarification on this point, some questions remain. Considering the recent tobacco litigation and the concern over tobacco advertising, would the relation between the Commerce Clause and the First Amendment undergo the same analysis? With the Court striking down this type of paternalistic regulation of commercial speech, tobacco advertisement regulation seems difficult to distinguish. Perhaps federal regulation and the (possibly more dangerous) nature of tobacco would make the Court react differently.

IV. ALTERNATE ANALYSES—AWAY FROM *CENTRAL HUDSON*

A. *Categorical Approach: R.A.V. v. St. Paul*[85]

While the Court has found First Amendment protection over a wide range of "core" speech, it has also created categories of speech which receive less or no protection. Commercial speech is one such category.[86] Despite the loss of First Amendment protection for these categories, the Court has found unconstitutional content-based distinctions within such a category. In *R.A.V.*, the Court struck down a St. Paul, Minnesota ordinance which proscribed certain kinds of "hate speech."[87] The Court was unani-

83. *44 Liquormart*, 116 S. Ct. at 1514. The Court distinguished the regulation in *LaRue* as one concerning a type of speech in liquor establishments, not one involving speech concerning alcohol. *Id.*

84. *Id.* at 1514-15.

85. *R.A.V.*, 505 U.S. 377 (1992).

86. Application of the "clear and present danger" category perfected in *United States v. Brandenburg*, 395 U.S. 444 (1969), was given some consideration, but given the Court's abandonment of this doctrine and the difficulty in applying *Brandenburg* to commercial speech, a detailed discussion would not aid the analysis here.

87. The ordinance was aimed at punishing racially, sexually, or religiously discriminating speech that "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others." St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN. LEGIS. CODE § 292.02.

mous in its decision, but was bitterly divided on the reasoning. Justice Scalia, writing for a five-member majority on the unconstitutionality of content-based discrimination even for "unprotected" speech, explained why "fighting words" received full First Amendment protection.

> St. Paul has not singled out an especially offensive mode of expression—it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty.[88]

Justice Stevens, in his opinion concurring in the result, responded to the ascension of "fighting words" to strict scrutiny. "Assuming that the Court is correct that this . . . class of speech is not wholly 'unprotected,' it certainly does not follow that fighting words and obscenity receive the *same* sort of protection afforded core political speech. . . . Perversely, this gives fighting words *greater* protection than is afforded commercial speech."[89]

If a content-based restriction of categorically "unprotected" speech fails under a strict scrutiny analysis, why would the Court give content-based restrictions of commercial speech different treatment? The reason was offered by Justice Scalia:

> The content-based discrimination reflected in the St. Paul ordinance comes within neither any of the specific exceptions to the First Amendment prohibition . . . nor a more general exception for content discrimination that does not threaten censorship of ideas. It assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribeable. . . . [T]he reason why fighting words are categorically excluded from . . . protection . . . is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.[90]

The Court did not create its "fighting words" doctrine to suppress the content of a certain type of speech, but rather to affect the way in which it is expressed, or in Scalia's language, the "mode of expression." Government can proscribe face-to-face confrontations, but the state would have to meet strict scrutiny to regulate the same expression in another forum

88. *R.A.V.*, 505 U.S. at 393-94.
89. *Id.* at 422–23 (Stevens, J., concurring).
90. *Id.* at 393 (Scalia, J.).

where the risk of violence was not present. Unlike other types of speech, however, commercial speech *is* regulated on the basis of content.[91] States regulate the advertisement of some activities but not others, because the content of some activities is more prone to cause public harm. Because content is one of the bases for regulating commercial speech, the Court would not review such content-based restrictions under strict scrutiny.[92]

This reasoning loses much of its persuasiveness when one of the main premises—the advertising causes public harms (typically fraudulent or misleading advertisements)—is removed on a showing of the truth of the commercial speech. If the risk of public harm which permits states to proscribe certain commercial speech does not exist because the commercial speech is truthful, the content-based reasons to regulate the speech are eliminated. Further, the information value of commercial speech seemingly outweighs the value of fighting words in both its utility to the individual listener and the sheer number of listeners who are interested in the communication. Truthful commercial speech should thus be reviewed under the same strict scrutiny analysis given to content-based regulations of categorically-excluded speech.

B. *Strict Scrutiny Analysis Subject to Time, Place, and Manner Restrictions*

If the Court simply treated commercial speech as noncategorical, then noncommercial, content-based regulations would have to pass strict scrutiny muster. This would typically preclude any type of content regulation on advertising. A state, despite the heightened analysis, though, may still enact content-neutral regulations aimed at placing reasonable restrictions on the time, place, and/or manner of such restrictions.

The Court distinguished content-neutral and content-based review in *United States v. O'Brien*; that case elicited the general rule that content-neutral regulations on speech may be justified "if [they] further[] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essen-

91. The Court stated in *Fox* that "'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

92. There is however historical support for the protection of commercial speech. *See* Amici Curiae Brief for the Newspaper Association of America, 44 Liquormart v. Rhode Island, 116 S. Ct. 1495 (1996) (No. 94-1140).

tial to the furtherance of that interest."[93] This test was later restated in *Perry Education Ass'n v. Perry Local Educators' Ass'n* to allow regulations "narrowly tailored to serve a significant government interest, and [which] leave open ample alternative channels of communication."[94]

Thus, legislatures have some ability to restrict speech generally, but restrictions targeted specifically at commercial speech would fail under strict scrutiny. Note that by applying strict scrutiny, the distinctions made between commercial and noncommercial speech in *Metromedia*[95] would become content-based distinctions; since the lower scrutiny under *Central Hudson* would not be available to the Court, the outcome in *Metromedia* would change, and the Court would strike down the San Diego ordinances in total. Restrictions aimed at curbing truthful advertising would necessarily have to apply to a broader range of products than a state would desire, however, to comply with content-neutral scrutiny.

The result of the ascension of commercial speech would be disappointing to lawmakers. Because truthful advertising would receive the same protection as core political speech, any content-neutral regulations targeted at various product advertising would also have to apply to other speech to avoid a content-based characterization. Perhaps the advertising, even if truthful, of harmful products about which states worry could be classified as inherently misleading, and could thus avoid the application of strict scrutiny. Whether evidence supports this classification, and what protection the Court should then give this type of truthful advertising, remain to be seen.

V. CONCLUSION

The decision in *44 Liquormart* failed to resolve many questions, its effect on the broadcast medium being just one. The Court will have to reach an answer soon because this issue will not go away. Twenty-six years ago, in *Capital Broadcasting Co. v. Mitchell*, a district court panel found that a statutory ban against all cigarette advertising was valid, and the Court affirmed without opinion.[96] Since that time, no cigarette advertising has appeared on television. Similarly, until recently, the hard liquor industry had a voluntary ban on television advertising which had been in place since 1948.[97] Joseph E. Seagram and Sons, Inc. placed a commercial

93. *O'Brien*, 391 U.S. 367, 377 (1968).

94. *Perry Educ. Ass'n*, 460 U.S. 37, 45 (1983).

95. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512 (1981).

96. *Capital Brdcst. Co.*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd without opinion sub nom.* Capital Brdcst. Co. v. Acting Attorney Gen. Kleindienst, 405 U.S. 1000 (1972).

97. *Facing Declining Sales, Liquor Industry Drops Ban*, ALCOHOLISM & DRUG ABUSE

for its product last June on a Corpus Christi, Texas television station breaking the ban,[98] which coincidentally corresponds to the month after the Court announced its opinion in *44 Liquormart*.

Former FCC Chairman Reed Hundt has made public statements condemning the liquor industry's actions and vowing intervention by either the FCC or the Federal Trade Commission (FTC) if the networks begin to accept such advertising.[99] Further, Representative Joseph Kennedy (D-Mass.) introduced a bill explicitly providing the FCC with such advisory and regulatory powers.[100] The act would create an antitrust exception to broadcasters, allowing them to voluntarily ban alcohol advertising targeted at minors.[101] An advisory committee would target such advertising, and if the broadcasters failed to act, the Act empowers the FCC to regulate.[102]

The FCC is required to ensure broadcasting in the public interest.[103] This interest, however, is balanced by the First Amendment. In *FCC v. Pacifica Foundation*, the FCC limited radio broadcast of a George Carlin comedy bit to the evening, in order to prevent harm to children.[104] Analyzing the restriction of "indecent speech" under intermediate scrutiny, the Court allowed the regulation, but stressed "the narrowness of [its] holding."[105] Considering the more intense intermediate scrutiny given in *44 Liquormart*, it is doubtful whether the FCC may regulate alcohol advertising without sound evidence of defined relationships between advertising and product consumption.

The Court historically has had difficulty analyzing commercial speech. Since the middle of this century, protection for commercial speech has improved from none to some level of intermediate scrutiny. The importance of advertising has seemingly improved in the minds of the Justices, while the Court has begun to more carefully consider the state's motivation for regulation. However, the road the Court has taken most recently, since the adoption of *Central Hudson*, fails to consider consistently these opposing forces. In one instance, the Court embraces the state-

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WK., Nov. 18, 1996, at 2.

98. *Id.*

99. FCC Chairman Reed Hundt, Speech Delivered to the Children's Action Network Los Angeles (Nov. 19, 1996) (as prepared for delivery), *available in* 1996 FCC LEXIS 6382.

100. *Alcohol Advertising Standards Bill Is Introduced by Rep. Kennedy*, WASH. BEVERAGE INSIGHT, Apr. 25, 1997, at 1 (discussing H.R. 1292, the Voluntary Alcohol Advertising Standards for Children Act).

101. *Id.*

102. *Id.*

103. 47 U.S.C. § 326 (1994).

104. *Pacifica*, 438 U.S. 726 (1978).

105. *Id.* at 750.

sponsored paternalism; it sees through it and discards it in the next. Only by adopting an absolute, less-manipulable test can the Court avoid the pitfalls of its own creation.

As our society becomes more sophisticated, the reasons for distinguishing between commercial and noncommercial speech disappear. At least concerning truthful advertising, there is no reason to believe that the legislature may better receive and analyze such information than any citizen. Unfortunately, under *Central Hudson*, the state may do just that. It is most frustrating and disturbing to realize that the Court could have elevated itself above the *Central Hudson* uncertainty, but did not. If the Court were to apply strict scrutiny to advertising, the issue would be resolved in a majority of cases. Until then, the Court will struggle, remaining on the *Central Hudson* line.