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Justice Clarence Thomas: The Emergence of a Commercial-Speech Protector

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JUSTICE CLARENCE THOMAS: THE EMERGENCE OF A COMMERCIAL-SPEECH PROTECTOR

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Justice Clarence Thomas, the nation's second African-American on the United States Supreme Court, has received arguably more wide-ranging criticism than any sitting Justice in recent memory. Thomas' confirmation hearings have become American legend, as former employee and current law professor Anita Hill accused Thomas of sexual harassment while Thomas headed the Equal Employment Opportunity Commission.[1]

In addition, some of Thomas' critics have dubbed him "Uncle Thomas" for his conservative views on civil rights.[2] They argue that without affirmative action Thomas would not have been admitted into Yale Law School.[3] Yet, in 1995, Thomas expressed his sharp views on affirmative action, saying that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice."[4] His critics lash out, saying that Thomas criticizes the very practice that allowed him to become who he is.

Justice Thomas has also received criticism for aligning himself with the conservative, iconoclastic Justice Antonin Scalia and for rarely opening his mouth at oral arguments.[5] Many of his critics are upset that Thomas represents a 180-degree shift from the great liberal

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1. Ken Foskett, *The Clarence Thomas You Don't Know*, ATLANTA J. & CONST., July 3, 2001, at 1A. Thomas narrowly earned Senate confirmation 52-48 in 1991. At one point during the proceedings, he referred to the inquiry regarding the Hill allegations as a "high-tech lynching."

2. *See* Eric E. Harrison, Magazine: *Clarence Thomas, 'Lawn Jockey for the Far Right,'* ARKANSAS-DEMOCRAT GAZETTE, Nov. 6, 1996, at 3F (describing the cover of the November 1996 issue of Emerge Magazine); David Hudson, *Justice Clarence Thomas Defends the First Amendment*, THE TENNESSEAN, Sept. 19, 1997, at 17A.

3. Jack E. White, *Says He's Nobody's "Slave,"* TIME, Aug. 10, 1998, at 64.

4. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (Thomas, J., concurring).

5. *See* David L. Hudson, Jr., *Justice Thomas Emerges as Court's Champion of Commercial Speech*, COMMERCIAL SPEECH DIGEST, Fall 1997, *available at* http://www.mediainstitute.org/digest/97fall/hudson.html (last visited Mar. 10, 2002).

Justice Thurgood Marshall.[6] Perhaps the resentment he has faced for his views on affirmative action have caused Thomas to become a strong believer in the First Amendment. Whatever the reason, Justice Thomas has indeed become a free-speech defender.[7] One commentator writes:

> Thomas has been a much-maligned member of the court. His presence, especially before an African-American audience, inspires more jeers than cheers. But he should be applauded for his courageous and highly principled stance on the First Amendment. Here, he truly is an Uncle Tom—Uncle Tom Jefferson, that is.[8]

Thomas is starting to receive positive press for his First Amendment jurisprudence. Veteran Supreme Court reporter Tony Mauro writes that Thomas has become "something of a First Amendment purist."[9]

Thomas has taken strong stances in several First Amendment areas, such as campaign finance reform,[10] workplace harassment speech,[11] and even indecent speech.[12] However, Thomas has most clearly staked out his claim as a First Amendment defender in his commercial speech opinions.[13] Ironically, when Justice Marshall retired in 1991, some commentators called his resignation a "blow to commercial speech protection."[14] True enough, Marshall was a forceful advocate for commercial speech, along with Justices William Bren-

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6. A. Asadullah Samad, *Between the Lines: Is it Time to Embrace Clarence Thomas?*, THE ETHNIC NEWSWATCH, Aug. 20, 1998, at A7.

7. *See* Ken Foskett, *The Clarence Thomas You Don't Know*, ATLANTA J. & CONST., July 3, 2001, at 1A.

8. Robyn E. Blumner, *Justice Stands Up for Free Speech*, ST. PETERSBURG TIMES, Jan. 24, 1999, at 6D.

9. Tony Mauro, *The Education of Clarence Thomas*, AM. LAW., Aug. 2001, at 77, 127.

10. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 631-48 (1996) (Thomas, J., concurring) (concluding that campaign related funds are essential to the First Amendment); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410-30 (2000) (Thomas, J., dissenting) (stating that strict scrutiny should be applied to campaign contributions).

11. Avis Rent A Car System, Inc. v. Aguilar, 529 U.S. 1138, 1140 (2000) (Thomas, J., dissenting) ("Attaching liability to the utterance of words in the workplace is likely invalid for the simple reason that this speech is fully protected speech.").

12. United States v. Playboy Entm't Group, 529 U.S. 803, 829-30 (Thomas, J., concurring) ("What remains then is the assumption that the programming restricted by § 505 is not obscene, but merely indecent. The Government, having declined to defend the statute as a regulation of obscenity, now asks us to dilute our stringent First Amendment standards . . . I am unwilling to corrupt the First Amendment to reach this result.").

13. *Shink Mo. Gov't*, 528 U.S. at 410-11.

14. Steven W. Colford, *Marshall Will Be Missed*, ADVER. AGE, July 1, 1991, at 3.

nan and, particularly, Harry Blackmun.[15] However, Justice Clarence Thomas has evolved into an ardent defender of commercial free-speech rights, becoming an even more forceful advocate for commercial speech than his luminous predecessor.

This Article seeks to examine Thomas' opinions in the commercial speech area to chronicle the evolution of the Justice in commercial speech. In Part I, the Article will briefly examine the history of the commercial speech doctrine and focus on the Court's test in *Central-Hudson*. Part II will examine Thomas' various opinions in commercial speech cases. Finally, the piece will examine the likelihood that Thomas' position on commercial speech will become the law of the land.

I. THE HISTORY OF THE COMMERCIAL SPEECH DOCTRINE

For most of the 20th century, commercial speech received no First Amendment protection. In 1942, the U.S. Supreme Court ruled in *Valentine v. Chrestensen*[16] that commercial speech was entitled to no First Amendment protection.[17] *Valentine* concerned the owner of a former naval submarine who distributed handbills advertising the exhibition of his submarine in New York City.

City officials warned F.J. Chrestensen that distributing handbills for business advertising would violate the city's Sanitary Code. The city code provided that no one could distribute handbills for commercial or business purposes. However, city officials also told Chrestensen that he could freely distribute handbills solely devoted to "information or a public protest."[18]

Chrestensen proceeded to print two-sided handbills with one side showing his submarine and the other side protesting the city's actions in refusing him wharfage facilities.[19] After the police prevented him from distributing his double-faced handbills, Chrestensen sued in federal court. The case eventually reached the U.S. Supreme Court, which rejected the entrepreneur's First Amendment claim stating "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."[20]

For many years, "purely commercial advertising" received no First Amendment protection. If the Court would extend First Amendment protection to an advertisement, it would distinguish the line of

15. *See* David L. Hudson, Jr., *Justice Harry A. Blackmun's Legacy: Modern Commercial Speech Doctrine*, COMMERCIAL SPEECH DIGEST, Spring 1999, at 6-7.
16. 316 U.S. 52 (1942).
17. Valentine v. Chrestensen, 316 U.S. 52, 55 (1942).
18. *Valentine*, 316 U.S. at 53-54.
19. *Id.* at 53.
20. *Id.* at 54.

cases flowing from *Valentine* by saying the ad contained political speech, or some other form of noncommercial speech. For example, in the landmark libel case *New York Times Co. v. Sullivan*,[21] the U.S. Supreme Court ruled that an editorial advertisement decrying civil rights abuses in Montgomery, Alabama, contained political speech.[22]

> The publication here was not a 'commercial' advertisement in the sense in which the word was used in [*Valentine*]. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.[23]

The Court did not abandon the *Valentine* view until the mid-1970's in a pair of decisions authored by Justice Harry Blackmun.

Bigelow v. Virginia[24]

The first case, *Bigelow*, concerned criminal charges filed against a Virginia newspaper publisher who ran ads advertising that abortion was legal in the state of New York. The publisher contended that his conviction violated his First Amendment rights to communicate on an important public issue. The U.S. Supreme Court reversed the lower court rulings and sided with the publisher. Justice Harry Blackmun, writing for the Court, rejected the state's argument that First Amendment protections are inapplicable to a paid advertisement stating that "Our cases . . . clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form."

Blackmun described the *Valentine* ruling as distinctly "limited."[25] He determined that the *Valentine* case "obviously does not support any sweeping proposition that advertising is unprotected per se." Blackmun distinguished the speech on the handbills in *Valentine* from the ad about abortions in Bigelow's newspaper. According to Blackmun, "The advertisement published in appellant's [Bigelow's] newspaper did more than simply propose a commercial transaction. It contained factual material of 'clear public interest.'"[26]

Blackmun's opinion laid the groundwork for his opinion the following year when he wrote "Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the

21. 376 U.S. 254 (1964).
22. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).
23. *Sullivan*, 376 U.S. at 266.
24. 421 U.S. 809 (1975).
25. Bigelow v. Virginia, 421 U.S. 809, 819 (1975).
26. *Id.* at 822.

marketplace of ideas."[27] Blackmun criticized the approach of labeling speech as "commercial" and not engaging in deeper First Amendment analysis. Regardless of whatever label is placed on speech, Blackmun reasoned that a court must assess the free-speech interests and the public interests allegedly served by the regulation.[28] Nevertheless, Blackmun reserved for a later day "the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation."[29]

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.[30]

The very next year, Justice Blackmun authored another opinion, in which he laid to rest any lingering doubts that may have arisen from his opinion in *Bigelow*. *Virginia Pharmacy* concerned the constitutionality of a Virginia law prohibiting pharmacists from advertising prescription drug prices. Virginia asserted that allowing such advertisements would demean the professionalism of the profession. Justice Blackmun again wrote the majority opinion striking down the statute as violative of the First Amendment. In doing so, Blackmun directly addressed the Court's holding in *Valentine*, referring to it as a "simplistic approach" of "doubtful validity."[31]

Blackmun determined that consumers and society in general have a strong interest in the free flow of commercial information. He wrote that "the free flow of commercial information is indispensable."[32] According to the high Court, the state's interests showed a paternalism that implied that the state can decide to keep the public ignorant about certain information. The high Court determined that there was "an alternative to this highly paternalistic approach."[33] The Court continued in oft-cited language:

> That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and

27. *Id.* at 826.
28. *Id.*
29. *Id.*
30. 425 U.S. 748 (1976).
31. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 749, 759 (1976) (citations omitted).
32. *Va. Pharmacy*, 425 U.S. at 765.
33. *Id.* at 770.

> the dangers of its misuse if it is freely available, that the First Amendment makes for us.[34]

Blackmun warned that perhaps "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn."[35]

However, according to Blackmun, "some forms of commercial speech regulation are surely permissible." These included regulations governing "untruthful," "misleading," and "deceptive" commercial speech.[36]

Central-Hudson

In 1980, the U.S. Supreme Court attempted to refine its jurisprudence in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[37] *Central Hudson* examined the constitutionality of a New York regulation banning "promotional advertising" by electrical utilities. The regulation banned such advertising in order to further the national policy of conserving energy.[38] The high Court struck down the regulation, finding it to be more extensive than necessary. The Court reasoned, "To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order violates" the First Amendment.[39] The Court determined that the state did not show that a "more limited restriction on the content of promotional advertising would not serve adequately the State's interests."[40]

Far more important than the Court's ruling on the facts of the case was the test laid out by the high Court. Justice Lewis Powell, writing for the Court, articulated a four-part test for analyzing the constitutionality of commercial-speech regulations. First, the Court noted that its case law had recognized a "common-sense" distinction between commercial speech and other types of speech.[41] The Court then articulated a four-part test for regulations that impact commercial speech:

> 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

34. *Id.*
35. *Id.* at 765.
36. *Id.* at 770-71.
37. 447 U.S. 557 (1980).
38. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 559 (1980).
39. *Cent. Hudson*, 447 U.S at 570.
40. *Id.*
41. *Id.* at 562 (citing Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-56 (1978)).

> must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.[42]

Thus was born the so-called *Central Hudson* test—a test that still predominates in commercial speech jurisprudence.

The *Central Hudson* test is as follows:

- Does the speech concern lawful activity and is it nonmisleading?
- If the answer is no, and the speech concerns illegal activity or is misleading, the analysis ends. If not, courts must apply the following prongs:
  - Does the government have a substantial interest in its regulation?
  - Does the regulation directly advance the substantial governmental interest?
  - Does the regulation restrict more speech than necessary to serve the governmental interest?

In *Central Hudson*, the Supreme Court altered its traditional First Amendment analysis by applying a lower level of scrutiny to commercial speech. Traditionally, content-based restrictions on speech must satisfy the highest level of judicial review known as strict scrutiny.[43] The Supreme Court relaxed this requirement, finding that commercial speech was different than other forms of noncommercial speech.

Interestingly, Justice Blackmun authored a concurring opinion in *Central Hudson*. He agreed that the promotional advertising ban was unconstitutional, but expressed concerns about the so-called *Central Hudson* test.[44] Justice Blackmun stated: "I believe the test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech."[45] Blackmun correctly noted that the Court had sanctioned the use of intermediate scrutiny to evaluate the constitutionality of a law regulating speech based on content.[46] Traditionally, in First Amendment law, laws regulating speech based on

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42. *Id.* at 566.

43. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) ("Content-based regulations are presumptively invalid.").

44. *Cent. Hudson*, 447 U.S. at 573 (Blackmun, J., concurring).

45. *Id.* (Blackmun, J., concurring).

46. *Id.* (Blackmun, J., concurring).

the content of that speech (content-based laws) had been subject to so-called strict scrutiny.

Blackmun wrote that the basic principle of the First Amendment was that "absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public."[47] For this reason, some legal commentators criticized the *Central Hudson* test as not affording enough protection for commercial speech. For example, two authors of a leading text on commercial speech write: "What *Central Hudson* seemed to do, then, was to take this moderately rigorous test established in a noncommercial context for content-neutral regulation of speech and apply it to content-based regulations of commercial speech."[48]

Board of Trustees of the State University of New York v. Fox[49]

In *Fox*, the U.S. Supreme Court examined the constitutionality of a state university rule that prohibited commercial activity in dorm rooms. A representative of a company that sold housewares had been charged with trespassing, soliciting without a permit, and loitering.[50] The University claimed that its resolution banning commercial solicitation in dorm rooms furthered its substantial interest of promoting an educational environment, preventing commercial exploitation of students, and preserving residential tranquility.[51]

The Court remanded the case with instructions on how to apply the final prong of the *Central Hudson* test. Writing for the majority, Justice Scalia cited the following statement in *Central Hudson*: "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."[52] Scalia determined that this language was mere dicta and concluded that "our commercial speech cases support a more flexible meaning for the *Central Hudson* test."[53] Scalia wrote that what is required is simply a "'fit' between the legislature's ends and the means chosen to accomplish those ends."[54]

Justice Blackmun, joined by Justices Brennan and Marshall, dissented. The bulk of Blackmun's dissent is devoted to why the state university rule was unconstitutionally overbroad because it restricted

47. *Id.* at 575 (Blackmun, J., concurring).
48. P. CAMERON DEVORE & ROBERT D. SACK, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE § 3:12 at 3-30 (1999).
49. 492 U.S. 469 (1989).
50. Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 472 (1989).
51. *Fox*, 492 U.S. at 475.
52. *Id.* at 476 (citing *Cent. Hudson*, 447 U.S. at 564).
53. *Id.* at 476-77.
54. *Id.* at 480.

both commercial and noncommercial expression.[55] However, in a footnote, Blackmun disagreed with Scalia's characterization of the "less restrictive means" language in *Central Hudson* as dicta. Blackmun characterized the language as "integral to the Court's holding."[56]

II. JUSTICE THOMAS' COMMERCIAL SPEECH JURISPRUDENCE

Justice Thomas did not begin auspiciously in the commercial-speech arena. In *City of Cincinnati v. Discovery Network, Inc.*,[57] Thomas, along with Justice Scalia, joined in Chief Justice Rehnquist's dissent. In *Discovery Network*, the Supreme Court examined the constitutionality of a city ordinance that prohibited distribution of "commercial handbills" on public streets in news racks. The ordinance distinguished between "commercial handbills" and newspapers. The ordinance singled out the commercial handbills, claiming they adversely affected the city's safety and aesthetic concerns even though there were only a handful of news racks that distributed these commercial handbills, as opposed to the thousands of news racks that distributed newspapers.[58]

The evidence in *Discovery Network*, showed that only 62 news racks distributed the targeted "commercial handbills," while more than 1,500 distributed untargeted newspapers. The court determined that the removal of just a few news racks did not materially advance the government's interests.[59] Justice Stevens, writing for the majority, stated "Not only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted."[60] The Court observed that the remaining news racks that distributed newspapers were as much an "eyesore" as the targeted "commercial handbills."[61]

The most protective Justice was none other than Justice Harry Blackmun, the author of the Court's opinions in *Bigelow* and *Virginia Pharmacy*. In his concurrence, Blackmun questioned the legitimacy of the *Central Hudson* test, writing: "In this case, Central Hudson's chickens have come home to roost."[62] According to Blackmun, "the

55. *Id.* at 486-87 (Blackmun, J., dissenting).
56. *Id.* at 486 n.1.
57. 507 U.S. 410 (1993).
58. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 413-14 (1993).
59. *Discovery Network*, 507 U.S. at 418.
60. *Id.* at 412, 424.
61. *Id.* at 425.
62. *Id.* at 436 (Blackmun, J., concurring).

commercial publications at issue in this case illustrate the absurdity of treating all commercial speech as less valuable than all noncommercial speech."[63] Blackmun concluded that he hoped "the Court ultimately will come to abandon *Central Hudson*'s analysis entirely in favor of one that affords full protection for truthful, noncoercive commercial speech about lawful activities."[64]

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented. The Chief Justice cited *Ohralik* for the proposition that commercial speech receives less protection, "commensurate with its subordinate position in the scale of First Amendment values."[65] In support of his arguments, Chief Justice Rehnquist cited three reasons for according commercial speech less First Amendment protection:

- Commercial speech is more durable because it relates to economic self-interest.
- Commercial speech is less important to basic First Amendment interests as compared to political speech.
- Granting more protection to commercial speech will "erode the First Amendment protection accorded noncommercial speech."[66]

In his dissent, Rehnquist reasoned that the city could reduce its news racks by only sixty-two in number without violating the *Central Hudson* test. Chief Justice Rehnquist stated that "Our commercial speech cases establish that localities may stop short of fully accomplishing their objectives without running afoul of the First Amendment."[67] Rehnquist's entire opinion resonates with the view that cities may regulate commercial speech because it is entitled to less protection than noncommercial speech.[68] Rehnquist made the familiar argument that elevating commercial speech to equal status with noncommercial speech "will erode the First Amendment protection accorded noncommercial speech."[69] It is remarkable, given Justice Thomas' current position on commercial speech that he signed on to Rehnquist's dissent.

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63. *Id.* at 437 (Blackmun, J., concurring).
64. *Id.* at 438 (Blackmun, J., concurring).
65. *Id.* at 438-39 (Rehnquist, C.J., dissenting) (citing Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978)).
66. *Id.* at 438-39 (Rehnquist, C.J., dissenting).
67. *Id.* at 442 (Rehnquist, C.J., dissenting).
68. *Id.* at 439 (Rehnquist, C.J., dissenting) ("Our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'") (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) and Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978)).
69. *Id.* at 439.

Rubin v. Coors Brewing Company[70]

Justice Thomas first emerged in commercial speech jurisprudence when he authored the Court's opinion in *Rubin v. Coors Brewing Co.*[71] Rubin involved a challenge to a federal law prohibiting beer labels from advertising alcoholic content. Section 5(e)(2) of the Federal Alcohol Administration Act, 27 U.S.C. § 201 et seq., provided that alcoholic beverages had to be labeled in conformity with regulations by the Secretary of the Treasury. The law provided that "statements likely to be considered as statements of alcoholic content of malt beverages are hereby prohibited unless required by State law."[72] Corresponding federal regulations prohibit the following descriptive terms that suggest high alcoholic content: "strong," "full strength," "extra strength," "high test," "pre-war strength," and "full oldtime alcoholic strength."[73] The regulation allowed the disclosure of alcoholic content in the case of wines and spirits.

Coors Brewing Company contended that the labeling ban violated its First Amendment rights. The federal government countered that the ban served two substantial state interests: (1) It curbed "strength wars" among beer brewers; and (2) it facilitated state efforts to regulate alcohol under the Twenty-First Amendment.[74] In considering the issues, Justice Thomas applied a standard analysis to the labeling ban, beginning with introductory language about the evolution of the commercial speech doctrine from *Valentine* to *Virginia Pharmacy*.[75] Thomas noted that regulations on commercial speech were analyzed under the *Central Hudson* test.[76]

Because both sides agreed that the speech was truthful and nonmisleading, the analysis proceeded to the substantial state interest question of *Central Hudson*. Thomas concluded that the interest in curbing strength wars was substantial, writing that the government "has a significant interest in protecting the health, safety and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs."[77] Thomas rejected the other alleged state interest, concluding that the states had "ample authority to ban the disclosure of alcohol content."[78] Justice Thomas then applied the

70. 514 U.S. 476 (1995).
71. 514 U.S. 476 (1995).
72. Federal Alcohol Administration Act, 27 U.S.C. § 205(e)(2) (1935).
73. Rubin v. Coors Brewing Co., 514 U.S. 476, 481 (1995); 27 CFR § 7.26(a) (1994).
74. *Rubin*, 514 U.S. at 485.
75. *Id.* at 481.
76. *Id.* at 482.
77. *Id.* at 484-85.
78. *Id.* at 486.

third prong of *Central Hudson*—whether the regulation directly and materially advanced the government's asserted interest.

Thomas determined that the law failed the third prong "because of the overall irrationality of the Government's regulatory scheme."[79] Thomas noted that other parts of the federal scheme appeared to promote the disclosure of alcoholic content. For example, he pointed out that the scheme failed to prohibit the disclosure of alcoholic content in advertising.[80] Thomas also noted that section 205(e)(2) banned the disclosure of alcoholic content on beer labels but allowed—and in certain cases even required—such information with respect to wines and spirits. In recognizing this disparity, Justice Thomas wrote, "If combating strength wars were the goal, we would assume that Congress would regulate disclosure of alcohol content for the strongest beverages as well as for the weakest ones."[81] Justice Thomas added that, "There is little chance that § 205(e)(2) can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effect."[82] Finally, Justice Thomas reasoned that the law violated the final prong of *Central Hudson* because there were several less restrictive alternatives—such as directly limiting alcoholic content of beer and prohibiting marketing that emphasizes high alcohol strength—that would have advanced the government's goal.[83]

44 Liquormart, Inc. v. Rhode Island[84]

A year later Justice Thomas emerged as a high protector of commercial speech, calling on the Court to fundamentally alter its commercial speech jurisprudence. *44 Liquormart, Inc. v. Rhode Island*[85] examined the constitutionality of two Rhode Island statutes that prohibited advertising the retail prices of alcoholic beverages. The first law prohibited any "manufacturer, wholesaler or shipper" from "advertising in any manner" the price of alcohol products.[86] State law did allow for price tags attached to the product in a store as long as the sign was not visible from the outside of the store.

Another state law prohibited the media from publishing any advertisement that makes "reference to the price of any alcoholic bever-

79. *Id.* at 488.
80. *Id.* (citing 27 U.S.C. § 205(f)(2); 27 C.F.R § 7.50 (1994)).
81. *Id.* at 488.
82. *Id.*
83. *Id.* at 490-91.
84. 517 U.S. 484 (1996).
85. 517 U.S. 484 (1996).
86. R.I. GEN. LAWS § 3-8-7 (1987) (repealed 1996).

age."[87] A Rhode Island retailer and a Massachusetts-based retailer challenged the law in federal court, after the Rhode Island retailer was assessed a $400 fine by the State Liquor Control Administrator.[88] Rhode Island argued that the statutes were a constitutional means to promote temperance or reduce alcohol consumption in the state. The U.S. Supreme Court unanimously sided with the liquor retailers.

Justice Stevens wrote the Court's opinion, in which he noted that when dealing with a ban on truthful, nonmisleading commercial messages, "there is far less reason to depart from the rigorous review that the First Amendment generally demands."[89] Stevens noted that "complete speech bans . . . are particularly dangerous because they all but foreclose alternative means of disseminating certain information."[90] Although stating that the statutes should be analyzed under more rigorous First Amendment review, Stevens nevertheless applied *Central Hudson* and determined the laws violated the last two prongs of the test.

Justice Thomas authored a concurring opinion in which he said that when dealing with laws that seek to keep information from citizens in order to "manipulate their choices in the marketplace," the law is "per se illegitimate."[91] Thomas' opinion extols Blackmun's decision in *Virginia Pharmacy*, quoting the 1976 decision at length. Then, in a historic passage, Thomas wrote:

> I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech. Indeed, some historical materials suggest to the contrary.[92]

Thomas stated he could not join in the principal opinion's application of the *Central Hudson* balancing test, because application of the test "makes little sense to me" in cases where "the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark."[93] Thomas explicitly stated that his position was akin to Justice Blackmun's in *Virginia Pharmacy*. He stated: "I would adhere to the doctrine adopted in *Virginia Pharmacy* and in Justice Blackmun's *Central Hudson* concurrence, that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible."[94]

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87. R.I. GEN. LAWS § 3-8-8.1 (1987) (repealed 1996).
88. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 492-93 (1996).
89. *Liquormart*, 517 U.S. at 501.
90. *Id.*
91. *Id.* at 518 (Thomas, J., concurring).
92. *Id.* at 522 (Thomas, J., concurring).
93. *Id.* at 523 (Thomas, J., concurring).
94. *Id.* at 526 (Thomas, J., concurring).

Thomas characterized the Court's *Central Hudson* decision as a "sudden turn away from *Virginia Bd. of Pharmacy*."[95] He noted that the courts have had difficulty in applying the *Central Hudson* balancing test "with any uniformity."[96] Thomas concluded: "Rather than continuing to apply a test that makes no sense to me when the asserted state interest is of the type involved here, I would return to the reasoning and holding of *Virginia Bd. of Pharmacy*."[97]

In more recent commercial speech cases, Thomas has reiterated his view in *44 Liquormart*. In both *Glickman v. Wileman Bros. & Elliott, Inc.*[98] and *Greater New Orleans Broadcasting Ass'n v. United States*,[99] Thomas authored short opinions, stating his strong views on the need for greater First Amendment protection for truthful commercial speech.

Lorillard Tobacco Co. v. Reilly[100]

In *Lorillard Tobacco Co. v. Reilly*,[101] Thomas once again expounded at length on the subject of commercial speech. The high Court had been asked to review the constitutionality of a Massachusetts law that imposed heavy regulations on outdoor tobacco advertising. The tobacco petitioners asked the Supreme Court to review the First Circuit's application of the *Central Hudson* test. Specifically, the petitioners point out that over the last decade, six Justices—including a majority of the current Court—have indicated that *Central Hudson* does not or should not establish a test of intermediate scrutiny that is generally applicable to all commercial speech restrictions.[102]

The Court ruled that the state tobacco regulations regarding cigarette advertising were preempted by the Federal Cigarette Labeling and Advertising Act.[103] The high Court also examined the First Amendment claim by the makers of cigars and smokeless tobacco

95. *Id.* (Thomas, J., concurring).
96. *Id.* at 527 (Thomas, J., concurring).
97. *Id.* at 528 (Thomas, J., concurring).
98. 521 U.S. 457, 504-06 (1997) (Thomas, J., dissenting) ("I continue to disagree with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally.").
99. 527 U.S. 173, 197 (1999) (Thomas, J., concurring) ("I continue to adhere to my view that '[i]n cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace,' the *Central Hudson* test should not be applied because 'such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial speech' than it can justify regulation of 'noncommercial' speech.'").
100. 121 S.Ct. 2404 (2001).
101. 121 S.Ct. 2404 (2001).
102. Petition for Cert. at 21, Lorillard Tobacco Co. v. Reilly, 121 S.Ct. 2404 (2001) (No. 00-596).
103. Lorillard Tobacco Co. v. Reilly, 121 S.Ct. 2404, 2417 (2001); 15 U.S.C. § 1331 (1966).

products. The tobacco petitioners had challenged the constitutionality of a host of restrictions, including most notably a 1,000-foot restriction on outdoor tobacco ads. The majority of the Court determined that this restriction violated the *Central Hudson* test.

Thomas agreed with the majority on the preemption issue. However, he wrote another concurring opinion expressing his strong view that content-based restrictions on commercial speech should be subject to strict scrutiny: "In my view, an asserted government interest in keeping people ignorant by suppressing expression is 'per se illegitimate and can do no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech."[104] Thomas went further, saying that the Massachusetts regulations violated the First Amendment because the state's interests in regulating the commercial speech were unrelated to the major reason that commercial speech restrictions are subject to less scrutiny. The major reason commercial speech regulations are subject to less scrutiny is because of the government's strong interest in preserving a fair bargaining process.[105]

In *Lorillard*, the state of Massachusetts argued that tobacco advertising is misleading because it targets children. Thomas responded that this "justification is belied, however, by the sweeping overinclusivity of the regulations."[106] The state also argued that its regulations should be upheld because the tobacco ads propose illegal sale to minors of tobacco. Thomas rejected this argument, writing: "It is difficult to see any stopping point to a rule that would allow a State to prohibit all speech in favor of an activity in which it is illegal for minors to engage. Presumably, the State could ban car advertisements in an effort to enforce its restrictions on underage driving."[107]

III. THOMAS' EVOLUTION AND THE FUTURE OF COMMERCIAL SPEECH

In a span of just a few years, Thomas went from a justice who silently joined a dissenting opinion in *Discovery Network*, which explained why commercial speech is entitled to a lower level of protection, to staking out a position on the other extreme as the commercial speech protector. Thomas appears to have taken the mantle from Justice Harry Blackmun as the leading protector of commercial speech, even more than Justices Stevens and Kennedy. So far, the rest of the

104. *Lorillard*, 121 S.Ct. at 2432 (Thomas, J., concurring) (citing *Liquormart*, 517 U.S. at 518 (Thomas, J., concurring)).
105. *See Liquormart*, 517 U.S. at 501.
106. *Lorillard*, 121 S.Ct. at 2434.
107. *Id.* at 2435.

Court has not followed Thomas on his quest to return to the Blackmun doctrine laid out in *Virginia Pharmacy*.

In 1998, the Ninth Circuit cited Thomas' concurring opinion in *44 Liquormart* when it stated: "The current debate centers not on whether commercial speech is a form of expression entitled to constitutional protection, but on the validity of the distinction between commercial and noncommercial speech."[108] Other courts have recognized that many of the Supreme Court Justices, including Thomas, have criticized the *Central Hudson* balancing test.[109]

The Supreme Court itself recognized that its *Central Hudson* test has come under heavy fire from many legal scholars.[110] According to the Court, "Partly because of these intricacies, petitioners as well as certain judges, scholars and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech."[111] Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit has written scholarly law review articles questioning the distinction between commercial and noncommercial speech.[112] In fact, Justice Thomas cited one of Kozinski's pieces in his historic concurring opinion in *44 Liquormart*.[113]

Overall, the *Central Hudson* test has been called "too flabby" and its critics say "elasticity" has allowed government lawyers to advance a number of suspect arguments.[114] However, in spite of these criticisms, the *Central Hudson* test has survived more than twenty years. In *Lorillard*, the *Central Hudson* test showed once again its Rasputin-like character, surviving despite more heavy judicial body-blows from the pen of Clarence Thomas.

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108. United Reporting Publ'g Corp. v. Cal. Highway Patrol, 146 F.3d 1133, 1136 (9th Cir. 1998), *rev'd*, 528 U.S. 32 (1999).

109. *See* North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755, 770 (N.D. Ohio 2000) (mentioning that six Justices have criticized the *Central Hudson* test since 1980); Consolidated Cigar Corp. v. Reilly, 218 F.3d 30, 42-43 (1st Cir. 2000), *aff'd in part, rev'd in part sub. nom*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) ("In declining to impose a more searching review than that mandated by *Central Hudson*, we are aware of the recent rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification.").

110. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999).

111. *Greater New Orleans*, 527 U.S. at 184.

112. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627 (1990) ("It is the thesis of this Article that the commercial/noncommercial distinction makes no sense."); Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993).

113. *Liquormart*, 517 U.S. at 524 n.8 (Thomas, J., concurring).

114. John Walsh, et al., 'Central Hudson' *Test: A Failed Promise*, N.Y. L.J., Aug. 13, 1998, at 2.

More than 35 five years ago, Justice Blackmun told us that people's interests may be "keener by far" in commercial information than in "the day's most urgent political debate." Justice Thomas has taken the torch and held the *Central Hudson* test under fire. Perhaps soon, the U.S. Supreme Court as a whole will abandon its second-class treatment of commercial speech and apply a more consistent First Amendment analysis to regulations on truthful speech. While the Court may continue to hold commercial speech to a subordinate scale, Justice Thomas more and more stakes out his claim as a Justice sensitive to First Amendment claims. Nowhere is this more evident than in the area of commercial speech.