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Improving the Odds of the Central Hudson Balancing Test: Restricting Commercial Speech as a Last Resort

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IMPROVING THE ODDS OF THE *CENTRAL HUDSON* BALANCING TEST: RESTRICTING COMMERCIAL SPEECH AS A LAST RESORT

I. INTRODUCTION

In the twenty years since the landmark decision of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[1] which was the first decision to afford purely commercial speech protection under the First Amendment,[2] the United States Supreme Court has struggled to define the scope of that protection and, consequently, the level of scrutiny that should be applied to legislation that seeks to restrict commercial speech.[3] The result of this struggle is a series of puzzling and often paradoxical decisions that make it difficult for scholars to pinpoint the precise status of commercial speech within the First Amendment hierarchy.[4] The Court's confusing and continuously changing view of

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1. 425 U.S. 748 (1976).

2. U.S. CONST. amend. I. The First Amendment provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

3. *See generally* Bruce P. Keller, *The First Amendment and Regulation of Advertising*. 954 PLI/CORP 55, 56 (Sept. 17, 1996). Commercial speech was initially defined as speech that does "no more than propose a commercial transaction." *Id.* (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)). In 1980, the Court redefined commercial speech to include "expression related solely to the economic interests of the speaker and its audience." *Id.* (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980)). In 1993, the Court returned to the *Pittsburgh Press* standard of asking whether the speech "does no more than propose a commercial transaction." *Id.* (citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422 (1993)). *See also* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 432 (1971).

4. ROY L. MOORE, MASS COMMUNICATION LAW AND ETHICS 159 (1994). *See also* Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1205 (1988).

The First Amendment hierarchy consists of three tiers. At the top of the hierarchy are those categories of speech that have been deemed fundamental contributors to the marketplace of ideas. They include political, artistic, religious, and scientific forms of expression. When the government attempts to restrict these types of expression, the court will apply strict judicial scrutiny. Under the court's strict scrutiny analysis, the government bears the heavy burden of proving that the restriction is necessary to further a compelling state inter-

commercial speech has appropriately been analogized to a pendulum[5] that swings back and forth from almost full protection to virtually no protection.[6]

In 1996, the confusion surrounding this form of expression persisted as the Supreme Court issued its seventh commercial speech decision in three years.[7] In *44 Liquormart v. Rhode Island*,[8] the Court issued a con-

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est, and that it is implementing the least restrictive means available to achieve that interest. Jeffery M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 329 (1995).

The next tier in the First Amendment hierarchy involves expression that is afforded an intermediate level of judicial scrutiny. Under an intermediate level of scrutiny, a law will be upheld if it serves a substantial state interest and the means used are reasonable, although not perfect. *Id.* The Courts generally apply this level of scrutiny to commercial speech restrictions, content-neutral restrictions, and time, place, and manner restrictions.

The final, and lowest, tier in the First Amendment hierarchy encompasses fighting words, obscenity, pornography and libel. Laws that aim to restrict these forms of expression are subject to a rational basis review. Under this minimal level of scrutiny, the government simply must prove that the restriction serves a legitimate interest and that the means chosen to achieve that interest are reasonable. *Id.* at 330.

5. Dennis William Bishop, Note, *Building The House On A Weak Foundation,* Edenfield v. Fane *& the Current State of the Commercial Speech Doctrine*, 22 PEPP. L. REV. 1143, 1144 (1995). *See* MOORE, *supra* note 4, at 159. There has been "no evolution of constitutional law on commercial free speech, but instead the Court has almost erratically switched from one [level of judicial scrutiny] to another, usually dependent on the individual facts of a particular case." *Id.*

6. In *Virginia Pharmacy*, the Court considered commercial speech to have a high degree of constitutional protection in light of its "indispensable" role in our capitalistic society. *Virginia Pharmacy*, 425 U.S. at 765. Two years later, however, the same Court decided that commercial speech only deserved a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). In 1980, the Court ultimately settled on according commercial speech an intermediate level of constitutional protection. Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980). However, six years later, the Court again shifted and held that the legislature should decide whether or not to restrict the dissemination of commercial speech. Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 344 (1986). In 1993, the Court returned to affording commercial speech greater protection when it held that:

> [t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Edenfield v. Fane, 507 U.S. 761, 767 (1993).

7. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (blanket ban on off-site advertising of alcohol prices found unconstitutional); Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (thirty day waiting period before attorneys could solicit accident victims found to be constitutional); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (prohibiting placement of alcohol content on beer labels found unconstitutional); Ibanez v. Fla. Dept. of Bus. & Prof'l Regulation, 512 U.S. 136 (1994) (regulation prohibiting attorney from listing CPA credentials found unconstitutional); United States v. Edge Broad. Co., 509 U.S. 418 (1993) (FCC statute prohibiting broadcast of lottery advertisement in states that do not permit lottery

voluted eight-part decision striking down a Rhode Island statute that prohibited vendors and the media from advertising the prices of alcoholic beverages.[9] Although the Supreme Court was unanimous in holding that the Rhode Island ban violated the First Amendment, it was deeply divided as to why.[10] This noticeable lack of consensus indicates how unsettled the Court remains about the degree of protection that should be afforded commercial speech.

The *44 Liquormart* decision is particularly significant because it calls into question the future viability of the current four-part balancing test that is the standard against which all First Amendment commercial speech challenges are measured.[11] This standard, commonly referred to as the *Central Hudson*[12] balancing test, was created by the Supreme Court in 1980 to provide a consistent analytical framework for lower courts to apply when reviewing legislation intended to promote important societal policies by restricting commercial speech. In order for commercial speech to warrant First Amendment protection under this standard, it must (1) concern lawful activity and not be misleading.[13] If the speech meets this threshold, it may be regulated only if (2) the asserted government interest is substantial; (3) the regulation directly advances the asserted government interest; and (4) the regulation is no

found constitutional); Edenfield v. Fane, 507 U.S. 761 (1993) (regulation prohibiting solicitation by CPA found unconstitutional); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (ordinance prohibiting newsracks that displayed commercial material, but not prohibiting newsracks that displayed traditional noncommercial materials, found unconstitutional).

8. 517 U.S. 484 (1996).

9. *Id.*

10. *Id.* There were four distinct views among the Justices as to why the Rhode Island ban violated the First Amendment, none of which received majority support. Justice O'Connor, joined by the Chief Justice and Justices Souter and Breyer, struck down the statutes as failing the existing *Central Hudson* standard. Justice Stevens, joined by Justices Kennedy and Ginsburg, similarly found the Rhode Island statutes to be unconstitutional under this existing standard; however, the Stevens' plurality proposed adopting a stricter level of scrutiny for bans that restrict truthful, nonmisleading speech for purposes unrelated to the preservation of a fair bargaining process. Justice Scalia also found the statutes to be unconstitutional under the *Central Hudson* standard, but did so only because the parties had failed to offer an alternative standard of review. Finally, Justice Thomas rejected the existing intermediate standard entirely and would afford truthful, nonmisleading commercial speech the same level of protection as political speech. *See infra* Part IV B.

11. Keller, *supra* note 3, at 79-80.

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

13. *Id.* at 566. *See also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

more extensive than necessary to serve that interest.[14] The regulation must satisfy each of these four prongs in order to be constitutionally valid.[15]

While the Court's application of the four *Central Hudson* factors led to the appropriate result in *44 Liquormart*, the current test does not consistently provide adequate assurance that truthful, non-misleading commercial speech will survive judicial scrutiny.[16] It is an *ad hoc* balancing test[17] that is susceptible to manipulation, particularly when applied to legislation designed to restrict "vice" activities such as gambling, smoking, and alcohol consumption. Instead of applying a consistent level of judicial scrutiny to commercial speech restrictions, courts tend to use a sliding scale under which the level of scrutiny is dependent upon the governmental interest being asserted. Therefore, as commercial speech enters into its third decade under First Amendment jurisprudence and increasingly becomes the target of numerous restrictions,[18] this Comment recommends that certain modifications must be

14. *Central Hudson*, 447 U.S. at 566. Surviving the first two prongs of the test is seldom a problem in commercial speech cases. The majority of the confusion and disagreement centers on the third and fourth prongs under which the Court reviews the "fit" between the speech restriction and the underlying governmental interest.

15. *Id.*

16. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 431 (1993) (Blackmun, J., concurring). *See also* Scott Joachim, Note, *Seeing Beyond the Smoke and Mirrors: A Proposal For the Abandonment of the Commercial Speech Doctrine and an Analysis of Recent Tobacco Advertising Regulations*, 19 HASTINGS COMM. & ENT. L.J. 517 (1997) (criticizing the *Central Hudson* test as being an "ad hoc test resting on unfounded assumptions and illogical distinctions."). *See also* Valarie D. Wood, Note, *The Precarious Position of Commercial Speech:* Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995), 19 HARV. J.L. & PUB. POL'Y 612 (1996). The test, as it currently reads, is "manipulated just as easily to uphold regulations as to invalidate them. When the Court applies *Central Hudson* to each case, the outcome is indistinguishable except upon the specific facts of the case. Only if the identical fact pattern arose could the outcome in the next case be predicted." *Id.* at 620.

17. R. GEORGE WRIGHT, SELLING WORDS, FREE SPEECH IN A COMMERCIAL CULTURE 62 (1997). The author has characterized the *Central Hudson* test as a framework that "combines apparent rigidity with remarkable vagueness." *Id. See also* P. Cameron DeVore, *The Two Faces of Commercial Speech Under the First Amendment*, 12 COMM. LAW. 23 (1994) (The author believes that the controversy surrounding this test is due to the fact that it has done more for the appearance of orderly analysis than it did for orderly analysis itself.). *See also* Roxanne Hovland & Gary B. Wilcox, *The Future of Alcoholic Beverage Advertising*, 9 COMM. & L. April 1987, at 5, 11.

18. The more prominent and controversial of these restrictions is the Food and Drug Administration's comprehensive restrictions on tobacco advertising that were signed into law by President Clinton in August 1996. A federal district judge in North Carolina recently issued a decision on these ad restrictions. *See* Coyne Beahme, Inc. v. United States Food & Drug Admin., 966 F. Supp. 1374 (M.D.N.C. 1997). For a detailed discussion on the FDA regulations, see: Sandra E. McKay, et al., *The FDA's Proposed Rules Regulating Tobacco and Underage Smoking and the Commercial Speech Doctrine*, J. PUB. POL. & MKT. 296

made to the *Central Hudson* balancing test to better insulate commercial speech's constitutional protection from further derogation.

The Court can begin by revising the test's malleable fourth prong. In *Central Hudson*, the Court interpreted the "no more extensive than necessary" language as requiring that the government use the least restrictive means when regulating the dissemination of truthful, nonmisleading commercial speech.[19] However, in 1986, this standard apparently was reduced to a mere rational basis test when the Court determined that it was "up to the legislature" to determine the propriety of the speech restrictions.[20] Since 1989, the Court has retreated, at least in theory, from this rational basis review, and now requires that there be a "reasonable fit" between the ends and means chosen by the legislature when it restricts commercial speech.[21] Unfortunately, over the past seven years, the Court has offered only vague and ambiguous language to elucidate what this "reasonable fit" standard requires.[22] At

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(Sept. 1, 1996) (1996 WL 12334051).

19. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980). While the Court did not explicitly use the phrase "least restrictive means," it held that "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive." *Id.* The term "reasonable" was never mentioned.

20. Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 344 (1986).

21. Board of Trustees of the State University of N.Y. v. Fox, 492 U.S. 469, 480 (1989). *See also* Tara L. Lavery, Note, *Commercial Speech Suffers A First Amendment Blow in* United States v. Edge Broadcasting Co., 14 N. ILL. U. L. REV. 549, 550 (1994).

22. In *44 Liquormart*, Justice O'Connor summarized the language used by the Court to define "reasonable fit." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 529-30 (1996) (O'Connor, J., concurring on judgment). In *Fox*, the Court defined reasonable fit as a "fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Fox*, 492 U.S. at 480. While the government "need not employ the least restrictive means to accomplish its goal, the fit between means and ends must be 'narrowly tailored.'" *Id.*

In *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Court determined that in order to satisfy the fourth prong, the State's regulation must indicate a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." *44 Liquormart*, 517 U.S. at 529-30 (citing *Discovery Network, Inc.*, 507 U.S. at 417). The *Discovery Network* Court stated that the "existence of numerous and obvious less-burdensome alternatives to the restriction of commercial speech . . . is certainly a relevant consideration in determining whether the 'fit between ends and means is reasonable." *Discovery Network*, 507 U.S. at 417-8 n.13.

Recently, in *Rubin v. Coors Brewing Co.*, 515 U.S. 476 (1995), the Court determined that the availability of less burdensome alternatives to achieve the asserted policy interest signals that the fit between the legislature's objectives and the means chosen to accomplish those objectives may be too imprecise to withstand First Amendment scrutiny. *44 Liquormart*, 517 U.S. at 529 (citing to *Rubin*, 115 S. Ct. at 1593-94). Later that year, in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the Court determined that "if alternative channels permit communication of the restricted speech, the regulation is more likely to be considered

best, the "reasonable fit" threshold can be defined as falling somewhere between the stringent "least restrictive means" standard and the lax "rational basis" standard.

This imprecise evidentiary standard is problematic because it allows courts to be overly deferential to the legislature's conjecture and speculation regarding the beneficial effects of restricting advertising. This Comment proposes that this "reasonable fit" standard be replaced with the more stringent "least restrictive means" standard that was intended when the Court initially created the *Central Hudson* balancing test. Implementing this proposed revision would provide greater protection for commercial speech by imposing a heavier evidentiary burden on the government to demonstrate that restricting the free flow of truthful, nonmisleading commercial speech is the most feasible and least speech restrictive alternative in which to directly and materially advance the government's substantial interest.

Before analyzing this proposed revision, Part II provides the reader with background on the commercial speech doctrine and its precarious position within the First Amendment hierarchy. Part III discusses how the Court, in recent years, has moved toward salvaging the *Central Hudson* balancing framework by refining and strengthening the test's final two prongs. Part IV specifically focuses on the *44 Liquormart* decision and how several members of the Court appeared willing to adopt more stringent methods of interpreting the fourth prong of the *Central Hudson* test. But, because there was no consensus among the Justices regarding these alternatives, there continues to be no clear guidelines regarding the level of scrutiny to apply under this final prong.

Part V analyzes how abandoning the "reasonable fit" standard in favor of the more rigorous "least restrictive means" standard will: (1) reduce inconsistent decisions by the courts, (2) force a legislature to investigate and pursue more effective methods of achieving its policy goals that do not involve restricting speech, and (3) provide commercial speech with the heightened constitutional protection it deserves. This proposed revision, however, does not completely close off the option of restricting certain forms of commercial speech. Instead, it would impose a higher level of responsibility upon the government to demonstrate that non-speech restrictive alternatives or a narrower speech restriction failed to effectively achieve its asserted policy initiatives before it would be permitted to adopt a broader speech restriction.

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reasonable." *44 Liquormart*, 517 U.S. at 529 (citing Florida Bar v. Went For It, 515 U.S. at 633-34).

In short, this "least restrictive means" standard will finally strike the proper balance between protecting the consumer and protecting the Constitution by reducing the arbitrariness surrounding the regulation of commercial speech.

II. THE EVOLUTION OF THE COMMERCIAL SPEECH DOCTRINE

A. No Protection to Almost Full Protection

Contrary to the plain language of the First Amendment, freedom of speech is "not absolute at all times and under all circumstances."[23] The Supreme Court has held that there are certain "well-defined and narrowly limited classes of speech"[24] that are unworthy of First Amendment protection because they fail to contribute to the marketplace of ideas.[25] Initially, commercial speech was considered to fall within this unprotected category.

Commercial speech's unprotected status was the result of the Supreme Court's 1942 decision in *Valentine v. Chrestensen*.[26] In this case, F.J. Chrestensen challenged a New York City sanitation ordinance that prohibited the distribution of commercial handbills on public streets.[27] Even though Chrestensen's handbill included both commercial and non-commercial speech, the Supreme Court viewed the entire handbill as commercial speech and upheld the ordinance prohibiting its distribution.[28] The Court held that while the government may not "unduly burden or proscribe" the dissemination of information or opinion of public interest, "the Constitution imposes no such restraint on government as respects purely commercial advertising."[29] As a result, commercial

23. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

24. *Id.* at 571.

25. *Id.* at 572.

26. Valentine v. Chrestensen, 316 U.S. 52 (1942).

27. *Id.* F.J. Chrestensen purchased a decommissioned U.S. Naval submarine believing that he could make money by traveling along the eastern coast and allowing the public to tour his boat for a fee. After arriving and docking his submarine in New York City, Chrestensen had handbills printed up with a diagram of the submarine, its location in the harbor, and an advertisement inviting the public to take guided tours of the boat for a quarter. Chrestensen was stopped by the police and informed that his commercial handbill violated a city sanitation ordinance. The ordinance at issue specifically prohibited the distribution of commercial handbills, but permitted the distribution of political handbills.

28. *Id.* at 55. The Court took the position that the First Amendment was not intended to protect speech that merely enables the speaker to "hawk his wares." *See also* Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 14 (1979).

29. *Valentine*, 316 U.S. at 54.

speech was not entitled to any protection under the First Amendment and would not be entitled to any protection for the next thirty years.[30]

In 1975, however, the Court formally rejected the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. In *Bigelow v. Virginia*,[31] the Court addressed the legality of a Virginia statute that made it a misdemeanor to sell or circulate any publication that encouraged the procuring of an abortion.[32] Jeffrey C. Bigelow, the director and managing editor of the *Virginia Weekly*, was charged and convicted of violating this statute when he ran a paid advertisement for a New York City abortion referral service.[33] On appeal, the Supreme Court reversed the conviction.

In its decision, the Court distinguished the facts in this case from the *Valentine* case by stating that the *Virginia Weekly* advertisement "did more than simply propose a commercial transaction;"[34] it also contained factual information that clearly was of public interest.[35] Although the *Bigelow* Court determined that speech that both proposes a commercial transaction and provides factual information is deserving of First Amendment protection, it left unanswered the issue of whether purely commercial speech also was deserving of First Amendment protection.

In the following term, the Court was squarely confronted with this issue.[36] In *Virginia State Board of Pharmacy v. Virginia Citizens Con-*

30. The *Valentine* decision gave rise to the commercial/noncommercial dichotomy that continues to be the theoretical impediment to elevating commercial speech's status within the First Amendment hierarchy.

31. 421 U.S. 809 (1975).

32. *Id.*

33. *Id.* at 812. The advertisement informed the reader that abortions were now legal in New York and that there were no residency requirements. If the reader wanted immediate placement in accredited hospitals and clinics at a low cost, they should call or write the Women's Pavilion in New York City. The ad further stated that the entire matter would be kept "strictly confidential." *Id.*

34. *Id.* at 822.

35. *Id.*

36. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). Justice Blackmun, writing for the majority, differentiated this case from other speech cases by framing the issue as follows:

> Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.

Id at 760-61.

sumer Council, Inc.,[37] a citizen's group challenged a Virginia statute that prohibited licensed pharmacists from publishing, advertising, or promoting the price of prescription medications.[38] Virginia's principle rationale for enacting the ban was that it was necessary to preserve the professional image of pharmacists.[39] The Court disagreed, however, and determined that the State's interest in professionalism was clearly outweighed by the consumer's need for information as to who is offering what products and at what prices.[40] In response to the State's assertion that commercial speech lacks protection because it fails to enlighten public decisionmaking, the Court recognized that in our free enterprise system, "the free flow of commercial information is indispensable"[41] because it allows the public to make "intelligent and well-informed"[42] economic decisions when allocating resources in their day-to-day lives.[43] In fact, the Court went so far as to say that an individual'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."[44] Such language invalidated the commonly held belief that commercial speech is so removed from any exposition of ideas that it is undeserving of First Amendment protection.[45]

While the Court ultimately concluded that commercial speech is entitled to a certain degree of First Amendment protection, it stopped short of affording it absolute immunity from government regulation. In

37. 425 U.S. 748 (1976).

38. *Id.* at 750-51 (citing VA. CODE ANN. §54-524.35 (1976)).

39. *Id.* at 752, 766-77. The State also argued that price advertising of prescription drugs would jeopardize the pharmacist's expertise and the customer's health because aggressive price competition would mean that a pharmacist could not devote the time required for expert compounding, handling, and dispensing of drugs. In short, the quality of care would suffer if price advertising were allowed *Id.* at 767-68. *See also* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH, A TREATISE ON THE THEORY OF THE FIRST AMENDMENT §12-6 (1994).

40. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976). In Justice Blackmun's opinion, the prohibition of drug price information struck hardest the poor, the sick, and the elderly, who the least able to shop from pharmacist to pharmacist and who spent a disproportionate amount of their income on prescription drugs. *Id.*

41. *Id.* at 765.

42. *Id.*

43. The Court found that there is an alternative to regulating speech. The "alternative is to assume that information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.* at 770.

44. *Id.* at 763.

45. *Id.* at 762.

a footnote, the Court recognized that certain "commonsense differences"[46] existed between commercial and non-commercial speech, suggesting that "a different degree of protection is necessary to insure that the free flow of truthful and legitimate commercial information is unimpaired."[47] While this footnote made clear that commercial speech received something less than full protection under the First Amendment, it failed to delineate clear guidance as to the precise scope of that protection.[48]

B. The Central Hudson Balancing Test

Four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[49] the Supreme Court formulated a standard to apply to legislation designed to restrict truthful, nonmisleading commercial speech.[50] The case involved an order issued by the New York Public Service Commission prohibiting all public utilities from promoting the use of electricity.[51] The order was in response to the Commission's findings that, because of the energy crisis at the time, it needed to conserve its fuel supplies and reduce public demand.[52] After the fuel shortage had eased, however, the Commission voted to continue the ban on promotional advertising.[53] Central Hudson Gas &

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46. *Id.* at 771 n.24.

47. *Id.* at 772 n.24. The Court noted that there are certain inherent characteristics about commercial speech that make it unnecessary for court's to guarantee its unfettered dissemination. *Id.* First, unlike political commentary that tends to be highly subjective, commercial speech is more objective. *Id.* Thus, individuals are better able to evaluate the accuracy of these commercial messages and the legality of the underlying activity. *Id.* Second, because advertising is the "*sine qua non* of commercial profits," it is more durable and less likely of being chilled by regulations. *Id.* The court believes that based on these two factors, the greater objectivity and hardiness of commercial speech, it was unnecessary to apply strict scrutiny to laws that seek to regulate or restrict commercial speech. *Id.*

48. Mary B. Nutt, Recent Development, *Trends in the First Amendment Protection of Commercial Speech*, 41 VAND. L. REV. 173, 180 (1988). "*Virginia Board* and its progeny represent the peak of constitutional protection for commercial speech. Later cases have refined the commercial speech doctrine and concomitantly narrowed the [F]irst [A]mendment protection of commercial expression." *Id.* at 185. *See also* Leonard M. Niehoff, *The Supreme Court Clarifies The Commercial Speech Doctrine—Again*, 75 MICH. B.J. 828 (August 1986).

49. 447 U.S. 557 (1980).

50. *Id.*

51. *Id.* at 558.

52. *Id.* at 559. The order was "based on the Commission's finding that 'the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter.'" *Id.* (citations omitted).

53. *Id.* at 563.

Electric Corporation challenged the ban as an infringement of its First Amendment rights.[54] The Commission defended its decision on the grounds that there was a substantial state and national interest in energy conservation.[55]

In its decision, the Supreme Court began by reiterating the "commonsense distinctions" between commercial speech and other varieties of protected speech.[56] In light of these inherent distinctions, the Court determined that the Constitution accords a lesser degree of protection to commercial speech than to other constitutionally guaranteed forms of expression.[57] The Court ultimately settled on an intermediate level of scrutiny under which the level of protection is based on the expression at issue and the governmental interests being served by the regulation.[58] In order for the lower courts to apply this intermediate scrutiny, the Court designed the following four-part balancing test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.[59]

In applying the test, the Court determined that the promotional advertising ban satisfied the first three prongs, but failed the fourth prong.[60] While the Commission directly advanced its substantial interest in promoting energy conservation and maintaining fair and accurate rates by banning promotional advertising, the Court concluded that by prohibiting all forms of promotional advertising the Commission's order was more extensive than necessary.[61] The Commission failed to

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54. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y. 447 U.S. 557, 560 (1980).

55. *Id.* at 560-1.

56. *Id.* at 562 (quotations omitted).

57. *Id.* at 563. *See also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

58. *Central Hudson*, 447 U.S. at 563.

59. *See id.* at 566 (brackets added).

60. *Id.* at 566-71.

61. The Court held that the complete ban on promotional advertising could be, in fact, blocking the Commission from achieving their goal of energy conservation and more accurate rates, because the ban prohibited Central Hudson from advertising their "heat pump," which both sides acknowledged would be a major improvement in electric heating. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 570 (1980). Fur-

show how a more limited restriction on promotional advertising would not adequately satisfy the State's interest in conservation.[62] In other words, the Commission failed to show that a complete ban on promotional advertising was the least restrictive means in which to advance the asserted policy goals.[63]

Justice Powell, writing for the majority, offered a two-part explanation regarding the fourth prong. He stated that "[t]he State cannot regulate speech that poses no danger to the asserted state interest... nor can it completely suppress information when narrower restrictions on expression would serve its interest as well."[64] The Court found the ban to be unconstitutional because the Commission's asserted interest could have been equally served by either requiring counterspeech or a narrower speech restriction.[65] In doing so, the Court signaled that restrictions on commercial speech should be used as a last resort or in combination with non-speech restrictive alternatives.

C. The Diminished Protection of Commercial Speech

While the *Central Hudson* decision arguably should have resolved any controversy over the level of protection afforded to commercial speech, problems soon developed as the Court began to interpret and apply the balancing test inconsistent, particularly the fourth prong.[66] After *Central Hudson,* there was a presumption against regulating commercial speech unless the proponent could clearly demonstrate that the regulation was the least speech restrictive method available for achieving the asserted policy goals.[67] However, by the mid-1980s, this presumption weakened as the Court progressively moved away from the more stringent "least restrictive means" standard[68] and began to ap-

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thermore, the ban precluded Central Hudson from promoting electric heat as a "backup" to solar and other more efficient heat sources. *Id.*

62. *Id.* at 570.

63. *Id.* at 570-71.

64. *Id.* at 565. *See also John M. Blim,* Comment, *Free Speech and Health Claims Under the NLEA of 1990: Applying a Rehabilitated* Central Hudson *Test for Commercial Speech,* 88 NW. U. L. REV. 733 (1994).

65. *Central Hudson,* 447 U.S. at 570-71.

66. *See* Todd J. Locher, Comment, *Board of Trustees of the State University of New York v. Fox: Cutting Back on Commercial Speech Standards,* 75 IOWA L. REV. 1335, 1339 (1990).

67. *Central Hudson,* 447 U.S. at 570-71.

68. *See* Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), and Zaurderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). In *Zaurderer,* the Court considered whether an Ohio attorney, who advertised to women that may have been injured through using the Dalkon Shield intrauterine device, violated the disciplinary rules of the Ohio Office of Disci-

ply a more flexible "reasonable fit" standard under which the Court generally defers to the government's subjective discretion and judgment. This departure from the "least restrictive means" standard was primarily the result of two decisions.

1. The *Posadas* decision

The first was the Court's 1986 decision in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.[69] In the 5-4 decision, the majority applied a highly deferential method of analysis in upholding a Puerto Rican statute that prohibited casinos from advertising directly to the residents of Puerto Rico, but permitted advertising aimed at tourists.[70] Justice Rehnquist, writing for the majority, provided a superficial application of the *Central Hudson* factors to the *Posadas* facts. First, Justice Rehnquist was satisfied that the advertising of casino gambling concerned a lawful activity and was not fraudulent or misleading.[71] Second, he found that the government's interest in reducing the harmful effects of gambling such as "the increase of local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime" was deemed substantial enough to justify regulation.[72]

After satisfying the first and second prongs, the Court concluded that the last two steps of the analysis required "a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends."[73] Rather than making a careful and thorough inquiry into

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plinary Counsel. *Zaurderer*, 471 U.S. at 626-28. In applying the *Central Hudson* balancing test, the Court determined that the first and second prongs were met but that the third prong was not. *Id.* at 647. The Court did not agree that the rule regulating attorney advertising directly advanced the State's interest in preventing consumer deception. *Id.* But, more importantly for our purposes, the Court rejected the appellant's contention that the state's disclosure requirements needed to be the least restrictive means of advancing the government's interest. *Id.* at 651 fn.14. Rather, the Court applied a less stringent standard when it determined that the regulations be "reasonably related to the state's interest in preventing deception of consumers." *Id.* at 651. This appeared to alter the interpretation of the fourth prong from a least restrictive means requirement to a reasonable ends/means requirement. *Id. see also* Denise D. Trimler, Note, *Perpetuating Confusion in the Commercial Speech Area:* Adolph Coors Co. v. Brady, 26 CREIGHTON L. REV. 1193, 1204, 1215 (1993).

69. 478 U.S. 328 (1986).

70. *Id.* at 330 & 348. In an effort to develop its tourism industry, the Puerto Rican Legislature enacted The Games of Chance Act of 1948, which legalized the playing of roulette, dice, and card games in licensed gambling facilities. *Id.* at 331-32. The Act, however, included a provision that "no gambling room shall be permitted to advertise . . . to the public of Puerto Rico." *Id.* (citing P.R. LAWS ANN., tit. 15, §77 (1972)).

71. Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 340-41(1986).

72. *Id.* at 341.

73. *Id.*

whether the regulation directly advanced the asserted goals by means that were no more extensive than necessary, the Court simply deferred to the subjective beliefs of the Puerto Rican legislature.[74] This high level of deference was evident in the Court's conclusion that the restriction directly advanced the government's asserted interest in protecting the health, safety, and welfare of its citizens.[75] Instead of relying on statistical or anecdotal evidence, the Court based its determination on the fact that the Puerto Rican legislature believed that the means were reasonable.[76] Justice Rehnquist blindly accepted Puerto Rico's argument that the ban directly advanced the asserted interest even though the legislature only chose to regulate the advertising of casino gambling, not other types of gambling.[77] Justice Rehnquist concluded that the legislature's belief was a reasonable one; one that should not be second-guessed by the Court.[78]

Finally, regarding the fourth prong, the Court did not require proof that the advertising ban was the least restrictive means of protecting its citizens from the dangers of gambling.[79] Instead, the majority applied a rational basis type analysis when it stated that "it is up to the legislature" to decide whether less speech restrictive alternatives, such as counterspeech or a narrower speech restriction, would be an equally effective and preferable method of protecting its citizens.[80] In essence, the *Posadas* Court took the burden of proving that the regulation is no more extensive than necessary from the proponent's shoulders and placed it on the opponent's shoulders to disprove.[81]

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74. *Id.* at 342-44.

75. *Id.* at 343.

76. *Id.* at 341-42. "The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one . . ." *Id.* at 342.

77. The court provided a two-part response to the appellant's argument that the restriction was under-inclusive because it failed to include advertising of other forms of gambling such as horse racing, cockfighting, and the lottery. First, the Court held that, whether or not other kinds of gambling are advertised in Puerto Rico, the restrictions on casino advertising "directly advance the legislature's interest in reducing demand for" gambling. Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 342 (1986). Second, the Court stated that the asserted interest of the legislature is not necessarily to reduce all forms of gambling, but to reduce the demand for casino gambling. *Id.* The Court also determined that the restriction was not under-inclusive because the legislature is in a better position than the Court to weigh the risks associated with the various forms of gambling. *Id.*

78. *Id.* at 342-43.

79. *Id.*

80. *Id.* at 344.

81. In adopting this deferential approach, the *Posadas* decision made the *Central Hud-*

Justice Rehnquist, however, did not stop there in his attack on commercial speech. In *dicta*, he further weakened the level of protection afforded commercial speech when he stated that as long as the government retained "the greater power to completely ban casino gambling" it also retained "the lesser power to ban [the] advertising of casino gambling."[82] This statement, if taken to its extreme, would allow the complete suppression of almost all truthful commercial advertising because most commercial and economic conduct can be regulated by legislatures.[83]

2. The *Fox* decision

Three years later, the Court further weakened the level of protection afforded commercial speech with its decision in *Board of the Trustees State University of New York v. Fox.*[84] While the *Posadas* Court implicitly diminished commercial speech's constitutional protection, the *Fox* Court performed a more explicit reduction with its broad interpretation of the final prong of the test. In this 5-4 decision, Justice Scalia wrote that it would be incompatible with commercial speech's subordinate position within the First Amendment hierarchy to mandate that the least restrictive means be utilized when regulating or restricting commercial speech.[85] Justice Scalia interpreted the fourth prong's "no

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son balancing test substantially easier for the government to pass. Consequently, more government restrictions on commercial speech would be able to withstand constitutional attack under such an approach than under the more stringent examination utilized prior to *Posadas*. *See* Arlen W. Langvardt & Eric L. Richards, *The Death of* Posadas *and the Birth of Change in Commercial Speech Doctrine: Implications of* 44 Liquormart, 34 AM. BUS. L.J. 483, 499 (1997); *See also* Philip B. Kurland, Posadas de Puerto Rico v. Tourism Company*: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,"* 1986 SUP. CT. REV. 1, 12.

82. *Posadas*, 478 U.S. at 345-46. Justice Rehnquist stated that it would

> 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 through advertising on behalf of those who would profit from such increased demand.

Id. at 346. This convoluted logic became known as the "greater-includes-the-lesser" argument. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §12-15, at 903 (2d ed. 1988).

83. Howard K. Jeruchimowitz, Note, *Tobacco Advertisements and Commercial Speech Balancing: A Potential Cancer to Truthful, Nonmisleading Advertisements of Lawful Products*, 82 CORNELL L. REV. 432, 445 (1997).

84. 492 U.S. 469 (1989).

85. *Id.* at 478. In *Fox*, the Court upheld a university regulation that prohibited commercial enterprises from operating on university property. *Id.* at 471. A representative of American Future Systems, Inc. (AFS) inadvertently violated the regulation when she attempted to hold a Tupperware party in one of the school's dormitories. *Id.* at 472. When

more extensive than reasonably necessary"[86] language as merely requiring that there be

> [A] 'fit' between the legislature's ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . that employs not necessarily the least restrictive means but . . . means narrowly tailored to the desired objective.[87]

The Court's decision meant that an ordinance will be unconstitutional only if it is "substantially excessive, disregarding 'far less restrictive and more precise means.'"[88]

Whereas this distinction may appear to involve semantics rather than clear distinctions, the *Fox* decision emphasized that legislation regulating or restricting truthful, nonmisleading advertising will be subject to much less than strict scrutiny by the courts.[89] Under the more stringent "least restrictive means" standard, the government has the burden of demonstrating that less restrictive regulations could not sufficiently advance the government's asserted interest.[90] After the *Fox* decision, however, the evidentiary burden was reduced, and the government is only required to prove that "its regulation of commercial speech is reasonable and in proportion to its interest."[91] Simply stated, the *Fox* standard opened the floodgates to more paternalistic restrictions of commercial speech that previously would have been struck down under

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asked to leave by campus police, she refused and was arrested. *Id.* at 472. Fox, and several other students, brought suit challenging the regulation as a violation of the First Amendment. *Id.* at 473.

86. *Id.* at 477. Justice Scalia observed that if the word "necessary" in the phrase "not more extensive than is necessary" was strictly interpreted, then a least restrict means test would be appropriate. *Id.* at 476. However, if it were interpreted more loosely, then a "reasonable fit" was all that was required. *Id.* Justice Scalia found support for the latter by relying on the interpretation of "necessary" as it was used to determine the scope of the Necessary and Proper Clause of the Constitution in *McCulloch v. Maryland*, 4 Wheat 316 (1819). *Fox*, 492 U.S. at 476.

87. *Fox*, 492 U.S. at 480 (citations omitted). Consistent with its deferential analysis in *Posadas*, the Court then went on to say that "[w]ithin those bounds we leave it to governmental decision makers to judge what manner of regulation may best be employed." *Id.*

88. *Id.* at 479 (citations omitted). However, the Court emphasized that this new "reasonable fit" standard is far different from the "rational basis" test. *Id.* at 480. While the *Fox* Court eliminated the "least restrictive means" standard, it also rejected the "rational basis" test that the Court seemed to be applying in the *Posadas* decision. *Id.*

89. Albert P. Mauro Jr., Comment, *Commercial Speech After* Posadas *&* Fox*: A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931 (1992).

90. Locher, *supra* note 66 at 1347.

91. *Id.*

the "least restrictive means" standard.[92]

III. REFINING THE *CENTRAL HUDSON* TEST: THE STRUGGLE FOR CONSISTENCY

A. The 1993 Decisions: Two Steps Forward, One Step Back

The Supreme Court subsequently retreated somewhat from its deferential position in *Posadas* when it attempted to clarify and strengthen portions of the *Central Hudson* test. In 1993, the Court significantly strengthened the final two prongs of the test with its decisions in *City of Cincinnati v. Discovery Network, Inc.*[93] and *Edenfield v. Fane.*[94]

In *Discovery Network*, the Court struck down a municipal ordinance that banned the use of freestanding newsracks for the distribution of commercial advertising publications.[95] In applying the fourth prong, the Court held that the city failed "to establish a 'reasonable fit' between its legitimate interests in safety and aesthetics and its choice of a limited and selective prohibition of [commercial] newsracks as the means chosen to serve those interests."[96] By failing to investigate how regulating the size, shape, appearance, and number of newsracks would serve their interest, the city had not "carefully calculated" the costs and benefits to

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92. *Id.*

93. 507 U.S. 410 (1993).

94. 507 U.S. 761 (1993).

95. In order to maintain safe and attractive sidewalks and streets, Cincinnati began to enforce an old ordinance that banned the use of freestanding newsracks for the distribution of commercial publications, handbills, or leaflets (*e.g.* free magazines) on public property. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 413 (1993). The ban did not, however, include the freestanding newsracks that were used for the distribution of traditional publications (*e.g.* newspapers and magazines). *Id.* The respondent, who published and distributed free real estate magazines that advertised properties for sale in various parts of the country, challenged the ordinance after their permit to install 24 newsracks was revoked because their newsracks were found to violate the ordinance. *Id.* In applying the *Central Hudson* test, the Court struck down the ban because it did not directly advance the city's interest. *Id.* at 417. Specifically, while the ban would lead to the removal of 62 commercial newsracks, it would not address the "harm" caused by the 1,500 to 2,000 noncommercial newsracks that presumably were identical to the commercial newsracks in size, shape, appearance, and location. *Id.* Any advancement that resulted from the ban was found to be "minute" and insufficient to satisfy the third and fourth prongs. *Id.* at 418.

Of further significance was the Court's rejection of the city's reasoning that the noncommercial information remained on the newsracks because it was more valuable in content than the commercial information. *Discovery Network*, 507 U.S. at 424-25. The Court concluded that the city placed too much importance on the commercial/noncommercial distinction. *Id.* In so holding, the Court further eroded the commercial/noncommercial dichotomy that had plagued commercial speech for over fifty years.

96. *Discovery Network*, 507 U.S. at 416-17

speech that were associated with the prohibition.[97] While the Court was unwilling to readopt the "least restrictive means" standard[98] in *Discovery Network*, it did state that "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."[99] The Court's application of the fourth prong in *Discovery Network* constituted a significant departure from the highly deferential approach of previous decisions.

In *Edenfield v. Fane*,[100] the Court focused more narrowly on strengthening the third prong when it struck down a Florida regulation that prohibited in-person solicitation by certified public accountants.[101] In sharp contrast to its deferential approach in *Posadas*, the *Edenfield* Court held that the government carries the burden of demonstrating that it is regulating speech to address a serious problem and that the preventive measures it implements will contribute to solving that problem.[102] The Court held that "[t]his burden is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a *material* degree."[103] In the absence of such a rigorous evidentiary standard, the government could easily "restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression."[104] This decision would significantly strengthen the level of scrutiny that courts should apply under the third prong of the *Central Hudson* test.

Later that same term, however, the Court returned to its deferential style of analysis in *United States v. Edge Broadcasting*.[105] In *Edge*

97. *Id.* at 417.

98. *Id.* at 416-17 n.12 & n.13.

99. *Discovery Network*, 507 U.S. at 417, n.13.

100. 507 U.S. 761 (1993).

101. *Id.* The Board argued that the ban was necessary to preserve the "attest function" in which the CPA renders his opinions on the financial status of a business. *Id.* The Board believed that a CPA who solicits clients is one that "is in need of business and may be willing to bend the rules." *Id.* at 765. In applying the test the Court held that, while this interest was substantial, the state failed to offer studies or anecdotal evidence that demonstrates that the regulation directly advances its interest in protecting potential clients from deception or unscrupulous accountants. *Id.* at 771. Consequently, the ban was found to be unconstitutional. *Id.* at 772.

102. *Id.* at 770-71.

103. *See id.* (emphasis added).

104. *Id.*

105. 509 U.S. 418 (1993).

Broadcasting, the Court upheld a federal statute that banned television and radio broadcasters from advertising state lotteries if the lotteries were illegal in the state in which the television or radio broadcaster was licensed.[106] In applying the *Central Hudson* factors, the Court completely ignored the monumental revisions it had made just a few months earlier in *Edenfield* and *Discovery Network*. Contrary to *Edenfield*, but similar to *Posadas*, the Court in *Edge* accepted the government's argument without relying on a great deal of demonstrable evidence.

Furthermore, the Court disregarded the broadcaster's argument that the regulation did not directly advance the State's interest in protecting its citizens when it said that the third prong "cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity."[107] Under the fourth prong, the Court had "no doubt that the fit in this case was a reasonable one."[108] The *Edge Broadcasting* decision is a prime example of how the Court is able to mold and shape the vague language of the *Central Hudson* test in order to arrive at the desired result.[109]

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106. Edge Broadcasting Company operates a radio station licensed by the Federal Communications Commission (FCC) in North Carolina. *Id.* at 424. The station is approximately three miles from the border between Virginia and North Carolina. *Id.* Over 92% of the station's audience lived in Virginia and 95% of its advertising revenue came from Virginia advertisers. *Id.* While Virginia operated a widely publicized lottery, North Carolina did not. *Id.* Because North Carolina does not have a state lottery, FCC regulations (Title 18 U.S.C. §§1304, 1307 (1988 Supp. III)) prohibited the station from broadcasting Virginia lottery advertisements. *Id.* Edge Broadcasting brought suit to challenge the constitutional validity of the regulations. *Id.*

107. *Id.* at 427. The Court focused on the legislative history behind the FCC regulations and stressed the importance of protecting a state's decision of whether or not to institute a state-run lottery. *Id.* at 424-25, 436. The Court believed that protecting state's rights was the substantial interest at issue in this case and protecting the individual citizens was secondary.

Furthermore, in response to the argument that the regulation did not directly advance the asserted interest because North Carolina residents were inundated by lottery advertisements from other sources that were not being regulated, the Court stated that the third prong did not require that the Government make progress on every front before it can

> make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced.

Id. at 434.

108. *Id.* at 429.

109. The flaws in the Court's analysis become more apparent when it is read with the *Bigelow* decision. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Court said that the state cannot restrict a citizen's behavior as he travels into another state to engage in legal activities. *Id.* at 824-25.

B. 1994-95 Decisions

In the following term, the Court heard two more commercial speech cases. In *Rubin v. Coors Brewing Co.*,[110] the Court was asked to address the constitutionality of a federal regulation that prohibited beer manufacturers from displaying alcohol content on malt beverage labels.[111] While the Court recognized that protection against "strength wars" was a substantial interest, it unanimously struck down the regulation because it was "irrational" and did not "directly and materially advance the government's interest."[112]

While the case ultimately was decided under the third prong, the Court also said the regulation did not satisfy the fourth prong because the government failed to pursue the numerous alternative methods that would have more directly addressed the potential risks associated with strength wars without prohibiting speech.[113] The Court held that "the availability of these options, all of which could advance the government's interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the labeling restriction] is more extensive than necessary."[114]

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110. 514 U.S. 476 (1995)

111. *Id.* at 480. Section 5(e)(2) of the Federal Alcohol Administration Act prohibits any producer, importer, wholesaler, or bottler of alcoholic beverages from selling, shipping, or delivering any malt beverages, distilled spirits, or wines in bottles unless they conform with the regulations prescribed by the Secretary of the Treasury. *Id.* One of these requirements was that, unless required by state law, alcohol content could not be printed on the labels of malt beverages (*i.e.* all beers and ales). *Id.* The primary goal behind this regulation was to curb "strength wars" by brewers who might seek to compete for customers on the basis of alcohol content. *Id.* at 483. Coors filed suit to challenge the regulation after the Bureau of Alcohol, Tobacco and Firearms refused to approve labels and advertisements that included the beverage's alcohol content. *Id.* at 478-79.

112. *Id.* at 488. First, the Court was troubled by the fact that the regulation did not impose the same restrictions on the advertising of the malt beverages. *Id.* Whereas the laws governing the printing of labels prohibit the disclosure of alcohol content unless such disclosure is required by state law, the regulations prohibiting statements of alcohol content in advertising only applied to those states that affirmatively prohibit such advertisements. *Id.* Because only 18 states had such laws, the Court found that the regulation did not directly advance its interest, particularly in light of the fact that advertising would seem to constitute a more influential weapon than labels in protecting against the outbreak of strength wars. *Id.* Second, the Court did not see the logic in requiring the disclosure of alcohol content on the labels of wine and distilled spirits while prohibiting the same disclosure on the labels of malt beverages, if the ultimate objective was to combat strength wars. *Id.*

113. *Id.* at 490-91., The Court listed "several alternatives, such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength, or limiting the labeling ban only to malt liquors, which is the segment of the market that allegedly is threatened with a strength war." *Id.*

114. *Id.* at 491.

The *Rubin* decision is significant for three reasons. First, rather than simply deferring to the government's judgment, the Court was beginning to require that the government investigate and implement less restrictive alternatives before deciding to regulate speech.[115] Second, the Court held that it was no longer going to adhere to the deferential approach outlined in *Posadas*. In a footnote, Justice Thomas rejected the assertion that, after *Posadas* and *Edge Broadcasting*, there was an exception to the *Central Hudson* standard that would allow legislatures "broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption," gambling, and the like.[116] Third, Justice Thomas also declined to perpetuate the notion that the "greater-includes-the lesser" language should be regarded as binding authority.[117] This theory that the government had the ability to ban advertising of a product if it had the ability to ban the product or service being advertised was merely *dicta*.[118] Similar to the reasoning set forth in *Edenfield*, the Court's analysis in *Rubin* represented a significant departure from the highly deferential analysis outlined in prior decisions. These decisions signified an apparent movement toward affording commercial speech greater protection.

However, as expected, the Court followed up this highly anti-paternalistic decision with a pro-paternalistic decision later that same term.[119] In *Florida Bar v. Went For It, Inc.*,[120] the Court reviewed a Florida regulation that prohibited attorneys from sending targeted mailings to victims for the first thrity days following an accident or a disaster.[121] In a 5-4 decision, Justice O'Connor upheld the regulation

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115. *Id.*

116. Rubin v. Coors Brewing Co., 514 U.S. 476, 482 n.2. In other words, the Court was unwilling to create a subcategory within the commercial speech doctrine that is entitled to less constitutional protection than traditional commercial speech messages because the product or service involved is considered a "vice."

117. *Id.*

118. *Id.*

119. The terms "pro-paternalistic" and "anti-paternalistic" were applied by Mr. Martin Redish to distinguish between cases in which the Court did and did not defer to the legislature's beliefs as to what was in the best interests of its residents. Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 611-617 (1996).

120. 515 U.S. 618 (1995). This case is the most recent in a long series of cases concerning lawyer advertising. For a detailed discussion on the lawyer advertising aspect of the commercial speech doctrine, see Ronald D. Rotunda, *Professionalism, Legal Advertising, and Freedom of Speech in the Wake of* Florida Bar v. Went For It, Inc., 49 ARK. L. REV. 703 (1997) and Paul A. Wilson, *Can I Say That in This Advertisement?, Twenty Years of Attorney Advertising*, 20 AM. J. TRIAL ADVOC. 409 (1997).

121. *Florida Bar*, 515 U.S. at 620-21. Florida Bar asserted that it has a substantial interest in protecting the privacy and tranquillity of the accident victims and their loved ones

because the Florida Bar provided compelling evidence of how the 30-day moratorium directly advanced the State's interest in protecting victims and their families.[122] The Court was also satisfied that the regulation was no more extensive than necessary because, while it regulated targeted mailings, it did not prohibit attorneys from resorting to other alternative forms of advertising.[123]

While the Court insisted that the fourth prong did not require that the "least restrictive means" be implemented, its decisions in *Discovery Network*, *Rubin*, and *Florida Bar* appeared to apply that "probing" level of judicial scrutiny.[124] The Court's shift toward this heightened level of scrutiny would become even more evident in the 1995-96 term with its decision in *44 Liquormart Inc. v. Rhode Island*.[125]

IV. THE 44 LIQUORMART V. RHODE ISLAND DECISION

A. The Facts and Procedural History

The *44 Liquormart* decision involved two Rhode Island statutes that prohibited the price advertising of alcoholic beverages.[126] The purpose of the statutes was to protect the health and welfare of Rhode Island residents by promoting temperance in the consumption of alcohol.[127] The State believed that, if it allowed price advertising, retailers would lower their prices in order to be competitive and this would result in

during a period of grief and trauma. *Id.* at 624. It also protects the reputation and dignity of the legal profession that was undermined in the eyes of the public by this form of solicitation. *Id.* at 625.

122. In contrast to *Edenfield*, the petitioner in this case submitted a 106-page summary of a two year study that it had conducted on the affect of direct lawyer solicitations. *Id.* at 626. The summary included statistical and anecdotal evidence that supported the Florida Bar's views regarding the potential harm associate with direct mail solicitations. *Id.* at 626-27.

123. "Our lawyer advertising cases have afforded lawyers a great deal of leeway to devise innovative ways to attract new business." *Id.* at 633. The State of Florida permits attorneys to advertise on prime-time television, the radio, billboards, newspapers, and, the yellow pages. *Id.* at 633-34. The Court determined that these represented ample alternative channels for lawyers to disseminate their advertisements.

124. Redish, *supra* note 119, at 623.

125. 517 U.S. 484 (1996).

126. *Id.* at 488-90. The first statute made it illegal for in-state vendors and out-of-state manufacturers, wholesalers, and shippers to advertise, in any form whatsoever, the price of alcoholic beverages, with the exception of displays and price tags that were not visible outside the establishment. *Id.* (citing R. I. GEN. LAWS §3-8-7 (1987). The second statute prohibited the media from publishing or broadcasting advertisements that made "reference to the prices of any alcoholic beverages." *Id.* (citing to R. I. GEN. LAWS § 3-8-8.1 (1987)).

127. *44 Liquormart*, 517 U.S. at 490-91.

higher alcohol consumption by Rhode Island residents. Therefore, the State prohibited all forms of off-site price advertising of alcoholic beverages.

In 1991, 44 Liquormart, a retail liquor store, placed an advertisement in the local newspaper which alluded to its low prices on alcoholic beverages.[128] The Rhode Island Liquor Control Administrator held a hearing and determined that the advertisement violated the statutes, fined 44 Liquormart $400, and ordered the retailer to cease running the advertisement.[129] After paying the fine, 44 Liquormart along with Peoples Super Liquor Stores, Inc., a Massachusetts retail liquor chain with Rhode Island customers, filed an action in federal district court seeking a declaratory judgment on the constitutional validity of the two statutes.[130]

The District Court found the two statutes to be unconstitutional.[131] In applying the *Central Hudson* balancing test as modified by the *Edenfield* and *Rubin* decisions, the Court concluded that the advertising ban failed to directly and materially advance the State's interest in limiting alcohol consumption and was "more extensive than necessary to serve that interest."[132] The Court also rejected the argument that the Twenty-first Amendment somehow reduced the State's burden of demonstrating that the prohibition satisfied the *Central Hudson* factors.[133]

On appeal, the First Circuit applied a *Posadas* style of analysis in reversing the District Court's decision.[134] It found "inherent merit" in the State's argument that a ban would decrease competitive pricing, thereby driving up prices and reducing alcohol consumption.[135] The Court of Appeals also found merit in an earlier decision by the Rhode Island Supreme Court[136] which held that the Twenty-first Amendment grants the individual states the ability to regulate the sale and advertising of alcohol. In 1995, the U.S. Supreme Court granted *certiorari* to resolve the issue of whether the price advertising ban was constitutionally valid.[137]

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128. While the advertisement did not specifically state the price of any alcoholic beverages, it contained pictures of rum and vodka bottles, along with other non-alcoholic products (*i.e.*, snacks and mixers), and the word "WOW" next to the bottles. *Id.* at 492.

129. *Id.* at 493.

130. *Id.* at 492.

131. 44 Liquormart, Inc. v. Racine, 829 F. Supp. 543, 549, 554 (D.R.I. 1993)

132. *Id.* at 555.

133. *Id.*

134. 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 7 (1st Cir. 1994).

135. *Id.* at 7.

136. S&S Liquormart, Inc. v. Pastore, 497 A.2d 729 (R.I. 1985).

137. 44 Liquormart, Inc. v. Rhode Island, 115 S. Ct. 1821 (1995).

B. The Decision

The Supreme Court unanimously reversed the First Circuit's decision to uphold the Rhode Island ban as well as its decision that the Twenty-first Amendment somehow supersedes the First Amendment mandate against speech restrictions. The Court, however, was far from unanimous as to why the Rhode Island ban on alcohol price advertising violated the First Amendment. There were four separate opinions written on this issue, each of which is addressed below.

1. The Plurality Opinion of Justice Stevens

After summarizing the facts and procedural history of the case, Justice Stevens began the principal opinion by providing an overview of the commercial speech doctrine.[138] He recognized that the public's keen interest in receiving accurate information meant that certain regulations on commercial speech were warranted. This regulation, he believed, was justified by the commonsense distinctions between commercial and noncommercial speech.[139] While Justice Stevens recognized the need to regulate or restrict speech that may be deceptive or exert an undue influence, he believed, as did some of his colleagues in *Central Hudson*, that special concerns arise regarding those "regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy."[140] It was the Court's decision in *Central Hudson* that these blanket restrictions be reviewed with "special care."[141]

However, unlike the members of the *Central Hudson* majority, Justice Stevens elaborated on the meaning of this "special care" standard.[142] Rather than applying the same degree of judicial scrutiny to all commercial speech restrictions,[143] Justice Stevens believed that there should be two levels of scrutiny depending upon the scope and purpose of the speech restrictions. Specifically, he believed that restrictions designed to protect consumers from misleading, deceptive, or aggressive sales tactics should remain subject to intermediate scrutiny, while a more rigorous level of scrutiny should be applied when the government com-

138. *44 Liquormart, Inc.*, 517 U.S. 484, 496-500 (Stevens, J., plurality opinion). Justices Kennedy, Souter, and Ginsburg joined Justice Stevens in Part III of the opinion.

139. *Id.* at 498-99.

140. *Id.* at 499-500 (quoting Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 n.9 (1980)). Justices Kennedy and Ginsburg joined Justice Stevens in Part IV of the opinion.

141. *Id.* at 500.

142. *Id.*

143. *Id.*

pletely prohibits the dissemination of truthful, nonmisleading commercial speech for reasons unrelated to the preservation of a fair bargaining process.[144]

Justice Stevens offered three reasons for why this heightened level of scrutiny was necessary. First, blanket prohibitions are dangerous because they all but foreclose the alternative channels of disseminating certain types of information.[145] Second, these bans tend to conceal an underlying governmental policy that could be advanced just as effectively without regulating speech.[146] Finally, blanket bans usually rest on the assumption that the public will respond irrationally to the truth, and Justice Stevens was particularly skeptical of government attempts to serve consumers' best interests by keeping them ignorant about a product or service.[147] Therefore, regardless of commercial speech's supposed "hardiness" and "greater objectivity," Justice Stevens believed that blanket bans on truthful, nonmisleading speech should be subject to a more stringent level of scrutiny than the traditional intermediate scrutiny; it should be subject to strict scrutiny.[148]

In Part V of the opinion, Justice Stevens determined that the Rhode Island ban should be subject to this more stringent "special care" analysis because (1) it completely prohibited the dissemination of "truthful, nonmisleading speech about a lawful product," and (2) it serves an interest "unrelated to consumer protection."[149] While the first three prongs remain the same under this "special care" analysis, the fourth prong of the test would be revised to require that the least restrictive means be utilized to achieve the governmental interest.[150]

In applying the test to the facts, Justice Stevens was satisfied that the regulated expression was truthful, nonmisleading commercial speech about a lawful product and that Rhode Island had a substantial interest in promoting temperance.[151] However, in applying the third prong, Justice Stevens agreed with the district court's determination that the ban failed to directly and materially advance the State's interest in limiting

144. 44 Liquormart Inc., v. Rhode Island, 517 U.S. at 501.

145. *Id.* at 502.

146. *Id.* at 502-04.

147. *Id.*

148. *Id.*

149. *Id.* at 503. Justices Kennedy, Souter, and Ginsburg joined Justice Stevens in this portion (Part V) of the opinion.

150. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. at 508 (1996) (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 n.9 (1980)).

151. *Id.*

alcohol consumption.[152] While Justice Stevens conceded that the price advertising ban may have some effect on the purchasing patterns of a small percentage of Rhode Island citizens, he did not believe that the state presented sufficient evidence to demonstrate that the ban would significantly decrease market-wide consumption.[153] Contrary to the First Circuit Court of Appeals, Justice Stevens was unwilling to engage in "speculation or conjecture" regarding the ban's role in promoting temperance.[154]

In applying the traditional fourth prong, Justice Stevens concluded that Rhode Island failed to meet its burden of demonstrating a "reasonable fit" between the price advertising ban and its interest in promoting temperance.[155] Justice Stevens recognized that there were several less burdensome alternatives—such as directly regulating the price of alcohol, imposing a higher tax on alcohol, and creating educational campaigns focused on the dangers associated with alcohol consumption—that would have more effectively reduced consumption than a blanket ban on price advertising.[156] Consequently, because the ban could not survive the traditional *Fox* "reasonable fit" standard, Justice Stevens found it unnecessary to apply the more rigorous "least restrictive means" standard.[157]

In Part VI of the opinion, Justice Stevens followed Justice Thomas' lead[158] in erasing *Posadas* and its highly deferential analysis from the commercial speech landscape.[159] Justice Stevens stated that after ten years of reflection, he now was persuaded that the majority in *Posadas* "erroneously performed the First Amendment analysis" when it upheld the Puerto Rican casino advertising ban.[160] In particular, he believed that the majority "clearly erred in concluding that it was 'up to the leg-

152. *Id.* at 504-06.

153. *Id.*

154. *Id.* at 506-08. Justice Stevens believed that engaging in "speculation and conjecture" regarding the affect that a regulation will have is "an unacceptable means of demonstrating that a restriction... directly advances the State's asserted interest." *Id.* at 508 (citing Edenfield v. Fane, 507 U.S. 761, 770 (1993)).

155. *Id.*

156. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. at 506-08 (1996).

157. *Id.*

158. Rubin v. Coors Brewing Co., 514 U.S. at 482 n.2 (1994).

159. *44 Liquormart.* 517 U.S. at 509-10. Justices Kennedy, Thomas, and Ginsburg joined Justice Stevens in this portion (Part VI) of the opinion.

160. *Id.* Relying on Justice Rehnquist's application of the third prong in *Posadas*, Rhode Island argued that, because expert testimony regarding the effectiveness of the ban was inconclusive either way, the ban constituted a "reasonable choice." *Id.*

islature' to choose suppression over a less speech-restrictive policy."[161] The *Posadas* style of reasoning "cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available."[162] As a result, the Stevens plurality declined to give further support to its highly deferential analysis.[163]

Justice Stevens also followed Justice Thomas'[164] lead in formally rejecting the "greater-includes-the-lesser" argument.[165] Justice Stevens noted that this reasoning was merely *dicta* and only offered after the majority had already determined, albeit incorrectly, that the Puerto Rican ban satisfied the *Central Hudson* factors.[166] Justice Stevens believed that this type of reasoning should be rejected as "inconsistent with both logic and well-settled doctrine."[167]

Finally, by again relying on the *Rubin* decision, Justice Stevens dismissed the State's assertion that, under the *Posadas* and *Edge Broadcasting* decisions, its price advertising ban should be permitted because it targets commercial speech that involves a "vice" activity.[168] Justice Stevens believed that it would be difficult to define and enforce a "vice" exception to the commercial speech doctrine because

> Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to "vice activity." Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market. The recognition of such

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161. *Id.*

162. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. at 509-10 (1996).

163. *Id.* Justice Stevens stated that, "in keeping with our prior holdings, we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate." *Id.*

164. Rubin v. Coors Brewing Co., 514 U.S. 482 n.2.

165. *44 Liquormart*, 517 U.S. at 510. In *Posadas*, Justice Rehnquist concluded his majority opinion by stating that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.* (citing Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. at 345-46). On the basis of this reasoning, Rhode Island argued that its "undisputed authority to ban alcoholic beverages" must also include the power to restrict the advertising of alcoholic beverages. *44 Liquormart*, 517 U.S. at 510.

166. *Id.*

167. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. at 510-11. In analyzing the "greater-includes-the-lesser" syllogism, Justice Stevens disagreed with Justice Rehnquist's conclusion in *Posadas* that along with the greater power to ban the product was the lesser power to ban speech about the product. *Id.* Justice Stevens found the power to ban speech to be much more compelling and dangerous than the ability to ban the product or service. *Id.*

168. *Id.* at 511.

> an exception would have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the vice label on selected lawful activities, or requiring the federal courts to establish a federal common law of vice. For these reasons, a "vice" label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity.[169]

2. The Concurring Opinion of Justices O'Connor, Rehnquist, Souter, and Breyer

While Justice O'Connor agreed that the Rhode Island ban was unconstitutional, she did not share Justice Steven's desire to formulate a new analytical scheme for evaluating commercial speech regulations.[170] She was content to decide the case under the traditional *Central Hudson* factors. In applying the test, Justice O'Connor found that the ban satisfied the first three prongs, but not the fourth.[171] In her opinion, the fit between the State's price advertising ban and its goal to promote temperance was not reasonable.[172] Similar to Justice Stevens, Justice O'Connor believed that Rhode Island overlooked other methods—such as establishing minimum prices or imposing a higher sales tax—that would have more directly promoted temperance than prohibiting the dissemination of truthful, nonmisleading information.[173]

While not nearly as adamant as some of her colleagues, Justice O'Connor also found the *Posadas* style of analysis to be outdated.[174] Justice O'Connor held that since *Posadas*, "this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny."[175] Under this "closer look" approach, the Court would no longer defer to the State's proffered justification for its regulation. Rather, the State must show that the speech restriction directly advances its asserted interest and

169. *Id.* at 512-16 (citations omitted).

170. *Id.* at 528-32.

171. *Id.* at 529.

172. *Id.*

173. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. at 530-31. In addition to pursuing direct regulation, Justice O'Connor also believed that educational programming was preferable to banning speech. *Id.*

174. *Id.* at 531-32.

175. *Id.* at 531.

that it is narrowly tailored.[176]

3. The Concurring Opinion of Justice Thomas

Finding the *Central Hudson* test difficult to apply consistently, Justice Thomas was prepared to abandon the last three prongs of the test in favor of a more strict one-step inquiry.[177] Justice Thomas believed that in situations where "the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," the *Central Hudson* test provides insufficient protection.[178] He viewed paternalistic regulations of truthful, nonmisleading speech as *per se* illegitimate, and believed that they should be reviewed under a stricter level of scrutiny.[179]

Justice Thomas also was particularly interested in the fact that Justice Stevens and Justice O'Connor appeared to adopt a stricter interpretation of the fourth prong.[180] While Justice Thomas applauded his colleagues implicit desire to afford commercial speech greater protection,[181] he failed to see why they did not simply bypass the fourth prong analysis completely in favor of striking down all regulations that seek to suppress truthful, nonmisleading speech about lawful products.[182] Justice Thomas reasoned that a stricter application of the fourth prong (*i.e.*, a least restrictive means approach) would be virtually impossible for governments to overcome because directly restricting conduct would always be less burdensome than restricting speech. Therefore, it was an unnecessary inquiry.[183]

Justice Thomas concluded his concurrence by denouncing the *Central Hudson* test as inherently inconsistent. In doing so, he urged his colleagues to return to the broad protection that was afforded commercial speech under *Virginia Pharmacy*.[184]

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176. *Id.* at 531-32.

177. *Id.* at 518-20 (Thomas, J., concurring). Justice Thomas would have saved the first prong of the test and required only that the expression be truthful, nonmisleading speech about a lawful product. *Id.*

178. *See id.* at 523.

179. 44 Liquromart, Inc. v. Rhode Island, 517 U.S. at 525-528 (1996).

180. *Id.* at 524-25.

181. *Id.* at 525.

182. *Id.* at 526.

183. *Id.*

184. *Id.* at 527-28.

4. Justice Scalia's Concurrence

Justice Scalia shared Justice Thomas' trepidations regarding the continued use of the *Central Hudson* balancing test.[185] However, unlike Justice Thomas and Justice Stevens, Justice Scalia was not prepared to declare the *Central Hudson* test "wrong."[186] While ultimately deciding the case under the *Central Hudson* factors, Justice Scalia warned future litigants that he was "not disposed to develop new law, or reinforce old."[187] Justice Scalia's somewhat middle-of-the-road concurrence is important because, while other members of the Court seem entrenched in their views, his open-minded approach may mean that he will cast the deciding vote in future commercial speech cases.

C. Implications of 44 Liquormart

While the Court's opinion in *44 Liquormart* was disjointed and hard to reconcile, there are several conclusions that can be drawn from it. First, the Twenty-First Amendment does not qualify the First Amendment's prohibition against state laws that abridge an individual's freedom of speech.[188] Second, although at least six members of the Court appeared ready to discard all or parts of the traditional *Central Hudson* balancing test in *44 Liquormart*, the test remains the threshold standard for reviewing legislation that restricts the dissemination of commercial speech.

Justice Stevens [189] and Justice Thomas[190] each proposed implementing a more stringent level of judicial scrutiny when the government attempts to preclude the dissemination of truthful, nonmisleading commercial speech about lawful products or services in order to keep legal users of a product ignorant so as to manipulate their choices in the marketplaces; however, neither proposition received majority support. The survival of the existing *Central Hudson* standard was due to Justice O'Connor's belief that the facts of the case did not warrant changing the current balancing test.[191] Her statement, however, leaves open the possibility that a fact pattern may present itself that justifies revising all or

185. *44* Liquormart, Inc. v. Rhode Island, 517 U.S. at 517 (Scalia, J., concurring). Justice Scalia considered the test "to have nothing more than policy intuition to support it." *Id.*

186. *See id.*

187. *Id.*

188. *Id.* at 514-16.

189. *Id.* at 501; *see supra* footnotes 138-169 and accompanying text.

190. *Id.* at 518-23; *see supra* footnotes 176-183 and accompanying text.

191. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. at 528-32; *see supra* footnotes 170-175 and accompanying text.

part of the four-part balancing test.

Finally, the Court rejected the continued reliance on *Posadas* and its overly deferential method of analysis.[192] While the 1986 decision was not formally overruled, both pluralities agreed that it was no longer a viable First Amendment authority. In rejecting the deferential approach, the Court also discarded both the "greater-includes-the-lesser" theory and the idea that there was a "vice" category within the commercial speech doctrine that entitled advertising of gambling, alcohol, and tobacco products less constitutional protection than other forms of commercial speech.[193]

D. The Aftermath

Although the *44 Liquormart* decision was regarded as a significant victory that was bound to elevate commercial speech's status within the First Amendment hierarchy,[194] two subsequent lower court decisions called into question whether commercial speech was in a better position after *44 Liquormart* than it was previously. In 1995, the Fourth Circuit issued a pair of decisions concerning two Baltimore City ordinances that banned all stationary outdoor advertising of tobacco and alcohol products except in certain areas of the city.[195] Relying exclusively on *Edge Broadcasting, Florida Bar,* and *Posadas*, the Court found that both ordinances satisfied all four prongs of the *Central Hudson* balancing test. It completely ignored the *Edenfield* heightened evidentiary requirement and decided that a "logical nexus" between the ordinances and the city's interests was all that was necessary to satisfy the third prong.[196]

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192. *Id.* at 508-11 (Stevens, J., plurality opinion), 528 (O'Connor, J., concurring on judgment); *see also supra* notes 138-169 and 170-175 and accompanying text.

193. *Id.* at 508-11.

194. David O. Stewart, *Change Brewing In Commercial Speech*, 82 A.B.A. J. 44 (July 1996).

195. Anheuser-Busch, Inc. v. Mayor of Baltimore, 855 F. Supp. 811 (D.Md. 1994), *aff'd*, 63 F.3d 1305 (4th Cir. 1995) [hereinafter *"Anheuser-Busch I"*], Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore, 862 F. Supp. 1402 (D.Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir. 1995) [hereinafter *"Penn Advertising I"*]. The regulation at issue in *Anheuser-Busch I* was Baltimore Ordinance 288, which prohibited all stationary outdoor advertising of alcoholic beverages except in certain commercially and industrially zoned areas of the city. *Anheuser-Busch I*, 63 F.3d at 1308-09. The regulation at issue in *Penn Advertising I* was Baltimore Ordinance 307, which similarly prohibited all stationary advertising of tobacco products except in certain commercial and industrial zoned areas of the city. *Penn Advertising I*, 63 F.3d at 1320-21.

196. *Anheuser-Busch I*, 63 F.3d at 1314. The Court applied the same standards in upholding the alcohol advertising restrictions in *Penn Advertising I. Penn Advertising I*, 63 F.3d at 1325.

In deciding that both ordinances were narrowly drawn, the circuit court determined, without offering any clarification, that there were no less restrictive means available to advance the government's interest.[197] The circuit court's use of the phrase "least restrictive means" is misleading because it interpreted the fourth prong as follows "[i]f a regulation goes only 'marginally beyond what would adequately have served the governmental interest,' the regulation will not be invalidated; only when a regulation is 'substantially excessive, disregarding far less restrictive and more precise means' will the regulation be invalidated under this prong of *Central Hudson*."[198]

The Supreme Court subsequently granted *certiorari* in both cases, vacated the Fourth Circuit's opinion, and remanded the cases for further consideration in light of the *44 Liquormart* decision.[199] On remand, the Fourth Circuit surprised many observers when it declined to reverse its prior decisions.[200] Instead, the circuit court drew several distinctions between *44 Liquormart* and the two lower court cases that it believed necessitated reaffirming its decisions. First and foremost, the circuit court emphasized that there was no consensus among the nine Justices in *44 Liquormart* as to why the ban violated the First Amendment.[201] Without a consensus, the circuit judges recognized that they were only bound by those portions of the decision in which the majority of the Justices "concurred on the narrowest grounds."[202] According to Judge Niemeyer, the only portion of the decision in which a majority of the nine Justices concurred was that "keeping legal users of alcoholic beverages ignorant of prices through a blanket ban on price advertising"[203]

197. *Anheuser-Busch I*, 63 F.3d at 1316 and *Penn Advertising I*, 63 F.3d at 1325.

198. *Anheuser-Busch I*, 63 F.3d at 1315 and *Penn Advertising I*, 63 F.3d at 1325.

199. Anheuser-Busch, Inc. v. Mayor of Baltimore, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded sub nom.* Anheuser-Busch Inc. v. Schmoke, 116 S. Ct. 1821 (1996), Penn Advertising of Baltimore, Inc. v. Mayor and City Council, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded sub nom.* Penn Advertising of Baltimore, Inc. v. Schmoke, 116 S. Ct. 2575 (4th Cir.1996).

200. Anheuser-Busch Inc. v. Schmoke, 101 F.3d 325 (4th Cir. 1996) [*"Anheuser-Busch II"*] Penn Advertising of Baltimore, Inc. v. Schmoke, 101 F.3d 332 (4th Cir. 1996) *cert. cenied*, 117 S. Ct. 1569 (1997) [*"Penn Advertising II"*]. Because the Fourth Circuit's rationale for reaffirming both cases is contained almost exclusively in the *Anheuser-Busch II* decision, the following discussion will cite only to that opinion.

201. *Anheuser-Busch II*, 101 F.3d. at 328.

202. *Id.* (*quoting* Marks v. United States, 430 U.S. 188, 193 (1977)). In *Marks*, the Court held that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Anheuser-Busch II*, 101 F.3d at 328 (quoting *Marks*, 430 U.S. at 193).

203. *See Anheuser-Busch II*, 101 F.3d at 329. Judge Niemeyer, however, failed to real-

violates the First Amendment.

Judge Niemeyer pointed out that while Rhode Island enacted a blanket ban on all forms of off-site price advertising in order to dissuade legal users from consuming alcohol, Baltimore's ordinances merely were time, place, and manner restrictions that were narrowly targeted at preventing non-legal users (*i.e.* minors) from consuming alcohol or tobacco products.[204] Moreover, unlike Rhode Island's blanket ban, the Baltimore ordinances did not foreclose all channels that the petitioners could use to disseminate their messages.[205]

Judge Niemeyer further contrasted the cases by pointing out that neither Baltimore nor the State of Maryland was "attempting to undermine democratic processes and circumvent public scrutiny by substituting a ban on advertising for a ban on the product, as the *44 Liquormart* Court feared was the case with Rhode Island."[206] Rather, Baltimore was utilizing the ordinances to reinforce existing laws that banned the consumption of alcohol and tobacco products by minors.[207]

Rhode Island also banned price advertising in an effort "to enforce adult temperance through an artificial budgetary constraint."[208] Baltimore, in contrast, sought "to protect children who are not yet independently able to assess the value of the message presented." In addition, it was not attempting to prohibit adults from purchasing alcohol or tobacco products.[209] Based on these facts, Judge Niemeyer concluded that the decision should be reaffirmed because it "conforms to the Supreme Court's repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media."[210]

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ize that a majority of the nine Justices also agreed that *Posadas*, the decision that the Fourth Circuit relied upon in deciding *Anheuser-Busch I* and *Penn Advertising I*, was no longer binding authority. *Id.*

204. *Id.*

205. *Id.* In contrast to the Rhode Island ban, the Baltimore ordinances did not bar petitioners from resorting to newspapers, magazines, radio, direct mail, Internet, and other media sources. *Id.*

206. *Anheuser Busch II*, 101 F.3d 325 (4th Cir. 1996) (citing *44 Liquormart*, 116 S. Ct. at 1508).

207. *Id.*

208. *Id.*

209. *Id.* at 329.

210. *Id.* (citing Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct 2374, 2386 (1996); Action for Children's Television v. FCC, 58 F.3d 654, 657 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 701 (1996); Osborne v. Ohio, 495 U.S. 103 (1990); New York v. Ferber, 458 U.S. 747, 759 (1982); FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978); Stanley v. Georgia,

In his dissent, Judge Butzner said that he would have vacated the district court decision and remanded the case to the lower court for an evidentiary hearing concerning the link between banning billboards and reducing underage consumption of alcohol or tobacco products.[211] He stated that an evidentiary hearing was necessary to properly evaluate whether the third and fourth prongs of *Central Hudson* had been met.[212]

In both sets of decisions, the Fourth Circuit summarily disregarded *Edenfield*'s mandate that courts not defer to the legislature's conjecture about a regulation's effectiveness. Instead of inquiring into whether the ordinances directly and materially advanced Baltimore's interest in reducing underage consumption of tobacco and alcohol products, the circuit court simply accepted the city's position that the partial outdoor advertising ban would significantly reduce the use of these products by minors.

When courts fail to make a careful, searching inquiry into whether or not the regulation satisfies the third prong, it typically fails to do the same under the fourth prong. This was a problem in the aforementioned cases as well. The Fourth Circuit failed to determine whether the bans were narrowly tailored or whether less speech restrictive alternatives existed to reduce consumption.[213] In effect, the Fourth Circuit

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394 U.S. 557, 566 (1969); Ginsburg v. New York, 390 U.S. 629, 639-40 (1968); Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

211. *Id.* at 330 (Butzner, J., dissenting).

212. *Id.* at 331. "A charge that advertising restrictions infringe rights guaranteed by the First Amendment requires careful evaluation assessing the credibility of witnesses and weighing the evidence. These functions should be performed by a judge—not by a city council." *Anheuser Busch II*, 107 F.3d 325, 332 (4th Cir. 1996). Furthermore, contrary to the other members of the panel, Judge Butzner also correctly stated that a majority of the *44 Liquormart* Court expressly decided to no longer support *Posadas* and its deferential analysis. *Id.* at 331-32. This is significant because, in deciding *Anheuser-Busch I* and *Penn Advertising I*, this same panel relied on *Posadas'* deferential analysis to support its decision to uphold the billboard bans. *Id.* Therefore, by reaffirming these prior decisions in *Anheuser-Busch II* and *Penn Advertising II,* the Court defiantly disregarded the Court's rejection of *Posadas*. *Id.*

213. The Court's perfunctory application of the *Central Hudson* test in these cases is significant because it has been the impetus behind the enactment of similar billboard restrictions across the nation. For example, Richmond, California banned tobacco advertisement on billboards within 500 feet of elementary and secondary schools, and King County, Washington banned tobacco advertising in all county-owned buildings. *See* Donald W. Garner & Richard J. Whitney, *Protecting Children From Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479, 487-489 (1997). Cincinnati limits outdoor tobacco advertising signs to certain areas. Other cities have banned tobacco ads on public transit systems, including New York; Syracuse; Seattle; Portland; San Francisco; Alameda, Santa Clara, and Contra Costa Counties (California); Denver; Boston; Amherst; Springfield (Massachusetts), and Madison

seriously undermined the recent advances made by the Supreme Court to reinforce the *Central Hudson* test because it disregarded both requirements that the speech restrictions directly advance the government's asserted interest and that it constitute a reasonable fit.[214]

The Supreme Court had an opportunity to review the Baltimore ordinances, but it declined to do so.[215] One commentator offered the following rationales for why the Supreme Court denied *certiorari* in the two Baltimore billboard cases.[216] First, the commercial speech doctrine "is still in a state of flux, and the Court is unwilling to clarify its position at this time."[217] Second, there currently is no disagreement among the circuits that the Court needs to resolve.[218] Third, the Court might be waiting for a decision from another circuit that supports the Court's reasoning in *44 Liquormart* and then use it to resolve any split with the Fourth Circuit's position.[219] Finally, this commentator posits that the Court has already granted *certiorari* on eight commercial speech cases in the last four years, and it should not be expected to decide a commercial speech case every term.[220]

Whatever the Court's reasoning, it passed up a golden opportunity to develop and solidify its protective holding in *44 Liquormart,* and, at the same time, eliminate some of the confusion surrounding commercial speech. As a result, unless presented with a blanket ban on commercial speech, the doctrine remains as perplexing as it was prior to *44 Liquormart.*

V. REVISING THE FOURTH PRONG

While the members of the Court were unable to agree on many is-

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(Wisconsin). *Id.*

214. Felix H. Kent, *Reviewing 1997: Tobacco Settlement,* N.Y. L. J. 3 (12/19/97).

215. Anheuser-Busch, Inc. v. Mayor of Baltimore, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded sub nom.* Anheuser-Busch Inc. v. Schmoke, 116 S. Ct. 1821 (1996), *reaff'd,* 101 F.3d. 325 (4th Cir. 1996), *cert. denied,* 117 S. Ct. 1569 (April 28, 1997) and Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded sub nom.* Penn Advertising of Baltimore, Inc. v. Schmoke, 116 S. Ct. 2575 (1996), *reaff'd* 101 F.3d 332 (4th Cir. 1996), *cert. denied,* 117 S. Ct. 1569 (1997). *See also,* Edward Felsenthal and Yumiko Ono, *Outdoor Ads for Tobacco Can Be Curbed,* THE WALL ST. J., April 29, 1997, at B1.

216. *See* Richard T. Kaplar, *Court's Refusal to Hear Baltimore Appeals Sparks Flurry of New Restrictions,* COM. SPEECH DIG. (Spring 1997) <http://www.comspeech.com /digest/97spring/news/court/1.html>.

217. *See id.*

218. *Id.*

219. *See id.*

220. *See id.*

sues in *44 Liquormart*, they were able to agree that *Posadas* was no longer controlling authority. The *Posadas* decision, which has been the impetus behind numerous paternalistic regulations in the past decade, no longer can be used to justify affording commercial speech minimal constitutional protection. And, because the *Fox* "reasonable fit" standard grew out of the *Posadas* decision, the next logical step would be to discard this low evidentiary standard in favor of a standard that affords commercial speech greater protection.

Strengthening the level of protection afforded to commercial speech could be accomplished by readopting the "least restrictive means standard." In *44 Liquormart*, the Court seemed to move in this direction. Both the Stevens and O'Connor pluralities, while ultimately applying the *Fox* "reasonable fit" standard, focused on the fact that Rhode Island had several less speech restrictive alternatives available, which were more likely to advance Rhode Island's goal of promoting temperance. While Justice Thomas would have adopted the more extreme approach of eliminating the final three prongs of the test, he recognized that both Justice Stevens and Justice O'Connor appeared to apply a stricter interpretation of the fourth prong, which "would go a long way toward the position [he would] take." Therefore, assuming that a theoretical compromise can be reached, a majority of the Court might be prepared to readopt the "least restrictive means" standard when applying the fourth prong.

There are three primary justifications for adopting this more strenuous standard. First, as the aforementioned cases suggest, the reasonable fit standard allows too much judicial discretion and, consequently, too many inconsistent results. Second, it creates a disincentive for governments to investigate and implement non-speech restrictive alternatives that have the potential to be highly effective. Third, commercial speech no longer is—if it ever was—deserving of a subordinate position within the First Amendment hierarchy and is entitled to a broader level of protection. Each of these concerns will be addressed in turn.

A. Reduce Judicial Discretion and Inconsistent Results

The obvious justification for abandoning the "reasonable fit" standard is that it leads to inconsistent results.[221] A primary reason for these

221. *See* Leonard M. Niehoff, *The Supreme Court Clarifies the Commercial Speech Doctrine—Again*, 75 MICH. B.J. 828 (1996); *see also* Edward O. Correia, *State and Local Regulation of Cigarette Advertising*, 23 J. LEGIS. 1, 7-8 (1997); Karl Boedecker et al., *The Evolution of First Amendment Protection for Commercial Speech*, 59 J. MKTG. 38, 43 (1995).

inconsistent results is that jurists currently enjoy a high level of discretion under this relaxed "reasonable fit" standard.[222] The lack of clear guidelines as to what constitutes a "reasonable fit" means that each jurist is permitted great latitude to insert his or her personal views when reviewing commercial speech regulations. There are no safeguards to prevent them from relying on either public sentiment or their own individual biases about a product or service when determining whether the government may regulate the advertising of that product or service.[223] This high level of discretion means that the advertising and legal communities are left guessing as to their chances for success.[224]

However, under the "least restrictive means" standard, the level of arbitrariness in which courts review commercial speech restrictions would be reduced. In combination with the more rigorous *Edenfield* standards, this least restrictive means standard would require that the courts look for a closer causal nexus between the substantial harm that the government seeks to restrict and the speech that allegedly will produce such harm.[225] This heightened standard would, in effect, create a rebuttable presumption that favors the free flow of truthful, nonmisleading commercial speech.[226] This modified prong could only be satis-

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Since its adoption of the reasonable fit standard in 1989, the Supreme Court has relied on the fourth prong to uphold two out of five commercial speech restrictions. In *United States v. Edge Broadcasting*, 509 U.S. 418 (1993), the Court used a watered-down version of the fourth prong to uphold the lottery broadcasting restriction. In *Florida Bar v. Went For It Inc.*, 515 U.S. 618 (1993), the fourth prong played somewhat of a lesser role in the Court's decision to uphold the 30-day moratorium. On the other hand, the Court applied a more stringent interpretation of the fourth prong in striking down the government's commercial speech restrictions in *Rubin v. Coors Brewing Co.*, 515 U.S. 476 (1995), *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) and *44 Liquormart Inc., v. Rhode Island*, 517 U.S. 484 (1996). The fourth prong was not a significant factor in the Court's decisions of *Ibanez v. Fla. Dept. of Bus. & Prof. Regulation*, 512 U.S. 136 (1994) or *Edenfield v. Fane*, 507 U.S. 761 (1993). Based on these decisions, there is a slightly better than a 50-50 chance that a commercial speech restriction will be struck down under this reasonable fit standard.

222. WRIGHT, *supra* note 17, at 62.

223. The "reasonable fit" standard appears to depend more on the subjective views of the Justices and less on the verifiable evidence offered by the government. The subjective nature of the "reasonable fit" factor has become increasingly problematic as the lower courts have been confronted with municipal, state, and federal legislation that seeks to protect minors from legal, but potentially harmful, products. *See* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny As Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 300-02 (1998).

224. *See* Felix H. Kent, *Re-Affirmation of First Amendment in Commercial Speech*, N.Y. L.J., Apr. 6, 1993, at 3. Kent states that the protection for commercial speech has been a "Supreme Court made roller coaster ride" for the legal and advertising community. *Id.*

225. *See* SMOLLA *supra* note 39, at §3.03(2).

226. *Id.*

fied if the government clearly establishes that there are no less speech restrictive alternatives that would have a comparative impact on furthering the state's asserted interests.[227] By requiring the courts to begin their review in a light that strongly favors the free flow of truthful, nonmisleading commercial expression, and not one that allows great deference to the legislatures, this revision will reduce judicial discretion and promote predictability.[228]

In his concurrence, Justice Thomas was skeptical that the "least restrictive means" standard would transform the *Central Hudson* balancing test into a more speech-protective analytical framework.[229] He believed that because directly regulating a product "would virtually always be at least as effective in discouraging consumption as [ ] restricting advertising," all restrictions would fail under this more stringent standard.[230] This is not necessarily true.

Granted, this heightened level of scrutiny makes it more difficult to justify speech restrictions, but it does not make it impossible. The government would not be obligated to use the least speech restrictive alternatives if those alternatives already have been implemented and failed to resolve the problem. For example, a narrow advertising ban (e.g. one that restricts cigarette billboard advertising within a reasonable distance of schools, parks, or other areas heavily populated by children) may, in fact, be the least restrictive method of reducing underage smoking if the city can demonstrate that underage smoking continues to increase in spite of: (1) it's rigorous monitoring and enforcement system; (2) its laws that restrict and severely punish the sale of tobacco products to minors; and (3) its well-funded anti-smoking educational programs. Of course, the city would need to demonstrate that the speech restrictions directly and materially reduce consumption by minors. But if the less speech restrictive alternatives are not feasible or do not directly and materially advance the government's objective, then greater restrictions on advertising may become necessary even under this more protective standard.

It is important to keep in mind that, under this proposed revision, governments would be required to implement the most effective measures that restrict the least amount of speech. Critics may argue that this

227. *Id.*

228. *See generally* Paul A. Blechner, *First Amendment: Supreme Court Rejection of the Least Restrictive Alternative Test*, 1990 ANN. SURV. AM. L. 331 (1991).

229. *44 Liquormart Inc., v. Rhode Island*, 517 U.S. at 518-20 (Thomas, J., concurring).

230. *Id.*

is already required under the current "reasonable fit" standard, and in theory they may be correct. However, as the case law demonstrates, this has not always been applied in practice. By adopting the "least restrictive means" standard, the Court would be required to apply a stronger presumption in favor of protecting speech than currently exists under the "reasonable fit" standard.

Critics may also challenge this revision by arguing that this will not reduce inconsistencies because it is simply the replacement of one vague and imprecise standard with another. This argument also is not necessarily accurate. The "least restrictive means" standard has been in existence for several years and has been applied in numerous contexts.[231] However, if the standard still remains elusive, asking the following two questions should provide additional clarification as to what is required in order to satisfy this least restrictive means requirment.[232] First, is the governmental regulation narrowly tailored to restrict the least amount of speech possible while directly and materially advancing its asserted policy interest? Second, are there feasible alternative policies or tactics that can accomplish the government's interest just as effectively without restricting speech? A negative answer to the first inquiry or an affirmative answer to the second inquiry would mean that the speech restriction does not satisfy the "least restrictive means" standard.

B. Promoting Less Speech Restrictive Alternatives

The second rationale for abandoning the "reasonable fit" standard in favor of the "least restrictive means" standard is that it would force legislatures to investigate other non-speech restrictive alternatives in order to further their paternalistic policy goals. The following are three alternative methods in which governments can further their paternalistic goals without restricting speech: direct regulation, counterspeech, and self-regulation.

1. Direct Regulation

If a community wishes to reduce the consumption of a certain product or service, it would make more sense to regulate the use of that

231. Some of the more recent cases are: *Denver Area Education Telecommunication Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996); *Sable Communications v. FCC*, 492 U.S. 115 (1989); and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

232. The following questions are modified versions of questions proposed by Mr. Edward O. Correia, *supra* note 221, at 34.

product or service than to restrict the advertisement of the product.[233] Justices Stevens and O'Connor agreed that direct regulations on conduct would be preferable and more effective than restrictions on speech. There are at least three tactics that can be used to regulate conduct. First, the government could reduce demand. The most common method for reducing the demand for a product or service is to make the product more expensive by imposing a higher tax on it. Justice O'Connor stated that a tax "is not normally very difficult to administer and would have a far more certain and direct effect" than restricting speech.[234] Second, the government could restrict access. For instance, the government could impose and strictly enforce age restrictions, purchase period curfews or impose higher licensing fees to reduce the number of vendors authorized to sell the product. Finally, the government could enhance the penalties imposed upon those vendors and consumers who fail to conform with these requirements.[235]

2. Counterspeech

In addition to regulating conduct, legislatures also could choose to add to rather than subtract from, the commercial marketplace of ideas.[236] In his concurrence in *Virginia Pharmacy*, Justice Stewart stated that the only way that ideas can be suppressed is through "the competition of other ideas."[237] This method is commonly referred to as counterspeech. Counterspeech gives consumers the ability to weigh the two competing messages in the context of the individual consumer's economic decisionmaking capacity. The purpose of utilizing counterspeech, however, should not be to impose government-determined rationality on individuals, but rather to allow the government to provide consumers with essential information that is necessary when making important day-to-day decisions.

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233. Debra Gersh Hernandez, *Tobacco Ad Debate Rages*, EDITOR & PUBLISHER, Sept. 7, 1996, at 24.

234. *44 Liquormart*, 517 U.S. at 529-32 (O'Connor, J., concurring).

235. In San Jose, California, the use of sting operations to catch an punish vendors that sell to minors has contributed to the thirty percent drop in cigarette sales. Elizabeth Gleick, *Out of the Mouth of Babes*, TIME, Aug. 21, 1995, at 33-34.

236. *See generally* Helen McGee Konrad, Note, *Eliminating Distinctions Between Commercial and Political Speech: Replacing Regulation with Government Counterspeech*, 47 WASH. & LEE L. REV. 1129 (1990).

237. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 780 (1976) (Stewart, J., concurring). Justice Stewart also stated that "people will perceive their own best interests if only they are well enough informed, and ... the best means to that end is to open the channels of communication rather than to close them." *Id.*

In the late 1960s, counterspeech proved to be a highly effective tool in convincing people to quit smoking.[238] In 1967, the Federal Communications Commission decided that the Fairness Doctrine applied to cigarette advertising. This meant that it was a "controversial issue of [such] public importance"[239] that broadcasters would be required to donate air time to anti-smoking organizations.[240] Soon thereafter, television and radio stations began carrying advertisements concerning the dangers of smoking and its causal relationship to lung cancer.[241] While the ratio of cigarette advertisements to antismoking advertisements was four-to-one, the message was getting through to consumers.[242] The consumption of cigarettes declined, and several reports credited the decline to the anti-smoking ads.[243]

Due to the dramatic impact of anti-smoking advertisements on sales, the tobacco industry decided that it would not challenge the 1969 ban on cigarette advertising[244] because they knew that the advertising ban eliminated not only cigarette commercials, but the anti-smoking commercials as well.[245] The tobacco industry knew that as soon as the anti-smoking advertisements stopped, cigarette sales would begin to rise; they were correct.[246]

In the 1990s, counterspeech again has become a highly effective tool in reducing underage smoking.[247] In Vermont, counterspeech programs have cut teen smoking by thirty-five percent.[248] In Massachusetts and in

238. MICHAEL G. GARTNER, ADVERTISING AND THE FIRST AMENDMENT 30-33 (1989).

239. *See* Banzhaf v. FCC, 405 F.2d 1082, 1086 (D.C. Cir. 1968).

240. Daniel Helberg, Note & Comment, *Butt Out: An Analysis of the FDA's Proposed Restrictions on Cigarette Advertising Under the Commercial Speech Doctrine*, 29 LOY. L.A. L. REV. 1219, 1230 n.84 (1996). "The FCC articulated the Fairness Doctrine in 1949 in response to a Supreme Court mandate that the FCC, in determining who could broadcast over the radio, must consider the 'public interest, convenience, or necessity.'" *Id.* (citing Roland F. Hall, *The Fairness Doctrine and the First Amendment: Phoenix Rising*, 45 MERCER L. REV. 705, 709 (1994)). *See also* GARTNER, *supra* note 238, at 30.

241. *See* GARTNER, *supra* note 238, at 30.

242. *Id.*

243. *Id.*

244. *Id.* (referring to the "Public Health Cigarette Smoking Act of 1969," 15 U.S.C. §§1331-1341 (1994)).

245. *See* GARTNER, *supra* note 238, at 30.

246. *Id.*

247. *See generally* David A. Locke, *Counterspeech as an Alternative to Prohibition: Proposed Federal Regulation of Tobacco Promotion in American Motorsport*, 70 IND. L.J. 217 (1997).

248. Douglas Birch, *Antismoking Ads Can Work, Experts Say*, THE BALTIMORE SUN, Aug. 12, 1995, at 1A.

San Jose, California, government funded anti-smoking advertisements and programs have contributed to a forty percent decrease in cigarette sales since 1994.[249] These statistics are symbolic of how non-speech restrictive alternatives can be highly effective in advancing the government's paternalistic goals while respecting the high value commercial speech has in our society.

3. Self-Regulation

Finally, the advertising industry could adopt a system of self-regulation.[250] The concept of self-regulation in advertising began in the 1960s and has since been adopted in fifty-two countries throughout the world.[251] Canada, for example, has a self-regulatory body comprised of advertisers, media executives, and members of various consumer associations that reviews advertisements and handles public and industry complaints.[252] In addition to reviewing the advertisements for truth and accuracy, the Canadian Advertising Foundation also monitors other areas such as "taste, decency, sexism, and gender portrayal."[253] It is considered a highly effective and preferable alternative to government-imposed speech restrictions.[254]

In the United States, some observers believe that the role of the National Advertising Review Council ("NARC") and the National Advertising Bureau of the Council of Better Business Bureaus should be expanded to oversee the more controversial aspects of advertising.[255] Currently, these agencies only review advertisements for their truth and accuracy, but there is growing interest in having it address controversial issues, such as tobacco and alcohol advertising.[256] Members of Congress and the advertising community believe that new self-regulatory steps must be taken in the area of alcohol advertising so as to avoid further

249. Gleick, *supra* note 235, at 34.

250. Rance Crain, *Self-Regulation Can Solve Tobacco, Liquor Ad Furor*, ADVERTISING AGE, Dec. 16, 1996. "The beauty of self-regulation is that it eliminates those tricky First Amendment issues . . . If the industry itself were to agree to common-sense restrictions on cigarette promotions, that voluntary agreement would carry a lot of credibility both with the public and with the government." *Id.*

251. Joanne Ingrassia, *Regional Focus Canada; Canada's Ad Industry Self-Regulation Aids Quality*, ADVERTISING AGE INT'L., Sept. 18, 1995, at I-28.

252. *Id.*

253. *Id.*

254. *Id.*

255. Both entities are private self-regulatory agencies for certain members of the U.S. advertising industry. Crain, *supra* note 250, at 23.

256. Crain, *supra* note 250, at 23.

involvement by the Federal Communications Commission or the Federal Trade Commission.[257] These voluntary self-regulations, if adopted by the advertising community, would ensure that advertisers are truthful, accurate, and responsible to consumers and society as a whole.

The National Advertising Division ("NAD") has begun to parallel its decisions with those of the Federal Trade Commission and the Food and Drug Administration.[258] NAD also has addressed controversial questions that have not yet been addressed by the governmental agencies.[259] Furthermore, NAD and NARC decisions are published regularly and the handling of these cases greatly resembles formal legal proceedings, which includes the reliance on established precedents.[260] Observers now view self-regulation as a viable and less costly alternative to going to judicial or administrative adjudication.[261]

C. Greater Protection For Commercial Speech

The third rationale for abandoning the "reasonable fit" standard in favor of the "least restrictive means" standard is that commercial speech deserves a higher degree of protection than it currently enjoys. Historically, commercial speech has been viewed as substantially less valuable than political speech. This distinction is based on the idea that, unlike political speech, commercial speech is not critical to the maintenance of a viable democracy.[262]

This justification for affording commercial speech a subordinate position in the First Amendment hierarchy is flawed because our free market economic system and our democratic political system are inseparable.[263] Advertising is as "crucial to our capitalistic ideology as political speech is to our democratic ideology."[264] While commercial speech "may not affect how people are governed as directly as political speech does, [ ] it indirectly influences people's attitudes and values

257. Ira Teinowitz, *Renewed Call for Self-Regulation*, ADVERTISING AGE, Apr. 7, 1997, at 51.

258. Felix H. Kent, *Reviewing 1997: Tobacco Settlement*, N.Y.L.J., Dec. 19, 1997, at 3.

259. *Id.*

260. *Id.*

261. *Id.*

262. *See* Jackson & Jeffries, Jr., *supra* note 28, at 14. *Compare* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971), *with* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1216 (1983).

263. *See* GARTNER, *supra* note 238, at 9.

264. BURT NEUBORNE, FREE SPEECH, FREE MARKETS, FREE CHOICE 17 (1987).

about how they should be governed."[265] Furthermore, the free flow of commercial speech allows advertisers and consumers to economize their time and effort in deciding how to allocate their resources.[266] For these reasons, commercial speech is entitled to greater First Amendment protection.

The standard argument over the years for not providing commercial speech greater protection is that there are "commonsense differences" between commercial speech and noncommercial speech.[267] In *Virginia Pharmacy*, the Court believed that the existence of these commonsense differences suggested that a different degree of protection is necessary in order to properly protect the dissemination of commercial speech.[268] These distinctions have been the proverbial albatross around the neck of commercial speech.

The first of these commonsense distinctions between commercial and noncommercial speech is that commercial speech is somehow "more verifiable" than noncommercial speech.[269] Commercial speakers are viewed as being better informed as to both the economic marketplace and their products.[270] Hence, they are better situated than a political speaker "to evaluate the accuracy of their messages and the lawfulness of the underlying activity."[271]

Even if commercial speech is in fact more verifiable than political speech, the Court has never explained why the degree of verifiability should dictate the level of protection speech should receive under the First Amendment.[272] Perhaps the members of the Court became constitutional conservationists and viewed the First Amendment as some sort of resource whose value can be spread only so thin before it disappears. However, even if verifiability was a critical factor in determining the level of protection to afford a form of speech, there are examples of when political speech is more verifiable than commercial speech.[273] For

265. *See* GARTNER, *supra* note 238, at 9. "While politics can shape a man's business, his business can just as surely shape his politics." *Id.*

266. GARTNER, supra note 238, at 9.

267. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-2 n. 24 (1976).

268. *Id.*

269. *Id.*

270. *Id.*

271. Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 n.6 (1980) (citations omitted).

272. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 635-37 (1990).

273. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,

example, it would be easier to determine how an incumbent candidate voted on a certain issue than it would be to accurately determine if Miller Beer "tastes great" or is "less filling."

The second commonsense distinction is that commercial speech is hardier or more durable than noncommercial speech.[274] The court explained this distinction as follows: "[S]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation foregone entirely."[275] In other words, the Court presumed that greed will overcome any chilling effects that may be associated with commercial speech regulations. This reasoning, similar to the verifiability distinction, is unsupported.[276] Consequently, because these commonsense distinctions are unfounded, they should no longer be used as a justification for affording commercial speech a subordinate position in the First Amendment hierarchy.[277]

VI. CONCLUSION

The *44 Liquormart* decision clearly signifies a desire by a majority of the Court to provide greater constitutional protection for truthful, nonmisleading commercial speech. However, the decision also signifies the Court's inability to come to a consensus on how that protection should be provided. This Comment has suggested a revision that can be viewed as a compromise between the Justice's competing views. It proposed that the Court dispense with the "reasonable fit" standard in favor of the "least restrictive means" standard under the existing *Central Hudson* balancing test.

Under this heightened standard, the level of discretion afforded judges would be diminished substantially. Judges would be required to make a searching inquiry into whether the legislation directly advances the asserted governmental interest while still restricting the least amount of speech. Furthermore, because this standard makes it extremely difficult to restrict the dissemination of truthful, nonmisleading speech, governments will be forced to turn to proven non-speech alternatives in order to achieve their asserted interest rather than restricting speech in hopes that it will do the same. Finally, this standard will, once

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Inc., 425 U.S. 748, 771-72 n.24 (1976).

274. *Id.* Commercial speech is the "off-spring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation." *Central Hudson*, 557 U.S. at 564 n.6 (internal citations omitted).

275. *Id.*

276. Kozinski & Banner, *supra* note 272, at 637.

277. Kozinski & Banner, *supra* note 272, at 637.

and for all, eliminate the so-called commonsense distinctions argument that has plagued commercial speech for over the past twenty years. In short, this revision ultimately would tip the scales of the *Central Hudson* balancing test in favor of affording commercial speech with greater constitutional protection.

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