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COMMENTS

STRANGE BREW: THE STATE OF COMMERCIAL SPEECH JURISPRUDENCE BEFORE AND AFTER *44 LIQUORMART, INC. V. RHODE ISLAND*

INTRODUCTION

Throughout much of the twentieth century, the Supreme Court treated commercial speech[1] in the same manner as libel, obscenity, and so called "fighting words."[2] Consequently, commercial speech was viewed as an "unprotected" category of speech beyond the pale of First Amendment protection.[3] It was not until 1976, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[4] that the "Court changed its mind"[5] and granted constitu-

1. The term "commercial speech" is of very recent vintage. According to Judge Alex Kozinski, Skelly Wright, then a "titan" on the D.C. Circuit, coined it in 1971. Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 756 (1993). In Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 658 n.38 (D. C. Cir. 1971), *rev'd sub nom.* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), Judge Wright stated that "[c]ommercial advertising—indeed, any sort of *commercial speech*—is less fully protected than other speech, because it generally does not communicate ideas and thus is not directly related to the central purpose of the First Amendment." (emphasis added).

2. Justice Murphy used this expression in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In dictum, he wrote, "'fighting' words . . . [which] by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected because their "slight social value . . . is clearly outweighed by the social interest in order and morality." *Id.* at 572 (footnotes omitted).

3. *See* JOHN H. GARVEY & FREDERICK SCHAUER, THE FIRST AMENDMENT: A READER 335 (1992). *See also Anti-History, supra* note 1 (providing an excellent treatment of the commercial speech doctrine's history from colonial times to the present). Because of its recent adoption by the First Amendment, commercial speech has been characterized as the First Amendment's "[s]tepchild." *See, e.g.*, W. John Moore, *1st Amendment's Stepchild is Getting More Attention*, 25 NAT'L. J. 2074 (1993).

4. 425 U.S. 748 (1976).

tional protection to commercial speech.[6] While the Court in *Virginia Pharmacy* did extend a significant degree of protection to commercial speech, it refused to cloak such speech with the full regalia of First Amendment protection.[7] As a result, commercial speech advanced to an improved but still uncertain position within the hierarchy of First Amendment categories. In effect, by sandwiching commercial speech between historically unprotected categories (e.g., libel and obscenity) and categories with longer and more distinguished constitutional pedigrees (e.g., political speech),[8] the Court left it in a state of constitutional limbo.

The uncertain place of commercial speech was due in large measure to *Virginia Pharmacy*'s failure to come to a conclusion on two very important issues: (1) the theoretical basis of constitutional protection for commercial speech; and (2) how courts should evaluate restrictions on such speech. Even though the Court emphasized anti-paternalism as one important rationale for extending constitutional protection to commercial speech, the Court also identified a veritable smorgasbord of other interests and values to support its decision. These included protecting speaker and listener interests in the dissemination of commercial information, promoting economic efficiency,[9] and furthering the value of self-fulfillment.[10] The pre-

5. GARVEY & SCHAUER, *supra* note 3, at 335.

6. The Court provided strong hints that it would eventually extend First Amendment protection to commercial speech in cases like *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Bigelow v. Virginia*, 421 U.S. 809 (1975). In *Sullivan*, the Court invalidated the application of Alabama's libel law to a civil rights organization's advertisement in the New York Times. In so doing, the Court ignored the *New York Times*' motivation for placing the advertisement (profit) and instead focused on the content of the speech. *See* 376 U.S. at 265-66. In *Bigelow*, the Court went even further. In that case, Bigelow, an editor at a Virginia newspaper, ran an advertisement in his paper for a New York abortion service. At the time abortion was illegal in Virginia but legal in New York. Bigelow was convicted for violating a Virginia statute that prohibited the encouragement or procurement of abortion services. The Court reversed the conviction, holding that even though the speech involved was commercial in nature, the state's interest in prohibiting such speech should be balanced against the value of the speech in providing important information to the public. *See* 421 U.S. at 826.

7. *See Virginia Pharmacy*, 425 U.S. at 771-72 n.24 (stating that "commonsense differences" between commercial and non-commercial speech dictate that commercial speech receive less protection than other forms of protected speech).

8. For a graphical illustration of the different levels of protection afforded by the First Amendment, see William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107 (1982) (placing commercial speech between pornography and artistic or scientific speech).

9. According to then-Justice Rehnquist, by relying on this rationale the Court was squinting toward the long-since-discredited *Lochner* era of substantive due process: "While

cise point at which these values and interests intersected remained largely unexplained.[11]

The Court was similarly ambiguous about the second question. While *Virginia Pharmacy* seemed to favor a balancing approach to commercial speech, which usually suggests intermediate level review, the Court actually applied a categorical or strict scrutiny standard of review.[12] Thus, even though commercial speech was given significant protection in *Virginia Pharmacy*, it remained unclear how far its holding would extend in future cases and just how courts should analyze restrictions on commercial speech.[13]

The Court finally attempted to answer these questions in *Central Hudson Gas & Electric Corp. v. Public Service Commission of*

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there is . . . much to be said for the Court's observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession." *Virginia Pharmacy*, 425 U.S. at 784 (Rehnquist, J., dissenting).

10. Professor Tribe has identified three overarching rationales for the Court's decision in *Virginia Pharmacy:*

> First . . . the state's rationale was itself forbidden by the first and fourteenth amendments, which preclude regulating an activity on the premise that ignorance is preferable to knowledge. Second, the values of free speech are not limited to political dialogue but extend to any exchange of ideas or information that might make individual choices better informed. And third, . . . commercial information is indispensable to the formation of intelligent opinions as to how [the free enterprise] system ought to be regulated or altered.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 893-94 (2d ed. 1988).

11. Professor Richard Eberle concludes that the Court's use of a variety of rationales to support its holding actually made the Court's decision stronger. In his words, this "web of interdependent values . . . support one another and ultimately support commercial speech." Richard J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 453 (1992). Eberle identifies seven primary values and interests used by the Court to support its holding: (1) advancement of knowledge and pursuit of truth; (2) the speaker's economic interests; (3) the listener's interest in self-realization; (4) the value of information; (5) society's interest in the free flow of information; (6) helping to effectuate private decisionmaking; and (7) helping to effectuate public decisionmaking. *See id.* at 446-452.

12. *See* Jonathan Weinberg, Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 726 (1982) (observing that "even though the *Virginia Board* Court structured its opinion in a manner suggesting that it would engage in balancing, it actually adopted a per se approach").

13. *See* Leonard M. Niehoff, *U.S. Supreme Court Review: The Supreme Court Clarifies the Commercial Speech Doctrine—Again*, 75 MICH. B. J. 828, 828 (1996) (noting that in the wake of *Virginia Pharmacy* "there were [still] significant questions about how much [the] differences [between commercial and noncommercial speech] mattered and how the competing interests should be balanced").

New York.[14] In that case, decided just four years after *Virginia Pharmacy*, the Court announced a new four-part test for determining when commercial speech should receive First Amendment protection.[15] While the *Central Hudson* balancing test should have eased the way toward a more consistent and certain treatment of commercial speech, the Court's application of the test in subsequent cases produced spectacularly divergent results.[16] Despite the inconsistency of results under the test, and notwithstanding claims that the test represented a retreat from *Virginia Pharmacy*,[17] the Court's decision was embraced by both the academic and the judicial communities as an intelligent middle-of-the-road approach to commercial speech.[18] Academic criticism of *Central Hudson* was

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14. 447 U.S. 557 (1980).

15. Under this test, a court is to consider four questions when passing on the constitutionality of a commercial speech restriction: (1) whether the speech concerns a lawful activity and is not misleading; (2) whether the interest asserted by the government is substantial; (3) whether the regulation directly advances the asserted interest; and (4) whether the regulation is "not more extensive than is necessary to achieve that interest." *Id.* at 566.

16. According to Kozinski and Banner:

> Ever since [the advent of the Central Hudson test], judges and Justices have filled quite a bit of space in the case reporters trying to figure out precisely what forms of regulation the four-part test permits. We know that it permits more regulation than the analogous standard for noncommercial speech. Beyond that, however, the cases have been able to shed little light on *Central Hudson*, aside from standing as *ad hoc subject-specific* examples of what is permissible and what is not. Thus, government cannot prohibit certain sorts of commercial billboards, but can prohibit the unauthorized use of certain words altogether. Government cannot prohibit the mailing of unsolicited contraceptive advertisements, but can prohibit advertisements for casino gambling. Government cannot require professional fundraisers to obtain licenses, but can prohibit college students from holding Tupperware parties in their dormitories."

Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 631 (1991) (citations omitted) (emphasis added). *See also* Niehoff, *supra* note 13, at 828 ("Regrettably, like many of the Supreme Court's multiple part tests, the test set forth in *Central Hudson* may have done more for the appearance of orderly analysis than it did for orderly analysis itself, and significant confusion about the commercial speech doctrine persisted.").

17. Justice Blackmun made this claim in his *Central Hudson* concurrence. According to him, *Central Hudson* "is not consistent with [the Court's] prior cases." 447 U.S. 557, 573 (1980) (Blackmun, J., concurring in the judgment). In Justice Blackmun's view, *Virginia Pharmacy* announced a categorical prohibition against total restrictions of commercial speech. *See id.* at 576. Therefore, consideration of whether the restraint is substantially related to the asserted governmental interest only serves to emasculate the rule set forth in *Virginia Pharmacy*. *See id.* at 576-77 n.3.

18. *See* TRIBE, *supra* note 10, at 896 ("[P]rincipled accommodation of the conflicting values at stake may indeed be the most appropriate course in the commercial speech area."); Stephen Shiffrin, *The First Amendment and Economic Regulation: Away From a*

in short supply and, for the most part, was relegated to the back pages of law reviews.[19] Aside from Justice Blackmun's occasional dissents and frequent concurrences,[20] it was rare to find a justice joining in Justice Blackmun's eagerness to abandon the test.

The Court's love affair with the *Central Hudson* test ended in *44 Liquormart, Inc. v. Rhode Island*.[21] While *44 Liquormart* is sure to be celebrated for its partial overruling of *Posadas de Puerto Rico Associates v. Tourism Company*,[22] the more important aspect of the case may be what it has to say about *Central Hudson*. In three separate opinions a majority of the Court expressed its collective dissatisfaction with the existing approach.[23] For instance, while Justice Stevens stopped short of expressly rejecting the *Central Hudson* test, his alteration of the existing approach was noth-

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General Theory of the First Amendment, 78 NW. U. L. REV. 1212, 1251 (1983) (approving the Court's "general balancing methodology").

19. As anyone taking the time to read this Comment must know, the last section of most law reviews contains student-written notes and case comments. Perhaps the most widely cited student-written criticism of *Central Hudson*, written shortly after the decision, is found in Weinberg, *supra* note 12, at 730 (describing the four-factor test as "a shifting rule of law that may lead to little more than ad hoc adjudication"). Of course, not all criticisms of *Central Hudson* were relegated to the back pages of law reviews. *See, e.g.*, Thomas C. Marks, Jr., *Three Ring Circus: The Supreme Court Balances Interests*, 18 STETSON L. REV. 301, 352 (1989) (arguing that *Central Hudson* has allowed the Court "a high degree of choice as to whether government wins or loses" and thus permits the Court to engage in results oriented adjudication). Notably, while both Weinberg and Marks criticize the balancing test approach of *Central Hudson* on the same ground, they do so for different reasons. Weinberg believes the test allows for too much regulation of commercial speech, *see* Weinberg, *supra* note 12, at 748-750, while Marks argues that allowing the Court too much wiggle room will result in overprotecting commercial speech, *see* Marks, *supra*, at 352 (asserting that the *Central Hudson* approach represents a return to the Lochner era's "flexibility" in substituting the Court's judgment for that of the legislature).

20. Justice Blackmun was not the only jurist to voice early criticism of the test. For instance, *In the Matter of R.M.J.*, 609 S.W.2d 411 (Mo. 1980), *rev'd*, 455 U.S. 191 (1982), the Missouri Supreme Court defiantly refused to follow *Central Hudson* on grounds similar to those voiced by Weinberg and Marks above, declaring that "[w]e respectfully decline to enter the thicket of attempting to anticipate and to satisfy the *subjective ad hoc* judgments of a majority of the justice of the Supreme Court." *Id.* at 412.

21. 116 S.Ct. 1495 (1996).

22. 478 U.S. 328 (1986) (upholding a Puerto Rico statute banning the advertisement of gambling to residents of Puerto Rico). For a review of the *Posadas* decision, *see infra* notes 112-127.

23. A few commentators have picked up on this aspect of the case. *See, e.g.*, Jerome L. Wilson, *Rulings Cast Doubt on SLA Advertising Restrictions*, N.Y. L.J. 1 (July 24, 1996) ("[A] majority of the Court . . . would appear to be ready to abandon the Court's traditional balancing test, first promulgated in *Central Hudson Gas & Electric v. Public Service Comm'n of N.Y.*, and grant far greater freedom from governmental restrictions to commercial speech." (footnote omitted)).

ing short of revolutionary. Justice Thomas went even further. Not only did he expressly reject *Central Hudson*'s analytical approach, he also proposed a vastly different and much stricter categorical standard similar to the one originally adopted in *Virginia Pharmacy*. Justice Scalia, apparently unimpressed with *Central Hudson* and the proposed alternatives, preferred to remain on the fence. While he openly expressed his "discomfort"[24] with the *Central Hudson* framework, he was not prepared to abandon it until a workable alternative had been developed.[25] In his view, neither Justice Stevens nor Justice Thomas had proposed such an alternative. Notably, the status quo's apologists consisted of only four justices, including Chief Justice Rehnquist, and Justices O'Connor, Souter, and Breyer; and even they arguably applied the test in a much stricter manner than suggested by previous applications.[26] Thus, the Court split into two camps over the issue of how much protection to give commercial speech. For the first time since *Virginia Pharmacy*, a majority of the Supreme Court appears ready—if not entirely willing—to analyze some forms of commercial speech under the same standard of review as that applied to noncommercial speech.[27]

Even though the Court is now split into just two camps over *whether* the present incarnation of *Central Hudson* should be abandoned, it is unclear *what* its replacement will be. There are, for instance, some subtle but important theoretical and analytical differences between the opinions of Justices Stevens and Thomas. Justice Stevens, for example, concluded that total bans on truthful,

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24. *See id.* at 1515 (Scalia, J., concurring in part and concurring in the judgment).

25. Justices Scalia and Thomas each expressed their dissatisfaction with the test in varying degrees of intensity. See Parts II(C)(2) and (3), respectively, for a discussion of their views.

26. In her concurrence, Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Souter and Breyer, claimed that she was applying the plain vanilla *Central Hudson* test. *44 Liquormart*, 116 S.Ct. at 1520-23. However, Justice Thomas, who argued for the virtual elimination of the *Central Hudson* test, noted that Justice O'Connor's interpretation of *Central Hudson* "could, as a practical matter, go a long way toward the position I take." *Id.* at 1518-19. (Thomas, J., concurring). Justice Thomas explained that "[a]lthough the tenor of Justice O'Connor's opinion . . . might suggest that this is just another routine case-by-case application of *Central Hudson's* fourth prong, the Court's holding will in fact be quite sweeping if applied consistently in future cases." *Id.* at 1519.

27. *Cf.* Felix H. Kent, *A Significant First Amendment Decision*, N.Y. L.J., June 21, 1996, at 3 ("While the legal question involved and the answer given by the Supreme Court may seem simple, the diverse reasoning of various justices challenges the reader because new alignments appear to be taking form on the Court.").

nonmisleading speech should be reviewed with "special care"[28] and devoted a considerable part of his opinion to developing the theoretical construct upon which greater protection for commercial speech could be based. Under the theory developed by Justice Stevens, commercial speech should be protected not simply because of the value of information or the interest of the listener, but rather because it often implicates the value of self government and the interest in the communication process. Nevertheless, rather than abandon the *Central Hudson* test, he instead refined it to reflect the theoretical insights developed early in his opinion. His is a contextual approach as opposed to the categorical approach of *Virginia Pharmacy* or the mechanical test of *Central Hudson.*

Justice Stevens' less "mechanical" approach[29] stands in sharp contrast to the standard advocated by Justice Thomas. In Justice Thomas' view, the *Central Hudson* "balancing test should [not] be applied to a restriction of 'commercial' speech, at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark."[30] Justice Thomas' more categorical view of commercial speech restrictions stems from the model of commercial speech he employs. In his view, truthful, nonmisleading commercial speech is to be protected because it furthers listener interests and informational values, and a restriction on such speech should always be struck down. To balance the competing interests and engage in any extended analysis, then, is a waste of time. Because of the variety of opinions in the case, some commentators have warned that the decision's future significance may be muted by the alleged inability of lower courts to reconcile the many views into a coherent standard.[31]

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28. *44 Liquormart*, 116 S.Ct. at 1508 (quoting *Central Hudson*, 447 U.S. at 566 n.9).

29. *See* Jerome L. Wilson, *A Toast To Commercial Speech*, N.J. L.J., at S14 (August 26, 1996) (arguing that Justice Stevens' plurality opinion "seriously weakened . . . the Court's reliance on the rather mechanical balancing test" of *Central Hudson*).

30. *44 Liquormart*, 116 S. Ct. at 1518. It is interesting to note that, among all the Justices, only Justice Thomas insists on placing the word "commercial" in quotation marks. He also places "test" in quotation marks when speaking of the *Central Hudson* test. Presumably, this was Justice Thomas' attempt to show that he holds both the distinction between commercial and noncommercial speech, and the test used to evaluate commercial speech, in low regard.

31. *See* Thomas D. Blue, Jr., *Over the Edge: The Fourth Circuit's Commercial Speech Analysis in* Penn Advertising *and* Anheuser-Busch, 74 N.C. L. REV. 2086, 2088 (1996). Blue finds "puzzling" the Court's remand of cases involving cigarette and liquor billboard advertising with instructions to reconsider in light of *44 Liquormart* "[g]iven the ambiguous nature of the Supreme Court's holding." *Id.* Because none of the opinions garnered a

It is certainly fair to say that *44 Liquormart* is not a model of clarity. However, neither is it the judicial equivalent of *Finnegan's Wake.* Notwithstanding the case's ambiguity, it should be celebrated for changing or signaling change in at least three areas of commercial speech.[32] First, it is clear that *Central Hudson,* at least in its present incarnation, is on its way out. Consequently, some commercial speech restrictions may be subject to what is essentially strict scrutiny, whether such review is ostensibly undertaken as a *Central Hudson* analysis or as a more categorical approach.[33] Second, while the rhetoric of some justices was more restrained than that of others, a majority of the Court has disavowed and overruled several of *Posadas de Puerto Rico Associates v. Tourism Company*'s[34] more odious implications. Thus, advertising of vice products and other legal but unpopular or harmful products will not be treated any differently than other commercial speech. This is a significant development given the increasing eagerness on the part of Washington and some States to regulate advertising of cigarettes, liquor, and other so called "vice prod-

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clear majority, one possible consequence of the lack of agreement on rationale and analysis is that the decision will have virtually no impact on future cases. Under Marks v. United States, 430 U.S. 188, 193 (1976), "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*." (citation omitted)(emphasis added). The opinion in which the Justices concurred on the narrowest grounds is that of Justice O'Connor. Justice O'Connor based her opinion on two grounds. First, to the extent that *Posadas* was viewed as requiring courts to show greater deference to a legislative determination that speech, and not conduct, should be regulated, it was overruled. Thus, Rhode Island was not entitled to added deference merely on the basis of *Posadas*. All of the Justices agreed on this point. Second, the ban at issue in *44 Liquormart* did not satisfy *Central Hudson*'s fourth factor. Justice Stevens thought the ban failed both the third and fourth prongs, Justice Thomas advocated a categorical approach, and Justice Scalia said nothing either way. Consequently, under *Marks* the decision may be viewed as being based on *Central Hudson*'s fourth prong and nothing more. While that may be so, it is the thesis of this Comment that the decision is more important for showing the direction in which the Court is heading and how the various justices intend to get there than it is for its immediate impact.

32. *See* Niehoff, *supra* note 13, at 828 (noting that while the "votes on different parts of opinions are rather confusingly dispersed . . . some clear holdings and some trends emerge from a close reading of the case that are worth considering").

33. *See* Wilson, *supra* note 29, at S14 (noting that "even though there are a veritable medley of nuanced opinions and concurrences, one gets a single sense of a great clearing of the decks").

34. 478 U.S. 328 (1986) (these include the greater includes the lesser argument, the vice product "exception" to the commercial speech doctrine, and a deferential view of legislative judgments that borders on being obsequious).

ucts." Finally, and perhaps most importantly, Justice Stevens set forth a compelling model of commercial speech to guide his analysis. Animated by an aversion to paternalism and informed by an appreciation for the often ignored and misunderstood relationship between commercial speech and the political process, this model brings commercial speech within the core of First Amendment values and interests in a way that previous efforts failed to do. Further, Justice Stevens' model and approach succeeds where both *Virginia Pharmacy* and *Central Hudson* failed. While *Virginia Pharmacy* failed to tie theory to its analysis, and *Central Hudson* did not even attempt such a connection, Justice Stevens' plurality opinion successfully links a convincing theory of commercial speech with a workable analytical framework.

This Comment will examine these aspects of the case. Specifically, Part I reviews the landmark Supreme Court cases and opinions leading to the convoluted state of the commercial speech doctrine prior to *44 Liquormart*. Part II examines how the case was handled by the lower courts and the Supreme Court. Special emphasis will be placed on the views of Justices Stevens and Thomas. Part III analyzes the model of commercial speech upon which Justice Steven's plurality opinion was based. Part III further argues that, as Justice Thomas' correctly recognized, the Court's decision effectively puts truthful, nonmisleading commercial speech on a nearly equal footing with other forms of protected speech. Part III applauds this development and explores how Justice Stevens' opinion recognizes, more explicitly than any prior decision, the valuable role commercial speech performs as a "checking function" on the political process. Finally, Part III explains why Justice Stevens' theoretical and analytical approach is superior to both the categorical stance of Justice Thomas and the mechanical approach taken by Justice O'Connor.

I. THE LONG AND WINDING ROAD TO *44 LIQUORMART*: LANDMARK COMMERCIAL SPEECH CASES

To appreciate how *44 Liquormart* changes the landscape of commercial speech jurisprudence, it is necessary to examine the development of the commercial speech doctrine through prior case law. The following cases outline the progression of the Supreme Court's commercial speech jurisprudence up until *44 Liquormart*.

A. Valentine v. Chrestensen: *Low Tide for Commercial Speech*

In 1942, in *Valentine v. Chrestensen*,[35] the Supreme Court, citing little authority and providing even less explanation,[36] decided that commercial speech is deserving of no First Amendment protection:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privileged in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.[37]

The case involved an entrepreneur named Chrestensen who attempted to distribute handbills advertising submarine rides. The handbills contained an advertisement on one side and a political message on the other.[38] Chrestensen was convicted of violating a New York sanitary law prohibiting the distribution of advertisements in the streets. In the Court's mind, despite the mixture of political speech and commercial advertisement, Chrestensen was merely "pursu[ing] a gainful occupation."[39] Consequently, whether he had the right to do so was a matter to be decided by the state legislature: "Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user,

35. 316 U.S. 52 (1942).

36. According to Martin Redish, the Court, "without citing precedent, historical evidence, or policy considerations, . . . effectively read commercial speech out of the first amendment." Martin Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 450 (1971). Interestingly, the Court decided the case in record time. It was less than two weeks between oral argument and the date the opinion was circulated. *See* Kozinski & Banner, *supra* note 1, at 757. As Kozinski and Banner note, "In 1942, when the Court wrote shorter opinions and disposed of its cases faster, thirteen days wasn't unheard of, but it was about as fast as any case was ever decided." *Id.*

37. 316 U.S. at 54.

38. This mixture of the political and the commercial has continued. For instance, a Cleveland car dealer named Bob Serpentini begins every radio ad with a right wing harangue, followed by information on the great buys available at his dealership.

39. 316 U.S. at 54.

are matters for legislative judgment."[40] According to the Court, then, commercial speech should be subject to regulation to the same degree as any other commercial or business activity.[41] In other words, commercial speech was simply a substantive due process wolf dressed up as a First Amendment sheep.[42] And so things stood for the next thirty-four years.[43]

B. Virginia Pharmacy: *The Highwater Mark for the Protection of Commercial Speech*

In the seminal case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[44] the Court finally gave commercial speech explicit constitutional protection. The Court in *Virginia Pharmacy* was confronted with a challenge to a Virginia statute that prohibited the advertisement of prescription drug prices.[45] The statute was challenged on First Amendment grounds by prescription drug consumers who claimed "that they would greatly benefit if the prohibition were lifted and advertising freely allowed."[46]

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40. *Id.*

41. *See id.* As Kozinski and Banner argue, the language used by the Court resembled the language the Court had begun to use for the post-*Lochner* era of deference to economic regulation. *See* Kozinski and Banner, *supra* note 1, at 758; *see also* Redish, *supra* note 36, at 450 ("The Court felt that commercial advertising was merely ancillary to the proper performance of a business, and accordingly could be regulated by legislative action in the public interest.").

42. *See* Redish, *supra* note 36, at 450. It is worth noting that *Valentine* was decided shortly after substantive due process met its demise in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Further, the opinion in *Valentine* was written by none other than Justice Roberts, the same Justice who "made the switch in time to save nine," by abandoning his commitment to substantive due process in *Parrish*. *See* Kozinski & Banner, *supra* note 1, at 762.

43. Before *Virginia Pharmacy* there were occasional rumblings from individual members of the Court that the commercial/noncommercial distinction was supported by little more than *ipse dixit*. For instance, in 1959 Justice Douglas characterized *Valentine*'s ruling as "casual, almost offhand." Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring); *see also* Lehman v. Shaker Heights, 418 U.S. 298, 314-315 (1974) (Brennan, J., dissenting) (criticizing giving commercial speech less protection than other forms of speech); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 401 (1973) (Stewart, J., dissenting) (same), *reh'g denied* 414 U.S. 881 (1973).

44. 425 U.S. 748 (1976).

45. *See id.* at 749-750. The statute, VA. CODE ANN. sec. 54-524.35, made it illegal for pharmacists licensed in Virginia to publish, advertise or promote, "directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription." *Virginia Pharmacy*, 425 U.S. at 750 (quoting the Virginia Statute).

46. 425 U.S. at 753. In an earlier case, Patterson Drug Co. v. Kingery, 305 F. Supp.

The state defended the prohibition on several grounds. Not surprisingly, the state first asserted that the ban fell outside the scope of the First Amendment because it concerned mere commercial speech.[47] Next, the state argued that, even if commercial speech were to be accorded a modicum of First Amendment protection, a plethora of state interests served to save the prohibition from constitutional infirmity. The primary interest asserted by the state was that the statute served to "maintain[] a high degree of professionalism on the part of licensed pharmacists."[48] Advertising, claimed the state, would "reduce the pharmacist's status to that of a mere retailer."[49] Further, according to the state, removing the ban and opening up prescription drugs to price competition would harm not only the pharmacists' professionalism and expertise, but would also endanger the health of consumers.[50]

In an opinion authored by Justice Blackmun, the Court rejected each of these justifications. The Court initially engaged in an extended discussion of the commercial speech exception to the First Amendment, concluding that by 1975, "the notion of unprotected 'commercial speech' all but passed from the scene."[51] Proceeding

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821 (W.D. Va. 1969), the statute was unsuccessfully challenged by pharmacists and a drug retailing company. However, that challenge was based on the Due Process and Equal Protection clauses of the Fourteenth Amendment.

47. 425 U.S. at 758.

48. *Id.* at 766.

49. *Id.* at 768.

50. *See id.* at 767-68. According to the State:

> The aggressive price competition that will result from unlimited advertising will make it impossible for the pharmacist to supply professional services in the compounding, handling, and dispensing of prescription drugs. Such services are time consuming and expensive; if competitors who economize by eliminating them are permitted to advertise their resulting lower prices, the more painstaking and conscientious pharmacist will be forced either to follow suit or to go out of business.

Id.

51. *Id.* at 759. In 1975 the Supreme Court decided Bigelow v. Virginia, 421 U.S. 809, 813 (1975), which involved a conviction of a newspaper publisher under a Virginia statute outlawing advertisements that "encourage[d] or prompt[ed] the procuring of abortion." The Supreme Court reversed the conviction. In so doing, it engaged in a practice that would become a regular component of its commercial speech jurisprudence: revisionist interpretation of prior decisions. According to the Court, and despite clear language to the contrary in *Valentine*, the regulation in *Valentine* was upheld, not because it regulated commercial speech, but because it was a mere time, place, and manner restriction:

> [*Valentine*'s] holding is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does

from the premise that, at least since *Bigelow*, commercial speech was no longer completely outside the scope of First Amendment protection, the Court went on to explore the theoretical justifications for affording commercial speech constitutional protection. According to Justice Blackmun, the fact that advertising is motivated by economic considerations is not in itself sufficient to "disqualify" it from First Amendment protection.[52] More importantly, the Court appeared to place commercial speech on a level above that of even political speech—"As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[53] Because the ban on prescription price advertising would hit low income and elderly consumers the hardest, the Court reasoned, their interest in such information was especially keen.[54] But the Court also stated as a general matter that "society also may have a strong interest in the free flow of commercial information,"[55] and that commercial advertisers also comment on matters of great national importance.[56] As an example, the Court remarked that the pharmacist "could cast himself as a commentator on store-to-store disparities in drug prices."[57] The Court, however, refused to go so far as to say that for commercial speech to receive protection it must be of any political significance, stating that "[w]e see little point in requiring him to do so, and little difference if he does not."[58]

> not mean that [*Valentine*] is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge.

Id. at 819-20.

52. 425 U.S. at 762.

53. *Id.* at 763. One of the amicus briefs in a later case seized on this theme. In City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993), the Institute for Justice submitted an amicus curiae brief in which they argued that commercial advertising often "has a significantly more direct impact on the every-day lives of . . . citizens than the reporting of the important, yet distant, events in Bosnia or the Commonwealth of Independent States contained in non-commercial and fully protected publications." Amicus Curiae Brief of Institute for Justice in Support of Respondents at 5, *Discovery Network*, 113 S. Ct. 1505 (1993) (No. 91-1200). Scott Bullock, who helped write the amicus brief and also wrote an amicus brief for the *44 Liquormart* case on behalf of the Institute for Justice, told me that Justice Scalia actually quoted (without attribution) this language during oral argument in *Discovery Network*. Interview with Scott Bullock, at Georgetown University (Aug. 11, 1996).

54. 425 U.S. at 763-764.

55. *Id.* at 764.

56. *See id.*

57. *Id.* at 764-765.

58. *Id.* at 765.

The Court also refused to distinguish between what might be termed "highbrow" and "lowbrow" forms of advertising on a related but separate basis: self-fulfillment.[59] In a paean to the free enterprise system, Justice Blackmun wrote:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. *So long as we preserve a predominantly free enterprise economy,* the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[60]

The consequence of this insight was obvious to Justice Blackmun: "If [commercial speech] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered."[61] As one commentator has noted, "This analysis . . . appears to reflect interests foreign to those valued in traditional First Amendment jurisprudence."[62] After all, even though "[e]conomic efficiency and the economic interests of consumers are important, [they] are akin to property interests rather than to those related to expression or association."[63]

Despite these justifications, however, the Court did not go so far as to say that commercial speech is entirely free from government regulation. Thus, the state may regulate commercial speech with a time, place or manner restriction with a freer hand than in other speech contexts.[64] Greater regulation of commercial speech was justified in Justice Blackmun's eyes by its peculiar status. What made commercial speech different from other forms of speech stemmed from what the Court called "commonsense differences" between commercial speech and speech closer to the "core"

59. 425 U.S. at 765 (stating that "there is another consideration that suggests that no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn").

60. *Id.* at 765 (emphasis added).

61. *Id.*

62. Weinberg, *supra* note 12, at 225.

63. *Id.*

64. *See Virginia Pharmacy*, 425 U.S. at 770-71.

of First Amendment values.[65] These "commonsense differences" included the "greater hardiness" and "greater objectivity" of commercial speech,[66] which "make it less necessary to tolerate inaccurate statements for fear of silencing the speaker."[67] Consequently, the state is permitted to take greater steps to prevent false or misleading commercial speech than it is for other forms of speech.[68]

After establishing that commercial speech is protected, though to a lesser degree than other forms of speech,[69] the Court determined that the state's proffered justifications for the advertising ban did not survive scrutiny. The restrictions failed primarily because, in the Court's view, they were paternalistic measures whose primary purpose was to keep consumers "in the dark."[70] According to Justice Blackmun, "an alternative to this highly paternalistic approach" would be "to assume that [the] 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."[71] In the Court's view, if price advertising were permitted, a pharmacist could take a variety of approaches in order to show the superiority of his service.[72] However, "the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."[73] Despite this strong language, however, the Court did not provide any

65. *Id.* at 771-72 n.24.

66. *Id.* at 772 n.24.

67. *Id. But see* Kozinski and Banner, *supra* note 16, at 634-638 (arguing that commercial speech is neither hardier nor more verifiable than other forms of speech).

68. *See* 425 U.S. at 771 ("The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow *cleanly* as well as freely." (emphasis added)).

69. *See id.* at 768 ("The strength of these proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject.").

70. *Id.* at 769-70 (stating that "on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance").

71. *Id.* at 770.

72. *See id.*

73. 425 U.S. at 770. (noting that "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering").

clear guidelines for determining when a commercial speech restriction should be struck down.

Only Justice Rehnquist dissented.[74] In his view, the Court had substituted its views for those of the Virginia legislature and had therefore resurrected the much maligned *Lochner* doctrine of substantive due process. According to Justice Rehnquist, while the Court's decision might be sound as a matter of public policy, that was a determination best suited for the Virginia Assembly; and "there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession."[75]

The opinions of Justices Blackmun and Rehnquist thus represented two extreme views of commercial speech. Under the Blackmun view, commercial speech, unless misleading, false, or concerning an unlawful activity, should receive full First Amendment protection. Under the Rehnquist view, commercial speech should never receive constitutional protection because it is merely commercial activity dressed up in First Amendment garb. And at least since the end of *Lochner*, the regulation of such activity had been subject to mere rational basis review. Four years later, the Court attempted a compromise.

C. Central Hudson: *Providing a Framework for the Analysis of Commercial Speech*

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[76] decided in 1980, the Court established a formal test for determining when a restriction on commercial speech is unconstitutional in an effort to navigate between the polar views of Justices Blackmun and Rehnquist.[77] The case involved a Public Service Commission regulation that completely proscribed all public utility advertising promoting the use of electricity.[78] The Commission supported its ban on the ground that

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74. *Id.* at 781-90 (Rehnquist, J., dissenting).

75. *Id.* at 783-84.

76. 447 U.S. 557 (1980).

77. As some have argued, the test announced in *Central Hudson* represented a clear departure from *Virginia Pharmacy's* strong protection for commercial speech. *See* Karen Nelson Moore, *Justice Blackmun's Contributions On the Court: The Commercial Speech and State Taxation Examples*, 8 HAMLINE L. REV. 29, 42 (1985) (noting Blackmun's disagreement with the majority); *see also* Weinberg, *supra* note 12; Marks, *supra* note 19.

78. *See* 447 U.S. at 558.

promotional advertising would contravene the national policy of encouraging energy conservation.[79]

The Court began its analysis by emphasizing the "self-fulfillment" rationale for the protection of commercial speech, noting that "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[80] According to the Court, "The First Amendment's concern for commercial speech is based on the informational function of advertising."[81] Consequently, a state may, consistent with the First Amendment, "ban forms of communication more likely to deceive the public than to inform it."[82]

The Court then set forth a test for determining whether a commercial speech restriction is unconstitutional. Provided the speech is not false or misleading and the state's interest is substantial, the restriction must be "designed carefully to achieve the state's goal."[83] In order to determine if the restriction is so designed, two criteria must be satisfied:

> First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.[84]

The Court implied that satisfying the first criterion is a relatively simple matter, explaining that a regulation would not survive if it

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79. *See id.* at 559.
80. *Id.* at 561-62.
81. *Id.* at 563.
82. *Id.* (citations omitted).
83. 425 U.S. at 564.
84. *Id.* The Court set out all four factors in a single paragraph:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

only "indirectly advance[d]" the state interest.[85] Exploring the second requirement in greater detail, the Court phrased the standard in a variety of ways: a regulation must be "narrowly drawn;"[86] the regulation "may extend only as far as the interest it serves;"[87] the "State cannot regulate speech that poses no danger to the asserted state interest;"[88] and it cannot "completely suppress information when narrower restrictions on expression would serve its interest as well."[89] At least with respect to the fourth prong, the test articulated by the Court appeared to be rather strict. This becomes apparent if we examine how the Court actually applied the test.

In applying the test, the Court found that the speech involved was commercial and that the government did have a substantial interest in seeing that "rates be fair and efficient."[90] Turning to the third prong, the Court determined that there was "an immediate connection between advertising and demand for electricity" because, otherwise, Central Hudson would not contest the ban.[91] The regulation failed the fourth part of the test. According to the Court, the state failed to show "that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests."[92] Moreover, the regulation suppressed more speech than was necessary to effectuate the state's interests.[93] Finally, the state did not show that alternative means would have been equally effective at furthering its policy of energy conservation.[94] Thus, at least as applied in *Central Hudson* itself, the fourth prong of the test erects a very high hurdle for the government to clear before a commercial speech restriction will be upheld.

Justice Blackmun agreed with the Court's conclusion but did not countenance its reasoning.[95] In Justice Blackmun's view, the four-factor test announced by the Court represented an unnecessary departure from the approach he had articulated in *Virginia Pharma-*

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85. *Id.* at 564.
86. *Id.* at 565
87. *Id.*
88. 447 U.S. at 565.
89. *Id.*
90. *Id.* at 568-69.
91. *Id.* at 569.
92. *Id.* at 570.
93. 447 U.S. at 570.
94. *See id.* at 570-71 ("It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future.").
95. *Id.* at 573-579 (Blackmun, J., concurring in the judgment).

cy just four years earlier. According to Justice Blackmun, the Court's test was "[in]consistent with . . . prior cases and [did] not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech."[96] Like noncommercial speech, restrictions on commercial speech should be subject to strict scrutiny, *unless* the restriction is designed only to prevent the dissemination of false or misleading information or the speech involved concerns subject matter that "the State cannot or has not regulated or outlawed directly."[97]

Reiterating his strong aversion to paternalism in the free speech area, Justice Blackmun stated that the regulation here, like the one in *Virginia Pharmacy*, was nothing more than "a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice."[98] But Justice Blackmun added a somewhat different twist to his argument for striking down such regulations, one that Justice Stevens would later reassert in *44 Liquormart*.[99] Justice Blackmun argued that commercial speech restrictions that "keep consumers in ignorance" subvert the political process: "[T]he State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them."[100] While Justice Blackmun stated that this rationale was derived from the Court's earlier decisions, it is not expressly manifest in any opinions before *Central Hudson* itself and does not find full expression again until *44 Liquormart*.[101] "[A]bsent clear and present danger," wrote Justice Blackmun, "government has no power to restrict expression because of the effect its message is likely to have on the public," even when that speech is commercial in nature.[102]

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96. *Id.* at 573.
97. *Id.*
98. 447 U.S. at 574-75.
99. *See infra* notes 177-215 and accompanying text.
100. 447 U.S. at 575.
101. It is perhaps instructive to note that, in supporting this assertion, Justice Blackmun cited a law review article by Professor Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L. FORUM 1080, 1080-83. Professor Rotunda's article was the first to explore how restrictions on commercial speech can interfere with the workings of the political process.
102. 447 U.S. at 575 (citation omitted).

In a lengthy dissent, Justice Rehnquist sounded themes similar to those in his *Virginia Pharmacy* dissent, arguing with an even louder voice in *Central Hudson* that the Court was waxing a slippery slope to *Lochner*.[103] According to Justice Rehnquist, the Court had adopted a "broad interventionist role"[104] and had "fail[ed] to give due deference to th[e] subordinate position of commercial speech."[105] "[I]n so doing," said the Justice, the Court had "return[ed] to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a state based on the Court's own notions of the most appropriate means for the State to implement its considered policies."[106] According to Justice Rehnquist, restrictions on commercial speech were nothing more (or less) than economic regulations.[107]

Thus, the "compromise" of *Central Hudson* proved to be no compromise at all since it satisfied neither Justice Rehnquist nor Justice Blackmun. Further, by neglecting to explore *why* commercial speech deserves protection in favor of showing *how* that protection should be applied, the Supreme Court and the lower courts were left with a test that could be manipulated to come to whatever result a judge or court desired. Indeed, "[a]lthough *Central Hudson* should have ended the debate over the level of protection to be afforded commercial speech, it left subsequent courts groping for the exact meaning of the elements of the four part test."[108] While some Court decisions interpreted "not more extensive than necessary" to mean that the state must enact "the least restrictive measure" to advance its interest,[109] others construed it to mean that the regulation must go "no further than necessary in seeking to meet" the asserted interest.[110] As one commentator has remarked, "Although this distinction appears to be subtle, it can mean the

103. *Id.* at 583-607 (Rehnquist, J., dissenting).

104. *Id.* at 585.

105. *Id.* at 589.

106. *Id.* (citation omitted).

107. *See* 447 U.S. at 589; *see also* David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 373 (1990) (expressing this view).

108. Mark A. Conrad, Board of Trustees of the State Univ. of N.Y. v. Fox—*The Dawn of a New Age of Commercial Speech Regulation of Tobacco and Alcohol*, 9 CARDOZO ARTS & ENT. L.J. 61, 73-74 (1990).

109. *Id.* at 74 (citing Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 651-52 n. 14 (1985)).

110. *Id.* (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981) (plurality opinion)).

difference between a statute's invalidity and its constitutionality."[111] This proved especially true in the following case.

D. Posadas*: Rehnquist Gets His Way*

At issue in *Posadas de Puerto Rico Associates v. Tourism Company*[112] was a Puerto Rico statute that prohibited the advertising of casino gambling aimed at Puerto Rican residents but did not restrict that advertising when directed at tourists.[113] Justice Rehnquist, writing for the five person majority, upheld the prohibition after applying the *Central Hudson* test.

After determining that the speech involved was not false or misleading, and concerned a lawful activity, the Court proceeded to a determination of whether the government's asserted interest was "substantial."[114] According to the state, its interest was "the reduction of demand for casino gambling by the residents of Puerto Rico."[115] As in *Central Hudson*, the Court accepted, without much discussion, that the asserted interest was substantial.[116]

The Court next turned to a consideration of whether the means chosen (restricting advertising) directly advanced the state's asserted interest. According to Justice Rehnquist, "the answer to this question [was] clearly 'yes.'"[117] Again, the Court followed *Central Hudson*'s approach by stating that "the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view."[118] However, the Court appeared to stray away from *Central Hudson* by characterizing the legislature's belief as "reasonable."[119] In applying the fourth prong of the *Central Hudson* test, Justice Rehnquist took an even sharper turn away from the Court's earlier applications of the test.[120] The challenger had argued that demand could have been

111. *Id.*

112. 478 U.S. 328 (1986).

113. *Id.* at 335. Notably, casino gambling was legal in Puerto Rico.

114. *Id.* at 340-41.

115. *Id.* at 341.

116. *See id.*

117. *See* 478 U.S. at 341.

118. *Id.* at 342. Recall that in *Central Hudson* the Court remarked that, if the challenger believed the ban was ineffective, it would not have chosen to contest it. *See supra* note 103 and accompanying text.

119. 478 U.S. at 342.

120. *See* Philip B. Kurland, Posadas de Puerto Rico v. Tourism Company: "*'Twas Strange, 'Twas Passing Strange, 'Twas Pitiful, 'Twas Wondrous Pitiful,*" 1986 S. CT. REV. 1, 10 ("When it comes to the fourth element of the *Central Hudson* test, *Posadas*

reduced just as easily by requiring casino operators to include disclaimers designed to discourage gambling.[121] It is not surprising that the challenger raised this point, for the Court made precisely this point in *Central Hudson* six years earlier. There, the Court remarked that energy conservation could be encouraged just as easily by simply forcing the utility to provide information about the efficiency and expense of the offered service.[122] However, in *Posadas*, the Court rather perfunctorily disposed of this argument, stating simply that "it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising."[123] Continuing, Justice Rehnquist gave full effect to his concern for respecting legislative determinations by stating that "[t]he legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be *induced* by widespread advertising to engage in such potentially harmful conduct."[124] Thus, the regulation survived the four factor test of *Central Hudson.* Justice Rehnquist could have stopped there, but he went on to provide an additional reason for the Court's judgment.

In perhaps the most widely criticized part of his opinion for the majority, Justice Rehnquist stated in dictum that since Puerto Rico had the power to prohibit casino gambling altogether, it also had the lesser power of banning its advertisement.[125] For Justice Rehnquist, an advertising ban was less offensive than a wholesale ban, and the challenger should have been thankful that the Puerto Rican legislature did not go further:

> [I]t is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the *less intrusive* step of allowing the conduct, but reducing the demand through restrictions on advertising. It would surely be a Pyrrhic victory for casino owners . . . to gain recognition of a First Amendment right to advertise their casinos to the

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is even more deficient.").

121. 478 U.S. at 344.

122. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 571 (1980).

123. 478 U.S. at 344.

124. *Id.* (emphasis added).

125. *Id.* at 345-46.

> residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether.[126]

Justice Rehnquist believed that a constitutional doctrine that would allow the legislature to totally ban an activity or product, but would prevent the legislature from banning advertising for that activity or product, would indeed be "strange."[127]

E. Fox*: Turning Intermediate Scrutiny Into Rational Basis Review*

What emerges from both *Central Hudson* and *Posadas* is a sense that the Court was searching for a clear standard to apply to commercial speech—and not having much success. This may have been due to the fact that the Court was split over whether commercial speech is closer to simple economic activity or to core First Amendment values. The consequence of this split was that some members of the Court favored a deferential approach to legislative judgments while others preferred to make a more searching inquiry. This, in turn, produced an almost unpredictable standard of review for the third and fourth prongs of the *Central Hudson* test depending upon which side garnered the most support. While in *Central Hudson* the Court applied at least the fourth prong with some degree of intensity,[128] in *Posadas* the Court greatly relaxed the third and fourth prongs. Indeed, after *Central Hudson,* the commercial speech pendulum seemed to be swinging back toward *Valentine* and away from the strong First Amendment protection granted by *Virginia Pharmacy.*

The Court attempted to resolve the confustion over *Central Hudson's* fourth factor in *Board of Trustees of State University of New York v. Fox.*[129] In an opinion authored by Justice Scalia, the Court significantly weakened the requirement that a restriction on commercial speech be no more extensive than necessary to achieve the government's asserted interest.[130] Justice Scalia explained that

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126. *Id.* at 346 (emphasis added).

127. *See id.*

128. *See* Albert P. Mauro, Jr., *Commercial Speech After Posadas and Fox: A Rational Basis Wolf in Intermediate Sheep's Clothing,* 66 TUL. L. REV. 1931, 1941 (1992) (asserting that "the Court intended the four-part test to be applied critically and thoroughly, with the Court making its own independent judgment as to the strength of each factor").

129. 492 U.S. 469 (1989).

130. *See* Conrad, *supra* note 108, at 88 (stating that the Court "diminish[ed]" the fourth

the fit need "not [be] necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'"[131] The Court explained that while the state did not have to use the least restrictive means to achieve its stated goal, the means/ends fit must nevertheless be "narrowly tailored."[132] Thus, within the same case, the Court seemed to conflate a reasonableness standard with a "narrowly tailored" standard. One would think the two are quite different, but in the Alice in Wonderland world[133] created by the *Central Hudson* ad hoc balancing test, the two had become, as if by a wave of a wand, one and the same.

Justice Scalia reached this conclusion only after determining that the word "necessary" in *Central Hudson's* formulation of the rule should not be interpreted strictly, because to do so would "translate into the 'least restrictive means' test" employed by the court below.[134] Recognizing that *Central Hudson* itself appeared to require a strict interpretation,[135] Justice Scalia justified his more liberal interpretation by relying on Justice Marshall's reading of the Necessary and Proper clause in *McCulloch v. Maryland*.[136]

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factor and that "*Fox's* weakening of the constitutional protection accorded commercial speech is unmistakable"). *But see* Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L REV. 1433, 1442 (1990) (arguing that Justice Scalia was actually trying to lessen *Posadas'* impact on *Central Hudson*'s fourth prong); *cf.* John M. Blim, Comment, *Free Speech and Health Claims Under the Nutrition Labeling and Education Act of 1990: Applying a Rehabilitated Central Hudson Test for Commercial Speech*, 88 NW. U. L. REV. 733, 758 (1994) ("If one is not to miss the forest for the trees, it must be said that the significance of *Fox* lies not in its arguably minor weakening of the test's fourth prong, but instead in its more basic affirmation of the underlying principles of *Central Hudson*.").

131. 492 U.S. at 480 (quoting In re R.M.J., 455 U.S. 191, 203 (1982)).

132. *Id.*

133. Justice Scalia's explanation brings to mind the following exchange between Humpty Dumpty and Alice: "When *I* use a word . . . it means just what I choose it to mean," said Humpty Dumpty. This prompted Alice to respond, "[T]he question is whether you *can* make words mean so many different things." LEWIS CAROLL, THROUGH THE LOOKING GLASS 165 (Donald J. Gray, 2d ed. 1992).

134. 492 U.S. at 476.

135. *See id.* (noting "the statement in *Central Hudson* itself that 'if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.'" (quoting *Central Hudson*, 447 U.S. at 564)).

136. 4 Wheat. 316 (1819). It is difficult to understand why Justice Scalia believed that Chief Justice Marshall's interpretation of the word "necessary" in the Necessary and Proper Clause compelled an identical interpretation of the word when it was used by the Court in *Central Hudson*. In *Central Hudson*, after all, the Court itself provided an interpretive guide to determining what was meant by its use of the word, and this language

According to Justice Scalia, while *Central Hudson* and several other cases supported a strict interpretation of the word, other Supreme Court cases counseled for a more liberal interpretation. Recharacterizing the statements supporting a strict view as mere dicta, Justice Scalia concluded "that the reason of the matter requires something short of a least-restrictive-means standard."[137] To hold otherwise, argued Justice Scalia, would "impose[] a heavy burden on the State."[138]

Apparently ignored by Justice Scalia was the implication of giving such a liberal reading to the word "necessary." Under Chief Justice Marshall's formulation, the liberal interpretation represented the use of what we would today call a rational basis test. As Chief Justice Marshall wrote, "let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited . . . are constitutional."[139] Thus, despite Justice Scalia's protestations to the contrary, in *Fox*, the Court essentially adopted a rational basis test with respect to *Central Hudson*'s fourth factor.[140]

It should come as no surprise, then, that the district and appellate courts differed on so fundamental a question as the appropriate standard of review to be applied to the ban on price advertising in *44 Liquormart*. Not only were there cases to support both a deferential and a more fastidious examination of legislative ends and means,[141] but within *Fox* itself the Court said one thing but

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was even quoted by Justice Scalia. By contrast, the word "necessary" as it appears in Article I, section 8 was written by the drafters of the Constitution and was unaccompanied by an explicit textual explanation as to its intended scope or meaning; consequently, in the absence of clear language to the contrary, Justice Marshall cannot be faulted for giving the word such expansive meaning. However, the same does not hold for Justice Scalia, who ignored the Court's own admonition as to the scope of the word and its intended meaning. This brings to mind Walter Cook's remark: "[T]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." WALTER W. COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 159 (1942).

137. 492 U.S. at 477.

138. *Id.* at 477.

139. 4 Wheat. at 421.

140. *Cf.* Mauro, *supra* note 128, at 1951-54. While Mauro does not make this exact point, he does make the related argument that, whatever Justice Scalia might have claimed to be doing, what he in fact did was to turn *Central Hudson* into a rational basis test.

141. *See* Floyd Abrams, *A Growing Marketplace of Ideas*, LEGAL TIMES, July 26, 1993,

implied another.[142] Fortunately, for perhaps the first time since the *Central Hudson* test was initially articulated, Justice Stevens resolved the question with a clarity, in terms of both theory and analysis, that had been noticeably absent from the Court's prior decisions.[143]

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at S28. Writing after the Supreme Court's 1993 term, Abrams stated that "[i]t is as if there are two Supreme Courts in commercial-speech cases: one pro and one con . . . [and] this split has left both sides of the debate with their own well of precedent from which to draw." *Id.* Consequently, "the area [is] one of continuing unpredictability." *Id.*

142. *See supra* note 140 and accompanying text (discussing how Scalia claimed that this was not rational basis when in fact it probably was).

143. Even those cases granting commercial speech increased protection failed to provide any predictability to the Court's approach to commercial speech. *See* Abrams, *supra* note 141, at S28 (noting that "this term [the 1993 term] has been no exception" to the Court's schizophrenic approach to commercial speech). Four cases decided in the 1993 and 1994 terms are deserving of some discussion.

In *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) and Edenfield v. Fane, 507 U.S. 761 (1993), a majority of the Court again seemed to be giving commercial speech increased protection again. Nonetheless, Justice Stevens' majority opinion accepted without question *Fox's* articulation of the *Central Hudson* test, noting that the Court still adheres to the view that the government need not employ the least restrictive means to achieve its goals. 507 U.S. at 417 n.18. However, Justice Stevens emphasized that this was not a rational basis form of scrutiny by emphasizing that the government has the burden of proving the fit between means and ends, and by returning to the *Central Hudson* view that a court may speculate as to alternative means that a government might use in lieu of a restriction on speech. Justice Blackmun recognized that the Court's decision still failed to provide an adequate level of protection for commercial speech, and argued in his concurrence for the application of strict scrutiny. *Id.* at 434-36 (Blackmun, J., concurring in the judgment) (arguing that Cincinnati's newsrack policy was evidence that "*Central Hudson's* chickens have come home to roost"). Chief Justice Rehnquist, joined by Justices Thomas and White, dissented with the familiar Rehnquist refrain that commercial speech deserves less protection than noncommercial speech. *Id.* at 439 (Rehnquist, C.J., dissenting). Thus, the Court was still split into the same factions that were present thirteen years earlier in *Central Hudson.* This lessens the opportunity for applying the case to future situations. *Cf.* Edward J. McAndrew, *City of Cincinnati v. Discovery Network, Inc.: Elevating the Value of Commercial Speech?*, 43 CATH. U. L. REV. 1247, 1281-82 (1994) ("Although the *Discovery Network* Court afforded truthful, noncoercive speech high First Amendment value, the Court's failure to refine the *Central Hudson* standard to protect this new level of value may undermine its pronouncement."). Significantly, the Court supported its decision under a self-fulfillment theory, with Justice Stevens arguing that advertising serves to enlighten and inform the public, and to further rational decisionmaking. *Id.* at 421-22 n. 17.

In *Edenfield v. Fane,* Justice Kennedy, in an 8-1 opinion, attempted to dampen *Fox's* blow and mitigate the effect of *Posadas* by requiring that a government "seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a *material degree.*" 507 U.S. at 771 (emphasis added). Thus, Justice Kennedy "focused more pointedly on the state's burden in *Edenfield* than the Court [had] ever done before." Abrams, *supra* note 141, at S29. Like Justice Stevens' opinion in *Discovery Network,* Justice Kennedy's opinion in *Edenfield* articulated a self-fulfillment theory to undergird his decision. According to Justice Kennedy, "The commercial marketplace, like other spheres of our social and cultural

II. *44 Liquormart*: The Controversy, the Case, and the Courts

A. *The Controversy*

In 1956, the Rhode Island legislature passed two bills prohibiting the advertisement of alcoholic beverages prices.[144] One of the

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life, provides a forum where ideas and information flourish." 507 U.S. at 767. Justice Blackmun concurred, incorporating by reference his concurrence in *Discovery Network*. Justice O'Connor dissented.

While *Discovery Network* and *Edenfield* seemed to be taking the Court further toward giving commercial speech a level of protection not reached since *Virginia Pharmacy*, *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), demonstrated that, as of 1993, the Court was still deeply fragmented as to the appropriate level of protection to extend to commercial speech. According to Abrams, "*Edge* represents a setback for First Amendment interests in at least three respects." Abrams, *supra* note 141, at S29. First, the Court seemed to retreat from the more exacting standard imposed by the other two cases on *Central Hudson's* requirement that the governmental action directly advance its asserted interest. In fact, as Abrams notes, Justice White, who authored the opinion, neglected to even mention either *Discovery Network* or *Edenfield*. *See id.* Second, "under the guise of protecting its citizens' welfare outside its borders," the Court let stand the kind of "informational protectionism" that Justice Blackmun emphatically rejected in *Virginia Pharmacy*. *Id.* Finally, the Court "attempt[ed] to breathe life into [*Posadas*]" by employing Justice Rehnquist's "greater includes the lesser" argument. *Id.* Missing from the analysis is any discussion of what theory undergirds protection for commercial speech.

The final decision to which reference must be made is *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995). This case is not discussed in the text because the Court simply did not engage in an extended discussion of commercial speech, nor did it need to, in striking down the federal regulation of alcohol content on beer labels. The reason the Court did not have to resort to a detailed consideration of commercial speech is that the regulation at issue was so patently absurd that it would have been struck down even under a rational basis review. Because the case was so easy to decide under existing standards, the Court did not have to consider the underlying premises of its commercial speech jurisprudence. *See* Burt Neuborne, *Rubin v. Coors: Supreme Court Rejects Prohibitionism*, Legal Opinion Letter (June 9, 1995), *available in* LEXIS, NEWS Library, Crnws File ("[G]iven the internal inconsistencies in the regulatory scheme, it was difficult to take seriously the assertion that the regulation advanced any rational government interest."). There is one aspect of the decision worth noting, however, and that is Justice Stevens' concurring opinion. Apparently, after Justice Blackmun retired, Justice Stevens assumed the role of frontman for Justice Blackmun's perspective on commercial speech restrictions. In his concurring opinion, Justice Stevens all but advocated the rejection of the *Central Hudson* approach to commercial speech. *See id.* at 1594-96. According to Justice Stevens, "The Court's continued reliance on the misguided approach adopted in *Central Hudson* makes this case appear more difficult than it is." *Id.* at 1595 (Stevens, J., concurring in the judgment).

144. *See* 44 Liquormart v. Rhode Island, 116 S.Ct. 1495, 1501 (1996). Ironically, Rhode Island had never ratified the Eighteenth Amendment (which enacted prohibition), and was among the first states to ratify the Twenty-First Amendment (repealing prohibition). 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 5-6 (1st Cir. 1994), *vacated and remanded*,

statutes applied to Rhode Island retail dealers and out-of-state manufacturers, wholesalers, and shippers, and served to bar[145] them from advertising the price of alcoholic beverages to be sold in Rhode Island "in any manner whatsoever."[146] The other statute applied to the news media, and provided that "[n]o newspaper, periodical, radio or television broadcaster or broadcasting company . . . in the state of Rhode Island . . . shall . . . publish, or broadcast any advertisement . . . of the price or make reference to the price of any alcoholic beverages."[147]

On December 17, 1991, Rhode Island Liquor Control Administrator Kate Racine held a hearing to determine whether a Rhode Island retail alcohol dealer had violated the state's prohibition of off-premises price advertising for alcoholic beverages.[148] The controversy revolved around 44 Liquormart's advertisement in a December 1991 issue of the *Providence Journal-Bulletin*, Rhode Island's principal daily newspaper.[149] The advertisement, entitled "Thanksgiving Harvest," displayed various bottles of brand name liquors.[150] It also advertised various other non-alcoholic products at low prices, with the word "WOW" in burst form after the price.[151] None of the displayed bottles of alcoholic beverages was accompanied by a price, "but several of the 'WOW' exclamations—highlighted in burst form—appeared next to the displayed bottles."[152] After determining that this violated the state's prohibition on price advertising, Racine fined the store $400 and ordered it to discontinue the ads.[153] 44 Liquormart paid the fine and then filed suit in federal district court, alleging a violation of its First Amendment right to free speech.[154]

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116 S. Ct. 1495 (1996). The Twenty-First Amendment also granted states the right to regulate for themselves the "possession" or "delivery" of alcohol within their own borders. U.S. CONST. amend. XXI, § 2. In *44 Liquormart*, the Court unanimously held that the Twenty-First Amendment did not save the Rhode Island statutes from Constitutional infirmity. While significant in itself, that issue is beyond the scope of this Comment.

145. No pun intended.

146. R.I. GEN. LAWS Sec. 3-8-7 (1987).

147. R.I. GEN. LAWS Sec. 3-8-8.1 (1987).

148. *See* 44 Liquormart, Inc. v. Racine, 829 F.Supp. 543 (D.R.I. 1993), *rev'd* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

149. *Id.* at 545.

150. *Id.*

151. *See id.*

152. *Id.*

153. 829 F.Supp. at 545.

154. *See id.*

B. The Case in the Lower Courts

The case was a classic battle of the experts. The state defended the statute on the ground that it was designed to promote temperance by "directly reducing the consumption of alcohol" by Rhode Island citizens.[155] To show that its advertising ban would have this effect, the state called upon the expert testimony of an economist who stated that countries that ban "all broadcast advertising of alcohol had the lowest values for alcohol consumption."[156] The challengers presented two expert witnesses of their own who, predictably, came to conclusions contrary to the state's expert. Both concluded that while total advertising bans may have some effect, restrictions on price advertising have no significant effect on alcohol consumption.[157] The trial court found the challengers' expert testimony more persuasive than that of the defendants.[158] Initially the trial court noted "a pronounced lack of unanimity among researchers who have studied the effects of alcohol advertising. No less than twelve different conclusions have been reached regarding the impact of advertising on the general consumption of alcoholic beverages."[159] Even though the evidence pointed in two different directions, the Court concluded that the price ban had no significant impact on the level of alcohol consumption in Rhode Island.[160]

The court then applied the *Central Hudson* test and struck down the Rhode Island price prohibition, holding that it failed both the third and fourth prongs of the test.[161] Recognizing that *Posadas* seemed to counsel for a finding in favor of the state when evidence of the effectiveness of a regulation goes both ways, the court distinguished *Posadas*. It did so on the dubious ground that in *Posadas* the link between the ban on gambling advertisements and the level of gambling was "self-evident," while in this case the link between alcohol price advertising and consumption was not.[162] According to the court, "At best, price advertising is one

155. *Id.*
156. *Id.* at 548.
157. *Id.* at 546.
158. *See* 829 F.Supp. at 548 (stating "I do not find [the Defendants' expert] testimony persuasive").
159. *Id.* at 546.
160. *Id.* at 549.
161. *Id.* at 554-55.
162. *Id.* at 554.

factor among many that influence alcohol consumption patterns."[163] Turning to the fourth factor, the court concluded that the means chosen were more intrusive than necessary, because consumption could be reduced just as easily by increasing taxes on alcohol or establishing minimum prices.[164]

In an opinion remarkable for its brevity, the First Circuit Court of Appeals reversed.[165] The pivotal factor in the Court of Appeals' decision to reverse was the amount of deference to be shown to legislative determinations when evidence points in two directions and is not particularly persuasive on either side of the issue. Unlike the district court, the Court of Appeals adopted a deferential approach toward legislative judgments. Under this view, the trial court had impermissibly substituted its judgment for that of the Rhode Island legislature.

Addressing the district court's analysis under *Central Hudson*'s third prong, the Court of Appeals wrote: "The district court held that it was an issue for it to decide, unfettered, between competing witnesses, and since, on its weighing of the evidence, the court was not persuaded that the State was correct, it failed."[166] According to the Court of Appeals, the district court had applied the wrong standard. The standard "is not correctness," stated the Circuit Court, "it is reasonableness."[167] In its view, so long as there is more than a "tenuous" connection between the restriction and the state's interest, a commercial speech restriction will pass constitutional muster.[168] The Court of Appeals based its conclusion upon an uncontroversial reading of prior Supreme Court decisions interpreting the third prong. According to the court, "the term 'directly advances' is not absolute."[169] In fact, in nearly every case in which the Court struck down a regulation on commercial speech under a third-prong analysis, "the state has failed where the evidence was 'at most, tenuous'" or where the State failed to cite

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163. 829 F.Supp. at 559.

164. *Id.*

165. 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5 (1st Cir. 1994), *vacated and remanded*, 116 S.Ct. 1495 (1996).

166. *Id.* at 7.

167. *Id.*

168. *Id.* According to the court, "the term 'directly advances' is not absolute" and is satisfied so long as the restriction is "reasonable," and the connection is based on something more than "anecdotal evidence." *Id.* (citations omitted).

169. *Id.* at 6 (citation omitted).

"'evidence or authority of any kind.'"[170] Even warrantable inferences and anecdotal evidence would suffice.[171] Thus, according to the Court of Appeals, "when there is no empirical evidence either way, and expert opinions go both ways," a court is not "free to choose" the challenger's evidence over that of the state.[172]

Finally, in order to avoid the charge that it was disregarding the very case that had ushered in protection for commercial speech, *Virginia Pharmacy,* the Court of Appeals distinguished the earlier case. According to the court, in this case, "[t]he regulation is directed toward regulation of the *intoxicants themselves,* rather than speech. This is unlike [*Virginia Pharmacy*], where the speech was the actual focus of the regulation, since the aim of the restriction was the prevention of competition in pharmaceutical sales, not the discouragement of pharmaceutical purchases."[173] While the court's explanation is not entirely persuasive,[174] it does illustrate how *44 Liquormart* brought two significant Supreme Court cases, *Posadas* and *Virginia Pharmacy,* and their progeny, into conflict and reveals the conundrum faced by lower courts deciding commercial speech cases. Fortunately, the Supreme Court's decision may go a long way toward resolving this conundrum.

C. *The Supreme Court Opinion*

On May 13, 1996, the Supreme Court reversed the decision of the Court of Appeals.[175] While the decision of the Court to reverse was unanimous, there were four separate opinions, including three concurrences. Taken together, the opinions demonstrate that the Court is committed to affording commercial speech a more significant amount of protection than ever before. Thus, "[g]one is

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170. 39 F.3d at 6 (citation omitted).

171. *Id.*

172. *Id.* at 7.

173. *Id.* (emphasis added) (quoting Queensgate Investment Co. v. Liquor Control Comm'n, 433 N.E.2d 138 (1982) (upholding a price ban similar to that in the instant case)).

174. In *Virginia Pharmacy,* the Court noted that the State did not make an argument that the advertising restriction reduced consumption. However, it is not clear whether that would have made a difference in the outcome. On the one hand the Court characterized the omission of this argument as "prudent." 425 U.S. at 767 n.21. On the other, the Court noted that prescription drugs are available on a physician's prescription and there was little likelihood that physicians would prescribe more simply because drugs became cheaper. *See id.* Given the tenor of the Court's opinion in *Virginia Pharmacy,* however, this distinguishing factor seems a slender reed upon which to rest a decision to uphold a ban identical in scope—if not purpose—to the one in *Virginia Pharmacy.*

175. 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996).

the sting of Chief Justice Rehnquist's flat refusal to accord First Amendment protection to commercial speech."[176]

1. Justice Stevens' Plurality Opinion

Justice Stevens began his analysis of the Rhode Island statutes in Part III of his opinion by insisting that advertising has been an integral part of American culture and history since colonial days.[177] To support this claim, he noted that "commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados."[178] Justice Stevens then reiterated the Court's aversion to commercial speech restrictions that served to keep people ignorant and "served ends unrelated to consumer protection."[179] After repeating the distinction drawn by the Court between commercial and noncommercial speech, Justice Stevens made clear that commercial speech may be subject to restrictions that cannot be applied to other forms of speech.[180] The justification for this, he explained, stemmed from "the State's power to regulate commercial transactions."[181]

In Part IV of his opinion, Justice Stevens elaborated on what he meant by this statement and began his discussion of what he considered to be the theoretical underpinnings of First Amendment protection for commercial speech. He wrote that Rhode Island erroneously concluded that "*all* commercial speech regulation are subject to a similar form of constitutional review simply because they target a similar category of expression."[182] Citing from his concurring opinion in *Rubin v. Coors Brewing Co.*,[183] Justice Stevens stated that "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them."[184] Echoing Justice Blackmun's view, Justice Stevens wrote that a state

176. Kent, *supra* note 27, at 3.
177. *Id.* at 1505.
178. 116 S.Ct. at 1504.
179. *Id.* at 1505.
180. *Id. at 1505-06.*
181. *Id.* at 1506.
182. *Id.* at 1507.
183. 115 S.Ct. 1585 (1995) (striking down federal law prohibiting the inclusion of alcohol content on beer labels).
184. 116 S.Ct. at 1507 (citing *Rubin*, 115 S.Ct. at 1587-88 (Stevens, J., concurring)).

may regulate commercial speech *only* when its purpose is to "protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information."[185] If the state totally prohibits commercial speech "for reasons unrelated to the preservation of a fair bargaining process," then the restriction should be subject to strict scrutiny.[186] Despite the "hardiness"[187] and "greater objectivity"[188] of commercial speech, stated Justice Stevens, its regulation is "no less troubling." Consequently, there is no justification for reviewing such restrictions with "added deference" simply because they involve commercial speech.[189]

Bans like the one in Rhode Island, wrote Justice Stevens, "often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech."[190] In so doing, such bans "not only hinder consumer choice, but also impede debate over central issues of public policy."[191] Unlike direct taxes, or other more obvious forms of regulation, Justice Stevens seemed to be arguing, regulation of advertising protects the political decisionmaker from unpopular policies by making it difficult for the consumer to even determine the existence of a policy in the first instance. By articulating the theory of protecting commercial speech in this manner, Justice Stevens was able to neatly sidestep the criticism raised by Justice Rehnquist in both *Virginia Pharmacy* and *Central Hudson* that the Court was merely engaging in the type of judicial legislation of the *Lochner* era.

Justice Stevens applied the *Central Hudson* four factor test in Part V of his opinion. Because the parties stipulated that the speech at issue was not false or misleading,[192] the Court was only concerned with the third and fourth prongs: whether the advertising ban directly advanced the asserted interest in temperance; and

185. *Id.*

186. *Id.* ("[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.").

187. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 (1975).

188. *Id.*

189. 116 S.Ct. at 1508.

190. *Id.* (citation omitted).

191. *Id.* (citation omitted).

192. *See id.* at 1503.

whether the ban was no more extensive than necessary.[193]

Rhode Island argued that the ban advanced its interest in promoting temperance "in a direct and material way," as required by *Central Hudson* and the cases interpreting the third prong of the test.[194] Because every liquor store in the state stood to gain over $100,000 per year if the ban were lifted, Rhode Island contended that this was clear evidence that the ban was having a significant effect on liquor sales, and was therefore serving to reduce alcohol consumption.[195] Finally, after acknowledging that "alcohol consumption and the effect of advertising thereon is a difficult topic to research,"[196] the state pointed to expert testimony and social science research in an effort to show that the ban was, indeed, having its intended effect.[197]

Producing its own expert testimony, 44 Liquormart contended that Rhode Island failed to demonstrate an "immediate connection" between the promotion of temperance and the ban.[198] It characterized the state's argument that the ban directly advanced its interest as nothing more than a "hypothesis."[199] Further, it argued, "the price advertising ban is, at best, only theoretically, indirectly, related to its goal,"[200] because the state had failed to demonstrate "that truthful, non-misleading price advertising [actually] stimulates consumption."[201] Clearly, the evidence pointed in both directions.

Nevertheless, Justice Stevens agreed with 44 Liquormart that the ban failed the third part of the *Central Hudson* test. According to Justice Stevens, the state failed to demonstrate that the "speech prohibition [would] *significantly* reduce market-wide consumption."[202] Erecting an almost insurmountable barrier to the state, he suggested that in order to show a direct link between the ban and the state interest, Rhode Island would have had to establish with a large degree of certainty both the price level that would cause a "significant" reduction in alcohol consumption and the amount by

193. *See id.*
194. Respondent's Brief at 11, *44 Liquormart*, (No. 94-1140) (citing *Rubin*, 115 S.Ct. at 1588).
195. *See id.*
196. *Id.* at 23.
197. *See id.* at 23-28.
198. Petitioner's Brief at 35, *44 Liquormart*, (No. 94-1140).
199. *See id.* at 16.
200. *Id.* at 20.
201. *Id.*
202. 116 S.Ct. at 1509.

which prices would decrease without the ban.[203] According to Justice Stevens, without such evidence "any conclusion that elimination of the ban would significantly increase alcohol consumption would require [the Court] to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest."[204]

Turning to the fourth and final factor, Justice Stevens stated that the state failed this test as well, because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the state's goal of promoting temperance."[205] For example, the state could have directly regulated alcohol sales, taxed them, or established educational campaigns to reduce excessive drinking; all of these approaches would have been as or more effective, reasoned Justice Stevens.[206]

In Part VI of his opinion, Justice Stevens engaged in a lengthy and damning critique of the Court's decision in *Posadas*. According to Justice Stevens, *Posadas* "clearly erred" in granting deference to a legislative decision to "choose suppression over a less speech-restrictive policy."[207] In Justice Stevens' view, *Posadas* represented an unfortunate break from a continuous line of Supreme Court cases "striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available."[208] In overruling this aspect of *Posadas*, Justice Stevens signaled that the presence of even a single alternative to speech restrictions will suffice to defeat a state's restriction on commercial speech.[209]

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203. *Id.* at 1510.

204. *Id.* (quoting Edenfield v. Fane, 507 U.S. at 770 (1993)).

205. *Id.*

206. *See id.*

207. 116 S.Ct. at 1511.

208. *Id.* The "greater-includes-the-lesser" syllogism was recently rejected in another speech context. R.A.V. v. St. Paul, 505 U.S. 377, 381 (1992) (striking down a restriction on race-based hate speech) held that while the State may prohibit an entire category of speech, like fighting words, it cannot proscribe only those fighting words expressing a point of view with which the government does not agree.

209. As Justice Thomas recognized, Justice Stevens' formulation of *Central Hudson*'s fourth factor was far more protective of commercial speech than the formulation found in *Discovery Network*, a decision that is viewed by many as giving significantly more protection to commercial speech than it has received in any case since *Virginia Pharmacy*. *See infra* notes 235-237 and accompanying text (discussing how the fourth factor discussion gives more protection).

Justice Stevens next laid to rest *Posadas*' "greater-includes-the-lesser" approach, describing it as "inconsistent with both logic and well settled doctrine."[210] However, Rhode Island based its argument on more than just this aspect of *Posadas*. The state argued that *Posadas* and its progeny had established a "vice exception" to the commercial speech doctrine.[211] Justice Stevens rejected this contention as well, stating that *Rubin* had "effectively rejected the very contention" for which Rhode Island argued.[212] More importantly, thought Justice Stevens, such a vice exception would be almost impossible to define.[213] "Almost any product that proposes some threat to public health or public morals," wrote Justice Stevens, "might reasonably be characterized by a state legislature as relating to 'vice activity'."[214] Establishing a vice exception would therefore result in two predictable consequences: either the state legislatures would "justify censorship by the simple expedient of placing the 'vice' label on selected lawful activities," or, even worse, the federal courts would have to get into the business of establishing "a federal common law of vice."[215]

2. Justice Scalia's Concurrence

Justice Scalia issued an uncharacteristically brief concurring opinion.[216] He began by expressing his "discomfort" with the *Central Hudson* test,[217] a test that, according to Justice Scalia, has "nothing more than policy intuition to support it."[218] Like Justice Stevens, Justice Scalia also expressed his "aversion towards paternalistic governmental policies."[219] However, in Justice Scalia's view, "it would also be paternalism for us to prevent the

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210. *Id.* at 1512.

211. Respondent's Brief at 23-28, *44 Liquormart*, (No. 94-1140).

212. 116 S.Ct. at 1513.

213. *See id.*

214. *Id.*

215. *Id.*

216. *Id.* at 1515 (Scalia, J., concurring in part and concurring in the judgment). According to one commentator, Justice Scalia "stayed above the fray" by issuing such a concurrence. Kent, *supra* note 27, at 3.

217. *See* 116 S.Ct. at 1515. This is not surprising given Justice Scalia's general distrust of balancing tests. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (favoring a return, where possible, to a more rules-based jurisprudence); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989) (advancing a similar theme).

218. 116 S.Ct. at 1515.

219. *Id.*

people of the States from enacting laws that we consider paternalistic, unless we have good reason to believe that the Constitution itself forbids them."[220] To prevent this, Justice Scalia would look to the "long accepted practices of the American people."[221] However, because neither party briefed the issue, he was unable to explore this idea in any depth.[222]

In the concluding paragraph of his opinion, Justice Scalia, unable to come up with an alternative to the *Central Hudson* approach, decided simply to concur in the judgment.[223] He did, however, note that while he was "not disposed to develop new law" on the issue of commercial speech, he was also unwilling to "reinforce old [law]."[224] While not willing to develop a different approach, Justice Scalia nonetheless stands ready to abandon the Court's existing approach to commercial speech if confronted with the proper scenario in which to do so.

3. Justice Thomas' Radical Concurrence

Curiously,[225] Justice Thomas' concurring opinion presents the most direct challenge to the existing commercial speech constitutional stratagem. In Justice Thomas' view, *Central Hudson* ought to be jettisoned in favor of an approach that treats commercial and noncommercial speech identically when the speech restriction at issue is an attempt to keep the public uninformed. The *Central Hudson* test is thus ill-suited to cases involving outright prohibitions on speech. Accordingly, Justice Thomas began his concurrence by stating:

> In cases such as this, in which 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* balancing test should not be applied. . . . Rather, such an "interest" is *per se* illegitimate and can no more justify regulation of "commercial" speech

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220. *Id.*
221. *Id.* (citation omitted).
222. *See id.*
223. 116 S.Ct. at 1515.
224. *Id.*
225. Curious because only three years earlier Justice Thomas had joined Chief Justice Rehnquist's dissent in *Discovery Network*, arguing, essentially, for a fairly undemanding application of *Central Hudson*. *See Discovery Network*, 507 U.S. at 438 (Justice Thomas joining the dissent).

than it can justify regulation of "non-commercial" speech.[226]

Justice Thomas then called attention to the Supreme Court's ambivalence toward commercial speech, noting that, while some decisions stressed the "antipaternalistic premises of the First Amendment," others "appeared to accept the legitimacy of laws that suppress information in order to manipulate the choices of consumers."[227] For Justice Thomas, *Central Hudson* itself represented the latter approach.[228] Justice Thomas then flatly rejected the notion that commercial speech should necessarily be given less constitutional protection than other forms of speech, stating that there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'non-commercial' speech."[229]

According to Justice Thomas, not only is *Central Hudson* flawed from a historical point of view, it is illogical and invites judicial overreaching. The second prong of the test is flawed because, in Justice Thomas' view, it invites unprincipled judicial decision-making: "The second prong . . . requires judges to delineate those situations in which citizens cannot be trusted with information, and invites judges to decide whether they themselves think that consumption of a product is harmful enough that it *should* be discouraged."[230] Thus, "the *Central* Hudson test asks courts to weigh incommensurables—the value of knowledge versus the value of ignorance—and to apply contradictory premises—that informed adults are the best judges of their own interests, and that they are not."[231]

Justice Thomas was no less critical of *Central Hudson's* third prong. When the purpose of a commercial speech restriction is to keep members of the public in a state of ignorance, stated Justice Thomas, "[a]pplication of the advancement-of-state-interest prong of *Central Hudson* makes little sense."[232] This is because, "[f]aulting the state for failing to show that its price advertising ban decreases alcohol consumption 'significantly' . . . seems to imply that if the

226. 116 S. Ct. at 1515-16 (Thomas, J., concurring) (citation omitted).
227. *Id.* at 1517.
228. *See id.*
229. *Id.* at 1518.
230. *Id.* at 1520.
231. 116 S.Ct. at 1520.
232. *Id.* at 1518.

State had been *more successful* at keeping consumers ignorant . . . then the restriction might have been upheld."[233] This, in Justice Thomas' view, directly "contradicts *Virginia Pharmacy Bd.*'s rationale for protecting 'commercial' speech in the first instance."[234]

Justice Thomas also acutely observed that, while the opinion of Justice Stevens and the concurrence of Justice O'Connor purported to apply the *Central Hudson* test, the manner in which the fourth prong of that test was applied all but eliminated the test's applicability to future cases. According to Justice Thomas, the respective opinions of Justice Stevens and O'Connor "would appear to commit the courts to striking down restrictions on speech whenever a direct regulation (i.e., a regulation involving no restriction on speech regarding lawful activity at all) would be an equally effective method of dampening demand by legal users."[235] Justice Thomas continued:

> But, directly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be, and thus virtually all restrictions with such a purpose would fail the fourth prong of the *Central Hudson* test.[236]

Nonetheless, Justice Thomas chastised the other members of the Court for failing to own up to the fact that they had effectively articulated a new standard for evaluating commercial speech restrictions. Rather than jumping through the hoops established by *Central Hudson*, Justice Thomas would take a more direct route and simply (and forthrightly) apply a simple presumption of unconstitutionality to regulations like the one at issue in *44 Liquormart*.[237]

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233. *Id.*
234. *Id.*
235. *Id.* at 1519.
236. 116 S.Ct. at 1519.
237. *Id.* at 1519-20 ("[R]ather than 'applying' the fourth prong of *Central Hudson* to reach the inevitable result that all or most such advertising restrictions must be struck down, I would adhere to the doctrine adopted in *Virginia Pharmacy Bd.* and in Justice Blackmun's *Central Hudson* concurrence, that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.").

4. Justice O'Connor's Concurrence

Justice O'Connor's concurrence can easily be summed up with the following colloquialism: "If it ain't broke, don't fix it." According to Justice O'Connor, because Rhode Island's ban would fail under even the most perfunctory application of the *Central Hudson* four factor test, there was no need to refine the existing test or engage in a more extended discussion of commercial speech's place in First Amendment theory. Thus, Justice O'Connor refused to join in that part of Justice Stevens' opinion in which he advanced a more categorical argument against total bans on truthful, nonmisleading speech. Justice O'Connor also carefully avoided any discussion of Justice Stevens' strengthening of *Central Hudson*'s third factor. Justice O'Connor simply *assumed* that Rhode Island's regulation directly advanced the government's interest.[238] In her view, the state's regulation failed only *Central Hudson*'s fourth prong, because the fit between the interest and the method chosen by Rhode Island to achieve that interest was not "reasonable."[239] Rhode Island could simply establish minimum prices, tax alcohol sales, or engage in a multitude of other methods that do not implicate First Amendment rights.[240] Justice O'Connor's refusal to join in the analysis employed by Justice Stevens suggests that she, like Justice Thomas, recognized the revolution worked by Justice Steven's.

More important, however, was Justice O'Connor's agreement with Justices Stevens and Thomas that *Posadas'* deferential approach to legislative judgments ought to be abandoned in favor of a more fastidious examination of legislative means and ends. According to Justice O'Connor, *Posadas* was merely an aberration in what is otherwise a continuum of commercial speech jurisprudence: "[S]ince *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."[241] This assertion is not completely accurate. In fact, as Justice Thomas pointed out in his concurrence, cases can be found that support both a more demanding standard of review and one that is more facile. It is per-

238. *See id.* at 1521 (O'Connor, J., concurring in the judgment).
239. *See id.*
240. *See id.* at 1521-22.
241. 116 S.Ct. at 1522.

haps telling that Justice O'Connor cites to cases like *Discovery Network* and *Coors*.[242] Conspicuously absent from the litany of cases included is *United States v. Edge Broadcasting*,[243] decided in 1993, which supports a more deferential approach. Despite this bit of selective citation, however, Justice O'Connor's willingness to disavow *Posadas* is certainly a welcome development.

III. HOW *44 LIQUORMART* CHANGES THE LANDSCAPE OF COMMERCIAL SPEECH JURISPRUDENCE

44 Liquormart signals important changes in the Court's approach to commercial speech. First, a majority of the Court now favors imposing a significantly higher standard on commercial speech restrictions that prohibit truthful, non-misleading speech concerning lawful activities.[244] This standard is, in essence if not in name, a strict scrutiny standard. Second, by expressly disavowing several of *Posadas*' holdings,[245] and definitively rejecting its greater-includes-the-lesser syllogism, the Court is now committed to a more exacting review of legislative judgments concerning commercial speech, one that is more faithful to the spirit of *Virginia Pharmacy*. Finally, Justice Stevens' opinion highlights the important but long-neglected role theory should play in any principled attempt to give commercial speech a level of protection commensurate with its proximity to core First Amendment values. Whereas Justice Thomas' approach may provide *too much* protection to commercial speech, and Justice O'Connor's may provide *too little*, Justice Stevens' model of commercial speech, and the contextual

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242. *See id.* at 1521.

243. 509 U.S. 418 (1993) (showing extreme deference to legislative common sense judgment without requiring a significant amount of evidence).

244. Justices Kennedy, Souter, and Ginsburg joined Justice Stevens' application of *Central Hudson.* Justice Thomas, of course, advocated stricter scrutiny but favored a categorical test rather than application of the *Central Hudson* standard. Thus, even though Justice Thomas differed on what test to apply, all five Justices were in agreement that they should apply some form of stricter scrutiny to commercial speech regulations.

245. While it may have overruled *Posadas*' interpretation of the third and fourth factors, the case did not overrule *Posadas* approach to *Central Hudson's* second factor, the determination of whether the state has asserted a "substantial interest." Indeed, as one case interpreting *44 Liquormart* has stated, "[t]he *Liquormart* Court did not overrule the holding in *Posadas* . . . that [the State] may act in the absence of empirical evidence when it rationally perceives a threat to the health, welfare and benefit of its citizens." Nordyke v. Santa Clara, 933 F.Supp. 903, 908 (N.D. Cal. 1996). Thus, *44 Liquormart* did not mandate a more searching inquiry of whether the State has asserted a substantial interest when it is exercising its police powers.

approach that accompanies it, comes closest to granting commercial speech just the right amount of protection.

A. *The Court's New Analysis of Commercial Speech*

Though there are important differences between them, the opinions of both Justice Stevens and Justice Thomas depart from prior Supreme Court doctrine with respect to how the Court should analyze commercial speech restrictions. After *44 Liquormart*, merely dubbing speech "commercial" may no longer decide the issue of what level of review should be employed. As Justice Stevens remarked, "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them."[246] Regardless of whether a restriction is on commercial, political, or any other form of protected speech, if it is designed to keep the public uninformed, it will be subject to heightened scrutiny.[247] Provided the current alignment of the Court holds, a total prohibition on commercial speech will be subject to a less demanding standard of review *only* when its purpose is to protect consumers from misleading, false, deceptive, or aggressive advertising, or when it seeks to require the disclosure of beneficial advertising.[248]

Not so fast, some might respond. Although Justice Thomas advocated strict scrutiny for commercial speech and expressly rejected *Central Hudson*, Justice Stevens went on to apply *Central Hudson*. Indeed, First Amendment absolutists may be disappointed by Justice Stevens' seemingly conservative approach. Thus, the argument goes, how can a plausible case be made that *44 Liquormart* signals a departure from the existing approach when the principal opinion for the Court employed the same old test? There are at least two possible answers. First, perhaps Justice Stevens used the first part of his opinion to set forth an alternative approach, but postponed its application for a later date in order to give litigants and lower courts the opportunity to digest his analysis. Another answer, and the more plausible one, is that he was not applying the same old test. Rather, he was employing a new test under the old name. Judging from the number of votes Justices Stevens and Thomas were able to command for their respective

246. 116 S. Ct. at 1507 (citation omitted); *see also supra* notes 177-189 and accompanying text (discussing this aspect of Justice Stevens' opinion).

247. *See supra* notes 182-191 and accompanying text.

248. *See supra* notes 179-186 and accompanying text.

positions, it seems that perhaps Justice Stevens had the better approach. However, as explained later, his approach has reason as well as numbers on its side.

1. Killing Precedent Softly: Did Justice Stevens Adopt the Blackmun Approach to Overruling Precedent?

Arguably, not only did Justice Stevens borrow Justice Blackmun's views on commercial speech, he also borrowed Justice Blackmun's incremental approach to changing existing Supreme Court doctrine. Recall that Justice Blackmun did not announce a sudden change in the Court's approach to commercial speech in *Virginia Pharmacy*. Rather, he set the stage for extending First Amendment protection to commercial speech the year before in *Bigelow v. Virginia*.[249] In *Bigelow*, Justice Blackmun narrowed *Valentine*'s holding but did not overrule the decision.[250] He distinguished the earlier case by characterizing the regulation at issue in *Valentine* as a time, place, and manner restriction.[251] However, Justice Blackmun warned that at some point the First Amendment interests might need to be weighed against the interest in commercial speech.[252] Thus, Justice Blackmun laid the groundwork for granting commercial speech protection in *Virginia Pharmacy* and signaled that a change in existing doctrine was in the works. Similarly, with *44 Liquormart*, Justice Stevens may be laying the foundation for an overthrow of *Central Hudson*. He was simply waiting for the appropriate case in which to do so—and determined that *44 Liquormart* was not such a case.[253]

Therefore, like Justice Blackmun's approach in *Bigelow*, Justice Stevens' opinion may be viewed as an admonition to litigants and lower courts that they should begin to look beyond *Central Hudson* when framing arguments and making decisions. Viewed in this manner, parts III and IV of his opinion set forth an alternative and more categorical approach similar to that of Justice Thomas. Thus, perhaps he intended these sections to serve as a roadmap for future litigants and the lower courts. However, in order to avoid the accu-

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249. 421 U.S. 809 (1975).

250. *See* Moore, *supra* note 77, at 32.

251. *See id.*

252. *See Bigelow*, 421 U.S. at 825.

253. Justice Stevens is no fan of *Central Hudson*. In his opinion in Rubin v. Coors Brewing Co., 115 S.Ct. 1585, 1595 (1995) (Stevens, J., concurring in the judgment), Justice Stevens criticized the Court's reliance on *Central Hudson* as "misguided."

sation that he had pulled the rug out from under the litigants in the case before him, he simply applied the familiar *Central Hudson* standard. This interpretation finds a modicum of support in Justice Steven's own words. According to him, concluding that advertising significantly increases alcohol consumption "would require [the Court] to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest."[254] Further, near the end of his *Central Hudson* analysis, he wrote that "even under the less than strict standard that traditionally applies in commercial speech cases, the State has failed to establish a 'reasonable fit' between its abridgement of speech and its temperance goal."[255]

However, while this incremental approach to overruling precedent may have its benefits, it is at least debatable whether this case warranted such a conservative approach—and whether Justice Stevens actually applied it. For several reasons, *44 Liquormart* presented a perfect opportunity for Justice Stevens to definitively reject *Central Hudson.* First, aside from the fact that the case involved liquor rather than prescription drugs, the facts of *44 Liquormart* were more analogous to those of *Virginia Pharmacy* than any case since the Court's 1976 decision; the issue in both cases involved a total ban on price advertising. By returning to the categorical approach in *44 Liquormart,* Justice Stevens could have muted any criticism that he was departing from precedent by noting that he was just following the most relevant precedent. Second, while Justice Blackmun was in effect altering the lines of demarcation between unprotected and protected categories of speech, Justice Stevens was merely "calibrating" the level of protection given to an already protected category of speech. Consequently, the element of surprise was not as pronounced in *44 Liquormart* as it was in *Bigelow* and there was less need for treading lightly on existing precedent. Finally, by deftly recharacterizing the requirements of the third and fourth factors of *Central Hudson,* Justice Stevens essentially applied a strict scrutiny standard of review without admitting it (and if Justice O'Connor's concurrence is any indication, he did not fool anyone).[256]

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254. 116 S.Ct. at 1510.

255. *Id.* at 1510.

256. Justice O'Connor emphasized that she preferred to "apply[] the *established Central Hudson* test." *Id.* at 1521 (O'Connor, J., concurring in the judgment). The clear implica-

Thus, if Justice Stevens wished to abandon *Central Hudson,* this was the perfect case in which to do so. Surely he recognized this. Given his expressed hostility to that test, then, it seems rather peculiar that he did not join with Justice Thomas in advocating a more categorical approach. Why go through the motions of *Central Hudson* if the end result will usually be to strike down a ban on commercial speech? The answer, according to Justice Stevens, is that those motions are in themselves important. Commercial speech is, after all, "an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services."[257] The trick, then, is to design a framework that incorporates this salient consideration.

Provided the *Central Hudson* test provides a suitable framework for reconciling the heightened scrutiny traditionally accorded speech and the lower scrutiny reserved for economic regulation, applying the test's four factors can ensure that a court gives neither too much nor too little deference to legislative decisions. The benefit of such an approach is that it permits a consideration of competing interests. The problem with *Central Hudson* prior to *44 Liquormart,* however, was that it failed to provide that framework. It instead fostered results-oriented decision making. Because a court was free to uphold commercial speech regulations under the test's third and fourth prongs on the basis of nothing more stringent than common sense, the existing test carried with it the very real possibility that whether a commercial speech regulation was struck down or not depended more on a judge's intuition than on what the evidence revealed. The answer, however, was not to replace a test that gives legislative judgments too much credence with one that gives such judgments too little consideration, such as the categorical approach of Justice Thomas. Rather, the proper response was to refine the existing approach. And that is precisely what Justice Stevens did.

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tion is that she thought Justice Stevens was applying something *other than* the established test.

257. TRIBE, *supra* note 10, at 903 (emphasis added).

2. Strengthening *Central Hudson*

Rather than abandon *Central Hudson,* Justice Stevens simply made some much needed corrections to it. He accomplished this by refashioning the third and fourth prongs of the test. In fact, he bolstered them to such a degree that the test was transformed into something closer to a strict scrutiny standard than to the intermediate standard that had previously governed commercial speech cases.

Justice Stevens made the most substantial change to the third prong of the test. Previously, the connection between advertising and consumption was treated as a legislative fact. By introducing for the first time a requirement that a regulation on commercial speech must *significantly* advance the asserted state interest, Justice Stevens recharacterized the connection between advertising and consumption as an adjudicative fact.

A legislative fact is "a question of social factors and happenings which may submit to some partial empirical solution but is likely to remain subject to opinion and reasoning."[258] By contrast, an adjudicative fact is one that "is specifically related to [a particular case] or controversy."[259] The consequence of the distinction is, for example, that a legislative fact "cannot be thrust aside by two experts and a judicial trier of fact,"[260] while an adjudicative fact can.[261]

Because the connection between advertising and consumption had previously been treated as a legislative fact, the judiciary had adopted a very laissez faire approach toward the third prong of *Central Hudson.* Thus, prior to *44 Liquormart,* in order to survive a challenge under the third prong a regulation had to advance the state's interest to a "material degree"[262] and would fail this prong only if it "indirectly advanced" the state's interest.[263] Common sense and judicial notice were usually enough to prove that the state's interest was being directly advanced by its chosen regulatory scheme.[264] For instance, in *Central Hudson* the Court adopted a

258. Dunagin v. City of Oxford, 718 F.2d 738, 748 (5th Cir. 1983).

259. *Id.*

260. *Id.*

261. The difference between the district and appellate opinions was largely based on whether the court treated the connection as an adjudicative or as a legislative fact.

262. *Edenfeld,* 507 U.S. at 767.

263. Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 565 (1980).

264. *See, e.g.,* Dunagin v. City of Oxford, 718 F.2d 738, 750 (5th Cir. 1983).

"judicial notice approach"[265] when it found that the utility would not have contested the advertising ban unless it was having a negative effect on demand for electricity.[266]

Subsequent cases followed a similar line of reasoning. Some courts based their decisions on a "judicial notice approach"—as in *Central Hudson*—and others applied their "accumulated, common-sense judgment"[267] to establish a link between a restriction and the end sought. Such a deferential attitude was embraced by the Court as recently as 1994, as an amicus brief on behalf of the state pointed out.[268] In *Turner Broadcasting System v. FCC*,[269] Justice Kennedy wrote: "[The] obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence de novo, or to replace . . . factual predictions with our own."[270] As long as there was evidence in the record—anecdotal or otherwise—sufficient to create a reasonable inference that a legislature had good reason to believe that its chosen means would advance the state interest, a regulation would pass this part of the test.[271]

"There are compelling practical reasons for this approach."[272] One reason is that "[c]ourts are much less suited than legislatures to sort through the available evidence and make precise predictions in areas where predictions of any kind are difficult."[273] In fact,

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265. *Id.* at 750.

266. *See* 447 U.S. at 569 ("Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales.").

267. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981) ("We . . . hesitate to disagree with the accumulated, common-sense judgments of local lawmakers. . . . ").

268. *See* Amicus brief of Council of State Governments at 10, 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996) (No. 94-1140) [hereinafter *CSG Amicus Brief*].

269. 114 S.Ct. 2445 (1994).

270. *Id.*

271. For an excellent survey of this extremely deferential approach, see Dunagin v. City of Oxford, 718 F.2d 738, 749-750 (5th Cir. 1983) (citing several cases adopting such an approach). In that case the court concluded that:

> We simply do not believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an added market share at the expense of competitors. Whether we characterize our disposition as following the judicial notice approach taken in *Central Hudson Gas*, or following the "accumulated, common-sense judgment" approach taken in *Metromedia*, we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not "concrete scientific evidence" exists to that effect.

Id. at 750.

272. *CSG Amicus Brief*, *supra* note 268, at 10.

273. *Id.*

Justice Kennedy expressed this view in *Turner Broadcasting System v. FCC.*[274] This is particularly true where economic predictions are involved.[275] Moreover, as one commentator has written, acceptance of common sense determinations is entirely consistent with *Central Hudson*'s "emphasis on whether the regulation *'directly'* (rather than *'certainly'*) advances the governmental interest."[276]

In Justice Stevens' opinion, common sense had been overrated, or at least overused, by the Supreme Court and the lower courts. In his view, common sense had become a convenient synonym for luck. For as he explained, "any connection between the ban and a significant change in alcohol consumption would be purely fortuitous."[277] While Justice Stevens accepted without hesitation the state's contention that the liquor store would not oppose the advertising restriction unless it was having some kind of effect on demand,[278] that was not enough. Consequently, he rejected *Central Hudson*'s generous acceptance of such "evidence," and instead required the state to present evidence conclusively demonstrating that the price advertising ban was having a significant effect on consumption.[279]

Specifically, Justice Stevens said that the state would have to show two things in order to satisfy its evidentiary burden: (1) the price level at which a significant reduction in alcohol consumption would be achieved; and (2) the amount by which alcohol prices

274. 114 S.Ct. 2445, 2471 (1994) (plurality opinion) ("Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.").

275. Ironically, it was Justice Stevens who made precisely this point in his concurrence in *Turner Broadcasting.* According to Justice Stevens, "Economic measures are always subject to second-guessing; they rest on inevitably provisional and uncertain forecasts about the future effect of legal rules in complex conditions." *Id.* at 2473 (Stevens, J., concurring) (footnote omitted). According to an old joke, "if you lined up all the world's economists end to end they still would not reach a conclusion." This seems to be the animating thought behind the Court's deferential stance toward a legislature's economic predictions.

276. Daniel Hays Lowenstein, *Commercial Speech and the First Amendment: "Too Much Puff": Persuasion, Paternalism, and Commercial Speech,* 56 U. CINN. L. REV. 1205, 1217 (1988) (emphasis in original).

277. 116 S.Ct. at 1510.

278. *See id.* at 1509.

279. *See id.* ("[W]ithout any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will *significantly* advance the State's interest in promoting temperance." (emphasis added)).

would decrease if the ban were not in place.[280] What had previously been a satisfactory method of establishing the link between a commercial speech restriction, even in the very case that established the test, had now become mere "speculation" and "conjecture."[281] Whereas even *Central Hudson* seemed to adopt a standard analogous to rational basis review under the third prong of the test, with subsequent cases reinforcing the idea, Justice Steven's insistence on proof that the means *significantly* advance the end clearly sets an evidentiary hurdle that more closely resembles strict scrutiny than rational or intermediate level review.

One way of viewing Justice Stevens' reformulation of the third prong is that perhaps he was only correcting the lower courts' liberalization of the standard originally set forth in *Central Hudson*.[282] Viewed in this manner, Justice Stevens was instructing the lower courts to return to the more fastidious examination of the State's proof of effectiveness required by the Court since *Central Hudson*.[283] Many lower courts had shown a remarkable willingness to accept weak and even nonexistent evidence in support of commercial speech regulations.[284] This was certainly true for sev-

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280. *See id.* at 1610.

281. *Id.* at 1510. It is apparent that despite what Justice Stevens was actually doing, he did not wish to give the appearance that he was overturning prior case law. Thus, he characterizes using common sense judgment as conjecture and speculation in an apparent effort to show that he is merely following precedent like Edenfield v. Fane, 507 U.S. 761 (1993).

282. *See Interview with Evan T. Lawson*, MASS. LAWYER'S WEEKLY, Aug. 5, 1996, at B2 ("There had been a growing trend in the commercial speech area towards deferring to state legislative judgments by the lower courts. I think they were misreading the signals by the . . . Supreme Court."). Evan Lawson was the principal attorney representing 44 Liquormart, and performed the oral argument before the Supreme Court.

283. *See id.* at B2 ("What I think this case shows is that they intended to be more protective than they were perceived to have been.").

284. *See, e.g., Dunagin*, 718 F.2d at 748-750. *Dunagin* summed up nicely the way most courts interpreted the requirements of the test's third prong:

> [T]he issue of whether there is a correlation between advertising and consumption is a legislative and not an adjudicative fact question. It is not a question specifically related to this one case or controversy; it is a question of social factors and happenings which may submit to some partial empirical solution but is likely to remain subject to opinion and reasoning. That reasoning is the responsibility of legislators and judges, assisted by scholars as well as social scientists. The specific issue here was undoubtedly considered by the . . . [l]egislature. . . . Now the issue has moved to the judicial stage. *If the legislative decision is not binding at this stage, at least it carries great weight. Certainly it cannot be thrust aside by two experts and a judicial trier of fact.*

Id. at 748 (emphasis added).

eral of the cases the Court vacated and remanded for reconsideration in light of *44 Liquormart*.[285] For instance, in *Greater N.O. Broadcasting v. United States*,[286] the challengers to a ban on casino gambling advertising argued that the fact that other forms of media could advertise served to undermine the government's assertion that broadcast advertising advanced its interest in reducing gambling.[287] The Fifth Circuit Court of Appeals responded that "'[i]f 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.'"[288] Similar conclusions were reached in *Anheuser-Busch, Inc. v. Schmoke*[289] and *Penn Advertising v. Mayor and City Council of Baltimore*,[290] two other cases sent back for reconsideration.

However, this view is not entirely persuasive given the Supreme Court's acquiescence in, and even outright encouragement of, the lower courts' abrogation of the third prong of *Central Hudson*. The Supreme Court itself had repeatedly suggested that all a state need do is come forward with evidence showing that a regulation would tend to advance its interest;[291] it did not demand

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285. The Court vacated and remanded the following four cases for reconsideration: Greater N.O. Broadcasting v. United States, 69 F.3d 1296 (5th Cir. 1995), *vacated and remanded*, 65 U.S.L.W., Oct. 7, 1996; Penn Advertising, Inc. v. Mayor and City Council of Baltimore, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 116 S.Ct. 2575 (1996); Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 115 S.Ct. 1821 (1996); Pennsylvania State Police v. Hospitality Invs., 650 A.2d 854 (Pa. 1994), *vacated and remanded*, 116 S.Ct. 1821 (1996).

286. 69 F.3d 1296 (5th Cir. 1995), *vacated and remanded*, 65 U.S.W.L., Oct. 7, 1996.

287. *Id.*

288. *Id.* at 1301-02 (quoting United States v. Edge Broadcasting Co., 113 S.Ct. 2696, 2707 (1993)).

289. 63 F.3d 1305 (4th Cir. 1995). In *Anheuser-Busch* the Court of Appeals held "that it was reasonable for the Baltimore City Council to have concluded that [a regulation restricting billboard advertisements] of alcoholic beverages directly and materially advances Baltimore's interest in promoting the welfare and temperance of minors." *Id.* at 1314. According to the court, as long as there is a "logical nexus" between the objective and the "means selected for achieving that objective," *Central Hudson* does not require the government "to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem." *Id.*

290. 63 F.3d 1318 (4th Cir. 1995) ("Since the burden of justifying the ordinance falls on the government and it may carry this burden by pointing to legislative facts, studies, history, or *common sense*, an understanding of the ordinance's factual impact on particular parties *is not necessary to the inquiry*." *Id.* at 1323 (emphasis added)).

291. Such an approach has ominous overtones of the old "bad tendency" test employed in cases like Gitlow v. New York, 268 U.S. 652 (1925), which was ultimately replaced by the "clear and present danger" test. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

that such evidence be convincing. Further, it was up to the challenger to show that the regulation was "unreasonable."[292] In other words, the implication of the Court's language was that lower courts should not weigh the evidence. Where evidence pointed in two directions, as is often the case where economic predictions are involved, the state could satisfy its evidentiary mandate with mere anecdote, and a court could not demand more. Even *Edenfield*, a case often cited for its strong protection of commercial speech, implied that all that was necessary was for a state to present something to "validate[]" its "suppositions."[293] Moreover, as mentioned above, *Central Hudson* accepted common sense in lieu of hard evidence as a means of satisfying the third prong of the test.[294]

Therefore, an interpretation more faithful to the tenor of Justice Stevens opinion is that he was tightening the requirements of *Central Hudson*'s third prong, not returning it to the standard originally articulated. After all, it is hard to argue that if common sense was good enough in *Central Hudson* but not in *44 Liquormart*, Justice Stevens was simply adhering to the "original understanding" of the *Central Hudson* test. One response to this interpretation is that the two cases are factually distinguishable. And indeed they are. In *Central Hudson*, the advertising ban prohibited *all* advertising that promoted the use of electricity.[295] By contrast, the *44 Liquormart* advertising ban restricted only price advertising, not all liquor advertising. In rejecting the state's argument that the court should accept the common sense connection between a price advertising ban and a reduction in alcohol consumption, the district court

As an amicus brief on behalf of *44 Liquormart* argued, the "rational basis/bad tendency standard in commercial free speech cases would drain the term 'directly advance' of any meaning. It would virtually eliminate any practical distinction between regulating commercial speech and regulating economic behavior." Amicus Brief of Association of National Advertisers in Support of Petitioner, *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1995) (No. 94-1140) [hereinafter *ANA Amicus Brief*].

292. For example, in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1983), the Court wrote: "We hesitate to disagree with the accumulated, common sense judgments of local lawmakers . . . . There is nothing here to suggest that these judgments are *unreasonable*." (emphasis added). Perhaps even more instructive is that the Court then went on to quote from Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949), an economic regulation case, suggesting that the challenger has the burden of showing that the legislature's judgment is wrong. *Id.* at 109 (stating that "nothing has been advanced which shows [the legislative judgment] to be *palpably false*.'" (emphasis added)).

293. Edenfield v. Fane, 507 U.S. 761, 771 (1993).

294. *See supra* notes 90-91 and accompanying text.

295. 447 U.S. at 558-59

made precisely this distinction.[296] The problem with this response is that Justice Stevens treated this as a distinction without a difference. Nowhere in his plurality opinion does he mention it. Further, he accepted that, as a matter of common sense, a price advertising ban may have some impact on demand for and consumption of alcoholic beverages.[297] However, common sense was rejected as a legitimate means of proving a connection between the advertising ban and the state's interest.

Some may question the wisdom of forcing courts to conduct a full blown evidentiary hearing to determine whether a commercial speech regulation significantly advances the legislature's desired end. Aside from the toll it takes on judicial economy, such a requirement smacks of judicial activism. However, before we condemn Justice Steven's approach as inefficient and intrusive, a few things should be brought to mind. First, the more demanding application of the third prong of *Central Hudson* is not triggered unless there is a *total* or *blanket* prohibition on commercial speech. Thus, in the vast majority of cases where only partial restrictions are involved, the old common sense approach may still be used. Second, weighing evidence is a task the courts are peculiarly well-qualified to perform. It is, after all, something courts do on a daily basis. Why should it make a difference whether the experts are testifying on behalf of the state or a private party? In either case, the fact-finder's job is to examine the evidence, judge an expert witness' credibility, and determine which side put forth the most convincing proof. Why should it be any different when commercial speech is involved?[298] Finally, requiring conclusive evidence of

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296. 44 Liquormart, Inc. v. Racine, 829 F.Supp. 543, 554 (D.R.I. 1993) ("Unlike a number of cases in the commercial speech area, the link between alcohol *price* advertising and increased per-capita consumption is not self-evident." (citations omitted)).

297. *44 Liquormart*, 116 S.Ct. at 1509 ("We can agree that common sense supports the conclusion that a prohibition against price advertising, like a collusive agreement among competitors to refrain from such advertising, will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market." (footnote omitted)).

298. One reason given by the *Dunagin* court is that "[t]here are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial." *Dunagin*, 718 F.2d at 748. "Suppose," asked the court, that:

> one trial judge sitting in one state believes a sociologist who has found no link between alcohol abuse and advertising, while another trial judge sitting in another state believes a psychiatrist who has reached the opposite conclusion. . . . Should identical conduct be constitutionally protected in one jurisdiction and illegal in another? Should the fundamental principles of equal protection deliv-

the effectiveness of total bans on commercial speech prevents or at least discourages the type of ad hoc, results-oriented decision-making that *Central Hudson* has been accused of fostering. Common sense and judicial notice served not only to establish a link between legislative means and ends, but to sever that link as well. In *Bolger v. Young Drug Products Corp.*,[299] for instance, the Supreme Court actually struck down a law banning the mailing of contraceptive advertisements under *Central Hudson*'s third prong solely on the basis of common sense. The Court held that the statute provided little support for the government's interest in controlling children's access to birth control information. It did so not on the basis of evidence but by "reasonably assum[ing] that parents already exercise substantial control over the disposition of mail once it enters their mailboxes."[300] Consequently, strengthening the third factor to require evidence of a ban's effectiveness may actually help to limit the allure of judicial activism.

While Justice Stevens' redefinition of *Central Hudson*'s fourth factor is not as revolutionary as his reworking of the third factor, it is clear that he engineered a significant change here as well. As Justice Thomas recognized, the standard set by Justice Stevens is

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> ered in *Brown v. Board of Education of Topeka* be questioned if the sociological studies regarding racial segregation set out in the opinion's footnote 11 are shown to be methodologically flawed? . . . Does capital punishment become cruel and unusual when the latest regression models demonstrate a lack of deterrence? The social sciences play an important role in many fields, including the law, but other unscientific values, interests and beliefs are transcendent.

Id. (citations omitted).

One response to this is that some constitutional matters are simply too important to be left to the experts. A better response is available, however. There is an important distinction between the common sense approach adopted in commercial speech jurisprudence and the judicial notice approach adopted in the Court's capital punishment and equal protection cases. In *Brown*, for example, the Court was first provided with evidence before it employed that evidence to establish its judicial notice approach. By contrast, in the commercial speech cases there had never been any concrete evidence of the link between advertising and consumption. The Court adopted such a link as a matter of common sense before it ever had an evidentiary basis for doing so. Finally, perhaps free speech is an area that simply requires more detailed factual inquiry than other areas. The commercial speech area, and indeed the entire free speech area is very fact-intensive. Determining whether there is a clear and present danger, for instance, requires a detailed inquiry into the proximity of the danger and the degree to which speech may cause that danger. Whether something is obscene, and therefore unprotected, or whether it is just pornographic entails similarly detailed factual investigation. Thus, maybe the nature of speech itself is sufficiently distinct from other sorts of constitutional questions that it justifies a more fact-sensitive approach.

299. 463 U.S. 60, 73 (1983).

300. *Id.*

an almost insurmountable one.[301] In virtually every case involving a commercial speech restriction, the state has several alternatives at its disposal to effectuate its intended goals without infringing on First Amendment rights.[302] And again, while Justice Stevens attempted to frame his analysis in terms of existing Supreme Court precedent, the consequence of his analysis represents a remarkable alteration of existing Supreme Court doctrine.

What makes his analysis remarkable is that Justice Stevens has essentially recast the meaning of "necessary" found in *Central Hudson*'s requirement that a restriction on commercial speech can be no broader than is "necessary" to serve the government's asserted interest. Recall that in *Fox*,[303] Justice Scalia gave the word the same liberal meaning as that ascribed to it by Chief Justice Marshall in *McCulloch v. Maryland*.[304] Essentially, the word was viewed as a synonym for "convenient."[305] In *44 Liquormart*, however, Justice Stevens gave the word a much stricter meaning by omitting the requirement established in *Discovery Network* that such alternatives be "numerous" and "obvious."[306] Thus, as Justice Thomas recognized, this would "appear to commit the courts to striking down restrictions on speech whenever a direct regulation . . . would be an equally effective method of dampening demand."[307] Coupled with his overruling of *Posadas*, then, Justice Stevens transformed the *Central Hudson* standard into a "least-restrictive-means" test, a notion that was expressly repudiated by Justice Scalia in *Fox*.[308]

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301. *See supra* notes 235-37 and accompanying text (discussing Justice Thomas' appreciation for the practical ramifications of Justice Stevens' opinion).

302. As Justice Thomas states, Justice Stevens' opinion "would appear to commit the courts to striking down restrictions on speech *whenever a direct regulation would be . . . equally effective* . . . [and] directly banning a product . . . would virtually always be at least as effective." 116 S. Ct. at 1519 (Thomas, J., dissenting) (emphasis added).

303. Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 476-77 (1989).

304. 4 Wheat. 316 (1819).

305. 492 U.S. at 476-77.

306. Cincinnati v. Discovery Network, 507 U.S. 410, 417 n.1 (1993). Justice Thomas recognized this subtle difference as well. 116 S.Ct. 1518 (Thomas, J., concurring in the judgment) (noting that Justice Stevens "appear[ed] to adopt a stricter, more categorical interpretation of the fourth prong . . . than suggested in some of our other opinions") (citing Cincinnati v. Discovery Network, 507 U.S. at 417 n.1 (1993)).

307. 116 S.Ct. at 1519.

308. 492 U.S. at 477 ("Whatever the conflicting tenor of our prior dicta may be, we now focus upon this specific issue [of the fourth factor's meaning] . . . and conclude that the reason of the matter requires something short of a least-restrictive-means standard.").

B. Overruling Posadas*: Putting the Legislature to its Proof*

By requiring a tighter fit between legislative means and ends, Justice Stevens was forced to confront the *Posadas* decision head on. Recall that *Posadas* stood for three propositions, all of them related to *Central Hudson*'s fourth prong: (1) a legislature's reasonable judgment that prohibiting advertising is preferable to a less speech restrictive alternative should be given great weight by a reviewing court;[309] (2) the greater power to entirely prohibit the underlying product or activity carries with it the lesser power to restrict advertising of that product or activity;[310] and, (3) speech concerning so-called "vice" products may be regulated to a greater extent than other types of commercial speech because of its immoral or harmful nature.[311]

To bolster its position, the state relied on all three propositions. Justice Stevens rejected each of them and, in the process, overruled *Posadas* to the extent it stood for these propositions. Further, a majority of the Court agreed with Justice Stevens that the legislature should be held to a stricter standard than was suggested ten years earlier in *Posadas*.[312]

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309. The Court concluded:

> We think it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct.

Posadas de Puerto Rico Associates v. Tourism Company, 478 U.S. 328, 344 (1986).

310. *See id.* at 345. At least one commentator has argued that *Posadas* should not be read as supporting a greater-includes-the-lesser theory. According to Blim, "It is, however, by no means clear that the *Posadas* Court meant to say, even in dicta, that the power to ban the underlying commercial activity was all that was needed to ban its advertisement, requirements of *Central Hudson* notwithstanding." Blim, *supra* note 130, at 754. Blim concludes that the greater-includes-the-lesser theory is "a sort of fifth prong of the test," and a regulation survives "as long as it passes the *Central Hudson* test and does not suppress advertising of a constitutionally protected activity." *Id.*

311. *See* 478 U.S. at 345.

312. *See* Niehoff, *supra* note 13, at 829. According to Niehoff:

> [It is] clear that a majority of the Justices . . . have come to believe in a strict application of the *Central Hudson* test—although it also seems relatively clear that there is disagreement among them about whether some kinds of commercial speech restrictions call for an even higher level of scrutiny that is extraordinarily (if not entirely) unforgiving. If *44 Liquormart* provides relatively clear guidance on these issues, it provides unambiguously clear guidance on another issue: *Posadas is dead, buried, eulogized and forgotten.*

However, this requires a consideration of whether stricter scrutiny of legislative determinations is a necessary or positive development, and whether the Court's express disavowal of *Posadas* is clearly warranted. As Lawrence Tribe has argued in the context of a discussion of *Posadas'* greater-includes-the-lesser theory and vice exceptions, the deference given to the legislature in *Posadas* might not have been appropriate based on the facts of that case, but the reasoning shown by the Court may very well be applicable in other contexts.[313] According to Tribe, some advertising might be more analogous to "*incitement*" than to "*advocacy*."[314] Consequently, "if the activity being incited is sufficiently harmful *in itself*, the state's decision not to ban that activity outright—out of respect for privacy, or anticipated difficulties of enforcement—need not entail a first amendment duty to permit self-interested exhortation to engage in the activity."[315] Tribe elaborates:

> Such a theory would, for example, support a law prohibiting individuals from urging others to commit suicide, at least where such encouragement is motivated by self-interest (as in the case of one who would like to film another's death). This theory would also support a law prohibiting cigarettes for profit, but *not* a law prohibiting the advertisement of driving or skiing or other *merely risky* but not intrinsically harmful activities—activities that the State cannot plausibly claim it could ban outright but for the intrusiveness or impracticality of enforcing a direct prohibition.[316]

Such an approach, suggests Tribe, "seems unthreatening to basic free speech values."[317]

Under this analysis, forcing a duly elected legislative body to take the more drastic, intrusive, costly, and, perhaps, ineffective step of direct regulation or prohibition over the easier and often times more efficient step of merely prohibiting speech about "intrinsically harmful" substances like liquor could be viewed as a

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Id. (emphasis added).

313. Since liquor, not gambling is involved here, the facts of *44 Liquormart* are arguably much more amenable to Tribe's approach than the facts of *Posadas*.

314. *See* TRIBE, *supra* note 10, at 934 (emphasis in original).

315. *Id.* (emphasis in original).

316. *Id.* at 934 n.33 (emphasis in original).

317. *Id.*

judicial usurpation of legislative authority. Under this view, Justice Stevens, and, ironically, Justice O'Connor and Chief Justice Rehnquist, were engaging in judicial legislation by conjuring up methods whereby Rhode Island could promote its goal of temperance, methods that the legislature might have determined in its independent judgment were simply too costly and ineffective to pursue. Let us suppose that Justice Thomas is correct when he claims that a commercial speech prohibition like the one in *44 Liquormart* will nearly always fail under Justice Steven's formulation of *Central Hudson*'s fourth factor because direct regulation is always available. If this is true, then maybe the Court has stepped on some legislative toes. Has the pendulum swung too far?

Several reasons suggest that it has not. First, the approach suggested by Professor Tribe is vulnerable to the same criticism Justice Stevens leveled against the "vice" exception asserted by Rhode Island in *44 Liquormart*. There, Justice Stevens warned that such an exception could be created for almost any legal activity, stating that:

> 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,'. . . [and] would also 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.[318]

Similarly, a state legislature could simply assert that an alternative, more direct form of regulation is too prohibitive in terms of either cost or enforcement to employ.

More significantly, it is difficult to determine just what, precisely, constitutes "intrinsically harmful" as opposed to "merely risky" activities or products. After all, does it really make sense to say that someone who smokes one cigarette a day is engaged in "intrinsically harmful" activity, while someone who skis every day is merely engaged in "risky" activity? Probably not. One is not suddenly stricken with cancer after smoking a single cigarette. Thus, both are better viewed as "merely risky" activities, with the

318. 116 S. Ct. at 1513. *See also supra* notes 211-215 and accompanying text (discussing this portion of Justice Stevens' opinion).

risk increasing as the level of activity increases. Viewed in this way, very few activities or substances are properly understood as "intrinsically harmful."[319] Thus, the distinction seems to be one of degree, not kind. This kind of distinction does not lend itself well to line drawing, and, consequently, should not be employed in the First Amendment context where the danger of legislative overreaching is most pronounced.

Third, and relatedly, the incitement analogy ignores the salient fact that incitement may be constitutionally prohibited only when the speaker is exhorting a crowd to do something itself illegal, not merely immoral.[320] What is illegal is a matter of state law. By contrast, determining what is immoral would become a matter for the federal courts to decide. By denying the possibility of a vice exception for commercial speech prohibitions, Justice Stevens was actually exercising judicial restraint and demonstrating a respect for the values of federalism. To hold otherwise would be to force the federal courts to create a "federal common law of vice"[321] with all of its negative accoutrements.[322]

Finally, and perhaps most importantly, allowing the greater-includes-the-lesser approach and its concomitant, the vice exception, to remain as viable rationales in the commercial speech doctrine would permit legislatures to escape accountability for their actions. If we properly understand the theoretical construct upon which Justice Stevens' opinion is based, it becomes clear that he was

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319. Ingesting cyanide or other fatal poisons would presumably fit in this category, as would building pipe bombs or playing Russian roulette.

320. *See, e.g.*, Termiello v. Chicago, 337 U.S. 1, 5 (1949) (holding that merely inciting listeners to anger is not enough and requiring a showing that speech will lead to violence).

321. 116 S.Ct. at 1513. One commentator has suggested that this would be an unfortunate consequence of permitting a vice exception. *See* Kurland, *supra* note 120, at 15. Kurland notes that:

> The difficulty here is that we know or can find out, more or less, what has been made illegal. We cannot know what the courts will determine to be immoral until they tell us. Is gambling immoral? Only casino gambling? Is wine drinking immoral? When do purchases of luxuries become immoral? Doing any business with South Africa, Libya, Syria? If immorality is to be the guide to legitimating censorship, we have entered on a long and rocky road indeed.

Id. at 15.

322. The notion of federal common law has been subjected to numerous criticisms. First, it creates a variance between state and federal law, which in turn invites forum shopping. Further, it rests on the long discredited notion of natural law, "the assumption that there are objectively true principles of law for the federal courts to apply." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 297 (2d ed. 1994).

really facilitating majoritarian will rather than impeding it. The thinking behind Justice Stevens' refusal to defer to the judgment of Rhode Island's legislature was animated by a concern for the integrity of the political process, not the substance of political judgments. Recall that Justice Stevens left *Central Hudson*'s second prong—whether the state has asserted a substantial interest—and *Posadas*' interpretation of it, undisturbed.[323] Thus, he did not directly inquire into motive to determine whether the legislature was attempting to promote temperance or whether there was something more sinister at work.[324] In other words, Justice Stevens did not interfere with the substance of the legislature's judgment as to whether it could combat a particular evil, as was frequently done in the *Lochner* era. Rather, Justice Stevens' interference, if it can be called that, was with the decision-making process itself.[325]

In effect, then, Justice Stevens was telling the legislature that its chosen method of regulating liquor consumption was defective because it was not the product of informed policy-making. Because the legislature was unable to provide even a close approximation of how much the advertising ban cost (as evidenced by its failure to show the price at which consumption would be significantly decreased), the voters were similarly unable to judge whether to approve the regulation (by electing or rejecting those politicians who supported the measure). Of course, if that were all there was to his thinking, the opinion would be the commercial speech analogue to *Smith v. Van Gorkom*.[326] There is more to his opinion than that, however.

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323. This was recognized by the court in Nordyke v. County of Santa Clara, 933 F.Supp. 903, 908 (N.D. Cal. 1996). *See supra* note 245 and accompanying text.

324. *See* 116 S.Ct. at 1502 n.4 (refusing to determine whether the legislature was actually motivated by a desire to protect small retailers from price competition).

325. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1020 (4th ed. 1991). As Nowak & Rotunda write, "[T]he state may reach the same policy goals as it chose to reach before, but it may not use the means of prohibiting the dissemination of truthful information about lawful activity." *Id.* This serves to "encourage more rational majority decision-making and a more open weighing of the advantages and disadvantages of policy alternatives by preventing the use of the 'commercial speech' concept to deny entirely first amendment protection to an important area of speech." *Id.*

326. 488 A.2d 858 (1985). The business judgment rule generally requires courts to review with extreme deference the decisions of corporate boards of directors. However, in *Van Gorkom*, the Delaware Supreme Court said that a board of directors could not avail itself of the business judgment rule unless it first demonstrated that it had made an *informed* decision. *See id.* at 872-73. Further, the court held that the stockholders could not ratify the board's decision with a vote because the directors had abdicated their duty to be informed. *See id.* at 873.

Even though Justice Stevens did not inquire into motive directly, the lack of evidence on the fit between ends and means suggested that the legislature had chosen to regulate speech, rather than impose taxes or subsidies, precisely because the cost was so difficult to determine. Thus, it was no answer for the legislature to say, as the Court suggested in *Posadas,* that it was up to them to decide between restricting speech or targeting activity. They had lost the right. Viewed in this manner, Justice Stevens was not "dictat[ing] substantive results," he was he was only correcting a "malfunction[]" of the political process.[327] As John Hart Ely has explained, "Malfunction occurs when the *process* is undeserving of trust, when . . . the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."[328] In such circumstances, the courts serve as "referee[s]" and must step in "only when one team is gaining an unfair advantage, not because the 'wrong' team has scored."[329] Acting in the role of a referee is a role the courts "are conspicuously well situated to fill."[330] By repudiating the deferential language of *Posadas,* coupled with his strengthening of *Central Hudson*'s third factor, Justice Stevens was fulfilling this role. This aspect of Justice Stevens' opinion is explored in greater detail below.

C. The (Nearly) New Political Process Theory of the New Commercial Speech Doctrine

The model of commercial speech constructed by Justice Stevens reflects a subtle change in how the Supreme Court understands restrictions on commercial speech, at least when it comes to restrictions that seek to suppress the dissemination of truthful information about legal activities. The Court's prior failure to clearly articulate a single coherent theory to protect commercial speech is probably responsible for more confusion in the commercial speech doctrine than any other factor. *Virginia Pharmacy* set forth a hodgepodge of reasons for according commercial speech constitutional protection, but failed to settle on any one overriding rationale.[331] But after *Central Hudson,* the Court, aside from a few

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327. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980).
328. *Id.*
329. *Id.*
330. *Id.* at 102.
331. *See supra* notes 51-75 and accompanying text (discussing the various rationales

dissents and concurrences, never even went so far as to assert a theory that would do more than ensure that commercial speech remained in the hinterlands of First Amendment theory.[332] It was as if the Court felt there was no need to state the reasons for its doctrine once it had a ready-made test in hand for disposing of the cases coming before it.[333] With *44 Liquormart,* however, the Court has finally done some thinking about *why* commercial speech deserves protection, and *what* that may mean for the conclusions it reaches.

Of the four opinions in the case, Justice Stevens' is the only one that develops a model of commercial speech that respects its relation to both economic regulation and traditional First Amendment concerns. This compelling theory of commercial speech has its roots in, of all places, a footnote. Actually two of them, one infamous and the other relatively obscure. In *United States v. Carolene Products Co.*[334] Justice Stone, in "famous footnote [four]"[335] suggested that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . than are most other types of legislation."[336] The far less famous footnote number nine in *Central Hudson* expressed a similar idea: "We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy."[337] This theme was refined by Justice Blackmun in *Central Hudson.* Justice Blackmun wrote that commercial speech restrictions that keep consumers in ignorance serve to keep "the State's policy choices . . . insulated from the *visibility and scrutiny*

offered by the Court).

332. *See supra* note 143 (discussing *Discovery Network* and *Edenfield*). While *Discovery Network* and *Edenfield* did articulate a coherent theory, the theory articulated (self-fulfillment) could not bring commercial speech into the core of first amendment values and interests.

333. *See* Kozinski & Banner, *supra* note 13, at 634 ("[S]ince *Central Hudson,* examination of the nature of commercial speech is undertaken only when a dissenting Justice wants to point out that the majority opinion makes no sense, as did Justice Brennan in *Posadas.*").

334. 309 U.S. 144 (1938).

335. ELY, *supra* note 327, at 74.

336. 309 U.S. at 152 n.4.

337. 447 U.S. 557, 566 n.9 (1980).

that direct regulation would entail."[338]

This insight remained largely ignored—until *44 Liquormart.* In language strikingly similar to Justice Blackmun's, Justice Stevens argued in *44 Liquormart* that bans on the dissemination of truthful information should not be countenanced because they "often serve only to obscure an 'underlying governmental policy,'" and, in so doing "impede debate over central issues of public policy."[339]

Thus, for Justice Stevens, and for at least three other members of the Court,[340] commercial speech is to be protected not because it is necessary to maintain a working free market economy (as the *Virginia Pharmacy* decision phrased it), nor simply because bans on commercial speech are paternalistic (although that is certainly one component of the theory), but rather because they serve to impede the very speech that the First Amendment was designed to protect and promote: the discussion and criticism of governmental policies. Consequently, in answer to the criticism that Justice Stevens failed to show enough deference to legislators, it need only be said that he was merely acting in a "representation reinforcement"[341] capacity by facilitating an open dialogue on the state's alcohol policies. Once that dialogue is opened up, the state is free to pursue whatever goal it perceives to be in the best interests of its citizens.

A major premise underlying deference to legislative judgments in cases of ordinary economic regulation is that people get the regulation they deserve. If the voters do not like a particular piece of legislation, they presumably "vote the rascals out" and choose new representatives who will, they hope, repeal the legislation. However, "[s]ince, in politics, as in baseball, you can't hit what you can't see, [total bans on truthful speech] strike[] at the heart of a citizen's right to know in its most deeply political sense."[342] By "regulating prices indirectly through censorship . . . legislators . . . avoid both a clear statement and an open debate on the issue."[343] Consequently, legislative judgments should not be entitled to defer-

338. 447 U.S. at 575 (Blackmun, J., concurring in the judgment) (emphasis in original).

339. 116 S.Ct. at 1508.

340. Justices Kennedy and Ginsburg joined in this part of Stevens opinion. Although he emphasized other interests as well, Justice Thomas also seemed to accept the political process theory of commercial speech.

341. This theory is associated largely with John Hart Ely. *See generally* ELY, *supra* note 327.

342. *ANA Amicus Brief, supra* note 291, at 3.

343. *Id.*

ence if the regulatory means itself precludes informed political decision-making.[344] In this situation, it becomes the job of the courts to step in and restore the legitimacy of the democratic process.

This theory serves to undercut, if not directly refute, the argument advanced by several commentators that commercial speech, and especially "[p]rice advertising[,] is simply not political speech."[345] As Ronald Rotunda has explained, "[B]y disguising its true objectives, [the legislature] may implement a policy that the majority of people would oppose if they had received adequate information about the true costs of the proposal."[346] Rotunda concludes, therefore, that "[r]estrictions on advertising reflect an antidemocratic means of implementing other policy judgments."[347]

Thus, commercial speech clearly does implicate political speech, but it does so in an indirect way. It is the restriction itself that brings the speech into the core of First Amendment values by impeding the majoritarian process, rather than what the speaker might say or what the listener might hear. Consequently, unlike other forms of political speech, where, usually, speaker, listener, and process interests are all emphasized,[348] under *44 Liquormart's* approach, it is primarily, though not exclusively, the *process* that implicates political speech. This becomes clear when we examine what happens after the speech in a case like *44 Liquormart* is permitted. In this case, the only thing that will occur is that liquor retailers will begin advertising prices. Prices certainly do not carry a political message. All that happens is that the political process will now be opened up so that the legislators who wish to regulate

344. This need for the courts to exercise this policing function was especially acute in *44 Liquormart* since the regulation was essentially a price control measure by another name. As one of the amici on behalf of 44 Liquormart observed, "Given the intensely controversial nature of price control, amici believe that a decision to fix prices must, at a minimum, be made openly after full opportunity for democratic reflection." *ANA Amicus Brief, supra* note 291, at 9.

345. *See* Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment,* 78 NW. U. L. REV. 1212, 1227 (1983) (arguing that commercial speech has little to do with the First Amendment's core values). A similar view was recently expressed by Professor William Van Alstyne. According to him, bringing commercial speech within the realm now occupied by political speech will probably result in a "leveling down" of all forms of speech, rather than a "leveling up" of commercial speech. Van Alstyne, *supra* note 8, at 1639.

346. Rotunda, *supra* note 101, at 1081.

347. *Id.*

348. Weinberg identified three interests that may be protected by the First Amendment: speaker, listener, and the communication process. *See* Weinberg, *supra* note 12, at 730.

liquor consumption will be forced to openly impose those economic costs on the public that had previously been hidden from view by the advertising restriction. Thus, those who argue that price advertising is not political speech are correct to the extent they mean the mere statement "beer for $1.20 a six pack" is not political speech. However, they are wrong insofar as they fail to recognize that a restriction on that advertising impedes political speech by disguising the true costs of the ultimate policy favored by the legislature.

Further, because Justice Stevens' opinion did not rest on the free market platitudes of *Virginia Pharmacy*, the decision cannot be criticized for "suggest[ing] that the first amendment has been Chicago-school economics traveling incognito for all these years."[349] Thus, under the Justice Stevens' approach, far from being "removed from political debate,"[350] price advertising, and commercial speech in general, are inextricably intertwined with it and the entire political process. The argument is that a commercial speech regulation that keeps information from consumers, and thereby insulates the responsible decision-makers from popular reprisals for unpopular decisions, *necessarily* implicates the political process. Consequently, "[a] broader scope for judicial review should exist in these instances."[351] Because commercial speech regulations that seek to prevent the dissemination of truthful information about legal products and services prevent the political process from even getting underway, strict scrutiny should be applied to such regulations.

This is not a return to *Lochner*. Unlike substantive due process, it facilitates rather than frustrates majority will.[352] It is important

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349. *Id.* Actually, it would be more accurate to say that the Court was suggesting that the First Amendment has been Austrian-school economics "traveling incognito," since Hayek and other representatives of the Austrian school of economic thought have been the most stalwart foes of any governmental regulation, economic or otherwise, that seeks to inhibit the free flow of information. For a general discussion of this aspect of Austrian economics, *see generally* F.A. Hayek, *The Use of Knowledge in Society* (1945), *reprinted in* THE ESSENCE OF HAYEK at 211 (Chiaki Nishiyama & Kurt R. Leube eds., 1984).

350. Shiffrin, *supra* note 345, at 1227.

351. Rotunda, *supra* note 101, at 1083.

352. *See id.* Rotunda argues that:

> A court decision that requires a legislative body to reveal the true expense of a legislative decision does not infringe on the majority's substantive right to give aid to small pharmacies [or, presumably, small liquor stores]. Such a judicial mandate only encourages an open decision-making process: a process that facilitates more rational legislative decisions.

Id.

to appreciate the significance of this. What previously had found expression in only a few scattered concurring and dissenting opinions—first by Justice Blackmun in *Central Hudson*,[353] then in *Posadas*,[354] and, just before *44 Liquormart*, by Justice Stevens himself in *Rubin*[355]—has now found incarnation in the principal opinion of the Court. The Court has switched its focus from promoting the *listener's* need for self-fulfillment[356] to facilitating the communication *process* and ultimately promoting self-government.

D. Context v. Categories: The Stevens Political Process Model of Commercial Speech versus the Approaches of Thomas and O'Connor

Given Justice Steven's strong aversion to blanket prohibitions on commercial speech, one is led to ask why he did not simply employ the categorical approach espoused by Justice Thomas in order to strike down the ban on liquor price advertising. After all, it would have been a much more direct route than the zigs and zags of *Central Hudson*'s four part test.

The answer to this question can be developed only after determining what type of analysis the political process model compels. Making this determination is complicated by the fact that Justice Stevens never fully links his model of commercial speech to his application of *Central Hudson*. But the connection is clearly there, and once we understand how his model fits together with his analytical construct it is easier to appreciate why Justice Stevens refused to join with Justice Thomas' categorical approach. It also becomes clear why his approach is preferable to the approaches of both Justice Thomas and Justice O'Connor.

353. Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 578 (1980) (Blackmun, J., concurring).

354. Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 350 (1986) (Brennan, J., dissenting) (quoting from Justice Blackmun's *Central Hudson* concurrence).

355. Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1595 (1995) (Stevens, J., concurring in the judgment) ("As a matter of common sense, any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead.").

356. In both *Discovery Network* and *Edenfield*, the Court articulated the self-fulfillment value as justifying commercial speech's protection and the concomitant interest of the listener. By so doing, the Court was unable to bring commercial speech any closer to the core of First Amendment interests and values, namely the value of self-government and the interest of the political process.

Recall that in *44 Liquormart* Justice Stevens said that blanket "bans [on commercial speech] *often* serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech."[357] He did not claim that they *always* do so. Indeed he could not make such a claim since the political process model of commercial speech is only concerned with whether the democratic decision-making process has been frustrated, not whether it has come to the correct result. Strengthening *Central Hudson*'s third prong allows a court to determine if, in fact, an underlying governmental policy has been hidden by virtue of the commercial speech regulation. If the legislature is able to put a dollar sign on the cost of its advertising restriction, then, presumably, the voting public is able to make an informed choice about whether they wish to retain the restriction as a means of achieving a policy goal.

Justice Thomas thus misses the point when he complains that "[f]aulting the State for failing to show that its price advertising ban decreases alcohol consumption 'significantly' . . . seems to imply that if the State had been *more successful* at keeping consumers ignorant and thereby decreasing their consumption, then the restriction might have been upheld."[358] Provided the regulation survives the fourth prong of *Central Hudson*, then, Justice Thomas is correct. But that would not necessarily be a bad result. If the state can meet this very demanding evidentiary burden, it has demonstrated that it has openly considered the policy and its costs and that the public is therefore presumably aware of both. In fact, the public in such a case would be just as aware of the cost of the speech regulation as they would be of a direct price control or other regulatory technique for achieving the desired result. In other words, the public gets the legislation it deserves. Based on the burden of proof required by Justice Stevens in *44 Liquormart*, if evidence can be produced showing a clear connection between an advertising restriction and the harm, chances are that the restriction may be the *most effective* means of combatting the evil. Thus, the

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357. 116 S.Ct. at 1508 (emphasis added).

358. *Id.* at 1518 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas' criticism echoes that advanced against the clear and present danger test. As Vincent Blasi has written, "A nagging paradox of First Amendment theory is that speech advocating crime or revolution is protected only so long as it is ineffective; this is what the clear-and-present danger test is all about." Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 647.

regulation would also survive the fourth prong of the test.

Despite the claims of First Amendment absolutists, commercial speech does involve both an economic regulation element and a free speech component. So long as the Court continues to review economic regulations with less concern than it reviews traditional free speech issues, there must be an "accommodation" of the two interests. Justice Stevens' approach recognizes this and does a good job of accommodating these competing interests without favoring either one.

By contrast, Justice Thomas' categorical approach weighs the free speech element of commercial speech too heavily in relation to the economic regulation element. While the categorical approach may have its benefits, they are clearly outweighed in the commercial speech area. The principal disadvantage of the categorical approaches is that they generally ignore context. This is especially true when we are talking about commercial speech. When confronted with a commercial speech regulation under the Thomas' approach, a court must consider only one thing—is the ban total or partial?[359] If it is total, then the court simply strikes down the regulation. Suppose, however, that the legislature can show that its ban works, and that it works very well. Under Justice Thomas' approach this does not matter. But it should. As suggested above, if a state can present evidence showing that its ban clearly and significantly advances its interests, this suggests a close fit between the ends and means. By ignoring this possibility, Justice Thomas' proposal seems to erect a standard higher than what is applied in most other free speech cases. Indeed, Justice Thomas is not shy about this. For even he says that an interest in keeping commercial information from people is "*per se* illegitimate."[360]

Perhaps it is unfair to criticize Justice Thomas in this manner. Justice Thomas, after all, did not base his conclusion on a political process theory. Rather, his conclusion was premised on anti-paternalism. This may lead to a different place than the political process model. If paternalism is never a sufficient rationale for restricting speech, then a categorical approach may be more legitimate. Again, however, commercial speech has both traditional free speech and economic regulation components. While an anti-paternalism rationale is often employed to strike down restrictions on free speech, it

359. Actually, a court must also consider whether the ban is directed at preventing false or misleading claims, and whether it concerns a legal product.

360. *Id.* at 1516.

is never sufficient to strike down economic regulations. Thus, by relying primarily on anti-paternalist considerations to justify a categorical approach, Justice Thomas placed undue emphasis on the free speech component of commercial speech while ignoring its other half, the economic regulation component.

Justice O'Connor's approach is also inferior to the political process mode of analysis—but for different reasons. Whereas Justice Thomas' approach allows for virtually no balancing of interests, Justice O'Connor's adherence to the old *Central Hudson* test allows for too much. Since she did not address the test's third prong, by simply assuming that it had been satisfied,[361] under her view a court is free to use common sense, intuition, and judicial notice simply to assume (as she apparently did in *44 Liquormart*) a connection between a regulation and the end desired. As explained in detail above,[362] establishing the link in this manner creates unpredictability and undermines judicial legitimacy by inviting results-oriented decision making.

CONCLUSION

The decision in *44 Liquormart* signals a clear departure from earlier Supreme Court decisions in the area of commercial speech. Not only did the Court issue an opinion without a single dissenting vote, something rarely seen in the Court's previous commercial speech cases, it also provided commercial speech with more protection than in any other case since *Virginia Pharmacy*. At a minimum, the case represents a retreat from the long line of cases, beginning with *Posadas*, in which the Supreme Court began chipping away at constitutional protection for commercial speech. Viewed in conjunction with other recent cases like *Discovery Network* and *Edenfield*, it appears that the Court is now inclined to place commercial speech closer to the core of protected speech in some circumstances. Further, Justice Stevens' opinion is premised on a method that, if consistently applied, strikes an appropriate balance between the competing interests inherent in commercial speech regulations. At the very least, the case shows that the Court

361. *Id.* at 1521 (O'Connor, J., concurring in the judgment) ("Even if we assume *arguendo* that Rhode Island's regulation also satisfies the requirement that it directly advance the governmental interest, Rhode Island's regulation fails the final prong. . . . ").

362. *See supra* Part III(A)(2) (discussing the use of common sense as a smokescreen for results-oriented decision making).

has begun to think seriously again about commercial speech's place in the hierarchy of First Amendment values and interests. Because the case is so fragmented, its immediate impact may not be great. However, as a harbinger of things to come, the decision is a welcome and much needed refinement of the Court's commercial speech jurisprudence.

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