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CITY OF CINCINNATI V. DISCOVERY NETWORK, INC.: TOWARDS HEIGHTENED SCRUTINY FOR TRUTHFUL COMMERCIAL SPEECH?

I. INTRODUCTION

Only recently[1] has the Supreme Court given First Amendment[2] protection to commercial speech.[3] Initially, the Court refused to extend constitutional protection to commercial utterances. In *Valentine v. Chrestensen*,[4] the Court, without citing any precedent, held that "we are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."[5] However, soon after the *Chrestensen* decision, in the wake of post-war economic develop-

1. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

2. U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The Fourteenth Amendment's Due Process Clause makes this prohibition applicable to the states. *See e.g.*, Bigelow v. Virginia, 421 U.S. 809, 811 (1975); Fiske v. Kansas, 274 U.S. 380, 385 (1927).

3. Commercial speech has been given two definitions by the Court. It has been defined as "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980). However, in Board of Trustees v. Fox, 492 U.S. 469 (1989), the Court stated that the "test for identifying commercial speech" is speech that "proposes a commercial transaction." *Id.* at 473-44. This definition is more narrow than the *Central Hudson* definition, and, in City of Cincinnati v. Discovery Network, 113 S. Ct. 1505, 1513 (1993), the Court embraces the more narrow definition. *See infra* note 129 and accompanying text.

These definitions have been the subject of intense criticism. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-15, at 896 (2d ed. 1988) (stating that the distinction between commercial speech and noncommercial speech "has not provided reliable guidance for resolution of individual cases"); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 648 (1990) (stating that "we have a distinction then, with no basis in the Constitution, with no justification in the real world, and that must often be arbitrarily applied in any but the easiest cases"); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1216 (1983) (stating that the Court's "doctrinal treatment of commercial speech has been inadequate").

4. 316 U.S. 52 (1942).

5. *Id.* at 54.

ment, the Court began to express doubt about its validity.[6] This doubt eventually culminated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[7]

Following the *Virginia Board* decision, the Court's commercial speech doctrine developed on a case-by-case basis, and as a result, the Court has failed to develop a coherent commercial speech doctrine.[8] Even the commercial-noncommercial distinction has been the subject of harsh criticism, prompting one commentator to state that "we have a distinction, then, with no basis in the Constitution, with no justification in the real world, and that must often be applied arbitrarily in any but the easiest cases."[9] The Court has likewise been criticized for applying the First Amendment only sporadically in commercial speech cases.[10]

Over the course of two decades, the Burger-Rehnquist Courts have attempted to clarify the Court's commercial speech jurisprudence.[11] Not surprisingly, the conservative majorities of the Rehnquist Court appeared to formulate a jurisprudence based on a deferential posture, giving the States a large degree of latitude in which to enact measures regulating commercial speech.[12] Many scholars and commentators concluded that the Court's commercial speech jurisprudence amounted to a rubber stamp for state legislatures wishing to enact commercial speech prohibitions.[13]

However, the Court recently had an opportunity to review its commercial speech doctrine in *City of Cincinnati v. Discovery*

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6. Cammaran v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring) (stating that the *Chrestensen* decision was "causal, almost offhand" and that "it has not survived reflection").

7. 425 U.S. 748 (1976).

8. *See e.g.*, Shiffrin, *supra* note 3, at 1217-23.

9. Kozinski & Banner, *supra* note 3, at 628.

10. *Id.*; Mary B. Nutt, *Trends in First Amendment Protection of Commercial Speech*, 41 VAND. L. REV. 173, 180 (1988).

11. *E.g.*, Board of Trustees v. Fox, 492 U.S. 469, 480 (1989); Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

12. *See* Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 346-47 (1986); *infra* note 55 and accompanying text.

13. *See, e.g.*, Albert P. Mauro, *Commercial Speech after* Posadas *and* Fox: *A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931, 1952-54 (1992).

Network,[14] In *Discovery Network*, the Court surprisingly evaluated its previous commercial speech analysis and reformulated the level of scrutiny given to restrictions on commercial speech.[15] The Court demonstrated that legislative deference is no longer paramount[16] and hinted that truthful commercial speech may be entitled to increased First Amendment protection.[17]

This Casenote explores the novel approach taken by the majority in *Discovery Network* and the effect that this approach may have on the continuing development of the commercial speech doctrine. Part II of this Casenote explains the development of the Burger and Rehnquist Courts' modern commercial speech doctrine. Part III discusses, analyzes, and evaluates the *Discovery Network* opinion and illustrates the direction the Court may take in future commercial speech cases. Part IV recommends a reformulation of the commercial speech doctrine.

II. THE SUPREME COURT'S MODERN COMMERCIAL SPEECH ANALYSIS

A. Virginia State Board of Pharmacy v. Virginia Consumer Council[18]

In *Virginia Board* the Court had to determine if commercial speech "is wholly outside the protection of the First Amendment."[19] The Court focused on the Code of Virginia section 54-524.35, which prohibits any licensed pharmacist from publishing, advertising, or promoting the price of prescription drugs.[20] The issue squarely before the Court was whether the statement

14. 113 S. Ct. 1505 (1993).
15. *Id.* at 1510 n.11.
16. *Id.* at 1510 n.13 (stating that the Court has "rejected the rational basis review" for restrictions on commercial speech).
17. *Id.* at 1510 n.11.
18. 425 U.S. 748 (1976).
19. *Id.* at 761.
20. This section of the Virginia Code, in pertinent part, states that "[a]ny pharmacist shall be considered guilty of unprofessional conduct who . . . publishes, advertises or promotes, directly or indirectly, in any matter what so ever, any amount, price, fee, premium, discount, rebate, or credit terms . . . for any drugs which may be dispensed only by prescription." 425 U.S. at 750 n.2 (quoting VA. CODE ANN. § 54-524.35 (1974)).

"I will sell you the X prescription drug at the Y price" was within the ambit of the First Amendment.[21]

Justice Blackmun, writing for the majority, stated that contrary to some of the Court's previous decisions,[22] commercial expression was entitled to constitutional protection, and therefore, the Virginia regulation was invalid.[23] The majority advanced three rationales for its decision.[24] First, commercial speech is entitled to protection because the consumer and society in general have a keen interest in the free flow of commercial information. Second, the free flow of commercial expression is essential for the public to make intelligent private economic decisions.[25] Thus, "even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal."[26] Lastly, a state may not advance any state interest by not disclosing facts pertaining to a lawful activity.[27] Finding commercial speech entitled to First Amendment protection, the majority rejected the use of a balancing test in commercial speech cases, since the First Amendment, and not the legislature, should balance the individual and state interests involved.[28]

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21. *Virginia Board*, 425 U.S. at 761.

22. *E.g.*, Valentine v. Chrestensen, 316 U.S. 52 (1942).

23. *Virginia Board*, 125 U.S. at 762. "Our question is whether speech which does no more than propose a commercial transaction is so removed from any exposition of ideas . . . that it lacks all protection. Our answer is that it does not." *Id.* (citations omitted).

24. *See* TRIBE, *supra* note 3, at 894. Professor Tribe states that the *Virginia Board* decision rested on three notions. First, the state may not regulate speech on the premise that it is necessary to keep the population ignorant of facts pertaining to a legal activity. Second, values of free speech extend to commercial, as well as political, speech. Lastly, commercial speech is important because it is an instrument that may be used to enlighten public decisionmaking in a free enterprise system. *But see* Thomas Jackson & John Jefferies, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 5 (1979) (arguing that the *Virginia Board* decision was wrongly decided because commercial speech is not as valuable as political speech).

25. *Virginia Board*, 425 U.S. at 765.

26. *Id.*

27. *Id.* at 770. *See* TRIBE, *supra* note 3, at 893-94; Shiffrin, *supra* note 3, at 1217-21. *But see infra* note 55.

28. *Virginia Board*, 425 U.S. at 770.

Justice Rehnquist dissented and advanced two reasons why *Virginia Board* was wrongly decided. First, Rehnquist found commercial speech undeserving of First Amendment protection because, contrary to the majority's assertions, commercial speech does not "enlighten public decisionmaking in a democracy."[29] Rather, the First Amendment only protects information that is essential to "public decisionmaking as to political, social, and other public issues, rather than a decision of a particular individual as to whether to purchase one or another kind of shampoo."[30] Rehnquist further asserted that the legislature, not the courts, should balance the interests of the state and the individual, and therefore, courts should defer to the legislature's determination.[31]

Virginia Board is perhaps more infamous for what it does not say. As previously stated, the Court refused to employ a balancing test when examining commercial speech issues,[32] but it did not state what level of scrutiny it would employ. Justice Blackmun later explained that *Virginia Board* allows commercial speech to receive less than full First Amendment protection only when the government's measure is directed at the content of the speech as misleading or coercive, or when the government is regulating the time, place, and manner of commercial speech.[33] In all other applications, commercial speech "should be subject to the same scrutiny we apply to a regulation bur-

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29. *Id.* at 787. For support of Justice Rehnquist's view, see Lilian Bevier, *The First Amendment and Political Speech: An Inquiry into the Limits of Principle*, 30 STAN. L. REV. 299 (1978); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Jackson & Jefferies, *supra* note 24 at 5-6. *Contra* Kozinski & Banner, *supra* note 3, at 652; Shiffrin, *supra* note 3, at 1256.

30. 425 U.S. at 787.

31. *Id.* at 788-89. Rehnquist illustrates this deferential approach in Posadas de Puerto Rico v. Tourism Co., 478 U.S. 328 (1986). See *infra* note 55 and accompanying text.

32. *See supra* note 28 and accompanying text.

33. *Discovery Network*, 113 S. Ct. at 1518; Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 572 (1980); *see* TRIBE, *supra* note 3, at 894. The Sixth Circuit adopted Justice Blackmun's view of the Court's commercial speech jurisprudence. *See* Discovery Network v. City of Cincinnati, 946 F.2d. 464 (6th Cir. 1991).

dening noncommercial speech."[34] Strict scrutiny[35] would thus apply to these other applications.

B. Central Hudson Gas & Electric Corp. v. New York Public Service Commission[36]

Central Hudson was prohibited by a regulation promulgated by the New York Public Service Commission from dispensing all promotional advertising that had the effect of increasing the demand for electricity. While advertisements promoting the use of electricity were prohibited, the Commission permitted advertising which encouraged energy conservation. In addressing whether a complete ban on commercial speech was constitutionally permissible, Justice Powell, writing for the majority, attempted to clarify the level of scrutiny to be used for commercial speech regulations.

The majority employed an intermediate level of scrutiny,[37] which culminated in a four-prong test. First, the Court determined that commercial speech must be truthful, noncoercive, and related to a lawful activity to receive First Amendment protection.[38] If the regulation satisfies this threshold inquiry,[39] then the government has the burden of proving [2] a sub-

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34. *Discovery Network*, 113 S. Ct. at 1518.

35. Under the strict scrutiny standard, a regulation will only be upheld if the government interest is "compelling," and its interest is "substantially advanced" by a "narrowly tailored" regulation. This regulation must be the least burdensome means required to advance the government's objectives. Compare this to the intermediate scrutiny standard, which requires the government to have a "substantial" interest that is advanced by a regulation with a "reasonable" means-ends fit. The regulation does not have to be the least burdensome alternative, and will survive so long as it is not substantially excessive. *Compare* Buckley v. Valeo, 424 U.S. 1, 44-45 (1976) (illustrating the strict scrutiny standard) *with* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (applying the intermediate scrutiny test).

36. 497 U.S. 557 (1980).

37. *See supra* note 35.

38. *But see* Posadas de Puerto Rico v. Tourism Co., 478 U.S. 328, 346-47 (1986) (ruling that the legislature could engage in a partial prohibition of the advertising of a lawful activity, so long as the legislature could have completely banned the activity).

39. Commercial speech that is untruthful, deceptive, coercive, or relates to an illegal activity is unprotected per se. *E.g.* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980); Ohralik v. State Bar Ass'n, 436 U.S. 447, 457 (1978); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973).

stantial government interest [3] that is directly advanced [4] by a regulation that is not more extensive than necessary to accomplish this interest.[40] In applying this test to the Commission's regulation, the Court found that, although the first three prongs were satisfied, the regulation was more extensive than necessary, since the Commission could have employed less burdensome alternatives to advance its substantial interest in energy conservation.[41] The city failed to demostrate that a "more limited speech regulation would be ineffective."[42]

Justice Blackmun concurred in the judgment only, arguing that *Central Hudson's* intermediate scrutiny standard was inconsistent with *Virginia Board*.[43] Blackmun maintained that intermediate scrutiny is appropriate only when the government is regulating the content of commercial speech, or the time, place, and manner of such speech.[44] However, if the state seeks to "suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly,"[45] then the regulation is valid only if the state satisfies strict scrutiny.[46]

Justice Rehnquist was the sole dissenter in *Central Hudson*. Rehnquist abandoned his *Virginia Board* approach, placing commercial speech outside the scope of First Amendment

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40. *Central Hudson*, 447 U.S. at 566. The Court states:

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

Id.

41. *Id.* at 570.

42. *Id.* at 571.

43. *Id.* at 573. *See* Edenfield v. Fane, 113 S. Ct. 1792, 1804 (1993) (Blackmun, J., concurring).

44. *Central Hudson*, 447 U.S. at 573. *See supra* note 33.

45. *Central Hudson*, 447 U.S. at 573.

46. Blackmun states that "the test now evolved and applied by the Court . . . does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech." *Id.*

protection.[47] Instead, he stated that, although commercial speech should enjoy some level of First Amendment protection, it was not entitled to full constitutional protection.[48] Rehnquist argued that the Court should have deferred to the legislature's choice of speech regulation as long as the regulation was reasonable.[49] The *Central Hudson* test, Rehnquist asserted, "will unduly impair a state legislature's ability to adopt legislation reasonably designed to promote interests that have already been rightly thought to be of great importance to the state."[50] In sum, Justice Rehnquist would subject commercial speech regulations to a rational basis test.[51]

C. Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico[52]

In *Posadas*, the Court upheld a Puerto Rican statute prohibiting the advertisement of casino gambling to Puerto Rican residents, but permitting such advertisement to non-residents. Justice Rehnquist, writing for the majority, purported to apply the intermediate standard of *Central Hudson*,[53] but, in fact,

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47. *Id.* at 584.

48. *Id.* at 591.

> The test adopted by the Court today thus elevates the protection offered commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech. I think the Court in so doing has effectively accomplished the devitalization of the First Amendment . . .

Id.

49. *Id.* at 584-85. Rehnquist viewed the regulation, not as a restraint on free speech, but as an economic regulation of business conduct. He stated that the majority returned "to the bygone era of *Lochner v. New York*, in which it was common practice for the Court to strike down economic regulations . . . based on the Court's own notions of the most appropriate means for the state to implement its considered policies." *Id.* at 589 (citations omitted). In making this observation, Justice Rehnquist ignored that an economic regulation may, in fact, burden protected speech.

50. *Id.* at 585.

51. The rational basis test allows a regulation to be upheld so long as the government has a rational basis for its belief that the regulation furthers an important government interest. *E.g.*, Paris Adult Theàtre I v. Slaton, 413 U.S. 49 (1973). The government will satisfy its "burden" under this test if the regulation *could* further the important interest. *E.g.*, Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955). Compare this deferential test to the Court's strict and intermediate standards of scrutiny. *See supra* note 35.

52. 478 U.S. 328 (1986).

53. *Id.* at 340.

diluted the intermediate standard and applied a rational basis test.[54] By applying the rational basis test it rejected in *Central Hudson*, the majority deferred to the legislature's judgment and, without requiring the State to produce evidence, simply accepted that the partial ban on advertising was not more extensive than necessary to advance the state's interest in protecting the welfare of its citizens.[55] In essence, the majority stated that the legislature, not the Court, would determine whether the fourth prong of the *Central Hudson* test was satisfied.

The majority clearly misapplied the *Central Hudson* standard. Justice Blackmun, in his dissent, joined by Brennan and Marshall,[56] recognized this misapplication,[57] and stated that the fourth prong of *Central Hudson* unequivocally requires that "the government . . . *prove* that more limited means are not sufficient to protect its interests, and [it is] for a *court* to decide whether or not the government has sustained this burden."[58]

Posadas also advanced an alternate rationale. Justice Rehnquist, in dicta, concluded the opinion by stating that "it is precisely *because* the government could have enacted a

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54. *Id.* at 344.

55. *Id.*

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

Id. (emphasis added).

This is clearly an application of the rational basis test. See *Lee Optical*, 348 U.S. at 487-88, in which the Court ruled that the rational basis test is satisfied when the legislature *"might have* concluded" that the regulation advanced the government's interest. *Id.* (emphasis added).

56. Justices Brennan, Marshall, and Blackmun joined in a dissenting opinion. Justice Stevens filed a separate dissent.

57. The *Posadas* decision has been the subject of a great deal of criticism. *See*, Mauro, *supra* note 13, at 1947 (stating that the *Posadas* majority sidesteps the Court's commercial speech jurisprudence); Ronald D. Rotunda, *The Constitutional Future of the Bill of Rights: A Closer Look at Commercial Speech and State Aid to Religiously Affiliated Schools*, 65 N.C. L. REV. 917, 928 (1987) (stating that *Posadas* seems to be the result of "unprincipled decisionmaking"); TRIBE, *supra* note 3, at 902 (calling Rehnquist's opinion "disturbing").

58. *Posadas*, 478 U.S. at 357.

wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct . . . ."[59] Therefore, so long as the government can constitutionally ban the greater (gambling), it can certainly ban the lesser (advertising relating to gambling). This has become known as the "greater-includes-the-lesser" argument.[60]

Justice Stevens' dissent strenuously objected to this reasoning, concluding that it seriously conflicted with the Court's commercial speech jurisprudence.[61] As Justice Brennan pointed out, the "greater-includes-the-lesser" argument allows "the government to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity."[62] Additionally, this reasoning allows the legislature to approve speaker-specific bans without independent review by the courts. This speaker-based ban relies on the premise that a state may suppress information about a lawful subject, so long as it believes that the information is harmful to the public.[63] *Virginia Board* specifically and unambiguously rejected both of these premises. Likewise, only two years after *Posadas*, in *Lakewood v. Plain Dealer Publishing*,[64] the majority explicitly rejected Rehnquist's assertion that the "greater-includes-the-lesser" argument is an appropriate rational for prohibiting protected speech. Consequently, this dicta has had little effect upon the Court's commercial speech jurisprudence.

59. *Id.* at 346.

60. *See* TRIBE, *supra* note 3, at 903.

61. *Posadas*, 478 U.S. at 363 (Stevens, J., dissenting).

62. *Id.* at 350 (Brennan, J., dissenting).

63. *See* TRIBE, *supra* note 3, at 904 n.88. Justice Stevens states that "[w]ith respect to the audience, the newly constructed regulation plainly discriminate[s] in terms of the intended listener," and that this discrimination is an "obvious First Amendment problem." *Posadas*, 478 U.S. at 360 (Stevens, J., dissenting).

64. 486 U.S. 750, 762-69 (1988). The majority in *Lakewood* stated that "in a host of other First Amendment cases we have expressly or implicitly rejected" the "lesser-includes-the-greater" argument. *Id.* at 766. The Court also states that the "'greater-includes-the-lesser' syllogism . . . is blind to the radically different constitutional harms inherent in the 'greater' and 'lesser' restriction." *Id.* at 762-63 (footnote omitted).

D. Board of Trustees v. Fox[65]

In *Fox*, the State University of New York (SUNY) promulgated a regulation that prohibited commercial enterprises from operating on SUNY campuses. A representative for a housewares company was denied access to a campus dormitory when he attempted to sell products to students in their dormitory rooms. Writing for the majority, Justice Scalia asserted that it was necessary for the Court to clarify the fourth prong of the *Central Hudson* test.[66] The Court characterized the least restrictive means approach used in *Central Hudson* as dicta,[67] and stated that the fourth prong of the test is satisfied if there is a "reasonable fit" between the regulation and the substantial government interest.[68] Thus, as long as the cost of regulation is "carefully calculated" by the legislature, is not excessive, and the government interest is substantial, the fourth prong of *Central Hudson* is satisfied.[69] *Fox* unequivocally eliminated the least burdensome alternatives test from the Court's commercial speech analysis in favor of a "reasonable fit" requirement.

Although the majority asserts that its "not more extensive than necessary" inquiry is "far different, of course, from the 'rational basis' test,"[70] the Court's application of its inquiry clearly illustrates that the "reasonable fit" requirement is little more than the traditional rational basis test.[71] The regulation will be upheld so long as the cost of the regulation is not "inordinate" in comparison to its benefits.[72] In practice, a regulation

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65. 492 U.S. 469 (1989).
66. *Id.* at 476-77.
67. *Id.* at 477.
68. *Id.* at 480.
69. *Id.*
70. *Id.*
71. The Court's formulation appears to offer more protection than the rational basis test because it requires that a substantial interest be directly advanced by a regulation that is not excessively burdensome. However, in reality, the Court only gives this speech slightly more protection than the traditional test, because the Court defers to the state's finding that its regulation is not excessively burdensome. *Id.* Compare the application of the Court's *Fox* test to Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955), and Paris Adult Theatre I v. Slayton, 413 U.S. 49, 57-62 (1973), where the Court, in employing the rational basis test, takes substantially the same approach.
72. *Fox*, 492 U.S. at 480.

will have to be excessively burdensome to be invalidated. The majority asserts that it is "loathe to second-guess the government's judgment"[73] and that it is the role of the state "to judge what manner of regulation may best be employed."[74] *Fox* clearly embedded the *Posadas* rational basis approach into the *Central Hudson* analysis, and continued to afford the legislature a high degree of deference in selecting commercial speech regulations.[75]

Thus, after *Fox*, the test for determining whether truthful, nonmisleading commercial speech is protected was the *Central Hudson* test, as refined by *Fox* and *Posadas*. This is the framework under which *Discovery Network* was analyzed.

III. DISCOVERY NETWORK: REFORMULATION OF THE COMMERCIAL SPEECH ANALYSIS?

A. *Facts and Procedural History*

Discovery Network Incorporated advertises various educational, recreational, and social activities in a free magazine that it publishes nine times a year. Approximately one-third of these magazines were distributed to the public in news racks that the City of Cincinnati authorized Discovery to place on the sidewalks in 1989.[76] In March of 1990, the city notified Discovery that the permit to use the news racks would be revoked in thirty days. The city asserted that the magazines published by Discovery were considered commercial handbills,[77] and were

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73. *Id.* at 478.

74. *Id.* at 480.

75. This test offers slightly more protection than the rational basis test, as the government interest must be "substantial" and the regulation must directly advance this interest. *See id.*

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

77. The city defines commercial handbills as

> any printed or written matter, dodger, circular, leaflet, pamphlet, paper, booklet or any other printed or otherwise reproduced original 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

thus violative of section 714-23 of the Cincinnati Municipal Code.[78] This code section prohibited the distribution of all commercial handbills on public property, but permitted the distribution of newspapers[79] in similar dispensing devices. This regulation had the effect of removing sixty-two of the city's 1500-2000 news racks.[80]

After receiving notice of the permit revocation, Discovery was granted an administrative hearing and review by the Sidewalk Appeals Committee. However, the Committee refused to reissue the permit. Discovery proceeded to file a complaint in the United States District Court for the Southern District of Ohio, alleging that section 714-23 was unconstitutional because it violated the First Amendment. The district court concluded that the regulatory scheme advanced by the city, which prohibited the distribution of all commercial handbills on the public right of way, did violate the First Amendment.[81]

The district court found, as a matter of law, that the handbills were "commercial speech" entitled to First Amendment protection,[82] and determined that the city "may regulate publication dispensing devices pursuant to its substantial interest in promoting safety and aesthetics."[83] The court then applied the fourth prong of the *Central Hudson* test, as refined by *Fox*, and

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> (c) Which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which admission fee is charged for the purpose of private gain or profit.

Discovery Network, 113 S. Ct. at 1508 n.2 (citing Cincinnati Municipal Code § 714-1-C (1992)).

78. This section provides, in pertinent part, that

> No person shall . . . 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 public place . . . to hand out or distribute . . . any noncommercial handbill . . .

Id. at n.3 (citing Cincinnati Municipal Code § 714-23 (1992)).

79. Although the Supreme Court recognized the difficulty of defining the distinction between a "handbill" and a "newspaper," and suggested that the city had not adequately distinguished the difference between them, the Court refused to rule on this issue because the parties had stipulated that the banned materials were indeed "handbills," and that these handbills were a form of commercial speech. *Id.* at 1514 n.19.

80. *Id.* at 1510.

81. *Id.* at 1509.

82. *Id.* at 1508.

83. *Id.* at 1509.

determined that there was not a reasonable fit between the regulation and the city's goals of advancing aesthetic and safety concerns.[84] The fit was unreasonable because the number of news racks banned (sixty-two) was "minute" when compared to the total number of new racks remaining (1500-2000) on public property.[85] Thus, the regulation did not substantially advance the city's goals.[86] Additionally, the court noted that the city could have employed alternative means to advance its goals, specifically stating that the city could have regulated the "size, shape, number, or placement of such devices."[87]

The city appealed the decision to the Court of Appeals for the Sixth Circuit, arguing that the Supreme Court's previous decisions foreclosed a complete ban on the dispensing devices,[88] but that the Court's jurisprudence would allow a ban on purely commercial expression. The city asserted that it could regulate commercial speech while leaving noncommercial speech unregulated, because commercial speech has less First Amendment value than other constitutionally guaranteed expression.[89] The court of appeals disagreed and affirmed the district court, holding that commercial speech only receives less than full First Amendment protection when the regulation seeks to regulate the content of the speech (i.e. prohibit false or misleading speech), or to remedy the adverse secondary effects stemming from the speech.[90] Thus, because the city failed to assert either of these two interests, the regulation was invalid. The court agreed with the district court, that under the *Central Hudson* and *Fox* analysis, the city failed to adduce sufficient

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84. *Id.*

85. *Id.*

86. *See id.*

87. *Id.*

88. Newspapers are considered to be a form of political speech, and regulations prohibiting the dissemination of newspapers are subject to a high level of judicial scrutiny. *See* Lakewood v. Plain Dealer Publishing, 486 U.S. 750 (1988).

89. Commercial speech has been viewed as occupying a "subordinate position on the scale of First Amendment values" and is less protected than "other constitutionally guaranteed expression." *Ohralik*, 436 U.S. at 456.

90. Discovery Network v. City of Cincinnati, 946 F.2d 464, 471 (1991). Justice Blackmun takes the same approach to commercial speech regulations. *See* Edenfield v. Fane, 113 S. Ct. 1792, 1804 (1993) (Blackmun, J., concurring); *infra* note 138 and accompanying text.

affirmative evidence to show that the regulation advanced its safety and aesthetic goals.[91]

B. *The Majority Opinion*[92]

In evaluating the validity of the city's regulation banning news racks containing commercial handbills, the Supreme Court recognized that a city could "regulate publication dispensing devices pursuant to its substantial interests in safety and esthetics."[93] The Court, using the *Central Hudson* test as its analytical framework, held that although the city had satisfied the threshold requirement of *Central Hudson,* and had a substantial interest that was directly advanced by the regulation,[94] the city failed to show a reasonable fit between the regulation and the safety and aesthetic goals that the city sought to advance.[95] As stated in *Fox,* the city had the burden of affirmatively establishing a reasonable "fit between the legislative ends and the means chosen to accomplish these ends . . . a fit that is not necessarily perfect, but reasonable."[96] Additionally, the cost of the regulation must be "carefully calculated" to consider the costs and benefits of the regulation restricting commercial speech.[97]

The Court ruled that the city failed to prove a reasonable means-end fit and pointed to three factors which illustrated its absence. First, the fact that the city failed to regulate the size, shape, appearance, or number of news racks demonstrated that the city did not carefully calculate the costs of the regulation.[98] Because there were more effective, and less burdensome, means by which the city could advance its goals, the regulation was substantially excessive. Second, the resulting benefits were

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

92. Justice Stevens delivered the opinion of the Court, in which Justices O'Conner, Scalia, Kennedy, and Souter joined. *Discovery Network,* 113 S. Ct. at 1507.

93. *Id.* at 1509, 1510.

94. Although the majority does not expressly state that the regulation advances the city's safety and aesthetic goals, the Court seems to assume this for the purpose of its analysis. *Id.* at 1509-11.

95. *Id.* at 1510.

96. *Fox,* 492 U.S. at 480 (citation omitted).

97. *Id.*

98. *Discovery Network,* 113 S. Ct. at 1510.

inconsequential as only sixty-two out of a possible 2000 news racks were removed.[99] Therefore, the regulation did not substantially and materially advance the city's substantial interest. Third, and perhaps most important, the city regulation impermissibly distinguished between handbills and newspapers merely because commercial speech was viewed as "lower value" speech.[100] The Court stated that distinguishing speech by its perceived First Amendment value is "an impermissible means of responding to the city's admittedly legitimate interests."[101] Additionally, this low value/high value speech dichotomy bore no relation to the city's interest of safety and aesthetics. The news racks that contained newspapers as opposed to handbills, were still a threat to the city's safety and aesthetic goals, yet they were unregulated. Therefore, the regulation was substantially underinclusive.[102]

The city also argued that the ban on commercial news racks was a reasonable content-neutral restriction on the time, place, and manner of speech.[103] The Court rejected this claim, and held that the ordinance was not a reasonable time, place, or manner restriction because the regulation was *not* content neutral, and, in fact, the "very basis for the regulation [was] the difference in content between ordinary newspapers and commercial speech."[104] The Court found that "[i]t is the absence of a

99. *Id.*

100. *Id.* at 1516.

101. *Id.* at 1514.

102. At an intermediate level of scrutiny, if the Court finds that a regulation is substantially underinclusive, the Court will generally invalidate the regulation. A regulation is underinclusive if the government made classification does not disadvantage something even though it threatens the government's interest. *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (declaring a speech regulation invalid because, *inter alia*, it was substantially underinclusive); Craig v. Boren, 429 U.S. 190 (1976) (striking down a regulation on equal protection grounds because it was substantially underinclusive).

103. The Court has held that a state may impose reasonable restrictions on the place, time, or manner of speech provided that these regulations are made without regard to content. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984). The state may "impose reasonable restrictions on time, place, or manner of protected speech provided that restrictions are justified without reference to content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.'" *Ward*, 491 U.S. at 791 (citation omitted).

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

neutral justification for its selective ban on news racks that prevents the city from defending its news rack policy as content-neutral."[105]

Additionally, the city asserted that its ban on commercial news racks was content-neutral because the purpose of the regulation was not to suppress commercial speech, but rather, to regulate the "secondary effects" of the speech,[106] such as litter and visual blight. The Court rejected this argument because in order for the secondary effects doctrine to apply, there must be disparate secondary effects between the categories of speech that the government seeks to regulate.[107] Because the newspaper dispensing devices and the commercial handbill dispensing devices had the same secondary effects,[108] the city could not use the secondary effects doctrine to justify its regulation as content-neutral.

Although the majority suggests that *Discovery Network* is merely a mechanical application of the test developed in *Central Hudson*, the Court's approach in this case is novel for three reasons. First, the majority suggests that commercial speech is entitled to lesser protection only if the regulation is aimed at the content of commercial speech, or at the adverse effects stemming from its content.[109] The majority then states that if this were true, it would be logical to conclude that commercial speech that is not being regulated for its content or for effects stemming from its content "should be evaluated under the standards applicable to regulations on fully protected speech," *not* according to the lesser standard used for commercial speech.[110]

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105. *Id.* at 1517.

106. For a discussion of secondary effects see Barnes v. Glenn Theatre, 111 S. Ct. 2456, 2468-71 (1991) (Souter, J., concurring); Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). The Court's secondary effects doctrine states that if a ban on speech is justified by the noncommunicative impact of the speech, then the ban will be construed as content neutral.

107. "[T]here are no secondary effects attributable to respondent publishers newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." *Discovery Network*, 113 S. Ct. at 1517.

108. *Inter alia*, litter, visual blight, and safety concerns.

109. *Id.* at 1510 n.11. Speech that is regulated as to its content or the effects arising from its content, is speech that is untruthful, coercive, inherently misleading, or pertains to an illegal activity. *Id.*

110. *Id.* Presumably, this standard that the Court discusses but does not explain, is a strict scrutiny standard. Under this standard, the state must prove that the

This is indeed remarkable as many commentators,[111] lower courts,[112] and Supreme Court members[113] have viewed the Court's commercial speech jurisprudence as offering truthful, noncoercive commercial speech regarding a lawful activity only the intermediate protection of *Central Hudson.* The *Central Hudson* view involves a two-tiered analysis. Commercial expression that is coercive, misleading, or related to an unlawful activity is unprotected per se.[114] Commercial expression that receives First Amendment protection is subjected to intermediate scrutiny.[115] However, *Discovery Network* advocates a three-tiered analysis. Commercial speech that is misleading, coercive, or related to an unlawful activity is unprotected speech, and a government regulation prohibiting this speech need only satisfy the rational basis test. Regulations that are designed to "protect consumers from misleading or coercive speech, or a regulation related to the time, place and manner of commercial speech"[116] are subject to *Central Hudson's* intermediate scrutiny. "[A] regulation that suppresses truthful commercial speech to serve *some other* government purpose" is entitled to strict judicial scrutiny.[117]

The Court, by suggesting that increased judicial scrutiny may be proper for truthful commercial speech, signals a move away from its previous assertions that commercial speech occupies a "subordinate position on the scale of First Amendment values."[118] Under this three-tiered analysis, truthful commercial

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regulation is a narrowly tailored and necessary regulation that substantially advances a compelling interest. *See supra* note 35.

111. *E.g.*, Nutt, *supra* note 10, at 206; Rotunda, *supra* note 57, at 922.

112. See Mauro, *supra* note 13, at 1959-68. Mauro surveyed all commercial speech cases decided by the lower federal courts after 1989, and found that in all cases, the courts have applied the *Central Hudson* intermediate scrutiny test.

113. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n (PSC), 447 U.S. 557, 573 (1980) (Blackmun & Brennan, JJ., concurring); Board of Trustees v. Fox, 492 U.S. 469, 480 (1989).

114. *Central Hudson,* 447 U.S. at 556.

115. *Id.*

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

117. *Id.* at 1518 (emphasis added). In the Court's next commercial speech case after *Discovery Network,* Blackmun reiterated that "commercial speech that is free from fraud, duress or the advocacy of unlawful activity" deserves full First Amendment protection. Edenfield v. Fane, 113 S. Ct. 1792, 1804 (1993) (Blackmun, J., concurring).

118. Ohralik v. Ohio State Bar Ass'n, 463 U.S. 447, 456 (1978).

speech is entitled to the same protection as political speech. Thus, the Court seems to be returning to the rationale of *Virginia Board*, in which truthful commercial speech and political speech were of equal First Amendment value.[119]

An alternate rationale for a possible shift towards heightened scrutiny rests on the theory that the Court should avoid distinctions between types of protected speech.[120] Heightened scrutiny for truthful commercial speech would eliminate the distinction between protected commercial speech and protected noncommercial speech. Generally, the Court has declined to create distinctions among types of protected speech.[121] Justice Brennan observed that "the Court refuses to embrace the notion, completely antithetical to basic First Amendment values, that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five members of this Court."[122]

In *Discovery Network*, the Court held for the first time that a state may not select noncommercial speech over commercial speech merely because it finds commercial speech to be "low value" speech.[123] The Court found that Cincinnati attached too

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119. *See Central Hudson*, 447 U.S. at 578 (Blackmun, J., concurring) (stating "we have not suggested that the 'commonsense distinction' between commercial speech and other speech justif[ies] relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech"); Shiffrin, *supra* note 3, at 1217-21; *cf. Central Hudson*, 447 U.S. 557, 563 n.5 (stating that commercial speech "is of less constitutional moment than other forms of speech"); *Ohralik*, 436 U.S. 447, 456 (stating that commercial speech occupies a subordinate position on the scale of First Amendment values). *Contra* Metromedia v. City of San Diego, 453 U.S. 490, 505 (1991) (plurality opinion) (noting that *Virginia Board* "did not equate commercial speech with noncommercial speech for First Amendment purposes").

120. *See* F.C.C. v. Pacifica Foundations, 438 U.S. 726, 761 (1978) (Powell & Blackmun, JJ., concurring) (stating that the Court may not decide which speech is "most" and "least" valuable for First Amendment purposes); Young v. American Mini Theaters, 427 U.S. 50, 73 n.1 (1976) (Powell, J., concurring) (declining to consider distinctions between types of protected speech); Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas & Black, JJ., dissenting) (arguing that no forms of expressions should be "beyond the pale of the absolute prohibition of the First Amendment"); *cf.* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2564 (1992) (Stevens, J., concurring) (illustrating the difficulties of distinguishing between the types of protected speech).

121. *See supra* note 120.

122. *Pacifica*, 438 U.S. at 762-63 (Brennan & Marshall, JJ., dissenting).

123. *See Discovery Network*, 113 S. Ct. at 1524 (Rehnquist, C.J., dissenting). Justice Rehnquist correctly pointed out that there is no precedent directly supporting the Court's decision. *Id.*

much significance[124] to the Court-made dichotomy between the two categories of speech, and held that a mere assertion that commercial speech is of lower value than noncommercial speech is insufficient to justify regulations making this dichotomy.[125] *Discovery Network* suggests that a locality may not express a preference for one type of speech over another merely because of its perceived First Amendment value, although the Court does not completely foreclose this possibility.[126]

The Court's aforementioned statements indicate that the Court is attaching less significance to the commercial-noncommercial dichotomy. The Court appears loathe to single out commercial speech merely because it has, in the past, been construed as lower value speech. The majority, by stating that the city "seriously underestimates the value of commercial speech,"[127] alluded to the fact that truthful commercial speech has more value than traditionally thought. Additionally, the Court for the first time has recognized the difficulty of categorizing speech as either commercial or noncommercial.[128] This difficulty prompted the Court, in dicta, to state that commercial speech must be narrowly defined, in order that speech deserving full First Amendment protection is not inadvertently suppressed.[129] The majority's de-emphasis of the commercial—noncommercial distinction evidences the Court's concern that its commercial speech doctrine *may*, in practice, have a chilling effect upon protected speech. These concerns further

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124. *Id.* at 1511. "The city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech." *Id.*

125. *Id.* at 1516.

126. *Id.* "[W]e do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify different treatment of commercial and noncommercial newsracks." *Id.*

127. *Id.* at 1511.

128. *Id.* "[T]his very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *Id.*

129. *Id.* at 1513. The majority advocates a narrow definition of commercial speech to "ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Id.* (quoting Bolger v. Youngs Drug Products, 463 U.S. 60, 66 (1983)). *See also* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 578 (1980) (Stevens, J., concurring) (arguing that commercial speech should be narrowly defined). The dissent correctly points out that the majority need not reach this issue, as both parties have stipulated that the speech barred by the regulation was commercial speech. *Discovery Network*, 113 S. Ct. at 1525.

evidence that the Court *may* be moving toward stricter scrutiny for regulations suppressing truthful commercial speech. The Court, by narrowing the definition of commercial speech, demonstrates that it is willing to employ the *Central Hudson* test only in cases where it is obvious that the speech is commercial. This definitional clarification will have the practical effect of subjecting more speech to strict scrutiny. By de-emphasizing the distinction between the types of speech, the Court may be indicating that it will seek to avoid this categorical approach in the future.[130]

The majority increased the level of scrutiny for its "reasonable-fit" requirement. Despite assertions to the contrary, the majority employed the version of the less restrictive means test that was rejected in *Fox*. The majority claimed that the city could have employed other means, such as regulations regarding the "shape, size, appearance and number of all news racks," rather than categorically banning all handbill news racks.[131] The fact that less restrictive means were available to the city to remedy its safety and aesthetic concerns indicates that a reasonable fit was not present. The majority, by stating "so too have we rejected the mere rational basis review,"[132] implies that deference to the legislature is no longer warranted. As the dissent correctly points out, the majority's approach is wholly inconsistent with the *Fox-Posadas* analysis. According to the dissent, the mere fact that less restrictive means by which the city could have addressed its safety and aesthetic concerns were available "does not render its prohibition against respondents' newsracks unconstitutional."[133]

Thus, it appears that the less restrictive means requirement of *Central Hudson*, which the Court viewed as "substantially excessive,"[134] may still be used by the Court, albeit in the guise of the "reasonable fit" test developed in *Fox*. This in-

130. Some commentators have suggested that the Court abandon the commercial-noncommercial distinction. *See, e.g.*, Kozinski & Banner, *supra* note 3, at 652; *Contra* Jackson & Jefferies, *supra* note 24, at 3.

131. *Discovery Network*, 113 S. Ct. at 1510.

132. *Id.* at 1515 n.13.

133. *Id.* at 1523. *Fox* made it clear that the least burdensome alternatives test should no longer be employed in the commercial speech analysis. 492 U.S. at 480. *See supra* note 71 and accompanying text.

134. *Fox*, 492 U.S. at 479.

creased standard that the city must meet apparently is based on the Court's belief that its past review of commercial speech cases afforded too much deference to the legislature. *Discovery Network* requires the city to justify its regulations restricting commercial speech.[135] The Court independently reviewed the legislature's asserted "means-ends fit" to determine if the "fit" was sufficiently narrowly tailored to comport with the First Amendment. *Discovery Network's* less deferential approach is contrary to the *Fox-Posadas* analytical framework. In *Fox* and *Posadas*, the Court left "governmental decisionmakers to judge what manner of regulation may best be employed."[136] The *Discovery Network* majority stated that "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."[137] The *Fox-Posadas* deferential approach is inconsistent with *Discovery Network's* independent means-ends analysis.

The return to the less restrictive means test would have the practical effect of making it increasingly difficult for a regulation to survive the Court's scrutiny.[138] The amount of regulations that the Court will uphold will decrease and localities may be deterred from enacting restrictive speech measures. The application of the reasonable fit test also dovetails with the general theme of the majority's opinion: commercial speech has not received adequate protection in the post-*Central Hudson* era, and increased scrutiny may be required to give commercial speech adequate First Amendment protection.

C. *The Concurring Opinion*

The concurring opinion of Justice Blackmun offers a different view on the evolution of the commercial speech doctrine. Blackmun maintained that *Central Hudson* was wrongly decided, because it offered commercial speech too little protection. The government may only regulate commercial speech that is

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135. *Discovery Network*, 113 S. Ct. at 1516.
136. *Fox*, 492 U.S. at 480.
137. *Discovery Network*, 113 S. Ct. at 1510 n.13.
138. *See Fox*, 492 U.S. at 479.

false, deceptive, misleading, or related to an illegal activity.[139] Blackmun correctly states that the Court's jurisprudence has permitted commercial speech regulation that did not "serve individual and societal interests in assuring informed and reliable decisionmaking."[140] Thus, the "lesser protection" afforded commercial speech is not because truthful commercial speech has less value than noncommercial speech, but rather because the Court has emphasized the interests of the listener in the commercial context.[141] Because the listener has no interest in false or misleading commercial speech, commercial speech has been afforded lesser protection.

Blackmun encouraged the majority to adopt its suggestion that regulations that are not based on content, or the effects stemming from the content, should receive full First Amendment protection.[142] Blackmun's support for the majority's suggestion drew sharp criticism from the dissent. The dissent argued that affording truthful, noncoercive commercial speech full protection will erode the level of protection accorded to noncommercial speech.[143] Blackmun correctly responds that this erosion will never occur. The mere fact that "government remains free . . . to ensure that commercial speech is not deceptive or coercive, [and] to prohibit commercial speech proposing illegal activities"[144] will significantly reduce the risk that greater protection for commercial speech will erode protection for noncommercial speech. A better reasoned justification for Blackmun's position is that the dissent's view of the First Amendment is too narrow. The dissent assumes that the "total amount of First Amendment protection available for judges to draw upon is a constant," so that by protecting commercial speech, there will

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139. *Discovery Network*, 113 S. Ct. at 1518 (Blackmun, J., concurring).

140. *Id.* at 1519 (quoting Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977)).

141. See Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993), where the Court states that "the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.*

142. *Discovery Network*, 113 S. Ct. at 1516-17.

143. *Id.* at 1522. This is known as the "leveling theory." As the dissent indicates, the thrust of this argument is that by giving commercial speech increased protection, speech already receiving full protection will somehow "lose" its full protection. The dissent never explains this theory, and the cases cited for this proposition fail to explain the basis of this "theory." Some scholars have commented that this argument has little merit. *See* Kozinski & Banner, *supra* note 3, at 648.

144. *Discovery Network*, 113 S. Ct. at 1521.

be less protection available for noncommercial speech.[145] This view is mistaken because the First Amendment's level of protection is not finite. Rather, commercial speech can receive full protection without reducing the level of protection afforded to noncommercial speech.[146] Leaving commercial speech unprotected does not ensure that noncommercial speech is better protected, as the dissent claims; it simply means that commercial speech is underprotected.

D. *The Dissenting Opinion*[147]

The dissenting opinion, penned by Chief Justice Rehnquist, stated that the majority's decision was "inconsistent with prior precedent."[148] Specifically, the dissent's main objection appears to be that the majority opinion is not consistent with the two-tiered analysis of *Central Hudson*. The dissent reasoned that because commercial speech is a lower value speech, the regulation should have been upheld even though it was substantially underinclusive.[149] However, this analysis ignores the Court's intermediate scrutiny jurisprudence, which invalidates restrictions provided they are substantially underinclusive.[150]

The dissent also suggested that the majority's finding that the city's regulation is not a reasonable fit is based on "the discredited notion that availability of a less restrictive means to accomplish the city's objectives renders its regulation of commercial speech unconstitutional."[151] As previously stated, this observation is correct—the majority places a heavy emphasis on the fact that there were less burdensome means that the city could have used to advance its safety and aesthetic goals. The

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145. Kozinski & Banner, *supra* note 3, at 648.

146. *Id.* There is no reason to believe that judges would not continue to apply the strict scrutiny standard to presently protected speech if commercial speech were to receive a heightened level of judicial scrutiny. *See id.*

147. Chief Justice Rehnquist filed the dissenting opinion in which Justices White and Thomas joined.

148. *Discovery Network*, 113 S. Ct. at 1521 (Rehnquist, C.J., dissenting).

149. *Id.* at 1524. "The fact that Cincinnati's regulatory scheme is underinclusive does not render its ban on respondents' newsracks as unconstitutional." *Id.*

150. *See supra* note 102.

151. *Discovery Network*, 113 S. Ct. at 1523. *See also supra* note 132 and accompanying text.

emphasis on less burdensome alternatives contrasts with the *Fox-Posadas* analysis.[152] *Fox* stated that the Court should "leave it to government decisionmakers to judge what manner or regulation may be best employed."[153] The majority should focus on the reasonableness of the fit, rather than the existence of less burdensome alternatives. The majority's analysis seems to return to the less burdensome alternatives analysis, which was thought to be extinct after *Fox.*

Rehnquist argued that there was a reasonable fit, as defined by *Fox*, between the regulation banning the handbills and the city's safety and aesthetic interests.[154] The dissent asserted that the relevant inquiry was not the *degree* to which the city's interests were furthered, as the majority stated, but rather the *relation* that the regulation bears to the problem that the city was trying to alleviate.[155] Thus, since the prohibition against the news racks was directly related to the city's efforts to enhance safety and aesthetics, it was irrelevant that only a small percentage of the news racks were removed. The dissent cites no direct precedent for this assertion.[156] This is probably because the "relation" inquiry is duplicative of the third part of the *Central Hudson* test, requiring that the regulation "directly advance" the government's substantial interest.[157] Viewed properly, the dissent substantively eliminated the reasonable fit requirement from the *Central Hudson* test, since the dissent's formulation of the reasonable fit requirement is the same inquiry as that in which the Court determines if the means "directly advance" the government's ends. This approach is consistent with Rehnquist's *Fox-Posadas* rationale, which allows the state,

152. *See supra* note 79 and accompanying text.

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

154. *Discovery Network*, 113 S. Ct. at 1525 (Rehnquist, C.J., dissenting).

155. *Id.* at 1523.

156. *Id.* The dissent fails to cite any precedent from the Court's commercial speech line of cases. The only precedent cited, Ward v. Rock Against Racism, 491 U.S. 781 (1989), is a case regarding time, place, and manner restrictions. *Ward* fails to offer any support for Rehnquist's assertion, as it deals exclusively with content-neutral regulations. Because *Discovery Network* involves a content based regulation, *Ward* is inapposite. It is interesting to note that neither *Fox*, which developed this "reasonable fit" test, nor any other commercial speech case, makes any mention of this "relation inquiry." *See Fox*, 492 U.S. at 480-85.

157. *See Discovery Network*, 113 S. Ct. at 1523.

not the Court, to determine if the regulation advances the state interest to a sufficient degree.

Lastly, Rehnquist suggested that there is no direct precedent in support of the majority's assertion that a city may not regulate commercial speech merely because it was viewed as low value speech.[158] Although Rehnquist is correct in asserting that the majority had no direct precedent stating that a city may not choose commercial speech over noncommercial speech, *Bolger v. Youngs Drug Products*[159] is sufficiently analogous to lend support to the majority's claim. In *Bolger*, the Court struck down a law that prohibited unsolicited advertising of contraceptives. The Court "specifically declined to recognize a distinction between commercial and noncommercial speech that would render this interest a sufficient justification for a prohibition of commercial speech."[160]

Additionally, the Chief Justice found *Discovery Network* contrary to the Court's ruling in *Metromedia Inc. v. City of San Diego*.[161] Justice Rehnquist's reliance on *Metromedia* is misplaced. *Metromedia* involved disparate treatment between two types of commercial speech, while *Discovery Network* involved disparate treatment between commercial and noncommercial speech.[162] In addition, the plurality opinion in *Metromedia* did not hold that a city may distinguish between commercial and

158. *Id.* at 1516.

159. 463 U.S. 60 (1983). *Bolger* involved 39 U.S.C. § 3001(e)(2) (1978), which prohibited the mailing of unsolicited advertisements for contraceptives. This law was invalidated because the government's interest of shielding recipients of mail from materials that they are likely to find offensive was not found to be "substantial," and consequently failed the *Central Hudson* test. *Id.* at 71. The other government interest asserted, aiding parent's efforts to control the manner in which their children learn about birth control, was considered substantial. However, the statute failed the third prong of *Central Hudson*, as the statute did not advance this goal. *Id.* at 72-75.

160. *Id.* at 71-72 (quoting Carey v. Population Serv. Int'l, 431 U.S. 678 (1977)).

161. 453 U.S. 490 (1981) (plurality decision). In *Metromedia*, the city imposed a ban on "offsite" advertising billboards, but permitted "onsite" advertising signs which identified goods sold or manufactured on site. The city also permitted noncommercial billboards. The Court, in a plurality opinion, upheld the city's ban on commercial billboards, by applying a somewhat diluted version of the *Central Hudson* test. *See* Nutt, *supra* note 10, at 189. The Court stated that the city could permissibly distinguish between onsite and offsite commercial billboards. *Metromedia*, 453 U.S. at 510-13. The Court then applied a stricter standard of scrutiny to the noncommercial billboards, and invalidated the ban on the noncommercial billboards. *Id.*

162. *Discovery Network*, 113 S. Ct. at 1514 n.20.

noncommercial speech. *Metromedia* is distinguishable from *Discovery Network*, and is therefore inapposite.

IV. Heightened Scrutiny for Truthful, Noncoercive Commercial Speech

As the analysis of the majority opinion illustrates, the Court appears to be moving towards heightened scrutiny for commercial speech that is not regulated due to its content or the adverse effects stemming therefrom. The majority acknowledges that the Court's post-*Central Hudson* analysis has not provided adequate protection for truthful, noncoercive commercial speech.[163] Therefore, the Court must formulate an analytical framework to provide sufficient constitutional protection for truthful commercial speech.

In light of the need for increased protection, this note posits that the Court should adopt the three-tiered commercial speech analysis suggested by the majority in *Discovery Network*. The first tier pertains to commercial speech that is untruthful, misleading, coercive, or related to an unlawful activity. Regulations which suppress this type of commercial speech will be upheld by the Court so long as the state has a rational basis to conclude that the regulation advances the state's interest in preventing untruthful speech.[164] The second tier involves regulations "designed to protect consumers from misleading or coercive speech"[165] or a regulation seeking to remedy the secondary effects of misleading speech.[166] These regulations are entitled to *Central Hudson's* intermediate level of scrutiny. The third tier involves regulations that suppress "truthful commercial speech designed to serve some other government purpose."[167] These regulations will only be upheld if the regulation survives strict scrutiny. Regulations designed to serve

163. *See id.* 113 S. Ct. at 1513 n.19; *see also Central Hudson*, 447 U.S. 570-83 (Stevens, J., concurring) (concluding that the Court's commercial speech doctrine does not adequately protect commercial speech).

164. *E.g.*, Pittsburgh Press v. Human Relations Comm'n, 413 U.S. 376 (1973).

165. *Discovery Network*, 113 S. Ct. at 1517 (Blackmun, J., concurring) (quoting *Central Hudson*, 447 U.S. at 573).

166. *See supra* note 106 and accompanying text.

167. *Discovery Network*, 113 S. Ct. at 1518.

health, safety, and welfare concerns of the state would be subject to strict scrutiny under the three-tier analysis. The Court's commercial jurisprudence supports this three-tiered approach, and the Court should accordingly adopt this approach.

Close examination of the Court's commercial speech jurisprudence reveals that commercial speech regulations are properly examined from the perspective of the listener. "[T]he general rule is that the speaker and the audience, not the government, assess the value of the information."[168] Accordingly, the "lesser value" traditionally accorded commercial speech stems not from the fact that commercial speech has inherently less value than noncommercial speech, but from the fact that the listener has no interest in hearing false, misleading, or coercive speech, nor in hearing speech pertaining to unlawful activity. "[T]he commercial speech that this Court has permitted the government to regulate or proscribe was commercial speech that did not serv[e] individual and societal interests in assuring informed and reliable decisionmaking."[169]

Because the listener has a substantial interest in hearing truthful, commercial speech, commercial speech deserves a high level of judicial scrutiny. Full First Amendment protection will more effectively further "the consumer's interest in the free flow of commercial information,"[170] which the court deems possessed of a strong societal interest.[171] Correspondingly, speech that is false or inherently misleading is of little value to the listener, and, therefore, a high degree of protection for this speech will not further the listener's interests.[172] Intermediate scrutiny is appropriate for regulations designed to prevent false and misleading commercial speech, as these regulations allow the government to facilitate the interests of the listener in hearing truthful, nonmisleading commercial utterances.

In all commercial speech cases except one,[173] a constitution-

168. Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993).

169. *Discovery Network*, 113 S. Ct. at 1518-19 (Blackmun, J., concurring) (quoting Bates v. State Bar, 433 U.S. 350, 364 (1977) (internal quotations and citations omitted)).

170. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 736 (1976).

171. *Id.*

172. *E.g.*, *Bates*, 433 U.S. at 384.

173. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500-15. *See infra* note

ally permissible regulation falls into one of two categories.[174] The first category consists of regulations that seek to prohibit false or misleading speech.[175] The other category seeks to remedy the adverse effects caused by the content of the commercial speech regulated.[176] In light of these decisions, the Court's commercial speech jurisprudence dictates that *Central Hudson's* intermediate scrutiny applies only to regulations which fit into one of these categories. Regulations which restrict truthful, noncoercive speech, in order to further a government interest unrelated to the content of the speech, are outside of these categories, and are thus properly analyzed under a strict scrutiny standard.[177]

V. CONCLUSION

The *Discovery Network* decision holds that a municipality may not treat commercial speech disparately merely because of its perceived First Amendment value.[178] It is important to note, however, that the Court did not hold that a municipality may *never* distinguish between categories of speech. The court held only that, in this instance, the disparate treatment was improperly motivated.[179] The Court further suggests that a three-tiered approach may gradually replace *Central Hudson*'s two-tiered, intermediate scrutiny approach in commercial speech

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174.

174. Discovery Network, Inc. v. City of Cincinnati, 946 F.2d 464 (6th Cir. 1991). The court of appeals recognized that *Metromedia* did not neatly fit into one of these two categories. However, the court ruled that *Metromedia* had little precedential value beyond the facts of the case, as it was a plurality decision. *Id.* Additionally, the concurrence in *Metromedia* specifically disagreed with the plurality's conclusion that the city could disparately treat "offsite" and "onsite" commercial speech. *Id.* at 471 n.9. In *Discovery Network* the Supreme Court ruled that *Metromedia* was not pertinent because it involved disparate treatment of two different types of commercial speech, whereas *Discovery Network* involved the disparate treatment of commercial and noncommercial speech. 113 S. Ct. at 1515 n.20.

175. *See, e.g.*, Friedman v. Rogers, 440 U.S. 1 (1979) (upholding a ban on optometry trade names because these names are inherently misleading); Bates v. State Bar, 433 U.S. 350 (1977) (upholding a restriction on advertisements for prices of legal services as inherently misleading).

176. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 477 (1976) (upholding prohibition on attorney in-person solicitation of clients for pecuniary gain).

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

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

179. *Id.* at 1516.

cases.[180] Although the Court hints that heightened scrutiny may be proper for truthful, noncoercive commercial speech, the Court has not yet adopted this position.[181] However, *Discovery Network* has provided the groundwork for the Court to embrace this proposition in the future.

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180. *Id.* at 1510 n.11.
181. *Id.*