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Edward J. McAndrew

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CITY OF CINCINNATI v. DISCOVERY NETWORK, INC.: ELEVATING THE VALUE OF COMMERCIAL SPEECH?

The First Amendment prohibits Congress from abridging the freedoms of speech and press.¹ For two hundred years after the American Revolution, however, the Supreme Court did not construe this right to protect commercial speech,² or speech proposing a commercial transaction.³

1. The First Amendment states, in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I. The First Amendment is made binding on the states through the Fourteenth Amendment, which provides, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." U.S. CONST. amend. XIV, § 1; e.g., *Bigelow v. Virginia*, 421 U.S. 809, 811 (1975) (stating that the Fourteenth Amendment makes the First Amendment binding on the states). In developing the First Amendment's value structure, the Framers believed that free speech was essential to principles of self-government. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 632 (1990) (citing Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), reprinted in 5 THE FOUNDERS' CONSTITUTION 121 (Philip B. Kurland & Ralph Lerner eds., 1987)).

2. The Supreme Court traditionally has defined commercial speech as "speech which does 'no more than propose a commercial transaction.'" *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). For discussions of definitions of commercial speech, see *infra* text accompanying notes 43-44, 88-89, 112-13, 143-44. See generally Kozinski & Banner, *supra* note 1 (discussing and rejecting asserted justifications for distinguishing between commercial and noncommercial speech). For a review of various theoretical underpinnings connecting communication and commerce, see Ronald K. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 698 (1993) (discussing the modern, indivisible relationship between commercial advertising and speech that traditionally has been protected by the First Amendment); Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993) (responding to Collins & Skover, *supra*); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993) (responding to Collins & Skover, *supra*).

3. In *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942), the Supreme Court expressly rejected extending First Amendment protection to the distribution of commercial handbills. See *infra* notes 30-32 and accompanying text. Similarly, in *Breard v. Alexandria*, 341 U.S. 622, 641-45 (1951), the Court declined to extend First Amendment protection to door-to-door solicitation of magazine subscriptions without the prior consent of solicited homeowners. See *infra* notes 33-36 and accompanying text. The First Amendment does not distinguish between commercial and noncommercial speech. See U.S. CONST. amend. I.

Thus, commercial speech could be regulated freely, even prohibited, by Congress or by the states.⁴

In 1976, the Supreme Court finally recognized that the First Amendment provides some level of protection for commercial speech.⁵ Nevertheless, questions regarding the proper definition of commercial speech and the amount of protection it warrants remained unanswered as the Court decided numerous cases under the "commercial speech doctrine."⁶ In 1980, the Court first articulated an operative standard of review for evaluating claims under this doctrine in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁷ Even after *Central Hudson*, however, confusion concerning the standard's proper application remained.

Early in the twentieth century, however, legal theorists began to formulate principles for expanding First Amendment protection to commercial speech. For instance, Oliver Wendell Holmes, in describing the role of symbols in our daily lives, discussed free speech's role in the marketplace of ideas during this period. OLIVER W. HOLMES, John Marshall (Feb. 4, 1901), in *COLLECTED LEGAL PAPERS* 266, 270 (1920); see also Collins & Skover, *supra* note 2, at 698 (referring to the marketplace of ideas in the modern context of commercial advertising).

4. See *infra* notes 30-37 and accompanying text. For general, non-legal information regarding the development of advertising prior to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, see Charles Goodrum & Helen Dalrymple, *ADVERTISING IN AMERICA: THE FIRST 200 YEARS* (1990).

5. *Virginia State Bd. of Pharmacy*, 425 U.S. at 761 (holding that First Amendment protection is not forfeited merely because speech is intended to produce income); see Mark D. Lurie, Note, *Issue Advertising, Commercial Expressions, and Freedom of Speech: A Proposed Framework for First Amendment Adjudication*, 28 B.C. L. REV. 981, 985-87 (1987) (discussing the value of commercial speech with respect to the First Amendment).

6. See *Board of Trustees v. Fox*, 492 U.S. 469, 473-77, 480-82, 486-87 (1989) (requiring a reasonable fit between a regulation suppressing commercial speech and a state's interests); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 340-44, 349-52 (1986) (upholding the validity of a Puerto Rico gambling statute restricting promotional advertising); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629, 637 (1985) (upholding advertisements of legal services in newspapers); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65, 68-69, 81 (1983) (invalidating a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-64, 579 (1980) (invalidating a state agency's prohibition of advertising promoting the consumption of electricity); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56, 474 (1978) (affirming sanctions against an attorney for his in-person solicitation of injured persons); *Bates v. State Bar*, 433 U.S. 350, 363-66 (1977) (holding that the First Amendment protects truthful advertising of routine legal services). For a general discussion of case law in this area, see Mary B. Nutt, *Trends in First Amendment Protection of Commercial Speech*, 41 VAND. L. REV. 173 (1988) (discussing judicial treatment of the commercial speech doctrine). For a brief discussion of various arguments advocating and rejecting First Amendment protection for commercial speech, see W. John Moore, *Look Who's Talking*, 25 LEGAL AFF. 2073, 2073 (1993).

7. 447 U.S. 557 (1980). The standard consists of a four-pronged analysis: (1) whether the speech is false, misleading, or proposes an illegal activity; (2) whether the government asserts a substantial interest in regulating the speech; (3) whether the restriction directly advances the government's interests; and (4) whether the regulation was no more extensive than necessary to serve the asserted governmental interest. *Id.* at 565. In evaluating the

In 1993, the Court clarified some of the ambiguity surrounding the appropriate level of First Amendment protection of commercial speech in *City of Cincinnati v. Discovery Network, Inc.*⁸ In *Discovery Network*, the Court struck down Cincinnati's blanket prohibition on the distribution of "commercial handbills"⁹ via newsracks located on public streets.¹⁰ In reaching its decision, the Supreme Court attempted to expand the scope of protection for certain types of commercial speech,¹¹ to clarify the proper application of the analytic standard,¹² and to provide guidance in classifying speech as commercial.¹³

In *Discovery Network*, the City of Cincinnati granted leases to the respondents, Discovery Network¹⁴ and Harmon Publishing Company,¹⁵ which allowed the respondents to distribute their promotional materials by placing free-standing newsracks in various locations throughout the City.¹⁶ However, the Director of Public Works, citing a municipal ordinance that prohibited the distribution of "commercial handbills" on pub-

fourth prong, the Supreme Court, in *Board of Trustees v. Fox*, 492 U.S. 469 (1989), held that this prong required a reasonable fit between the regulation and the asserted interest. *Id.* at 480; see *infra* notes 139-52 and accompanying text (discussing the *Fox* holding).

8. 113 S. Ct. 1505 (1993).

9. For an explanation of Cincinnati's definition of "commercial handbill," see *infra* note 17.

10. *Discovery Network*, 113 S. Ct. at 1516 (rejecting a complete ban on commercial handbill distributions via newsracks absent an asserted distinction between commercial handbills and newspapers relevant to the City's interests).

11. *Id.* at 1511-14. The Court discussed the historical treatment of commercial speech, from the denial of First Amendment protection in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to the more permissive view of commercial speech adopted in *Fox*, 492 U.S. at 469. *Discovery Network*, 113 S. Ct. at 1511-14.

12. *Discovery Network*, 113 S. Ct. at 1514-16 (providing that the City regulation banning the distribution of commercial handbills via newsracks was neither narrowly tailored nor directly related to the City's interest in aesthetics).

13. *Id.* at 1511-13 (citing various cases to indicate which types of commercial speech are entitled to First Amendment protection).

14. Discovery Network provides educational, social, and recreational programs to adults. *Id.* at 1508.

15. Harmon Publishing Company publishes and distributes free magazines advertising real estate nationwide. *Id.*

16. *Id.* Discovery advertises its programming activities in a magazine published nine times annually. *Id.* While consisting mainly of promotional advertisements, these magazines also include information about topics of general interest. *Id.* Discovery distributed approximately one-third of its magazines through the 38 newsracks that it was licensed to use. *Id.*

Harmon distributes its real estate magazine, which includes listings and photographs of available realty in the greater Cincinnati area, along with information about interest rates, market trends, and other real estate matters, through 24 newsracks licensed by the City. *Id.* The newsracks accounted for only 15% of the magazine's total distribution in Cincinnati. *Id.*

lic property, subsequently revoked the respondents' licenses.¹⁷ The respondents then sought declaratory and injunctive relief from enforcement of the revocation in the United States District Court for the Southern District of Ohio.¹⁸ Finding that the publications were commercial speech and were entitled to First Amendment protection, the district court granted relief.¹⁹

On appeal, the United States Court of Appeals for the Sixth Circuit held that commercial speech may be restricted only when the regulation seeks to proscribe false or misleading advertising or the adverse effects

17. Section 714-1-C of the Cincinnati Municipal Code provides:

Commercial Handbill shall mean any printed or written matter, dodger, circular, leaflet, pamphlet, paper, booklet or any other printed or otherwise reproduced original or copies of any matter of literature:

- a. Which advertises for sale any merchandise, product, commodity or thing; or
- b. Which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of directly promoting the interest thereof by sales; or
- c. Which directs attention or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

CINCINNATI, OHIO, CODE § 714-1-C (1992). Finding that the petitioners' publications fit within this definition, the City asserted that distribution of these magazines was prohibited by section 714-23, which provides:

No person shall throw or deposit any commercial or non-commercial handbill in or upon any sidewalk, street or other public place within the city. Nor shall any person hand out or distribute or sell any commercial handbill in any public place. Provided, however, that it shall not be unlawful on any sidewalk, street or other public place within the city for any person to hand out or distribute, without charge to the receiver thereof, any non-commercial handbill to any person willing to accept it, except within or around the city hall building.

Id. § 714-23.

18. *Discovery Network*, 113 S. Ct. at 1508. Petitioners filed their action pursuant to 42 U.S.C. § 1983 (1988). *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 466 (6th Cir. 1991), *aff'd*, 113 S. Ct. 1505 (1993). This provision provides for a civil action against any person, "who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects . . . any . . . person within the jurisdiction . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (1988). For a more detailed discussion of section 1983 claims with regard to municipal liability, see David Y. Bannard, Note, *A Foreseeability-Based Standard for the Determination of Municipal Liability Under Section 1983*, 28 B.C. L. REV. 937 (1987).

19. *Discovery Network*, 113 S. Ct. at 1509. The district court rejected the City's contention that there was a "reasonable 'fit,'" as required by *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989), between its ban on commercial speech and furthering its interests in safety and aesthetics. *Discovery Network*, 113 S. Ct. at 1509 (quoting *Fox*, 492 U.S. at 480). The ban, however, only removed 62 out of a total of 2000 newsracks from the City's streets. *Id.* at 1510. Thus, the court reasoned that the regulation only minimally improved safety and aesthetics while completely suppressing an entire category of protected speech. *Id.* at 1517. Furthermore, the court determined that Cincinnati could have served its interests in safety and aesthetics by regulating the size, shape, placement, and number of newsracks, rather than by eliminating only those distributing commercial handbills. *Id.* at 1510.

therefrom.²⁰ The Sixth Circuit affirmed the lower court's ruling after determining that the City failed to establish a "reasonable fit" between its complete suppression of commercial speech and the "minuscule" benefits to its governmental interests in safety and aesthetics.²¹ Furthermore, the Sixth Circuit rejected Cincinnati's argument that all commercial speech is of low First Amendment value.²²

The Supreme Court granted certiorari²³ and affirmed the Sixth Circuit's decision.²⁴ Justice Stevens, writing for the majority, dismissed the City's argument that all commercial speech is of low value.²⁵ Further, the Court determined that a "reasonable fit" standard is not satisfied when the regulation bears no relationship to serving the articulated governmental interests²⁶ and when the government has not carefully calculated the costs of the burden imposed on the speech.²⁷

In concurrence, Justice Blackmun wrote that "truthful, noncoercive commercial speech concerning lawful activities" should be afforded full First Amendment protection, considering the significant individual and societal interests in the uninhibited dissemination of such commercial information.²⁸ Chief Justice Rehnquist, in dissent, joined by Justices White and Thomas, argued that commercial speech is less valuable than other forms of protected speech and that the City successfully established a reasonable fit between the regulation and its legislative objectives.²⁹

This Note surveys the development of the commercial speech doctrine and the likely impact of *City of Cincinnati v. Discovery Network, Inc.* on commercial speech jurisprudence. This Note begins by studying the early rejection and initial accordance of First Amendment protection to commercial speech. This Note then reviews the articulation and refinement

20. *Discovery Network*, 946 F.2d at 469-70.

21. *Id.* at 471-72 (focusing on the fact that Cincinnati's regulation concerned the manner of distribution, and not the content, of the magazines). As it had done in the district court, the City argued that judicial precedent affording lesser protection to commercial speech justified its selective ban of commercial handbills. *Id.* at 469. Like the district court, the Sixth Circuit focused its analysis on the proper interpretation and application of the reasonable fit standard developed in *Fox*. *Id.* at 468; *see infra* notes 139-52 and accompanying text (discussing the *Fox* holding).

22. *Discovery Network*, 946 F.2d at 471.

23. *City of Cincinnati v. Discovery Network, Inc.*, 112 S. Ct. 1290 (1992).

24. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993).

25. *Id.* at 1511-12.

26. *Id.* at 1517 (finding that the regulation did not limit the number of newsracks to advance the City's safety and aesthetic interests, but rather, it "limited [only] the number of newsracks *distributing commercial publications*").

27. *Id.* at 1511-16 (asserting that Cincinnati justified its regulation with the bare contention that commercial speech had low First Amendment value).

28. *Id.* at 1517 (Blackmun, J., concurring).

29. *Id.* at 1521-25 (Rehnquist, C.J., dissenting).

of the analytic framework used to evaluate commercial speech regulations and studies the expanded protection proffered in *Discovery Network*. Next, this Note examines the separate opinions in *Discovery Network* and analyzes the potential ramifications of each on future commercial speech regulations. This Note contends that the majority opinion in *Discovery Network* appropriately expands protection of commercial speech by rejecting the view that all commercial speech is of low value and by illustrating the application of the reasonable fit standard. This Note concludes, however, that the Court's failure to reconstruct the application of the analytic framework currently utilized in commercial speech cases will diminish the effect of the Court's present stance that truthful, noncoercive commercial speech is of high First Amendment value.

I. THE DEVELOPMENT OF COMMERCIAL SPEECH JURISPRUDENCE

A. *Early Rejection of Protection for Commercial Speech*

In 1942, the Supreme Court decided that the Constitution did not protect commercial advertising in *Valentine v. Chrestensen*.³⁰ Without citing precedent, the Court rejected the claim that the First Amendment protects commercial handbills and asserted that the Constitution does not restrict government regulation of purely "commercial advertising."³¹ Even this brief, early Supreme Court opinion indicated the difficulties courts would encounter in defining commercial speech.³²

30. 316 U.S. 52 (1942). The respondent, the owner of a submarine, sued to enjoin the Commissioner of the New York City Police Department from enforcing a municipal ordinance that prohibited the distribution on city streets of handbills soliciting visitors for an admission fee. *Id.* at 53. The United States District Court for the Southern District of New York granted a permanent injunction, *Chrestensen v. Valentine*, 34 F. Supp. 596 (S.D.N.Y. 1940), *aff'd*, 122 F.2d 511 (2d Cir. 1941), *rev'd*, 316 U.S. 52 (1942), which was affirmed by the United States Court of Appeals for the Second Circuit. *Chrestensen v. Valentine*, 122 F.2d 511 (2d Cir. 1941), *rev'd*, 316 U.S. 52 (1942). For a detailed discussion of the development of the commercial speech doctrine through *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, see Thomas W. Merrill, Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976).

31. *Chrestensen*, 316 U.S. at 54. Deferring to the judgment of the legislature in a two paragraph discussion of the issues presented, the Court stated, "[w]e are . . . clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." *Id.* Various justices criticized this opinion in subsequent decisions. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 759 n.16 (1976) (reviewing the numerous criticisms of *Chrestensen*); see also Kozinski & Banner, *supra* note 1, at 627-28 (criticizing the absence of a legal foundation for the reasoning of the *Chrestensen* Court).

32. In the last paragraph of the *Chrestensen* opinion, the Court recognized the difficulty of categorizing a unitary message when one portion of the message is targeted at the

Nine years later, in *Breard v. Alexandria*,³³ the Court affirmed the conviction of a magazine subscription salesman who violated a local ordinance prohibiting the door-to-door solicitation of magazine and periodical subscriptions.³⁴ Addressing the First Amendment claim, the Court decided that the privacy rights of residence owners outweighed the rights of solicitors to use this particular method to increase their subscription sales.³⁵ In a strong dissent, Justice Black asserted that the design and philosophy of the American economic system requires the freedom to solicit paying subscribers.³⁶ Justice Black's dissent in *Breard* later would serve as a foundation to the Burger Court's accord of First Amendment protection to commercial speech.³⁷

general public interest and another portion concerns the furtherance of private profit. *Chrestensen*, 316 U.S. at 55. This problem arises in most commercial speech decisions. See Kozinski & Banner, *supra* note 1, at 640-42; see also *infra* notes 79-81, 88-89 and accompanying text, and *infra* text accompanying notes 111-13, 143, 174-76.

33. 341 U.S. 622 (1951).

34. *Id.* at 644-45.

35. *Id.* The Court relied heavily on a quantification of all private owners whose privacy interests may have been invaded, as opposed to the economic interest of the sole corporation that would have been served by a favorable decision. *Id.* at 636-37; see Nutt, *supra* note 6, at 177-79 (discussing the development of content-based commercial speech regulation analysis).

36. *Breard*, 341 U.S. at 650 (Black, J., dissenting). Justice Black argued that the solicitation of subscribers is vital to the freedom of the press in the American economic system and to related rights to publish and circulate. *Id.* In this case, he argued, the burden should have been placed on the landowner to forbid such solicitation rather than denying all First Amendment protection to this solicitation. *Id.* Justice Black acknowledged, however, that he would not have afforded this protection to an ordinary merchant who solicits door-to-door. *Id.* at 650 (footnote unnumbered). For a more detailed discussion of the Supreme Court's early treatment of commercial speech, see Samuel A. DiLullo, *The Present Status of Commercial Speech: Looking for a Clear Definition*, 90 DICK. L. REV. 705, 705-11 (1986).

At least one commentator has argued that by granting significant First Amendment protection to commercial speech, the government would encourage rational development of the individual—with rational self-fulfillment as the basis of the First Amendment's value structure. Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 444 (1971). In 1971, Professor Martin Redish explained that

given the current apathy on the part of many segments of the public towards issues of great political and social concern, it is arguable that for many, the only realistic means to stimulate use of the rational processes is to encourage the rational solution of problems that face individuals in their everyday life [sic]. Competing informational advertising in the commercial realm aids in the performance of this function.

Id.

37. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762-65 (1976) (discussing consumer interest in the free flow of commercial information).

B. Extending First Amendment Protection to Commercial Speech

1. Initial Protection

The Supreme Court first extended First Amendment protection to commercial speech in 1976 in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*³⁸ In *Virginia State Board of Pharmacy*, the Court invalidated a Virginia statute that prohibited price advertising by pharmacists.³⁹ Three components of the majority opinion would serve as a foundation for similar reasoning extending First Amendment protection to commercial speech in subsequent opinions: the acknowledgement that commercial speech serves significant interests;⁴⁰ the definition of this class of speech;⁴¹ and the illustration of an analytic mode for evaluating commercial speech regulations.⁴²

In *Virginia State Board of Pharmacy*, the Court explicitly defined commercial speech as that “which does ‘no more than propose a commercial transaction.’”⁴³ Nevertheless, the Court stated that commercial speech is not entitled to full First Amendment protection, citing, as a justification, commercial speech’s durability from the chilling effect of regulation.⁴⁴

38. 425 U.S. 748 (1976). The appellees challenged a state statute that prohibited pharmacists from advertising their prices for services or drugs. *Id.* at 749-50. Of particular importance to the Court’s resolution was the fact that the appellees were not pharmacists, but were drug consumers who claimed that the First Amendment protected their rights to receive price information advertised by pharmacists. *Id.* at 753-54. As did the district court, the Supreme Court found that the consumers’ interests in the free flow of price information outweighed the State’s interest in maintaining professionalism. *Id.* at 754-56.

39. *Id.* at 750; see Lurie, *supra* note 5, at 986-87 (discussing *Virginia State Bd. of Pharmacy*).

40. *Virginia State Bd. of Pharmacy*, 425 U.S. at 763-64. These significant interests included, in addition to the speaker’s commercial interest, an individual and societal interest in the free flow of commercial information to aid in effectuating various personal financial resource allocation decisions. *Id.*; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 894 (2d ed. 1988) (noting that suppression of commercial speech carries political as well as economic ramifications); DiLullo, *supra* note 38, at 729 (arguing that protection of commercial speech enhances protection of political speech); see *infra* notes 45-48 and accompanying text (discussing the significance of commercial speech in making economic decisions).

41. *Virginia State Bd. of Pharmacy*, 425 U.S. at 761-62; see *infra* note 43 and accompanying text.

42. *Virginia State Bd. of Pharmacy*, 425 U.S. at 762-70; see Nutt, *supra* note 6, at 180-83 (analyzing *Virginia State Board of Pharmacy*).

43. *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 385 (1973)). One commentator analogized language in advertising to language in a sales contract. Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. REV. 372, 386-89 (1979).

44. *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24. In a statement often repeated in subsequent decisions, the Court stated that “[t]here are commonsense differences between speech that does ‘no more than propose a commercial transaction,’ and other varieties. . . . [These differences] suggest that a different degree of protection is

Considering the merits of commercial speech,⁴⁵ the Court found that consumer and societal interests⁴⁶ in the free flow of information may be greater than their interests in current political events.⁴⁷ According to the

necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." *Id.* (quoting *Pittsburgh Press*, 413 U.S. at 385). These differences include the ease with which commercial speech can be verified by its disseminator and its durability with regard to regulation. *Id.* The Court reasoned that "[s]ince advertising is the *sine qua non* of commercial profits," it would not be abandoned solely because of governmental regulation. *Id.*

The Court reiterated that advertising would not be chilled by regulation in light of its importance to commercial enterprises. *Id.* Thus, cases involving commercial speech warranted a lower tolerance of false or misleading statements by the speaker. *Id.* (comparing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), with *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898 (1971)). This rationale also supports governmental regulation of the form and the content of speech to guard against deceptive advertising. *Id.* (comparing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), with *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)). For a critical discussion of these differences, see *Kozinski & Banner*, *supra* note 1, at 634-35.

One commentator gleaned five principles from the *Virginia State Board of Pharmacy* opinions for distinguishing between commercial and noncommercial speech:

- (1) The advertiser of commercial commodities and services has better access to the facts concerning his product than the media have to the facts in their news reports, which may be drawn from sketchy or conflicting sources.
- (2) The factual assertions in commercial advertising relate to tangible goods and services that are more susceptible to empirical testing by regulatory authorities than are representations made in news reports and editorials.
- (3) The importance of advertising in generating profits makes it less susceptible to the chilling effect of governmental regulation than news reporting and editorializing.
- (4) The advertiser of commercial commodities and services does not have to assemble the facts about his product under time pressure as do media distributors with publication deadlines for topical material.
- (5) Commercial speech has lower first amendment value than reports of news and expressions of opinion since commercial advertising generally makes no express contribution to the forum of ideas.

Merrill, *supra* note 30, at 222-23 (citations omitted).

45. The Court also articulated a framework for analyzing commercial speech claims by asking whether such speech "is so removed from any 'exposition of ideas' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection." *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and *Roth v. United States*, 354 U.S. 476, 484 (1957)).

46. The Court determined that the poor, the sick, and the elderly are affected most adversely by the prohibition, because a higher percentage of their incomes are devoted to buying prescription drugs. *Id.* at 763-64.

47. *Id.* at 763. The Court reiterated that although an advertiser's interest may be primarily economic, that fact does not necessarily preclude protection. *Id.* at 762. The Court also rejected the appellant's contention that the need to maintain professionalism and expertise in the pharmaceutical industry to protect the consumer justified the ban on pharmaceutical advertising. *Id.* at 766-68. Maintaining professionalism and expertise among pharmacists was unrelated to a ban related to retail drug sales. *Id.* at 768. The Court stated that the ban would affect the professional standards of pharmacists only indirectly,

majority, even the dissemination of information that appears not to serve the public interest should be protected because this information may be useful in a free enterprise economic system that permits the allocation of resources through a series of private economic decisions.⁴⁸

The Court, however, limited the scope of commercial speech protection.⁴⁹ First, the regulatory ban at issue in *Virginia State Board of Pharmacy* concededly was not a content-neutral "time, place, and manner restriction."⁵⁰ Second, the ban did not apply to false or misleading advertising or to speech that proposed illegal activity.⁵¹

While initiating a judicial movement toward First Amendment protection for commercial speech, the Court in *Virginia State Board of Pharmacy* offered little insight into how the definition should be applied or how commercial speech regulations should be analyzed.⁵² In comparison to subsequent opinions, the *Virginia State Board of Pharmacy* Court's analytic standard is rudimentary,⁵³ but its efforts to balance consumer and

through the potential responses of consumers reacting to disseminated information regarding drug prices. *Id.* at 769.

48. *Id.* at 765 (suggesting that commercial advertising information is essential to enable consumers to make well-informed economic choices).

49. *Id.* at 770.

50. *Id.* at 771. Time, place, and manner restrictions often have been upheld by the Court where they are content-neutral, narrowly tailored to serve significant governmental interests, and allow for alternative means of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (finding that a regulation prohibiting the use of sound trucks emitting loud noise was permissible if it applied equally, irrespective of the content of the noise); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (upholding the National Park Service's prohibition of sleeping in Lafayette Park and the National Mall in Washington, D.C. as a reasonable time, place, and manner restriction on expression); *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (holding that an ordinance restricting the establishment of adult movie theaters within 1000 feet of each other did not violate the First Amendment). For a general discussion of these restrictions and their validity, see Elisabeth A. Langworthy, Note, *Time, Place, or Manner Restrictions on Commercial Speech*, 52 GEO. WASH. L. REV. 127 (1983).

51. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771-73. The First Amendment never has protected untruthful speech. *Id.* at 771 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), and *Konigsberg v. State Bar*, 366 U.S. 36, 49 & n.10 (1961)). This limitation would serve as the initial prong in the analytic framework developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980); *see infra* text accompanying note 91.

52. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24; Nutt, *supra* note 6, at 180-83 (addressing the Court's definition of commercial speech in *Virginia State Board of Pharmacy*); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1183-85 (1988) (arguing that *Virginia State Bd. of Pharmacy's* definition of commercial speech does not encompass all communication related to business activities).

53. *Compare Virginia State Bd. of Pharmacy*, 425 U.S. at 772 with *Board of Trustees v. Fox*, 492 U.S. 469, 476-77 (1989) (rejecting the contention that the *Central Hudson* standard mandates a least restrictive means analysis); *Posadas de Puerto Rico Assocs. v. Tour-*

societal interests against governmental interests established a foundation for future analytic modes.⁵⁴

2. *Inconsistent Protection of the Commercial Practices of Attorneys*

The Supreme Court defined the scope of its *Virginia State Board of Pharmacy* holding during its subsequent term in *Bates v. State Bar*.⁵⁵ In *Bates*, two attorneys advertised their “‘legal clinic’” services at reasonable prices in a local Arizona newspaper.⁵⁶ Admitting that their action violated a state, attorney disciplinary rule that prohibited attorney advertising,⁵⁷ the attorneys challenged the constitutionality of that rule.⁵⁸ The Court concluded that the First Amendment protected truthful advertising of routine legal services.⁵⁹

Adhering strictly to *Virginia State Board of Pharmacy*'s precepts,⁶⁰ the Court focused on the attorneys' advertising of *routine* legal services,

ism Co., 478 U.S. 328, 340-44 (1986) (applying the *Central Hudson* framework and rejecting a constitutional challenge to Puerto Rico's Games of Chance Act of 1948, which permitted casino advertising to be directed only at tourists); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 638 (1985) (applying the *Central Hudson* framework in preventing disciplinary action from being taken against an attorney for nondeceptive newspaper advertising and in upholding the State's right to require the disclosure of information regarding fee and cost arrangements); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68-69 (1983) (applying the *Central Hudson* framework in finding the federal prohibition of unsolicited mailing of contraceptive advertisements unconstitutional); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 565-67 (1980) (establishing a four-part analytic framework to evaluate the protection of commercial speech).

54. See generally David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359 (1990) (examining the commercial speech doctrine and arguing, *inter alia*, that the Court has failed to articulate a principled definition of commercial speech).

55. 433 U.S. 350 (1977). After the Arizona Supreme Court upheld the state bar association's imposition of disciplinary actions against two attorneys for advertising their legal fees in the *Arizona Republic*, *In re Bates*, 555 P.2d 640, 641 (Ariz. 1976), *aff'd in part and rev'd in part sub. nom.*, *Bates v. State Bar*, 433 U.S. 350 (1977), the attorneys appealed to the Supreme Court, claiming that such commercial advertising regulation was unconstitutional. *Bates*, 433 U.S. at 356.

56. *Bates*, 433 U.S. at 354. The attorneys sought to provide affordable legal services to individuals with moderate incomes who did not qualify for government aid. *Id.*

57. *Id.* at 355. The rule at issue was replaced by Ethical Rule 7.2, which allows truthful attorney advertising. ARIZ. S. CT. R. 42.

58. *Bates*, 433 U.S. at 355-56. After the president of the Arizona State Bar filed a complaint, the two attorneys appeared before a three-member Special Local Administrative Committee. *Id.* at 356. That committee recommended that the attorneys be suspended for at least six months. *Id.* The Board of Governors of the State Bar subsequently reviewed the case and recommended a seven-day suspension for each attorney. *Id.* The attorneys then sought review before the Supreme Court of Arizona and the Supreme Court of the United States. *Id.*

59. *Id.* at 383.

60. *Id.* at 363-66.

while excluding from its review all advertising regarding the quality of legal services and in-person solicitation of clients.⁶¹ The Court rejected Arizona's justifications for prohibiting attorney advertising,⁶² including claims that advertising would have adverse effects on professionalism⁶³ and that attorney advertising is inherently misleading.⁶⁴ The Court concluded that Arizona's blanket prohibition of attorney advertising violated the First Amendment.⁶⁵

The Court was unclear, however, as to what level of First Amendment protection attorney advertising would be afforded. Citing " 'common-sense differences' " between commercial speech and other types of protected speech, the Court emphasized that an overbroad regulation would fail to create a powerful disincentive to advertise.⁶⁶ By utilizing an ad hoc

61. *Id.* at 367. The Court harmonized its decision with *Virginia State Board of Pharmacy*, which dealt solely with advertising of standardized products, by equating standardized products with *routine* legal services. *Id.* at 372-73. The Court expressly reserved deciding whether advertising regarding the *quality* of legal services would be afforded similar protection. *Id.* at 366. For a detailed discussion of commercial speech treatment relating to attorney advertising, see John Ratino, Note, *In re R.M.J.: Reassessing the Extension of First Amendment Protection to Attorney Advertising*, 32 CATH. U. L. REV. 729 (1983). For a general discussion of commercial speech protection for professionals, see Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45 (1985).

62. *Bates*, 433 U.S. at 368-79. As justification for its restriction, the State Bar cited the adverse effects of attorney advertising on professionalism, *id.* at 368-72, the misleading nature of such advertising, *id.* at 372-75, the adverse consequences on the effective administration of justice, *id.* at 375-77, the detrimental economic effects of such advertising, *id.* at 377-78, the undesirable effect on the quality of legal service, *id.* at 378-79, and the difficulty of enforcement. *Id.* at 379.

63. *Id.* at 368-72. Although the Court found the relationship between the suppression of attorney advertising and the State's interest in regulating the potentially adverse effects on attorney professionalism too tenuous to be credible, *id.*, it accepted this justification one year later in a subsequent attorney advertising case. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 454-56 (1978); *infra* notes 68-81 (discussing the *Ohralik* decision).

The *Bates* Court argued that the revelation of fees to clients prior to any initial meeting was consistent with the ethical responsibility to disclose fees promptly upon commencement of the professional relationship. *Bates*, 433 U.S. at 369 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1976)). The Model Code states that an attorney should establish "a clear agreement with his client as to the basis of the fee charges to be made . . . [a]s soon as feasible after a lawyer has been employed." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1976).

64. *Bates*, 433 U.S. at 372-75. The State claimed that legal services are too individualized to be described fully in an advertisement; that a client will not be able to predetermine which services she requires; and that attorneys would tend to emphasize irrelevant factors instead of the relevant factor of skill. *Bates*, 433 U.S. at 372. The Court rejected this argument because the advertised information would be relevant regardless of its potential deceptiveness. *Id.*

65. *Id.* at 379.

66. *Id.* at 380-81 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976)).

standard to balance Arizona's interest in regulating against the relevant consumer and societal interests,⁶⁷ the Court failed to articulate specifically the exact level of protection to be granted to commercial speech.

The Court modified the *Bates* holding in *Ohralik v. Ohio State Bar Ass'n*,⁶⁸ where it affirmed the sanctioning of an attorney for his in-person solicitation of injured persons.⁶⁹ In contrast to *Bates*,⁷⁰ the Court found that the State's interests in regulating in-person, attorney solicitations were comparatively greater than a particular attorney's entitlement to protection from suppression.⁷¹ Finding actual speech to be a "subordinate component" of a business transaction,⁷² the Court concluded that the regulation properly restricted the attorney's conduct.⁷³

The Court then evaluated the countervailing state interests to determine the extent to which such regulation was permissible.⁷⁴ The Court

67. *Id.* at 368-79. The Court decided *Bates* on the basis of its particular facts and circumstances. *See supra* notes 60-65 and accompanying text.

68. 436 U.S. 447 (1978).

69. *Id.* at 450. The appellant, Ohralik, visited a woman, who was injured in an automobile accident, in the hospital where he offered his legal services and asked her to sign an agreement. *Id.* The appellant also contacted the injured passenger and offered his services. *Id.* at 451. Both women later filed complaints against Ohralik, which were referred to the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. *Id.* at 453.

The Board found that the appellant violated the Ohio Code of Professional Responsibility. *Id.* DR 2-103(A) of the Ohio Code (1970) was modeled after the American Bar Association's Code of Professional Responsibility, and enumerated identically thereto.

70. *Ohralik*, 436 U.S. at 455. Ohralik argued that the *Bates* holding should control. *Id.*; *see supra* notes 55-67 and accompanying text (discussing the *Bates* decision).

71. *Ohralik*, 436 U.S. at 455. The Court also stated that in-person solicitation of clients by attorneys was inconsistent with the idea of the attorney-client relationship and with the best interests of the prospective client. *Id.* at 454. For a detailed discussion of the historical ban on attorney solicitation and advertising, see Note, *Advertising, Solicitation and the Professional Duty to Make Legal Counsel Available*, 81 *YALE L.J.* 1181 (1972).

72. *Ohralik*, 436 U.S. at 457. The Court reasoned that the subordination of speech resulted from the ability of the speaker to exert pressure on the receiver to respond immediately and thus conclude the transaction. *Id.* Conversely, the advertising at issue in *Bates* produced neither of these characteristics, thereby assuming a more prominent role in the overall event. *Id.* (comparing the *Bates* facts to the *Ohralik* facts).

This interpretation seems to contradict the Court's definition of commercial speech in *Virginia State Board of Pharmacy* as speech that merely proposes a commercial transaction. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)); *see supra* text accompanying note 43 (providing the Supreme Court's early definition of commercial speech). However, the Court distinguished *Ohralik* by noting that the appellant exerted additional pressure and persuaded the injured parties to conclude the transaction immediately. *Ohralik*, 436 U.S. at 457.

73. *Ohralik*, 436 U.S. at 457.

74. *Id.* at 460-62. The State Bar cited state interests in protecting consumers and maintaining professional standards as justifications for its regulation. *Id.* at 460.

upheld Ohio's regulation by accepting the substantiality of the State's special responsibility to maintain high professional standards among attorneys;⁷⁵ the same interest it had rejected in *Bates* only one year earlier.⁷⁶ The *Ohralik* Court found the threat of eroding professionalism to be more egregious than it had been in *Bates*, due to the "vexatious conduct" at issue.⁷⁷ As a result, the Court demonstrated that its method of analysis and ultimate decision in each commercial speech case would depend upon its characterization and evaluation of the relationship between the regulation at issue and the asserted interests justifying that restriction.⁷⁸

The *Ohralik* Court defined commercial speech by distinguishing between speech doing no more than proposing a commercial transaction in a traditionally regulated area and other varieties of speech.⁷⁹ The Court reasoned that unless it distinguished commercial speech from other varieties of protected speech, the greater protection afforded to these other

75. *Id.* In support of the view that regulation of the legal profession is particularly necessary, the Court cited, *inter alia*, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (stating that "lawyers are essential to the primary governmental function of administering justice"); *Cohen v. Hurley*, 366 U.S. 117, 124 (1961) (finding that lawyers are trusted agents of their clients). *Ohralik*, 436 U.S. at 460.

76. *See supra* notes 62-64 and accompanying text (discussing the *Bates* Court's rejection of the substantiality of Arizona's asserted interest in guarding against the potentially adverse effects of attorney advertising on professionalism).

77. *Ohralik*, 436 U.S. at 462. In concurrence, Justice Marshall determined that the appellant had engaged in "ambulance chasing, fraught with obvious potential for misrepresentation and overreaching." *Id.* at 469 (Marshall, J., concurring). He found the *circumstances* under which the appellant acted, more than the acts themselves, to be objectionable. *Id.* at 470.

Unlike the majority, however, Justice Marshall reasoned that the informational interests in solicitation should be entitled to protection equalling that afforded in *Bates*. *Id.* at 471; *see supra* notes 55-67 (discussing *Bates*). Consequently, Justice Marshall would not subordinate the free flow of information when the commercial speech is truthful and unpressured. *See Ohralik*, 436 U.S. at 476 (Marshall, J., concurring).

78. The Court also demonstrated that it may characterize and evaluate somewhat similar facts differently. *Compare Ohralik*, 436 U.S. at 454-56 (in-person solicitation) with *Bates v. State Bar*, 433 U.S. 350, 365-68 (1977) (newspaper advertising). Both cases address attorney advertising, although *Ohralik* involved in-person solicitation, *Ohralik*, 436 U.S. at 454-55, whereas *Bates* only involved newspaper advertising of routine services. *Bates*, 433 U.S. at 354. The *Ohralik* Court stated that in-person solicitation "is a business transaction in which speech is an essential but subordinate component." *Ohralik*, 436 U.S. at 457. Thus, the Court found that professionalism is more likely to be affected by in-person solicitation than it may be in cases of newspaper advertising of routine legal services. *Id.* at 457-58. The result is an extremely fact-specific standard under which the Court will reject most attempts at analogy, yielding inconsistent decisions.

79. *Ohralik*, 436 U.S. at 455-56. The Court employed the familiar language of a common-sense difference between commercial speech and other varieties as a justification for providing greater protection to the latter. *Id.*; *see supra* text accompanying note 43 (defining commercial speech).

varieties would be diluted.⁸⁰ Consequently, the Court concluded that the Constitution affords less protection to commercial speech, “commensurate with its subordinate position in the scale of First Amendment values.”⁸¹ The Court offered no method for applying these principles to a unitary message that proposed a commercial transaction, while also serving interests which, by themselves, would entitle the message to greater protection.

3. Central Hudson: *Articulation of an Analytic Standard*

In 1980, the Supreme Court fortified the First Amendment’s protection of commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁸² In *Central Hudson*, the Court invalidated the New York Public Service Commission’s (Commission) prohibition of public utilities’ promotional advertising of electricity consumption.⁸³ The Commission classified all advertising as either promotional⁸⁴ or informational,⁸⁵ but prohibited only the former because it contravened the State’s goal of energy conservation and tended to increase the marginal cost of utility service.⁸⁶ Although the *Central Hudson* Court accepted the substantiality of the Commission’s interests, it found the complete suppression of commercial speech to be “more extensive than necessary” to advance these interests.⁸⁷

80. *Ohralik*, 436 U.S. at 456; see McGowan, *supra* note 54, at 369-71 (discussing the Court’s adoption of the leveling argument in *Ohralik*).

81. *Ohralik*, 436 U.S. at 456. The Court neither elaborated on what these values actually are nor provided a citation as to where they can be found. *Id.*

82. 447 U.S. 557 (1980).

83. *Id.* at 570. Both the New York state trial court and the intermediate appellate court upheld the Commission’s restriction. *Id.* at 560-61. Finding that promotional advertising would not enhance private economic decision making processes because the utilities enjoyed monopolistic status, the New York Court of Appeals also affirmed. *Consolidated Edison Co. v. Public Serv. Comm’n*, 390 N.E.2d 749, 757 (N.Y. 1979), *rev’d sub. nom.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980).

84. The Public Service Commission defined “promotional advertising” as advertising that was intended to encourage additional energy consumption. *Central Hudson*, 447 U.S. at 559.

85. The Commission defined informational advertising to include advertising that clearly was not intended to promote energy consumption. *Id.*

86. *Id.* at 559-60. The Commission reasoned that informational advertising would shift consumption and would stabilize energy demand during a 24-hour period, while promotional advertising would encourage consumption when conservation was necessary. *Id.*

87. *Id.* at 569-70. The Court noted that the restriction prevented utilities from advertising and promoting more efficient energy sources and from encouraging a shift away from less efficient means of energy consumption. *Id.* at 570.

The Court defined commercial speech as both an "expression related solely to the economic interests of the speaker and its audience,"⁸⁸ and as a "'commonsense distinction between speech proposing a commercial transaction . . . and other varieties of speech.'"⁸⁹ Although struggling to delineate the specific boundaries of the classification, the Court successfully articulated a tangible, four-pronged, analytic framework by which commercial speech claims could be evaluated.⁹⁰ The first prong of the analysis requires a determination of whether the expression is false, misleading, or proposes an illegal activity.⁹¹ If the expression is truthful, nondeceptive, and proposes a lawful activity, the second prong requires the government to assert a substantial interest to justify regulating the speech.⁹²

If these two requirements are satisfied, the Court then examines the relationship between the regulation and the governmental interest.⁹³

88. *Id.* at 561. Although the Court derived its first definition from *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), the definition differed from the one commonly used in subsequent opinions interpreting commercial speech as expression proposing a commercial transaction. *See id.* The struggle to articulate a clear definition of commercial speech has plagued the Court since the doctrine's inception. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65-67 (1983) (finding that all of the advertisements at issue were commercial speech by reviewing numerous commercial characteristics, rather than applying the traditional *Virginia State Board of Pharmacy* definition).

89. *Central Hudson*, 447 U.S. at 562 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)). The dual definition used by the *Central Hudson* Court illustrates the inconsistency in the Court's efforts to develop a functional definition of commercial speech. The latter definition, which the *Virginia State Board of Pharmacy* Court relied upon, 425 U.S. at 772 n.24, became the test for identifying commercial speech in later decisions. *See Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989) (citing the latter definition and determining if there was a reasonable fit between the State's interests and the regulation suppressing commercial speech); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 340 (1986) (referring to the latter definition of commercial speech and upholding the validity of a Puerto Rico gambling statute that restricted promotional advertising); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1981) (citing the latter definition); *see also supra* text accompanying note 43; *infra* note 133 and accompanying text.

90. *Central Hudson*, 447 U.S. at 564. Application of this test presupposes that commercial speech is the subject of the regulation. *Id.* at 563-64; *see Fox*, 492 U.S. at 473 (discussing the preliminary need to resolve whether the speech at issue is commercial speech). Thus, the Court must determine that the expression is commercial speech before evaluating the regulation. *Central Hudson*, 447 U.S. at 563-64.

91. *Central Hudson*, 447 U.S. at 564. The Court asserted that the Constitution does not prohibit the government from regulating commercial speech "that do[es] not accurately inform the public about lawful activity." *Id.* at 563; *see Friedman v. Rogers*, 440 U.S. 1, 11 n.9 (1979) (noting that the government still may regulate a commercial activity that harms the public); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457-588 (1978) (finding that coercive advertising is not entitled to First Amendment protection).

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

93. *Id.*

Under the third prong, the restriction must directly advance the government's interest.⁹⁴ Finally, the fourth prong mandates that the regulation can be "no more extensive than necessary" to promote the government's interest adequately.⁹⁵ In a statement creating subsequent confusion and debate, the Court explained that the fourth prong requires an inquiry as to whether the interest could have been served equally well by a less restrictive method.⁹⁶

After concluding that the promotional advertising in *Central Hudson* qualified as commercial speech,⁹⁷ the Court found the Commission's interests in conserving energy and maintaining lower consumer utility rates to be clearly substantial.⁹⁸ The Court ultimately concluded, however, that the promotional advertising restriction directly advanced only the energy conservation interest.⁹⁹ Applying the fourth prong to determine whether the regulation was necessary to advance the State's interest in energy conservation,¹⁰⁰ the Court held that promotional advertising of electrical devices and services would not result in increased energy con-

94. *Id.* For instance, in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983), the Court invalidated a federal statute that prohibited the unsolicited advertising of contraceptives. *Id.* at 75. The Court found that the statute only marginally promoted the State's interest in aiding parents to control the disposition of mailbox contents, while completely suppressing otherwise protected speech. *Id.* at 73.

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

96. *Id.* This issue was not resolved until the *Fox* decision in 1989. *Board of Trustees v. Fox*, 492 U.S. 469, 477-79 (1989); see *infra* notes 145-49 and accompanying text (discussing the *Fox* Court's acknowledgement that the fourth prong was applied inconsistently due to confusion regarding its interpretation).

97. *Central Hudson*, 477 U.S. at 561. Rejecting the argument that promotional advertising conveyed little useful information because of the monopolistic structure of the electric utility industry, the Court reasserted that the amount of information conveyed does not alter the protection afforded. *Id.* at 566-68. The fact that substitute industries may compete with the electric utilities and that the overall dissemination of information would be reduced by suppression supported the application of commercial speech status. *Id.* at 566-67. The Court's rationalization of the application of commercial speech status is atypical. See, e.g., *Fox*, 492 U.S. at 473 (stating without elaborating that there was no doubt that the expression at issue was commercial speech); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 340 (1986) (deciding without elaborating that the advertising being regulated was commercial speech); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 637 (1985) (stating that "it is clear enough that the speech at issue in this case—advertising pure and simple—falls within [the] bounds [of commercial speech]").

98. *Central Hudson*, 447 U.S. at 568-69.

99. *Id.* at 566-68. While there was an immediate connection between promotional advertising and the demand for energy, the Court considered the relation between the regulation and the interest in ensuring fair and equitable rates to be highly speculative. *Id.* at 569.

100. *Id.* at 569-70.

sumption.¹⁰¹ Consequently, the Court concluded that suppressing such advertising was not necessary to promote the State's interest in energy conservation.¹⁰² Thus, the Court held that the regulation was overly extensive under the fourth prong and therefore invalid.¹⁰³

In a concurrence replicated in subsequent decisions,¹⁰⁴ Justice Blackmun found that the majority's standard provided insufficient protection for truthful, noncoercive commercial speech.¹⁰⁵ Moreover, Justice Blackmun argued that this analytic standard should not apply when a state attempts "to manipulate a private economic decision" by suppressing truthful information regarding a product or service.¹⁰⁶ Finally, Justice Stevens,¹⁰⁷ also concurring, argued that the two definitions of commercial speech were, respectively, too broad and too narrow.¹⁰⁸

101. *Id.* at 570. The Court concluded that promotional advertising "would cause no net increase in total energy use." *Id.*

102. *Id.*

103. *Id.* The State failed to satisfy its burden of proof because it did not show that a less restrictive method would not adequately serve the interest. *Id.* In particular, the Court emphasized that the State should have attempted to regulate the format or content of the promotional advertisements before categorically prohibiting them. *Id.* at 570-71.

104. *See* Board of Trustees v. Fox, 492 U.S. 469, 486-89 (1989) (Blackmun, J., dissenting); City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1517-21 (1993) (Blackmun, J., concurring).

105. *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring). Justice Blackmun argued that the majority's intermediate scrutiny standard should apply to commercial speech that is misleading or coercive, or to commercial speech regulations based on time, place, and manner restrictions. *Id.*

106. *Id.*

107. Justice Stevens' sentiments would later be reflected in his majority opinion in *Discovery Network*, 113 S. Ct. at 1511-14; *see infra* note 170 and accompanying text (discussing Justice Stevens' opinion in *Discovery Network*).

108. *Central Hudson*, 447 U.S. at 579 (Stevens, J., concurring). The first definition, "expression related solely to the economic interests of the speaker and its audience," would encompass speech afforded the highest degree of First Amendment protection. *Id.* The second definition, "speech proposing a commercial transaction," he argued, would not include all of the communication defined as promotional advertising. *Id.* at 580; *see* DiLullo, *supra* note 38, at 725-27 (addressing Justice Stevens' objections to the *Central Hudson* majority's proffered definitions of commercial speech).

Chief Justice Rehnquist argued in dissent, as he had done in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 783-85 (1976) (Rehnquist, J., dissenting), that regulation of commercial speech is economic regulation, rather than speech regulation. *Central Hudson*, 447 U.S. at 589 (Rehnquist, J., dissenting). He viewed the Court's use of the label speech regulation merely as an attempt to revitalize the doctrine of economic due process. *Id.* at 591. For an argument rejecting any protection for commercial speech, *see* Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 25-36 (1979).

4. *Disparate Application of the Central Hudson Standard*

In 1983, the Court, devoting increased attention to defining commercial speech, invalidated a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives in *Bolger v. Youngs Drug Products Corp.*¹⁰⁹ The Court found that Youngs' multi-page flyers promoting various products, as well as its flyers devoted exclusively to advertising prophylactics,¹¹⁰ constituted "core" commercial speech because they did "no more than propose a commercial transaction."¹¹¹ The Court also determined that Youngs' informational pamphlets qualified as commercial speech¹¹² because the pamphlets were concededly advertisements that referred to a specific product and the sender had an economic motivation for mailing them.¹¹³

The Court then applied the *Central Hudson* test to evaluate the federal regulation.¹¹⁴ Writing for the majority, Justice Marshall noted that, under the first prong, the communication was neither false, misleading, nor related to illegal behavior and thus, was guaranteed some level of protection.¹¹⁵ Further, under the second prong, Justice Marshall found that the government's interest in aiding parents' efforts to control their children's sexual education was "undoubtedly substantial."¹¹⁶

109. 463 U.S. 60 (1983). Title 39 U.S.C. § 3001(e)(2) states that "[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs." 39 U.S.C. § 3001(e)(2) (1988). This statute does not apply to unsolicited mailings in which the sender has no commercial interest. 39 U.S.C. § 3001(e)(2)(A) (1988); *Bolger*, 463 U.S. at 61 n.1.

110. *Bolger*, 463 U.S. at 62. Youngs, a contraceptives manufacturer, mailed three types of materials: (1) multi-page flyers promoting various products; (2) flyers primarily or exclusively promoting prophylactics; and (3) informational pamphlets promoting the general use of prophylactics, and the use of Youngs' products, in particular. *Id.*

111. *Id.* at 66 (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 762).

112. *Id.* at 67; see Merrill, *supra* note 30, at 236 (evaluating the constitutional status of commercial speech immediately after *Virginia State Board of Pharmacy*).

113. *Bolger*, 463 U.S. at 66-67. The Court stated that while any one of these factors, standing alone, would not compel such a decision, a combination of them did. *Id.*

114. *Id.* at 68-69. The Court reiterated that the amount of protection afforded to commercial speech depends on the nature of the particular expression and the asserted governmental interests. *Id.* at 68.

115. *Id.* at 69; see *supra* text accompanying note 91. If the communication was false, misleading, or related to illegal behavior, the government could suppress the speech completely. See *Virginia State Bd. of Pharmacy*, 425 U.S. at 771-72 (recognizing First Amendment protection for commercial speech that is not false, misleading, or related to illegal behavior).

116. *Bolger*, 463 U.S. at 73; see *supra* text accompanying note 92. The Court rejected the substantiality of the State's asserted interest in preventing the delivery of unsolicited, offensive materials to mail recipients. *Bolger*, 436 U.S. at 71 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977)). While the statute, as it was enacted in the nineteenth century, did not include either of the State's asserted interests as justifications, the

After applying the final prongs of the *Central Hudson* test,¹¹⁷ however, the Court invalidated the federal statute.¹¹⁸ Justice Marshall reasoned that the regulation was not directly related to the governmental interest because it provided "only the most limited incremental support" in aiding parents to control their children's sexual education.¹¹⁹ As in *Central Hudson*, the federal statute also failed the fourth prong of the analysis because it was more extensive than necessary.¹²⁰

In *Posadas de Puerto Rico Associates v. Tourism Co.*,¹²¹ the Court upheld the Puerto Rico Games of Chance Act of 1948,¹²² which prohibited casino gambling advertising targeted at residents of Puerto Rico but allowed such advertising to be directed at tourists.¹²³ After acknowledging that the speech was not misleading or false and concerned a lawful activity under *Central Hudson's* first prong,¹²⁴ the Court found Puerto Rico's

Court found the State's present interests acceptable because they were not diminished by the insufficiency of the original purposes. *Id.*; cf. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1514-15 (1993) (reasoning that an ordinance banning commercial handbills had been justified under a rationale different from the original rationale).

117. See *supra* text accompanying notes 94-95.

118. *Bolger*, 463 U.S. at 73-75.

119. *Id.* at 73. Justice Marshall based this conclusion on the premise that parents already exercised discretionary control over the contents of the mail. *Id.* Furthermore, such marginal protection would be achieved through a complete ban on materials that were entirely suitable for adults. *Id.*

120. *Id.* at 74-75. The Court also noted that such a restriction would deny parents the opportunity to discuss important issues of birth control with their children. *Id.* at 74. Justice Stevens, in concurrence, warned that the rigid classification of commercial speech inadvertently could suppress speech entitled to greater protection. *Id.* at 81 (Stevens, J., concurring). Moreover, recognizing that many communicative transactions contain both commercial and noncommercial elements, Justice Stevens asserted that the debate and analysis should focus on the style and form of governmental regulations, rather than on the content of the message. *Id.* at 84. The statute at issue, he concluded, should have been held invalid because it censored ideas, not form. *Id.*

Justice Stevens' view that the Court should avoid rigid classification of commercial speech and instead should examine regulations independently to ensure that protected speech is not suppressed provides the foundation for his majority opinion in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1511-13 (1993).

121. 478 U.S. 328 (1986).

122. The Games of Chance Act of 1948, P.R. LAWS ANN. tit. 15, § 71 (1972).

123. *Posadas de Puerto Rico*, 478 U.S. at 332-33. The Court summarily determined that the Act restricted pure commercial speech, doing " 'no more than propos[ing] a commercial transaction.' " *Id.* at 340 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). Thus, the Court determined that the *Central Hudson* analysis applied. *Id.*; see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980); *supra* notes 90-103 and accompanying text (demonstrating the standard for evaluating challenges to commercial speech regulations). For a detailed discussion of *Posadas de Puerto Rico*, see Ellen Marie Van Riper, Comment, *Posadas de Puerto Rico Associates v. Tourism Company: Rolling the Dice with Central Hudson*, 40 RUTGERS L. REV. 241 (1987).

124. *Posadas de Puerto Rico*, 478 U.S. at 340-41.

asserted interest in protecting "the health, safety, and welfare of its citizens" to be substantial, thus satisfying *Central Hudson's* second prong.¹²⁵

The Court then considered the latter elements of the *Central Hudson* analysis.¹²⁶ The Court deferred to the reasonable belief of the Puerto Rico legislature and concluded that the restriction directly promoted the legislature's interests in protecting the health, safety, and welfare of Puerto Rico's citizens.¹²⁷ The Court also found the fourth prong to be satisfied after the lower court modified the statute, rendering it no more extensive than necessary to promote the governmental interest.¹²⁸ Thus, the Court held that the statute was valid.

In 1985, the Court revisited the issue of attorney advertising¹²⁹ in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*.¹³⁰ In *Zauderer*, the Supreme Court held that while an attorney could not be

125. *Id.* at 341 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986), recognizing the preservation of a community's quality of life as constituting a substantial interest). The Puerto Rico legislature believed that advertising of casino gambling directed at residents could increase criminal activities and destroy citizens' "moral and cultural patterns." *Id.*

126. *Id.*; see *supra* text accompanying notes 94-95. The Court explained that these prongs involved an analysis of "the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Posadas de Puerto Rico*, 478 U.S. at 341. The *Fox* Court later used this description to define what type of "fit" was required. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (quoting *Posadas de Puerto Rico*, 478 U.S. at 341); see *infra* notes 139-52 and accompanying text (discussing the *Fox* holding).

127. *Posadas de Puerto Rico*, 478 U.S. at 342. In dissent, Justice Brennan criticized the majority opinion because of the deference it afforded to the Puerto Rico legislature in evaluating the fit between the restriction and the asserted interests. *Id.* at 352 (Brennan, J., dissenting). Justice Brennan also pointed out that the Court appeared to apply a rational basis review to the relatedness prong. *Id.* at 351-52. The Court subsequently rejected the application of a rational basis review in this context. See *Fox*, 492 U.S. at 480.

128. *Posadas de Puerto Rico*, 478 U.S. at 343-44. The Superior Court of Puerto Rico narrowed the statute's construction to ensure that it would only affect advertising aimed at the residents of Puerto Rico. *Id.* at 334-36.

In a lengthy dissent, Justice Brennan, joined by Justices Marshall and Blackmun, argued that truthful, noncoercive commercial speech should be fully protected under a standard of strict scrutiny, rather than being evaluated under the intermediate scrutiny standard of *Central Hudson*. *Id.* at 351 (Brennan, J., dissenting). Justice Brennan contended that the regulation of truthful, noncoercive commercial speech is merely "a covert attempt by the State to manipulate the choices of its citizens . . . by depriving the public of the information needed to make a free choice." *Id.* at 351 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 574-75 (1980) (Blackmun, J., concurring)). This, Justice Brennan argued, struck at the core of First Amendment values. *Id.*; see Jonathan Weinberg, Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 750 (1982) (stating that commercial speech regulations that deprive the public of information necessary to informed decisionmaking violate core First Amendment principles).

129. See *supra* notes 55-81 and accompanying text (discussing the *Bates* and *Ohrlik* decisions).

130. 471 U.S. 626 (1985). For an alternative discussion of *Zauderer*, see Nutt, *supra* note 6, at 191-93.

disciplined for soliciting business through certain newspaper advertisements,¹³¹ a state could require the attorney to disclose particular information regarding fee and cost arrangements to prevent deception.¹³² Acknowledging the Court's ambiguous definition of commercial speech, Justice White, writing for the majority, concluded that all attorney advertising qualified as core commercial speech.¹³³ In a discussion that caused substantial confusion regarding the proper application of the *Central Hudson* standard,¹³⁴ Justice White rejected the substantiality of the same interests that the Court had accepted ten years earlier in *Ohralik*.¹³⁵

Justice White distinguished the requirement to disclose detailed information regarding fees and costs from outright suppression of communication¹³⁶ by explaining that if such disclosure requirements were neither unduly burdensome nor likely to chill commercial speech, they would be valid.¹³⁷ The Court therefore sustained the validity of the Ohio regula-

131. *Zauderer*, 471 U.S. at 647. The advertisements contained nondeceptive illustrations and legal advice. *Id.* Moreover, these illustrations primarily served to impart information directly and to attract attention to the message. *Id.*

132. *Id.* at 652-53. In particular, the attorney would be required to disclose to potential clients that they would be liable for certain litigation costs based on contingency fee arrangements. *Id.*

133. *Id.* at 637. The advertisement, which the Court described as "advertising pure and simple," clearly proposed a commercial transaction. *Id.* In concluding this though, the Court demonstrated its own confusion about the proper classification of a unitary message that both proposed a commercial transaction and "link[ed] a product to a current public debate." *Id.* at 637 n.7 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980)). If the message only covered the latter, the Court may have classified it as noncommercial speech and afforded it full protection. *Id.* The Court also found that the advertisements were neither misleading nor false and did not propose an illegal activity. *Id.* at 639-41. See generally *McChesney*, *supra* note 61 (discussing commercial speech protection for professionals); *Ratino*, *supra* note 61 (explaining the application of the commercial speech doctrine to attorney advertising).

134. See *Board of Trustees v. Fox*, 492 U.S. 469, 476-77 (1989) (recognizing the confusion resulting, in part, from Justice Blackmun's *Zauderer* discussion of *Central Hudson*'s fourth prong).

135. *Zauderer*, 471 U.S. at 641; see *supra* notes 74-77 and accompanying text (finding that in-person solicitation of a traumatized person posed a greater threat to the erosion of the professional values of attorneys). Ohio attempted to justify the blanket prohibition by arguing that, otherwise, it would be required to distinguish between truthful and false commercial speech. *Zauderer*, 471 U.S. at 643-44. The *Zauderer* Court stated that commercial speech is sufficiently important to justify imposing the costs of drawing this distinction on the state. *Id.* at 646. Furthermore, the Court noted that the restriction did not promote directly the asserted interest in maintaining professional dignity. *Id.* at 647-48.

136. *Zauderer*, 471 U.S. at 650.

137. *Id.* at 651. The rights of the party seeking to advertise are protected adequately so long as the disclosure requirements are reasonably related to the asserted governmental interest in precluding deception. *Id.* The Court therefore rejected the use of a least restrictive means analysis for this test. *Id.* at 651 n.14.

tion requiring attorneys to inform clients of their potential liability for litigation costs.¹³⁸

5. *Refinement of the Not More Extensive than Necessary Prong*

In 1989, the Supreme Court significantly refined the fourth prong of the *Central Hudson* analysis, which requires that a commercial speech regulation be no “more extensive than . . . necessary”¹³⁹ to effectuate the intended governmental interest, in *Board of Trustees v. Fox*.¹⁴⁰ In *Fox*, the Court determined that commercial speech regulations are not necessarily invalid if they extend beyond the least restrictive means available to achieve substantial state interests.¹⁴¹ Before applying *Central Hudson*, the Court ruled that holding “[t]upperware parties”¹⁴² constituted nothing more than a proposal of a commercial transaction.¹⁴³ This standard would be “the test for identifying commercial speech.”¹⁴⁴

138. *Id.* at 652. In dissent, Justice Brennan disagreed with the majority’s reliance on highly speculative substantial justifications and on vague disclosure requirements. *Id.* at 658-59 (Brennan, J., dissenting). He argued that the majority’s requirements were ambiguous and unduly burdensome if they actually sought to require full disclosure of fee information. *Id.* at 663-64. In contrast, Justice Brennan would require the State to show that the advertising was either “‘inherently likely to deceive’” or that “‘a particular form or method of advertising has in fact been deceptive.’” *Id.* at 659 (quoting *In re R.M.J.*, 455 U.S. 191, 202 (1982)). For a detailed analysis of *In re R.M.J.* and an alternate discussion of the development of the commercial speech doctrine in the context of attorney advertising through 1982, see Ratino, *supra* note 61.

Justice O’Connor, concurring in part and dissenting in part, argued that a state cannot be completely precluded from regulating truthful, nondeceptive speech that may pose some threat to its interests. *Zauderer*, 471 U.S. at 677 (O’Connor, J., concurring in part and dissenting in part). Justice O’Connor would require a rational basis review of the state’s regulation. *Id.* at 678; see *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 (1993) (discussing rational basis review); *Fox*, 492 U.S. at 480 (same).

139. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980); see *supra* text accompanying note 95.

140. 492 U.S. 469 (1989).

141. *Id.* at 480. The State University of New York’s (SUNY) Resolution 66-156 (1979) prohibited the operation of private commercial enterprises on state university property. *Id.* at 471-72. SUNY students, along with American Future Systems, Inc., which sold housewares through “[t]upperware parties,” sued to invalidate the regulation under the First Amendment. *Id.* at 472. On remand to the United States District Court for the Northern District of New York, the United States Court of Appeals for the Second Circuit issued instructions that the fourth prong of *Central Hudson* could be satisfied only if SUNY’s regulation was the least restrictive means available to meet the state’s interests. *Fox v. Board of Trustees*, 841 F.2d 1207, 1213-14 (2d Cir. 1988), *rev’d*, 492 U.S. 469 (1989).

142. *Fox*, 492 U.S. at 472. A representative of American Future Systems, Inc., which sells china, crystal, and silverware to college students, was invited into the dormitory room of certain university students to demonstrate the products. *Id.*

143. *Id.* at 473-74.

144. *Id.* at 474 (citing *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 340 (1986)). The Court originally articulated this test in *Virginia State Board of Pharmacy v.*

Focusing on the requirements of *Central Hudson*'s fourth prong,¹⁴⁵ the Court discussed the proper meaning of the term "necessary."¹⁴⁶ The Court reviewed the interpretation of the Necessary and Proper Clause in *McCulloch v. Maryland*¹⁴⁷ and rejected a strict interpretation of "'necessary.'"¹⁴⁸ Consequently, the Court expressly affirmed that the *Central*

Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); see *supra* notes 38-54. In *Posadas de Puerto Rico*, the Court stated that this was the test for identifying commercial speech. *Posadas de Puerto Rico*, 478 U.S. at 340.

The respondents relied on *Riley v. National Federation of Blind, Inc.*, 487 U.S. 781, 796 (1988), wherein the Court found that North Carolina law required fundraisers to disclose the percentages of charitable contributions made in the previous 12 months. *Fox*, 492 U.S. at 474. In that case, the law compelled the presence of commercial speech. *Riley*, 487 U.S. at 795. As a result, the Court provided the expression as a whole, which was noncommercial, full First Amendment protection. *Id.* at 796. In *Fox*, appellants argued that because the presentation contained information regarding home economics, a noncommercial expression, it should be considered as wholly noncommercial speech, and thus, afforded full protection. *Fox*, 492 U.S. at 474.

While the *Fox* Court acknowledged that the tupperware parties combined noncommercial elements with commercial speech, it refused to distinguish those elements because, unlike *Riley*, they were not *required* to be inextricably interwoven with the commercial message. *Id.* at 474-75.

Furthermore, relying on *Bolger*, the Court reiterated that when an expression contains discussions of important public issues, it still can constitute commercial speech. *Id.* at 475; see McGowan, *supra* note 54, at 394 (referring to commercial speech as a "negative number" for its ability to deprive otherwise fully protected speech of full First Amendment protection).

145. See *supra* text accompanying note 95.

146. *Fox*, 492 U.S. at 476-77.

147. 17 U.S. (4 Wheat.) 316 (1819) (interpreting the term "necessary"). The Court noted that a strict interpretation of "necessary" essentially would demand a least restrictive means analysis. *Fox*, 492 U.S. at 476-77. The Court also noted that its reasoning in prior cases supported this strict interpretation. *Id.* at 476. In *Central Hudson*, the Court explained that under the fourth prong, if an interest could be served as well by a less extensive regulation, then the excessive restriction would be invalid. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980); see Kozinski & Banner, *supra* note 1, at 631 (describing *Central Hudson* as an "ad hoc subject-specific" standard).

The Court's decision in *In re R.M.J.* also supports a narrowly drawn standard regarding the extensiveness of restrictions. See *In re R.M.J.*, 455 U.S. 191, 207 (1982). Justice Scalia admitted in *Fox* that the Court also expressed support for the least restrictive means interpretation in *Zauderer*. *Fox*, 492 U.S. at 476 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 n.14 (1985)). Although ultimately rejecting a strict application, the *Fox* Court noted that certain disclosure requirements could be required as *less* restrictive means. *Id.* at 480.

148. *Fox*, 492 U.S. at 476. Justice Scalia stated that the term "'necessary,'" as it was used in *McCulloch v. Maryland*, is broader than the Court's interpretations in *Central Hudson* and *Zauderer*. *Id.* at 476-77. Compare *McCulloch*, 17 U.S. (4 Wheat.) at 316 with *Zauderer*, 471 U.S. at 644 and *Central Hudson*, 447 U.S. at 566. The *Fox* majority acknowledged that these cases could be read to suggest that a least restrictive means analysis should be applied. *Fox*, 492 U.S. at 476.

Hudson analysis “requires something short of a least-restrictive-means standard.”¹⁴⁹

Writing for the majority, Justice Scalia deduced that prior commercial speech decisions mandated a finding of a “reasonable fit” between the regulatory means and the governmental ends.¹⁵⁰ While this means-ends fit need not represent “the single best disposition,” Justice Scalia noted that it must be proportional to the asserted interest.¹⁵¹ Justice Scalia distinguished rational basis review from the reasonable fit standard by explaining that the latter requires both a substantial governmental interest—which the government has the burden of proving—and a careful calculation of the cost of regulation on the freedom of speech.¹⁵²

II. *City of Cincinnati v. Discovery Network, Inc.: Heightening Standards for Commercial Speech Regulation*

A. *The Sixth Circuit’s Elevation of Commercial Speech*

In *Discovery Network, Inc. v. City of Cincinnati*,¹⁵³ the respondents, commercial publishers who advertised their services on newsracks throughout the City of Cincinnati, sought relief from the enforcement of a local ordinance that prohibited the distribution of “commercial handbills” on public property.¹⁵⁴ The United States District Court for the Southern District of Ohio granted the respondents an injunction from enforcement.¹⁵⁵ On appeal to the United States Court of Appeals for the Sixth Circuit, the City of Cincinnati argued for reversal, contending primarily that the “low value” of commercial speech justified the City’s use of a discriminatory ordinance.¹⁵⁶

149. *Fox*, 492 U.S. at 477. The Court, relying on its statement in *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978), explained that “‘commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,’” and that the regulatory authority available in this area would be illusory if the Court employed a least restrictive means standard. *Fox*, 492 U.S. at 477 (alteration in original).

150. *Fox*, 492 U.S. at 477-80; see also David Rownd, Comment, *Muting the Commercial Speech Doctrine: Board of Trustees of the State University of New York v. Fox*, 38 WASH. U. J. URB. & CONTEMP. L. 275, 283-84 (1990) (arguing that the *Fox* Court should have adopted a least restrictive means analysis under *Central Hudson*’s fourth prong).

151. *Fox*, 492 U.S. at 480.

152. *Id.* at 480-81. Justice Scalia noted that a rational basis standard would require only that the regulation advance a legitimate governmental interest. *Id.* at 480.

153. 946 F.2d 464 (6th Cir. 1991), *aff’d*, 113 S. Ct. 1505 (1993); see *supra* notes 14-19 and accompanying text (discussing *Discovery Network*’s factual background).

154. *Discovery Network*, 946 F.2d at 465.

155. *Id.* (stating that the district court found the ordinance to violate the First Amendment).

156. *Id.* at 469.

The Sixth Circuit rejected the claim that all commercial speech has low value in First Amendment jurisprudence, thereby deviating from previous Supreme Court decisions.¹⁵⁷ The court stated that the lesser status of commercial speech applies only to content regulation and to the regulation of the distinctive, adverse effects of the content.¹⁵⁸ Otherwise, the court found, commercial speech is afforded a high degree of protection.¹⁵⁹ Furthermore, the Sixth Circuit found that the City of Cincinnati failed to establish a reasonable fit between the regulation and its governmental interests in safety and aesthetics.¹⁶⁰

157. *Id.* at 469-70. The City of Cincinnati argued that because the Constitution prevented it from banning newsracks completely, its limited ban on those newsracks distributing commercial speech was warranted. *Id.* at 469.

158. *Id.* at 469-70 & nn.10-11. The Sixth Circuit deduced, by dividing previous commercial speech decisions into two classes, that the Supreme Court never had held that the lesser status of commercial speech only applied to regulations of the content of commercial speech or of the distinctive effects of the content. *Id.* at 470-71.

159. *Id.* at 471. The City ordinance regulated the manner in which commercial speech was disseminated, rather than the content of the speech itself. *Id.* Also, the City was not attempting to alleviate the harmful effects resulting from the content of the speech. *Id.*

160. *Id.* at 468. In adopting the *Fox* interpretation of the fourth prong of the *Central Hudson* analysis, the court required the government to show that the benefits of the regulation outweighed the costs of the burden on speech. *Id.* at 468; *see supra* notes 145-52 and accompanying text (setting forth the *Fox* Court's interpretation of the fourth prong of the *Central Hudson* analysis). The court found that the regulation completely suppressed high-value commercial speech in an effort to pursue a policy unrelated to speech. *Discovery Network*, 946 F.2d at 471. As a result, the court determined that the heavy burden placed on the respondents and the public substantially outweighed the City's benefit. *Id.* The Sixth Circuit concluded that the categorical ban on commercial handbills, which removed only 62 of nearly 2000 newsracks from the streets, had a minuscule effect on the City's interests in safety and aesthetics. *Id.*

The court digressed to discuss the level of protection afforded to commercial speech and the rationale supporting this protection. *Id.* at 468-71. Discussing the rationale of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Sixth Circuit explained that commercial speech serves important public and societal interests, primarily in the free flow of commercial information to aid in public decision-making. *Discovery Network*, 946 F.2d at 469. It noted, however, that such speech is not totally free from governmental regulation. *Id.* at 469. Consequently, the government may implement time, place, and manner restrictions on commercial speech. *Id.*; *see supra* note 50 and accompanying text (discussing time, place, and manner restrictions). It also may suppress false or misleading speech, or speech proposing an illegal activity. *Discovery Network*, 946 F.2d at 469.

The Sixth Circuit rejected the City's assertion that the ordinance was a constitutional time, place, and manner restriction, *id.* at 470-71, and explained that the regulation could not be justified unless it dealt "with the content of the speech itself." *Id.* at 470; *see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (discussing the validity of and requirements for time, place, and manner restrictions). The *Discovery Network* court held that the regulation was not content-neutral. *Discovery Network*, 946 F.2d at 472. However, even if it were content-neutral, the court noted, it would fail because it "is clearly not the least restrictive means, as it places a substantially greater burden on commercial speech than is necessary." *Id.* at 473. For a discussion of the three-pronged standard for evaluat-

As a result of the Sixth Circuit's decision, the Supreme Court faced a number of issues. First, the Sixth Circuit's reasoning questioned whether all commercial speech was of low First Amendment value.¹⁶¹ Second, the decision threatened to confine the *Central Hudson* analytic framework¹⁶² by limiting the commercial speech inquiry to two types of cases: (1) where the content of commercial speech is regulated; or (2) where adverse effects stemming from the speech are restricted.¹⁶³ Finally, the Sixth Circuit's rationale for rejecting the reasonable fit argument blurred the line between the *Central Hudson* standard and a least restrictive means test.¹⁶⁴ The Supreme Court granted certiorari to resolve these issues.¹⁶⁵

B. *The Majority Opinion: Failing to Find a Reasonable Fit*

The *Discovery Network* majority ruled that commercial speech does not always have low value with regard to First Amendment protection,¹⁶⁶ and it prohibited suppression of speech solely because it is labelled as commercial speech.¹⁶⁷ The Court also stated that where a state's distinction between commercial and noncommercial speech bears no relationship to its substantial interests, the Court will not find a reasonable fit between the regulation and the asserted governmental interests.¹⁶⁸

ing time, place, and manner restrictions, see *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); see also *supra* note 50 and accompanying text.

Furthermore, the Sixth Circuit noted that the City could pursue various alternative means of serving its interests. *Discovery Network*, 946 F.2d at 472-73. As an example, the court suggested that newsracks could be chained to poles instead of being bolted to the ground, as the City currently required. *Id.* at 472. This option would eliminate rusting and directly serve the City's safety interest. *Id.* Regarding its aesthetic interest, the Court suggested that the City regulate the size and design of the newsracks as well. *Id.*

161. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1511 (1993).

162. See *supra* text accompanying notes 91-96 (outlining the four prongs of the *Central Hudson* standard).

163. *Discovery Network*, 946 F.2d at 470.

164. *Discovery Network*, 113 S.Ct. at 1510, nn.11-12.

165. *City of Cincinnati v. Discovery Network, Inc.*, 112 S. Ct. 1290 (1992).

166. *Discovery Network*, 113 S. Ct. at 1511-12. The Court cited its decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1979), in explaining that some types of commercial speech do not qualify for First Amendment protection. *Discovery Network*, 113 S. Ct. at 1512.

167. *Discovery Network*, 113 S. Ct. at 1514, 1516.

168. *Id.* at 1516. The Court emphasized that its holding does not foreclose the possibility that in a different situation, a community may be able to justify a regulation distinguishing between commercial and noncommercial speech. *Id.*

1. Commercial Speech Does Not Have Low First Amendment Value

The Court rejected Cincinnati's primary contention that all commercial speech has low First Amendment value.¹⁶⁹ Writing for the majority, Justice Stevens stated that the Court previously had relied upon "commonsense differences," which differed only in degree.¹⁷⁰ As set out in *Virginia State Board of Pharmacy*,¹⁷¹ these differences include the ease with which the accuracy of commercial speech can be verified by its disseminator and its durability with regard to regulation.¹⁷² Justice Stevens stated that the City's argument attached unwarranted significance "to the distinction between commercial and noncommercial speech . . . and seriously underestimate[d] the value of commercial speech."¹⁷³

In demonstrating the difficulty of classifying commercial speech under the traditional definition—as speech doing "no more than proposing a commercial transaction"—the majority claimed that even traditional newspapers arguably were "commercial handbills," because they contained advertising.¹⁷⁴ The Cincinnati regulation, the majority noted, failed to distinguish newspapers from commercial handbills.¹⁷⁵ Neverthe-

169. *Id.* at 1511. Relying on this premise, Cincinnati justified its allowance of noncommercial publications with greater First Amendment value (i.e. newspapers) to use the newsracks at the expense of commercial speech. *Id.*

170. *Id.* at 1513; *see supra* note 44 (discussing the term "commonsense differences"). To illustrate this point, Justice Stevens discussed the evolution of commercial speech protection and the definition of commercial speech by noting that the Court originally understood commercial speech to mean speech doing "no more than propos[ing] a commercial transaction." *Discovery Network*, 113 S. Ct. at 1512-13 (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). Justice Stevens explained that the Court expanded this understanding in *Central Hudson* where the Court defined commercial speech as speech "related solely to the economic interests of the speaker and [the listener]." *Id.* at 1513 (quoting *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980)). He noted, however, that the Court did not use this broader definition in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983), or in *Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989). *Discovery Network*, 113 S. Ct. at 1513. In *Bolger*, the Court examined the circumstances to ensure that all speech was properly protected. *Bolger*, 463 U.S. at 66-67. Finally, in *Fox*, the Court adopted the *Virginia State Board of Pharmacy* definition for recognizing commercial speech as speech doing no more than proposing a commercial transaction. *Fox*, 492 U.S. at 473-74 (citing *Virginia State Bd. of Pharmacy*, 425 U.S. at 762).

171. 425 U.S. 748, 772 n.24 (1976).

172. *Id.*; *see supra* note 44 and accompanying text (discussing commonsense differences).

173. *Discovery Network*, 113 S. Ct. at 1511.

174. *Id.*

175. *Id.* at 1511-12. The ordinance at issue banned the distribution of "'commercial handbill[s] in any public place.'" *Id.* at 1508 n.3 (quoting CINCINNATI, OHIO, CODE § 714-23 (1992)). However, the Cincinnati Municipal Code permitted the distribution of newspapers on public rights of way. *Id.* at 1511 (citing CINCINNATI, OHIO, CODE § 862-1 (1992)).

less, after suggesting that commercial speech could not be rigidly classified, the majority assumed that all speech at issue was core commercial speech.¹⁷⁶

2. Applying the Reasonable Fit Standard

Finding no challenge to the classification of the pamphlets as commercial speech, the majority applied the *Central Hudson* standard.¹⁷⁷ After stipulating to the satisfaction of the first two *Central Hudson* prongs,¹⁷⁸ the Court reaffirmed its statement in *Fox* that the fourth prong required a reasonable fit standard.¹⁷⁹ Moreover, the Court explained that while a regulation need not be the least restrictive means of achieving the governmental interest, the existence of numerous, less-burdensome alternatives is relevant in evaluating the reasonableness of the regulation.¹⁸⁰

Justice Stevens found "ample support in the record" to conclude that the City failed to establish a reasonable fit between the regulation and its interests in safety and aesthetics.¹⁸¹ First, Justice Stevens stated that the ordinance originally was not enacted to protect the asserted interests of

176. *Id.* at 1514. Thus, the Court was content to rely on the traditional definition, as established in *Virginia State Board of Pharmacy*, that commercial speech is that which proposes a commercial transaction. *Id.*

177. *Id.* at 1509-10. In footnote 11, Justice Stevens addressed the Sixth Circuit's suggestion that the *Central Hudson* standard might not apply when the regulation does not target the content of the speech or effects therefrom. *Id.* at 1510 n.11. Because the regulation at issue failed under *Central Hudson*, he passed on the opportunity to scrutinize this notion. *Id.* Although the Sixth Circuit was unable to categorize this case accordingly, it still applied *Central Hudson*. *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 471 (6th Cir. 1991), *aff'd*, 113 S. Ct. 1505 (1993). Thus, the Court concluded that the lower court merely had suggested that such a regulation may be subject to strict scrutiny, a test which is applied to regulations of fully protected speech. *Discovery Network*, 113 S. Ct. at 1510 n.11. The Court justified its failure to answer this question definitively by pointing out that the regulation at issue failed even under the *Central Hudson* standard, which represents a lower threshold than the strict scrutiny test. *Id.* This argument, therefore, did not affect the disposition of the case. *Id.* at 1509-10.

178. *Discovery Network*, 113 S. Ct. at 1509-10. The Court noted that there was no claim that the speech was deceptive, coercive or proposed unlawful activity, or that the City's interests were not substantial. *Id.*; *see supra* text accompanying notes 91-92 (discussing the first two *Central Hudson* prongs).

179. *Discovery Network*, 113 S. Ct. at 1510; *see supra* text accompanying note 95 (explaining *Central Hudson's* fourth prong). The Court noted that neither a least restrictive means analysis nor a rational basis analysis is appropriate. *Discovery Network*, 113 S. Ct. at 1510 n.13. The Court concluded this from its rejection of the City's argument that the Court essentially engaged in a least restrictive means analysis when it considered alternatives in evaluating the prohibition. *Id.* The Court noted that the *Fox* Court expressly rejected this argument. *Id.*; *see supra* notes 149-52 and accompanying text.

180. *Discovery Network*, 113 S. Ct. at 1510 n.13.

181. *Id.* at 1510. The Court also expressly reaffirmed that the City had the burden to establish a reasonable fit. *Id.*

safety and aesthetics.¹⁸² Second, Justice Stevens found that the City used the outdated ordinance to regulate commercial speech, instead of first restricting the size, shape, appearance, or number of newsracks.¹⁸³ The City's choice of available regulatory measures evidenced its failure to "carefully calculate[]" the costs and benefits related to the burden on this particular commercial speech.¹⁸⁴ Finally, Justice Stevens determined that the cost of complete suppression of commercial speech significantly outweighed the benefit derived from the removal of a small percentage of the total number of newsracks.¹⁸⁵

The Court also held that Cincinnati failed to satisfy the reasonable fit standard because the distinction between commercial and noncommercial speech bore no relationship to Cincinnati's asserted interests in safety and aesthetics.¹⁸⁶ Justice Stevens noted that all newsracks were equally unattractive¹⁸⁷ and unsafe.¹⁸⁸ Thus, commercial and noncommercial handbills equally affected Cincinnati's interests in safety and aesthetics.¹⁸⁹ Coupled with the reasoning that truthful, noncoercive commercial speech does not have low First Amendment value, Justice Stevens determined that suppressing only commercial handbills did not reasonably fit Cincinnati's interests.¹⁹⁰

Relying on *Bolger v. Youngs Drug Products Corp.*,¹⁹¹ Justice Stevens also discounted the City's and the dissent's argument that a reasonable fit would exist whenever the regulation advanced the City's interests, even

182. *Id.* As a 19th century ordinance, it was in effect prior to the development of the concern over newsracks. *Id.* The original purpose apparently was to prevent visual blight associated with littering, not any harm associated with freestanding newsracks. *Id.*

183. *Id.*

184. *Id.*; see *supra* note 160 (noting the Sixth Circuit's discussion of potential alternatives to the City's use of the regulation at issue).

185. *Discovery Network*, 113 S. Ct. at 1510. The ordinance would have removed 62 of approximately 1500 to 2000 newsracks. *Id.*

186. *Id.* at 1516.

187. *Id.* at 1514-15. The Court noted that the City argued in the district court that commercial handbills tended to proliferate to a greater extent than newspapers, but failed to reassert this argument on appeal. *Id.*

188. *Id.*

189. *Id.* at 1514 (stating that newsracks containing commercial handbills were no greater an eyesore than regular newsracks).

190. *Id.* at 1516. The Court noted that Cincinnati did not assert any interest in preventing a particular commercial harm—the principal purpose for distinguishing between commercial and noncommercial speech. *Id.* at 1515. If Cincinnati had asserted such an interest, the Court implied that a restrictive regulation would have been more acceptable because preventing commercial harm is the primary justification for regulating commercial speech. *Id.* (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 81 (1983) (Stevens, J., concurring)). Complete suppression, however, still may have been unjustified. *Id.*

191. 463 U.S. 60 (1983); *supra* notes 110-20 and accompanying text (discussing the holding and rationale of *Bolger*).

though it placed the entire burden on commercial speech.¹⁹² As in *Discovery Network*, the *Bolger* Court invalidated a commercial speech regulation after concluding that it provided “only the most limited incremental support for the interest asserted.”¹⁹³

3. *Rejection of the Regulation’s Validity as a Time, Place, and Manner Restriction*

The Court also rejected the City’s assertion that its regulation was a constitutionally valid time, place, and manner restriction.¹⁹⁴ The Court agreed with the Sixth Circuit’s holding that the basis of the regulation was not content-neutral.¹⁹⁵ In addition, Justice Stevens rejected the City’s interpretation of prior Court statements that the justification for the regulation is the proper basis for determining whether a restriction is content-based.¹⁹⁶ Instead, Justice Stevens found that Cincinnati failed to proffer a neutral justification for its selective ban on newsracks distributing commercial handbills, and thus, failed to prove that the regulation was content-neutral.¹⁹⁷

192. *Discovery Network*, 113 S. Ct. at 1511. In *Bolger*, the Court refused to distinguish between commercial and noncommercial speech to justify a regulation based on the interest of protecting people from receiving offensive material. *Bolger*, 463 U.S. at 71-72.

193. *Bolger*, 463 U.S. at 73; see *supra* note 116 (discussing the asserted governmental interests in *Bolger*). In *Discovery Network*, Justice Stevens suggested, however, that the Court would have been more willing to accept a low value argument if the City had articulated a legitimate basis for distinguishing between commercial and noncommercial speech. *Discovery Network*, 113 S. Ct. at 1516. However, because the City failed to assert such a basis, the Court found the distinction unreasonable and refused to consider the low value argument. *Id.* The Court recognized the narrowness of its holding and stated that such a distinction may be justifiable when it bears some relationship to the asserted interests. *Id.*

194. *Discovery Network*, 113 S. Ct. at 1516-17 (citing, as examples, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

195. *Id.* The Court has held that a state may impose content-neutral time, place, and manner restrictions on speech. *Ward*, 491 U.S. at 791; see *supra* note 50 and accompanying text (discussing time, place, and manner restrictions).

196. *Discovery Network*, 113 S. Ct. at 1517. The City argued that because its interests were unrelated to the content of the publications, its regulations were content-neutral. *Id.* at 1516. In this regard, Justice Stevens concluded that the asserted interests did not properly justify the elimination of all newsracks disseminating commercial speech. *Id.* at 1517.

Furthermore, the Court found that the commercial speech newsracks did not produce adverse secondary effects that were absent from the newsracks distributing noncommercial speech. *Id.*; cf. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (accepting the secondary effects justification as satisfying the substantial interest requirement of the *Central Hudson* test). In *Playtime Theatres*, the City was concerned with the secondary effects of crime and solicitation, which often resulted from the establishment of adult theaters. *Playtime Theatres*, 475 U.S. at 47-49. The City did not establish such concerns in *Discovery Network*.

197. *Discovery Network*, 113 S. Ct. at 1517.

C. *The Concurrence: Arguing for Full First Amendment Protection*

While agreeing with the majority's decision and the general applicability of the *Central Hudson* test,¹⁹⁸ Justice Blackmun argued in concurrence that commercial speech that is truthful, noncoercive, and concerns a lawful activity should receive full First Amendment protection.¹⁹⁹ Consistent with his previous opinions, Justice Blackmun asserted that such commercial speech is unquestionably "valuable" to listeners and society in general.²⁰⁰

Justice Blackmun agreed that intermediate scrutiny is appropriate for evaluating regulations of commercial speech that are deceptive, false, or propose an illegal activity.²⁰¹ Regulating commercial speech on these grounds, he contended, is consistent with the judicial emphasis on the listeners' First Amendment rights.²⁰² Yet, Justice Blackmun viewed the Court's decision in *Central Hudson* as more expansive, affording intermediate scrutiny to all commercial speech regulations.²⁰³ Accordingly, he argued, regulations of false, deceptive speech, or speech proposing an illegal activity would be addressed in the first prong of *Central Hudson*, and any surviving regulation would receive only intermediate scrutiny.²⁰⁴ Furthermore, under this approach, asserted interests need not relate to the prevention of deception or coercion.²⁰⁵

Justice Blackmun concluded that Cincinnati justifiably relied on the Court's previous statements regarding the level of First Amendment pro-

198. See *supra* notes 177-90 and accompanying text (explaining the majority's interpretation of the *Central Hudson* standard).

199. *Discovery Network*, 113 S. Ct. at 1517 (Blackmun, J., concurring); see *supra* notes 104-08 and accompanying text (discussing Justice Blackmun's *Central Hudson* concurrence, where he advocated full First Amendment protection for truthful, noncoercive commercial speech that does not propose an illegal activity).

200. *Discovery Network*, 113 S. Ct. at 1518 (Blackmun, J., concurring); see also *Board of Trustees v. Fox*, 492 U.S. 469, 486 (1989) (Blackmun, J., dissenting); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring).

201. *Discovery Network*, 113 S. Ct. at 1517 (Blackmun, J., concurring).

202. *Id.* at 1517-18 (citing Justice Blackmun's opinion in *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring)). Justice Blackmun noted that a listener would have little interest in receiving false or deceptive speech or speech proposing an illegal activity. *Id.* at 1518. He contrasted this treatment with that of false or deceptive noncommercial speech, or noncommercial speech proposing an illegal activity, which still is afforded full First Amendment protection. *Id.* at 1518 n.1. Thus, Justice Blackmun concluded, commercial speech is subject to regulation when it does not serve individual or societal interests in informed decision making. *Id.* at 1518-19 (citing *Bates v. State Bar*, 433 U.S. 350, 364 (1977)); see also *id.* at 1512 n.17 (majority opinion) (quoting Justice Blackmun's rationale in *Bates* for affording full First Amendment protection to core commercial speech).

203. *Discovery Network*, 113 S. Ct. at 1519 (Blackmun, J., concurring).

204. *Id.* (outlining the *Central Hudson* requirements); see *supra* text accompanying notes 91-96.

205. *Discovery Network*, 113 S. Ct. at 1519 (Blackmun, J., concurring).

tection afforded to commercial speech.²⁰⁶ Consequently, he suggested that instead of reserving judgement on *Central Hudson's* continued application to all commercial speech regulations, the Court should have adopted the Sixth Circuit's reasoning that *Central Hudson* applies only where the state has regulated the content of commercial speech or the adverse effects resulting therefrom.²⁰⁷ In Justice Blackmun's view, such an approach would ensure that truthful, noncoercive commercial speech relating to a lawful activity would be afforded full First Amendment protection.²⁰⁸

D. *The Dissent: Finding a Reasonable Fit*

Writing in dissent, Chief Justice Rehnquist, joined by Justices White and Thomas, argued that commercial speech is properly afforded less protection because it has low First Amendment value.²⁰⁹ As support, the Chief Justice cited traditional reasons for this inferior status and argued that commercial speech is more durable than other forms of First Amendment expression because it is economically motivated.²¹⁰ Chief Justice Rehnquist also stated that affording equal First Amendment status to commercial speech would erode the degree of protection afforded to other types of speech, rather than actually elevating protection of commercial speech.²¹¹

Moreover, Chief Justice Rehnquist argued that the City " 'carefully calculated' " the burden placed on commercial speech by its regulation,²¹² thereby establishing a reasonable fit between its ban on commercial

206. *Id.* at 1520. He recognized that, although the City's prohibition was unconstitutional, it logically and justifiably adhered to the past statements made by the Court on the issue. *Id.*

207. *Id.* at 1521.

208. *Id.* Justice Blackmun found that the " 'commonsense differences,' " which the Court relied upon to distinguish between commercial and noncommercial speech, did not justify relaxed scrutiny of regulations of truthful, nondeceptive commercial speech proposing a lawful activity. *Id.* at 1520 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976)); see *supra* note 44 (discussing the term "commonsense differences").

209. *Discovery Network*, 113 S. Ct. at 1521-22 (Rehnquist, C.J., dissenting) (citing *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989)).

210. *Id.* at 1522. This is one of only two commonsense differences often asserted as a basis for distinguishing between commercial and noncommercial speech. See *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24; *supra* note 44 (discussing the term "commonsense differences").

211. *Discovery Network*, 113 S. Ct. at 1522. This argument originally was asserted in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); see also McGowan, *supra* note 54, at 369-71 (discussing the Court's adoption of the leveling argument in *Ohralik*). The argument has been subject to criticism. Kozinski & Banner, *supra* note 1, at 648.

212. *Discovery Network*, 113 S. Ct. at 1523.

speech and its interests in safety and aesthetics.²¹³ The dissent suggested that the Court should focus on the relationship of the regulation to solving the overall problem, instead of evaluating the degree to which the City's interests would be promoted.²¹⁴ By focusing on the overall problem, Chief Justice Rehnquist argued that the underinclusiveness of the City's regulation should not render the action violative of the First Amendment.²¹⁵

The Chief Justice attacked the majority's position that the regulation was invalid because the distinction between commercial and noncommercial speech bore no relationship to Cincinnati's interests.²¹⁶ The dissent noted that prior precedents, while drawing this exact distinction, never have favored commercial speech over noncommercial speech.²¹⁷ Thus, Chief Justice Rehnquist found Cincinnati's regulation to be valid because it was actually less extensive than necessary to serve adequately the stated interests—even though it was not wholly successful.²¹⁸

213. *Id.*

214. *Id.* (noting that this inquiry is derived from the Court's analysis of time, place, and manner restrictions, which is "'substantially similar' to the *Central Hudson* analysis" (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989))).

215. *Id.* at 1523-24. The Chief Justice discussed *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 342 (1986), where the Court upheld a ban on promotional advertising aimed at Puerto Rico residents by rejecting the argument that the regulation should be invalid because it did not cover all types of advertising. *Discovery Network*, 113 S. Ct. at 1523; *see supra* notes 121-28 (discussing the *Posadas de Puerto Rico* holding).

Chief Justice Rehnquist also relied on *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512-14 (1981), where the Court upheld the City's ban of "off-site" billboard advertising, even though the regulation did not extend to "on-site" billboard advertising. *Discovery Network*, 113 S. Ct. at 1523-24. The *Metromedia* Court upheld the regulation because, although it was underinclusive, it directly related to the asserted interests in traffic safety and aesthetics. *Metromedia*, 453 U.S. at 511. Similarly, in *Discovery Network*, Chief Justice Rehnquist argued that the government should be free to regulate regardless of the lack of relationship between the regulation and the content of the speech. *Discovery Network*, 113 S. Ct. at 1525. At least one commentator has argued, however, that underinclusive regulations often violate the First Amendment by undermining the substantiality of the state's interests. William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U. L.Q. 637, 646 (1993).

216. *Discovery Network*, 113 S. Ct. at 1524.

217. *Id.* (citing *Metromedia* as an example). Chief Justice Rehnquist also argued that the majority misinterpreted *Bolger v. Youngs Drug Products Corp.* *Id.* Chief Justice Rehnquist asserted that the *Bolger* Court rejected the state's interest in shielding adults from offensive materials, regardless of whether the regulation applied to commercial or noncommercial speech. *Id.*; *see Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71-72 (1983).

218. *Discovery Network*, 113 S. Ct. at 1523. In reaching this conclusion, Chief Justice Rehnquist relied upon *Posadas de Puerto Rico*, 478 U.S. 328, and *Metromedia*, 453 U.S. 490. *Discovery Network*, 113 S. Ct. at 1523-25; *see supra* note 215.

III. *DISCOVERY NETWORK'S* ACHIEVEMENTS AND UNRESOLVED POTENTIAL PROBLEMS

In *Discovery Network*, the Supreme Court recognized that not all commercial speech has low First Amendment value.²¹⁹ After *Discovery Network*, the rationale that commercial speech is equal in value to noncommercial speech is applicable at least to truthful, nondeceptive commercial speech when the government fails to establish any basis for distinguishing between commercial and noncommercial speech.²²⁰ While Justice Stevens addressed the difficulty of attempting to classify speech into rigid categories,²²¹ the majority failed to offer guidance as to how speech may be classified as commercial or noncommercial.²²² Finally, the Court demonstrated the application of the reasonable fit standard to facts other than those in *Fox*²²³ and illustrated an inclination to scrutinize the directness of the relationship between a commercial speech regulation and the stated governmental interests.²²⁴

A. *Affording Greater Value to Commercial Speech*

The majority's disposition in *Discovery Network* clarifies previous ambiguities concerning the value of commercial speech and the amount of First Amendment protection it should receive.²²⁵ The majority's recognition that commercial speech does not have low value in all circumstances signals a clear departure from the previous rationale, adopted by the dissent in *Discovery Network*, that all commercial speech should be afforded

219. *Discovery Network*, 113 S. Ct. at 1516; see *supra* notes 169-76 and accompanying text.

220. See *Discovery Network*, 113 S. Ct. at 1509-10.

221. *Id.* at 1513. The Court also adhered to the traditional definition of commercial speech—that which “does ‘no more than propose a commercial transaction.’” *Id.* (quoting *Bolger*, 463 U.S. at 66).

222. *Id.* at 1514. After recognizing the futility of attempting to classify speech as commercial and illustrating that newspapers actually could be classified as “‘commercial handbills’” under Cincinnati's ordinance, Justice Stevens concluded that all speech at issue was “‘core’ commercial speech.” *Id.*

223. *Id.* at 1510.

224. *Id.* The Court arguably is willing to scrutinize the substantiality of the asserted interests more rigorously as well. Because the substantiality of Cincinnati's interests was not at issue, however, the Court did not entertain this issue.

225. See *supra* notes 43-54 (discussing the effects of *Virginia State Bd. of Pharmacy*); notes 60-67 (assessing the impact of *Bates*); notes 88-103 (reviewing the Court's resolution of *Central Hudson*); notes 130-38 (addressing the *Zauderer* decision); see also Nutt, *supra* note 6, at 202-04 (comparing and contrasting commercial and noncommercial speech regulation analysis).

a single level of protection.²²⁶ 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.²²⁷

Following *Discovery Network's* rationale and holding, the Court will continue to apply the *Central Hudson* standard²²⁸ in determining the validity of all commercial speech regulations.²²⁹ If the Court continues to apply the analytic framework in the same fashion, truthful, noncoercive commercial speech will not receive *full* First Amendment protection.²³⁰ Moreover, as the concurrence discussed, false or deceptive commercial speech, or speech proposing an illegal activity will be addressed under *Central Hudson's* first prong.²³¹ This creates two problems. First, the Court rarely has dwelled on evaluations under this prong in earlier decisions.²³² If the Court continues this pattern, commercial speech that is arguably false or coercive may survive scrutiny under the first prong and subsequently, may continue to receive protection equal to that purport-

226. *Discovery Network*, 113 S. Ct. at 1511; *see id.* at 1516 (rejecting Cincinnati's low value argument because its regulation did not bear any relation to its interests in public safety and aesthetics).

227. *Id.* Under *Discovery Network*, all commercial speech will continue to be evaluated under the *Central Hudson* standard. *Id.* at 1510 & n.11 (noting that because the speech regulation at issue did not pass the intermediate scrutiny of the *Central Hudson* analysis, there was no need to engage in a strict scrutiny analysis). Thus, all commercial speech likely will receive the same level of protection. It is unclear how the Court proposes to offer greater protection to a certain class of commercial speech by using the same evaluative framework in all cases. *See infra* notes 228-37 and accompanying text (discussing the potential effects of an unrefined *Central Hudson* standard subsequent to the *Discovery Network* opinion); *see also* Lurie, *supra* note 5, at 1000-04 (proposing a separate analytic framework for "issue advertising" and arguing that *Central Hudson* is essentially a two-part test).

228. *See supra* notes 90-103 and accompanying text (discussing the *Central Hudson* analysis).

229. *See Discovery Network*, 113 S. Ct. at 1510 n.11. Even though the *Discovery Network* Court did not decide whether all commercial speech regulations should be evaluated under *Central Hudson*, the Court eventually will have to address this issue when a regulation of truthful, noncoercive speech that bears some relationship to its asserted interests is challenged—a fact the majority indirectly acknowledged. *Id.* at 1516.

230. *See id.* at 1517 (Blackmun, J., concurring).

231. *Id.* at 1519-20; *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

232. *See Discovery Network*, 113 S. Ct. at 1509 (stating that "[t]here is no claim . . . that there is anything unlawful or misleading about [the speech]"); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 340-41 (1986) (concluding that the speech at issue was not false or misleading and did not propose an illegal activity); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (stating that the appellants did not contend that the advertisements were false or misleading, or related to illegal behavior); *Central Hudson*, 447 U.S. at 566-67 (same).

edly afforded to high value commercial speech.²³³ Thus, one method of ensuring greater protection of high value commercial speech is for the Court to engage in more rigid scrutiny under the first prong of the *Central Hudson* analysis.²³⁴

Second, even if the Court engages in rigorous scrutiny and successfully separates all misleading or coercive commercial speech from protected commercial speech, any speech surviving the first prong analysis will continue to receive only intermediate scrutiny.²³⁵ Conversely, noncommercial speech clearly is entitled to full First Amendment protection.²³⁶ The *Discovery Network* Court held that high value commercial speech could not be selectively suppressed in favor of noncommercial speech when the government failed to establish a neutral justification for such suppression.²³⁷ The Court's statement arguably creates a presumption of invalidity for any regulation that distinguishes between commercial and noncommercial speech without asserting a neutral justification. When a case arises in which the government successfully establishes a neutral justification for selective suppression, the Court finally may be compelled to demonstrate specifically how high value commercial speech will be protected.²³⁸ Altering the application of the *Central Hudson* standard, however, is a necessary prerequisite to providing greater protection for truthful, noncoercive commercial speech.

233. See *Discovery Network*, 113 S. Ct. at 1517-18 (Blackmun, J., concurring). Most post-*Central Hudson* opinions have focused on the proper application of the third and fourth prongs of the test—those standards addressing the relationship between regulation and the asserted interests. See *supra* note 232. This often results from the parties' failure to assert that the speech is false or misleading. See *supra* note 232 and accompanying text. Presumably, even if the speech were false or misleading, the Court may not notice such a fact, because it most likely will not be at issue. See Kozinski & Banner, *supra* note 1, at 630-31 (arguing that *Central Hudson* is an unpredictable standard); Rownd, *supra* note 150, at 284-85 (citing James M. Curtis, *Advertising Regulated Products*, 2 ANN. SURV. AM. L. 621, 636-37 (1985)).

234. The first prong evaluates the speech to determine if it is misleading, coercive, or proposes and illegal activity. *Central Hudson*, 447 U.S. at 564; see *supra* text accompanying note 91.

235. *Discovery Network*, 113 S. Ct. at 1519 (Blackmun, J., concurring). Justice Blackmun distinguished the standard of strict scrutiny, which requires a government regulation to be narrowly tailored to advance a compelling interest. *Id.*

236. *Riley v. National Fed'n of Blind, Inc.*, 487 U.S. 781, 796 (1988); see *supra* note 144 (discussing the difference between commercial and noncommercial speech in the context of the *Riley* decision).

237. *Discovery Network*, 113 S. Ct. at 1516.

238. See *id.* at 1510 n.11 (stating that Cincinnati did not successfully assert a neutral justification). Such a case also will test the theory that the Court, through its decision in *Discovery Network*, has created a presumption of invalidity for any regulation that distinguishes between commercial and noncommercial speech without establishing a neutral basis as justification.

B. Addressing Definitional Difficulties

Discovery Network also illustrates the Court's continuing struggle to delineate boundaries for the classification of commercial speech.²³⁹ The *Discovery Network* Court, however, did reject the notion that the three-pronged test used in *Bolger* should be utilized as a definitional standard.²⁴⁰ Nevertheless, the reaffirmance that speech that "does 'no more than propose a commercial transaction'" will define commercial speech,²⁴¹ and the Court's apparent acquiescence in the futility of attempting to classify commercial speech into rigid categories²⁴² indicates a willingness to continue to assess definitional problems on a case-by-case basis.²⁴³

The Court's failure to articulate a clearer means of classifying commercial speech will yield future decisions in which the application of the commercial speech doctrine may be unclear. As Justice Stevens noted, a unitary communicative message rarely does *no more than* propose a commercial transaction.²⁴⁴ Yet, to date, most cases have not significantly

239. *Id.* at 1511-13. For a general discussion of various potential definitions of commercial speech, see generally Merrill, *supra* note 30.

240. *Discovery Network*, 113 S. Ct. at 1513. The three-pronged test used in *Bolger* consisted of determining whether the speech: (1) was an advertisement; (2) referred to a specific product; and (3) was made by a seller with an economic motivation. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983). In addition to rejecting the *Bolger* analysis, the *Discovery Network* Court reaffirmed the *Fox* Court's statement that speech which "does 'no more than propose a commercial transaction'" is the standard for identifying commercial speech. *Discovery Network*, 113 S. Ct. at 1513 (quoting *Bolger*, 463 U.S. at 66).

241. *Discovery Network*, 113 S. Ct. at 1513.

242. The Court ultimately assumed that all speech at issue was "'core' commercial speech." *Id.* at 1514; see *supra* text accompanying note 176.

243. The Court's discussion, and somewhat arbitrary conclusion concerning the nature of the speech at issue, clearly denotes an unwillingness to expend effort to construct a complex definition of commercial speech. See *Discovery Network*, 113 S. Ct. at 1511-14. Some commentators have suggested that the Court intentionally has avoided the task of clearly defining commercial speech because commercial advertising is not the only component of the category. Kozinski & Banner, *supra* note 1, at 639-41 (explaining how commercial advertising can be excluded from the current definition of commercial speech); Daniel H. Lowenstein, "Too Much Puff": *Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1225-37 (1988) (suggesting that the commercial speech definition includes more than just commercial advertising); Schauer, *supra* note 52, at 1183-85 (asserting that the current definition of commercial speech is broader than commonly believed); McGowan, *supra* note 54, at 397-98 (discussing the ambiguity inherent in the current definition of commercial speech). See generally Todd F. Simon, *Defining Commercial Speech: A Focus on Process Rather Than Content*, 20 NEW ENG. L. REV. 215 (1984).

244. See *Discovery Network*, 113 S. Ct. at 1511 (discussing the difficulty of classifying a message as wholly commercial); see also *Board of Trustees v. Fox*, 492 U.S. 469, 474-75 (1989) (analyzing the level of protection afforded to a message that includes elements of commercial speech and public debate).

challenged the Court to determine whether a message constitutes commercial speech.²⁴⁵ Inevitably, cases will arise where the Court's definition may be difficult, if not impossible, to apply.²⁴⁶ The increased potential for misclassification may result in the unintentional suppression of speech that otherwise would be entitled to full First Amendment protection.²⁴⁷ While the Court clearly will not construct a complex definition of commercial speech,²⁴⁸ the potential for misclassification may be reduced by a focus on the overall function of a particular message.²⁴⁹

C. Clarifying the Application of the Reasonable Fit Standard

Discovery Network represents the first clear illustration of the proper application of the reasonable fit standard developed in *Fox*.²⁵⁰ More importantly, the Court demonstrated that it will reject any regulation premised solely on the low value of commercial speech, when that regulation bears no relationship to the asserted governmental interests.²⁵¹ In concluding that the City of Cincinnati failed to carefully calculate the costs of

245. Since the initial grant of First Amendment protection to commercial speech in *Virginia State Board of Pharmacy*, only in *Bolger* did the Court devote significant time to justifying its classification of the expressions at issue as commercial speech. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983); see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Interestingly, in *Bolger*, the Court altered its definition of commercial speech to encompass all of the advertisements at issue. *Bolger*, 463 U.S. at 66-67. Furthermore, in *Fox*, Justice Scalia, relying on *Bolger*, asserted that speech "can 'constitute commercial speech notwithstanding the fact that [it] contain[s] discussions of important public issues.'" *Fox*, 492 U.S. at 475 (quoting *Bolger*, 463 U.S. at 67-68).

246. The Court most likely will encounter the definitional difficulty in cases similar to *Bolger*, where numerous types of advertisements or expressions are at issue. See *Bolger*, 463 U.S. at 62.

247. Justice Stevens acknowledged the possibility of misclassification in arguing against a broad definition of commercial speech in *Central Hudson*. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557, 579 (Stevens, J., concurring); see also *Discovery Network*, 113 S. Ct. at 1513 (citing *Bolger*, 463 U.S. at 66-67); McGowan, *supra* note 54, at 382 (arguing that no principled distinction exists between commercial and noncommercial speech).

248. If *Discovery Network* represents a trend toward sub-classifying different types of commercial speech and affording each category a relative level of protection, the Court undoubtedly will create a more complex definition of the classification.

249. Justice Scalia espoused this view in *Fox*, 492 U.S. at 474. At least one commentator has suggested a definition of commercial speech based on a profit motive. McGowan, *supra* note 54, at 390.

250. See *supra* notes 145-52 and accompanying text (discussing the *Fox* Court's analysis of the fourth prong of the *Central Hudson* standard).

251. *Discovery Network*, 113 S. Ct. at 1516. In cases where the government fails to establish a relationship between the regulation of commercial speech and the asserted governmental interests, the Court will presume the regulation to be invalid. *Id.* The method by which the Court will determine whether the government has established a relationship, however, remains unresolved.

its regulation, the Court indicated that it will measure the degree to which the regulation advances the asserted interests.²⁵² Thus, not every rational basis asserted will be sufficient,²⁵³ and the government bears the burden of establishing the relationship.²⁵⁴

While the Court successfully distinguished the reasonable fit standard from rational basis review, its attempt to distinguish the reasonable fit standard from a least restrictive means analysis was less successful.²⁵⁵ The necessary degree of correlation between the regulation and the interest required to satisfy the reasonable fit standard remains unclear.²⁵⁶ In *Discovery Network*, no relationship existed between the City's regulation and its interests.²⁵⁷ Consequently, the Court will be forced to re-evaluate this standard as soon as a case presents *any* relationship between the regulation and the asserted interests.²⁵⁸ Until it does so, analyses of such relationships will result in inconsistent evaluations of the degree to which the relationship between a regulation and the asserted interests must rise.²⁵⁹

The concurring and dissenting opinions in *Discovery Network* offer two alternate means of avoiding the problem of potentially inconsistent First Amendment protection of commercial speech. The concurrence argues that truthful, noncoercive commercial speech that proposes a lawful activity should receive full First Amendment protection.²⁶⁰ The dissent argues that a single level of low value commercial speech should be retained, thereby requiring intermediate scrutiny for all commercial

252. *Id.* at 1510 & n.13.

253. *Id.* at 1510 n.13.

254. *Id.* at 1510 n.12.

255. *See id.* at 1510 n.13. While the Court explicitly stated that the reasonable fit standard does not require the "absolutely . . . least severe [regulation] that will achieve the desired end," it is not clear exactly where the line will be drawn. *Id.* (quoting *Fox*, 492 U.S. at 480).

256. *See id.* If the City were to show some relationship between the regulation and its interests, however, it is unclear how the Court would decide the issue. In fact, the *Discovery Network* Court only stated that the City's failure to show *any* relationship between the City's commercial speech regulation and its interests in safety and aesthetics allowed the Court to invalidate the regulation with "no difficulty." *Id.* at 1516.

257. *Id.*

258. Justice Stevens acknowledged that the Court's holding is narrow. *Id.*

259. The *Discovery Network* decision provides little, if any, notice to third parties regarding the constitutional requirements for the degree of correlation between a commercial speech regulation and its asserted interests. In this sense, *Discovery Network* has failed. As Justice Blackmun noted in his concurrence, under the Court's previous statements, Cincinnati was justified in suppressing commercial handbills in favor of noncommercial speech. *Id.* at 1520 (Blackmun, J., concurring).

260. *Id.* at 1518 (Blackmun, J., concurring); *see supra* notes 198-208 and accompanying text.

speech regulations.²⁶¹ The Court should adopt Justice Blackmun's proposal for altering the analytic standard²⁶² and should afford truthful, non-coercive commercial speech proposing a lawful activity full First Amendment protection. A majority of the Court recognizes the important role that commercial speech assumes in the daily lives of consumers and has rejected the low value rationale advanced by the dissent.²⁶³

Based on the majority's reasoning that truthful, noncoercive speech does not have low First Amendment value, future decisions may modify commercial speech protection.²⁶⁴ Any revision of the analytic standard for reviewing regulations of truthful, noncoercive commercial speech, however, must include a fact-specific evaluation of the relationship between a selective regulation of commercial speech and the asserted governmental interests. That evaluation should focus primarily on the informational or functional value of the speech to consumers and to society in general. Because the Court now has begun to measure the relationship between the regulation and the interests served, its next challenge will be to clarify the method of ensuring adequate protection to high value commercial speech.

IV. CONCLUSION

As the commercial speech doctrine has developed, the Supreme Court has struggled to define the classification and to determine the degree of protection that commercial speech should be afforded. *City of Cincinnati v. Discovery Network, Inc.* is instrumental to the future development of this doctrine. For the first time, the Court has rejected the notion that all commercial speech has low value, and that such speech can be suppressed unjustifiably to benefit noncommercial speech. In illustrating its willingness to evaluate the correlation between the regulation and the stated governmental interests under the reasonable fit standard, the Court has heightened the government's burden of justification. While expanding First Amendment protection, the full impact of *City of Cincinnati v. Discovery Network, Inc.* will be realized only through judicial confrontation of differing factual scenarios.

Edward J. McAndrew

261. *Discovery Network*, 113 S. Ct. at 1521-22 (Rehnquist, C.J., dissenting); see *supra* notes 209-18 and accompanying text.

262. *Discovery Network*, 113 S. Ct. at 1517-21 (Blackmun, J., concurring); see *supra* notes 201-205 and accompanying text.

263. See *Discovery Network*, 113 S. Ct. at 1521-25 (Rehnquist, C.J., dissenting).

264. See *supra* notes 236-37, 249-58 and accompanying text.

