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Trends in First Amendment Protection of Commercial Speech

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RECENT DEVELOPMENT

Trends in First Amendment Protection of Commercial Speech

I. INTRODUCTION

The first amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech or of the press."[1] Over the past few decades, the Supreme Court has applied the first amendment to commercial speech only sporadically.[2] The Court has vacillated between

1. U.S. CONST. amend. I.

2. Commercial speech is expression that proposes a commercial transaction. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 (1980).

refusing to apply the first amendment,[3] liberally extending first amendment guarantees,[4] and applying limited first amendment protections to commercial speech.[5] This expansion and contraction of first amendment protection stems partly from three factors: (1) the Court's characterization of the speech at issue as commercial or noncommercial, (2) the Court's perception of the relevant regulation as content-based or content-neutral, and (3) the Court's willingness to defer to a state's judgment on the necessity of imposing a restriction on commercial speech. The Court accords commercial speech less first amendment protection than noncommercial speech and scrutinizes regulations of commercial speech more leniently than restrictions on noncommercial speech.[6] Similarly, the Court deems content-based restrictions more invidious than content-neutral regulations and reviews the former more strictly than the latter.[7] Finally, the greater the deference given state judgments, the greater the likelihood that the Court will uphold the regulation of commercial expression.[8]

The Court has consistently scrutinized content-based regulations

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3. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).

4. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

5. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983); *In re* R.M.J., 455 U.S. 191 (1982); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

6. *See Central Hudson*, 447 U.S. at 562-63 (stating that "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression").

In *Ohralik* the Court stated:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

436 U.S. at 456.

7. *See Virginia Board*, 425 U.S. at 771 (indicating that the Court will approve mere time, place, and manner restrictions that (1) are justified without reference to the content of the regulated speech, (2) serve a siguificant governmental interest, and (3) leave open ample alternative channels for communication of the information); *see also* Note, *Restraint on Alcoholic Beverage Advertising: A Constitutional Analysis*, 60 NOTRE DAME L. REV. 779 (1985); Comment, *Standard of Review for Regulations of Commercial Speech*: Metromedia, Inc. v. City of San Diego, 66 MINN. L. REV. 903 (1982).

8. *See Virginia Board*, 425 U.S. at 770 (stating that "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us"); *cf. Metromedia*, 453 U.S. at 508 (observing that "[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them").

on noncommercial editorial speech strictly. For example, in *Pacific Gas & Electric Co. v. Public Utilities Commission*[9] the Court found that requiring a private corporation to provide a forum for opposing views infringed on that entity's freedom of speech.[10] The Court reviews content-neutral restrictions less strictly, as in *City of Renton v. Playtime Theatres, Inc.*[11] in which the Court upheld the validity of a local ordinance prohibiting motion picture theaters from locating within 1000 feet of any residential zone, single or multiple family dwelling, church, park, or school.[12]

The Court applies first amendment guarantees to purely commercial speech more restrictively. Thus, in *Zauderer v. Office of Disciplinary Counsel*[13] the Court employed an intermediate standard to review a regulation on advertising the availability of legal services. The Court concluded that a state may not discipline an attorney for soliciting business through advertisements containing truthful information and advice regarding potential clients' legal rights.[14] Recently, however, the Court has been particularly deferential toward state regulation of commercial speech promoting the use of a controversial product or service. The Court in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*[15] rejected a first amendment challenge to a Puerto Rican statute which prohibited the advertising of casinos to residents despite the fact tbat gambling was legal there.[16]

This Recent Development examines the degree of first amendment protection accorded commercial speech in light of the Supreme Court's recent decisions. Part II traces the judicial extension of constitutional protection to commercial speech during the last decade. Part III discusses four recent cases that address whether the courts should uphold restrictions on constitutionally protected speech. Part IV analyzes these decisions and explores the ramifications of permitting the regulation of commercial advertising of lawful activities. Part IV also argues that the Court's deference toward legislative judgments prohibiting commercial speech signals a retreat from first amendment protection of commercial speech and a willingness to encourage the governmental paternalism that this protection was intended to avoid. Part V stresses the need to apply an intermediate, rather than a deferential, standard of review to

9. 106 S. Ct. 903 (1986).
10. *Id.* at 908.
11. 106 S. Ct. 925 (1986).
12. *Id.* at 926-27.
13. 471 U.S. 626 (1985).
14. *Id.* at 647.
15. 106 S. Ct. 2968 (1986).
16. *Id.* at 2971.

truthful, nondeceptive commercial speech that promotes a lawful activity.

II. LEGAL BACKGROUND

A. *Commercial Speech Enters the Purview of the First Amendment*

Until the last decade, traditional legal principles deemed commercial speech undeserving of and exempt from the protection of the first amendment. In rejecting first amendment challenges to restrictions on commercial speech, the Supreme Court emphasized the commercial motivation of the advertiser rather than the content of the speech at issue.[17] In *Valentine v. Chrestensen*[18] the Court stated that purely commercial advertising, properly viewed, is merely the pursuit of "gainful occupation"[19] and, as such, is not entitled to first amendment protection.[20]

The Court's theory that the profit motive renders commercial speech unworthy of constitutional protection became subject to increasing attack during the next few years[21] as content began to assume a greater role in the analysis of commercial speech cases. In *New York*

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17. *See* Breard v. Alexandria, 341 U.S. 622, 641-45 (1951) (rejecting a first amendment challenge to a prohibition of commercial door-to-door selling of magazine subscriptions); Valentine v. Chrestensen, 316 U.S. 52, 53 (1942) (rejecting a first amendment challenge to a city ordinance banning the distribution of "commercial and business advertising matter" in the streets). *See generally* Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 722-23 (1982).

18. 316 U.S. 52 (1942). Chrestensen owned a retired United States Navy submarine that he displayed to the public for an admission charge. A New York sanitation ordinance prohibiting the distribution of commercial or business advertising frustrated his attempt to distribute handbills in New York City advertising the submarine. In an effort to exempt himself from the ordinance's coverage, he reprinted the same handbills but with a message on the reverse side protesting the city's refusal of his request to moor the submarine at city wharfage facilities. *Id.* at 52-53.

19. *Id.* at 54.

20. *Id.* The Supreme Court stated that the government's ability to control the dissemination of opinion must not be unduly burdensome, but concluded that "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Id.* at 54. The Court rejected Chrestensen's claim that the regulation impinged on his right to comment on a matter of public interest, specifically the wharfage denial, and declared that Chrestensen's action was merely a subterfuge to circumvent the ordinance. *Id.* at 55.

21. In 1959 Justice Douglas criticized the *Chrestensen* opinion as "casual, almost offhand . . . [and one which] has not survived reflection." Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring). In a subsequent case Justice Douglas characterized *Chrestensen* as "ill-conceived" and ready for overruling. Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 904-06 (1971) (Douglas, J., dissenting from denial of certiorari). By 1974 a majority of the Court had expressed doubts concerning the continued viability of *Chrestensen*. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 393, 398, 401 (1973) (expressions of Chief Justice Burger and Justices Douglas and Stewart in separate dissents); *see also* Note, *supra* note 17, at 723.

Times Co. v. Sullivan[22] the Court decided whether the application of state libel laws violated the first amendment. Looking beyond the *Times'* commercial interest in running advertisements, the Court examined the content of the speech at issue. Finding that a civil rights organization's advertisement communicated information about an issue vital to the public interest, the Court deemed the advertisement worthy of constitutional protection.[23] By distinguishing between "commercial" and "editorial" advertising, the Court defined commercial speech in terms of the content of the message rather than the purpose of the promoter. According to the Court, editorial speech containing opinions and information about important matters of public concern deserves full protection.[24] The Court, however, left untouched the *Chrestensen* dictate that purely commercial speech is wholly unworthy of first amendment protection.[25]

The progression from motive- to content-based analysis of commercial speech continued with *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.*[26] At issue in *Pittsburgh Press* was the validity of Pittsburgh's Human Relations Ordinance which prohibited newspapers from carrying "help wanted" advertising in sex-designated columns except when the employer or advertiser was free to make hiring or employment referral decisions on the basis of sex.[27] The Commission argued that the ordinance constituted a permissible regulation because the first amendment did not protect commercial speech.[28] The Court, however, refused to characterize the speech as commercial, declaring that the mere fact that speech relates to an advertisement does not render it commercial in nature.[29] In deciding whether the speech at issue was commercial, the Court rejected a motive-based analysis, stating that if profit motive were determinative, all facets of an entity's operations would be subject to regulation—a result clearly at odds with the first amendment.[30]

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22. 376 U.S. 254 (1964).

23. The Court stated that the advertisement, which criticized police action against members of the civil rights movement, "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." *Id.* at 266.

24. *Id.*

25. *See generally* Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 209-10 (1976).

26. 413 U.S. 376 (1973).

27. *Id.* at 378.

28. *Id.* at 384.

29. *Id.* at 384-85 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)). By focusing on the characterization of the speech, the Court seemed to accept the *Chrestensen* premise that commercial speech, properly defined, is not protected by the first amendment.

30. *Id.* at 385.

The Court then distinguished purely commercial advertisements merely proposing a commercial transaction from advertisements expressing an editorial position on matters of social or political concern.[31] In making this distinction, the Court implicitly held that the content rather than the motivation of the message determines whether the speech is commercial.[32] The Court, however, refused to extend first amendment protection to the newspaper advertisements because the content of the speech at issue proposed a transaction in violation of the law against employment discrimination.[33]

The content-based analysis assumed central importance two years later in *Bigelow v. Virginia*,[34] in which the Court reviewed the constitutionality of a Virginia statute as applied to the publication of a New

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31. *Id.*

32. *Id.* at 386-87; *see* Barnes, *Commercial Speech Concerning Unlawful Conduct: A Clear and Present Danger*, 1984 B.Y.U. L. REV. 457, 466 (1984). Applying the content-hased analysis, the Court declared that the advertisements more closely resembled the purely commercial speech in *Chrestensen* than the editorial expression in *Sullivan*. *Pittsburgh Press*, 413 U.S. at 385.

33. *Pittsburgh Press*, 413 U.S. at 388-89. Declaring that "we have no doubt tbat a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes," the Court concluded:

> Any First Amendment interest which might be served by advertising an ordinary commercial proposal and whicb might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself [discrimination in employment] is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

Id. at 389.

At least one commentator has interpreted this language as an implicit acknowledgement by the Court tbat pure commercial speech is not wholly undeserving of first amendment protection. *See* Note, *supra* note 25, at 213. This interpretation suggests that restrictions on commercial advertising should be assessed by balancing the first amendment interest at stake against the governmental interest. *Id.*

34. 421 U.S. 809 (1975). Then Associate Justice Rehnquist's dissent, joined by Justice White, declined to adopt the content-based analysis:

> This was a proposal to furnish services on a commercial basis, and since we have always refused to distinguish for First Amendment purposes on the basis of content, it is no different from an advertisement for a bucket shop operation or a Ponzi scheme which has its headquarters in New York.

Id. at 831 (Rehnquist, J., dissenting). As a purely commercial proposal, Justice Rehnquist deemed it "entitled to little constitutional protection." *Id.* at 832. Justice Rehnquist also found the states to have a legitimate public interest in regulation, citing New York's interest in maintaining high standards in the medical profession and protecting the public from unscrupulous practices. *Id.*

Nevertheless, content-based criteria increasingly were accepted as evidenced by the Court's decision a year later in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). In *Young* a Detroit ordinance restricting the showing of sexually explicit but nonobscene movies was upheld, in part on the ground that the content of the films rendered them deserving of a lesser degree of constitutional protection. In an analogy to commercial speech, Justice Stevens commented that "[t]he measure of constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication." *Id.* at 68-69; *see* Note, *supra* note 17, at 724 n.28.

York City organization's advertisement for low cost abortions.[35] The statute made it a misdemeanor to encourage, by advertisement, the procurement of abortions.[36] In holding the statute an unconstitutional infringement of first amendment speech, the Court reaffirmed its position in *Pittsburgh Press* that speech does not lose its first amendment protection merely because it appears as a commercial advertisement.[37] Confronted with *Chrestensen*'s apparent holding to the contrary, the Court stated that *Chrestensen* did not support the proposition that advertising is unprotected per se; rather, *Chrestensen*'s holding was limited to regulation of the manner in which advertising could be distributed.[38] The Court noted that, unlike the speech in *Chrestensen* and *Pittsburgh Press*, the advertisement at issue in *Bigelow* did more than simply propose a commercial transaction; the speech communicated information of widespread public and constitutional interest.[39] The value of commercial speech in the marketplace of ideas, in the Court's view, mandated balancing the first amendment interest at stake against the public interest purportedly advanced by the regulation.[40] In extending first amendment protection to the advertisement, the *Bigelow* balancing approach granted unprecedented protection to commercial speech. Nonetheless, the Court retained some flexibility: the scale still could tilt in favor of regulating an advertisement when the restriction reasonably furthered a legitimate public interest.[41] During its next term, however, the Court would further expand constitutional protection of commercial speech.

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35. 421 U.S. at 811 (majority opinion). Abortions were legal in New York, and no residency requirements were imposed. *Id.* at 812.

36. *Id.* at 811. At the time Bigelow was arrested, the statute provided: "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." *Id.* at 812-13 (quoting VA. CODE ANN. § 18.1-63 (1960) (repealed 1975)).

37. *Id.* at 818.

38. *Id.* at 819-20. The Court noted that the continuing validity of *Chrestensen* was in question. *Id.* at 820 n.6.

39. *Id.* at 822. The Court recognized that the advertisement in Bigelow's newspaper did more than propose a commercial transaction: "the advertisement conveyed information of potential interest and value to a diverse audience . . . [and] the activity advertised pertained to constitutional interests." *Id.*; *see* Roe v. Wade, 410 U.S. 113 (1973).

40. *Bigelow*, 421 U.S. at 826.

41. *Id.*; *see* Note, *supra* note 17, at 724.

B. Toward Greater First Amendment Protection for Commercial Speech

1. Virginia Board

The 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* represents the culmination of the Court's gradual reversal of its expressed stance in *Chrestensen.*[42] In *Virginia Board* the Court declared that purely commercial speech is entitled to first amendment protection because of its informational value to individual consumers and the general public.[43] The focus of *Virginia Board* was on the constitutionality of a Virginia statute effectively forbidding licensed pharmacists from advertising the prices of prescription drugs.[44] The complainants, prescription drug consumers, claimed that the first amendment protected their right to receive price information from pharmacists.[45]

The Court in *Virginia Board* had to determine whether the simple communication, "I will sell you the X prescription drug at the Y price,"[46] without any editorial comment, was wholly outside the protection of the first amendment.[47] The Court cited as indisputable the principle that speech does not lose its first amendment protection whenever the expression costs money or involves a solicitation to purchase.[48] Rather, content should be the distinguishing feature between unprotected speech and speech that deserves first amendment protection.[49] The Court concluded that purely commercial speech which does "no more than propose a commercial transaction"[50] is not so far removed from the "exposition of ideas"[51] that it lacks first amendment protec-

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42. 425 U.S. 748 (1976).

43. *Id.* at 770.

44. *Id.* at 749-50. The constitutional attack focused on VA. CODE ANN. § 54-524.35 (1974), which provides:

> Any pharmacist shall he considered guilty of unprofessional conduct who . . . (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

Cited in Virginia Board, 425 U.S. at 750 n.2.

45. *Virginia Board*, 425 U.S. at 753-54. In addressing the issue of whether first amendment protection applies to the flow of drug price information, the Court stated that first amendment protection, when applicable, extends not only to the communication itself but to its source and recipients as well. *Id.* at 756; *see* Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (stating that freedom of speech "necessarily protects tbe right to receive").

46. 425 U.S. at 761.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

51. *Id.* (quoting Cbaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

tion.[52] The Court found particularly persuasive the argument that consumers have at least as keen an interest in the free flow of commercial information as in political debate.[53] In the Court's opinion, the prohibition of drug price information struck hardest at the poor, the sick, and the elderly who were the least able to shop from pharmacist to pharmacist and who spent a disproportionate amount of their income on prescription drugs.[54] The Court concluded that because the free flow of commercial information is indispensable to making economic decisions, such advertising served the basic first amendment goal of enlightened public decisionmaking in a democracy and thus was entitled to first amendment protection.[55]

In reaching a decision, the *Virginia Board* majority rejected the balancing test suggested by *Bigelow*. The alternative to *Bigelow*'s strongly paternalistic approach of regulating commercial speech was to keep the channels of communication open so that individuals might make an informed decision about what is in their best interests.[56] The Court set forth the principle that the first amendment, not the legislature or the courts, balances the dangers of suppressing information and the dangers of its misuse if unrestricted.[57] The Court also stressed that its conclusion was limited to whether a state may suppress the dissemination of concededly truthful information about entirely lawful activity because of a fear of the information's effect upon its recipients.[58] In essence, the Court adopted a per se approach with respect to content-

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52. *Id.* The Court also criticized the legislative approach as "highly paternalistic." *Id.* at 770.

53. *Id.* at 763.

54. *Id.*

55. *Id.* at 765. The Court reasoned:

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

Id. (footnotes and citations omitted); *see* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (analyzing the role of the first amendment in guaranteeing democratic self-government).

56. "Virginia is free to require whatever professional standards it wishes of its pharmacies . . . . But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Virginia Board*, 425 U.S. at 770.

57. *Id.*

58. *Id.* at 773.

based restrictions on commercial speech,[59] but cautioned that its holding did not apply to mere time, place, and manner restrictions.[60] These content-neutral restrictions are justified if they serve a significant governmental interest and leave open ample alternative avenues of communication.[61]

Justice Rehnquist, the sole dissenter, criticized the majority's extension of first amendment protection to commercial speech, warning that the Court's opinion opened the door for active promotion of prescription drugs, liquor, cigarettes, and other products whose use arguahly should be discouraged.[62] Justice Rehnquist also took issue with the Court's assertion that its holding was consistent with the view that the first amendment is primarily a vehicle for the promotion of enlightened public decisionmaking about political, social, and other issues important to a democratic society.[63] Economic choices, in Justice Rehnquist's view, do not rise to the level of significance warranting constitutional protection.[64] Finally, the dissent declared that the potential harm caused by some products justifies statutory limitations on the dissemination of information about the products even though they may not be sufficiently harmful to warrant an outright prohibition against their sale.[65] Justice Rehnquist stated that the legitimacy of such legislation should be determined by balancing individual interests in free speech

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59. Note, *supra* note 17, at 726.

60. *Virginia Board*, 425 U.S. at 771.

61. *Id.*

62. *Id.* at 781 (Rehnquist, J., dissenting).

63. *Id.* at 787.

64. *Id.* (explaining that "[i]t is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment"); *see* Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979). Professors Jackson and Jeffries argue that *Virginia Board* was wrongly decided because first amendment protection should be extended only to speech concerning certain identifiable values such as effective self-government and individual self-fulfillment through free expression. *Id.* at 5. Despite this argument, the Court in *Virginia Board* elevated ordinary business advertising, which implicates none of these fundamental values, to the realm of constitutionally protected speech. *Id.* at 5-6.

According to Jackson and Jeffries, achieving aggregate economic efficiency and maximizing opportunity in a free market are values worthy of legislative consideration, but are not proper subjects of constitutional protection under the first amendment. *Id.* at 6. Their thesis, therefore, is that the first amendment should not protect commercial speech. *Id.* at 9. Jackson and Jeffries saw in *Virginia Board* the renovation of the discredited doctrine of Lochner v. New York, 198 U.S. 45 (1905), which embodied the heyday of the Court's invalidation of legislation solely because it interfered with economic liberty. Jackson & Jeffries, *supra*, at 30-31. "[E]conomic due process is resurrected, clothed in the ill-fitting garb of the first amendment, and sent forth to battle the kind of special interest legislation that the Court has tolerated for more than forty years." *Id.* at 30 (footnote omitted).

65. *Virginia Board*, 425 U.S. at 789 (Rehnquist, J., dissenting). Justice Rehnquist placed prohibitions on television commercials advertising liquor and cigarettes in this category. *Id.*

against determinations about the public welfare.[66] In his view, the danger that advertising would encourage widespread use of prescription drugs, either by illicit use or by generating patient pressure on doctors to prescribe such drugs outweighed individual interests in the freedom of advertising.[67]

2. *Virginia Board*'s Progeny

Subsequent decisions followed the holding in *Virginia Board* and granted almost complete first amendment protection to commercial speech.[68] In *Linmark Associates, Inc. v. Township of Willingboro*,[69] for example, the Supreme Court struck down as violative of the first amendment a township ordinance, prohibiting the posting of "For Sale" and "Sold" signs, enacted to stem the flight of white homeowners from a racially integrated community.[70] The Court rejected the characterization of the ordinance as a simple time, place, and manner restriction.[71] First, the ordinance did not leave open satisfactory alternative avenues of communication.[72] Second, the ordinance was not enacted to promote aesthetic values or other values "unrelated to the suppression of free expression."[73] The township, by not prohibiting all lawn signs or all signs of a particular dimension, manifested a complete lack of concern for the place and manner of the speech's dissemination. Moreover, the proscription of certain signs based on their content was motivated by a fear of the signs' primary effect—that recipients would act on the infor-

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66. *Id.* at 789. This balancing test was consistent with the *Bigelow* approach abandoned by the majority.

67. *Id.* Justice Rehnquist envisioned a scenario in which advertisements such as the following might become commonplace:

"Pain getting you down? Insist that your physician prescribe Demerol. You pay a little more than for aspirin, but you get a lot more relief."

"Can't shake the flu? Get a prescription for Tetracycline from your doctor today."

"Don't spend another sleepless night. Ask your doctor to prescribe Seconal without delay."

Id. at 788.

68. *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); *see also* Note, *supra* note 17, at 726-27.

69. 431 U.S. 85 (1977).

70. *Id.* at 86-88, 97.

71. *Id.* at 93-94.

72. *Id.* at 93. The options available to sellers—newspaper advertising and listing with real estate agents—involved greater costs and less autonomy, were less likely to reach buyers, and might be less effective in conveying the message. *Id.* at 93; *see supra* text accompanying notes 60-61.

73. *Linmark Assocs.*, 431 U.S. at 93-94 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968) (footnote omitted)). Nor did the ordinance restrict a type of communication such as television that "intrudes on the privacy of the home, . . . makes it impractical for the unwilling viewer or auditor to avoid exposure." *Id.* at 94 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975)).

mation available—rather than a detrimental secondary effect.[74]

Despite the township's laudable goal of promoting stable, racially integrated neighborhoods, the Court declared that the first amendment prohibits a state from achieving its aim by restricting the free flow of truthful information.[75] The Court warned that to allow the regulation of the information at issue would mean that every locality in the country could suppress any facts that reflect poorly on the locality as long as the community makes a plausible claim that disclosure would cause the recipients of the information to act "irrationally."[76]

In *Carey v. Population Services International*[77] the Court held unconstitutional the total suppression of advertisements for contraceptives.[78] The prohibition, which sought to prevent the dissemination of any information about the availability and price of contraceptives, could not be justified as a mere time, place, and manner restriction; nor could it stand as a prohibition against misleading advertisements or advertisements proposing an illegal transaction.[79] The statute not only contravened the societal interest in the free flow of commercial information about entirely legal products, but also suppressed speech concerning the availability of constitutionally protected products.[80] Consequently, the Court found the regulation unjustified.[81]

Finally, in *Bates v. State Bar of Arizona*[82] the Court struck down an Arizona disciplinary rule against advertising the availability and price of routine legal services.[83] Relying on *Virginia Board*, the Court held that the regulation violated the first amendment.[84] The Court limited its holding to the blanket suppression of truthful advertisements regarding the availability of a lawful service and acknowledged certain permissible limitations including reasonable time, place, and manner regulations,[85] prohibitions against advertisements concerning illegal transactions,[86] and suppression of advertising on the electronic broadcast media that poses problems "warranting special consideration."[87]

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74. *Id.* at 93-94 (citing Young v. American Mini Theatres, 427 U.S. 50, 71 n.34 (1976)).
75. *Id.* at 95-96 (referring to *Virginia Board*, 425 U.S. 748).
76. *Id.* at 96.
77. 431 U.S. 678 (1977).
78. *Id.* at 700-02.
79. *Id.* at 700 (citing *Virginia Board*, 425 U.S. at 771-73).
80. *Id.* at 701.
81. *Id.* at 701-02.
82. 433 U.S. 350 (1977).
83. *Id.* at 383-84.
84. *Id.* at 363-65.
85. *Id.* at 384 (citing *Virginia Board*, 425 U.S. at 771).
86. *Id.* (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973)).
87. *Id.* (citing Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*,

Justice Rehnquist dissented from the portion of the *Bates* opinion that holds the Arizona regulation of commercial solicitation by lawyers to be an infringement on the first amendment.[88] The dissent declared that invocation of the first amendment to protect advertisements of goods and services undermines the value of the first amendment as a protector of freedom of expression on matters of public importance.[89] Moreover, Justice Rehnquist lamented that the constitutionally sound and predictable distinction established by *Valentine v. Chrestensen*[90] in excepting commercial speech from first amendment protection had degenerated into case-by-case adjudication of first amendment claims brought by advertisers.[91]

C. *The Waning of First Amendment Protection for Commercial Speech*

Virginia Board and its progeny represent the peak of constitutional protection for commercial speech. Later cases have refined the commercial speech doctrine and concomitantly narrowed first amendment protection of commercial expression. In two 1978 cases concerning state regulation of attorney solicitation, for example, the Court distinguished speech linked to political expression from speech proposing a commercial transaction.[92] Both cases stemmed from disciplinary actions against attorneys for soliciting clients, but involved markedly different factual settings. In *In re Primus*,[93] Edna Primus' offense was to advise a Medicaid patient, who had been sterilized as a condition of continued receipt of government benefits, that the American Civil Liberties Union (ACLU) would represent her without fee in a suit against the doctor who had performed the operation.[94] In granting full first amendment protection to Primus' speech, the Court stated that Primus' actions were an expression of her political beliefs and ideas that reflected her affiliation with the ACLU.[95] The case thus involved the rights to political expression and associational freedom, both of which have been traditionally protected by the first amendment.[96]

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405 U.S. 1000 (1972) (upholding the constitutionality of 15 U.S.C. § 1335, which prohibits broadcast advertising of cigarettes)).

88. *Id.* at 404 (Rehnquist, J., dissenting in part).

89. *Id.*

90. 316 U.S. 52 (1942). For a discussion of *Chrestensen*, see *supra* notes 18-21.

91. *Bates*, 433 U.S. at 404-05 (Rehnquist, J., dissenting in part).

92. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 59 (Supp. 1979).

93. 436 U.S. 412 (1978).

94. *Id.* at 414-16.

95. *Id.* at 426-32, 437-38 & n.32.

96. *Id.* The Court noted that "[w]here political expression or association is at issue, tbe Court has not tolerated the degree of imprecision that often characterizes government regulation

In contrast, Albert Ohralik, the attorney disciplined in *Ohralik v. Ohio State Bar Association*,[97] offered his services on a contingency fee basis to two eighteen-year-old accident victims not long after the accident occurred.[98] While Primus had sought to vindicate the legal rights of others in the tradition of lawyers volunteering their services in the public interest, Ohralik's actions were primarily for the benefit of bis own pecuniary interests.[99] The Court also distinguished the public advertisement in *Bates* from Ohralik's in-person solicitation by pointing out that Ohralik's actions, by exerting pressure for an immediate response, left little time for comparison and reflection.[100] Consequently, the Court deemed the in-person solicitation of remunerative employment to be entitled to marginal first amendment protection subject to regulation in furtherance of important state interests.[101] Given Ohio's compelling interest in preventing the potential overreaching inherent in solicitation, the prophylactic rule restricting a lawyer's in-person solicitation of employment was justified.[102] By recognizing a state's interest in regulating solicitation of a lawful service, this decision signaled a retreat from the broad first amendment protection conferred upon commercial speech in *Virginia Board.*

Ohralik paved the way for *Central Hudson Gas & Electric Corp. v. Public Service Commission*[103] in which the Court clarified the degree of constitutional protection that commercial speech merits. Central Hudson opposed, on first amendment grounds, an order by the New York Public Service Commission banning all promotional advertising intended to stimulate the purchase of utility services while allowing infor-

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of the conduct of commercial affairs." *Id.* at 434.

97. 436 U.S. 447 (1978).

98. *Id.* at 450-51.

99. *Compare Primus*, 436 U.S. at 438 n.32 *with Ohralik*, 436 U.S. at 471 (Marshall, J., concurring).

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

101. *Id.* at 459.

102. *Id.* at 462, 468. Ohralik was disciplined under Disciplinary Rules (DR) 2-103(A) and 2-104(A) of the *Ohio Code of Professional Responsibility. Ohralik*, 436 U.S. at 453.

DR 2-103(A) of the Ohio Code provides: "A lawyer shall not recommend employment as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1970), *quoted in Ohralik*, 436 U.S. at 453 n.9.

Ohio DR 2-104(A)(1) provides:

> (A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:
>
> (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonahly believes to be a client.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY 2-104(A)(1) (1970), *quoted in Ohralik*, 436 U.S. at 453 n.9.

103. 447 U.S. 557 (1980).

mational advertising designed to shift consumption.[104] The Court decided whether a state's interest in decreasing public demand for a lawful activity justifies suppressing advertisement of the activity's availability.[105] The Court noted that while direct comments on public issues retain the full panoply of first amendment protections, statements made in the context of commercial transactions are entitled to less constitutional protection.[106] Moreover, the protection available for commercial speech depends on the nature of the message and the governmental interest advanced by its prohibition.[107]

The Court developed a four-pronged test to balance the competing interests of government and advertisers. First, the speech at issue must concern a lawful activity and not be misleading. Second, the restriction on commercial speech must serve a substantial governmental interest. Third, the regulation must directly further the asserted interest. Finally, the regulation must be no more extensive than necessary to achieve the state's interest.[108] Applying this test, the Court found Central Hudson's advertisement accurate and related to a lawful activity; therefore, the advertisement deserved first amendment protection.[109] The Court also determined that New York had a substantial interest in energy conservation and in ensuring that rates were equitable and efficient.[110] Even though the connection between promotional advertising and rate structures was tenuous, the Commission's order directly advanced the State's interest in energy conservation.[111] The order, however, failed the fourth prong of the test because New York made no showing that a more limited regulation would be ineffective in achieving the State's objective.[112] Consequently, the Court held that the prohibi-

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104. *Id.* at 558-60. This case arose in the context of the energy shortage of the early 1970s. The order was the Commission's response to concerns that the State did not have sufficient fuel to meet consumer demands for the 1973-74 winter. Though the fuel situation, and consequently the justification for the order, became less critical over the next few years, the ban on advertising remained. *Id.* at 559.

105. *See* Note, *supra* note 17, at 727-28 (discussing *Ohralik* and Friedman v. Rogers, 440 U.S. 1 (1979), as suggesting a retreat from the *Virginia Board* and *Linmark Associates* rejections of "paternalism" and as implying that a state may protect its citizens by shielding them from information).

106. *Central Hudson*, 447 U.S. at 563 n.5 (citing Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980)).

107. *Id.* at 563.

108. *Id.* at 566.

109. *Id.* at 566-68.

110. *Id.* at 569.

111. *Id.*

112. *Id.* at 570-71. The Court gave considerable attention to Central Hudson's argument that the ban not only prohibited advertising that would encourage energy use, but also prevented the utility from promoting electric services that would decrease energy use by diverting demand from inefficient sources. *Id.* at 570.

tion violated the first amendment because the prohibition was not the least restrictive means of serving the State's interest.[113]

Justice Blackmun, concurring in the judgment, denounced the majority's test as inconsistent with prior cases that provided full first amendment protection for truthful, nondeceptive commercial speech.[114] Justice Blackmun agreed that the intermediate scrutiny employed by the court was applicable to misleading or coercive speech and to time, place, and manner restrictions. He advocated stricter scrutiny when, as in this case, the state suppresses information about a lawful product in order to manipulate private decisions about the product's use.[115] Justice Blackmun questioned the legitimacy of state suppression of information on the availability of a legally offered product to decrease the demand for its use. He argued that, absent clear and present danger, a state should not be able to prohibit speech simply because of the effect the message may have on the public.[116] Moreover, in Justice Blackmun's view, content-based regulatory measures represent an attempt by the state to manipulate the choices of its citizens by depriving the public of the information needed to make a free choice.[117]

Justice Blackmun stated further that *Central Hudson* did not involve the special problems of the electronic broadcast media or concern the advertising of an unlawful transaction.[118] Given that the issue was state suppression of information about a legal activity because of fear concerning that information's effect on the recipients, Justice Blackmun found the majority's inquiry into the substantiality of the State's interest inappropriate and inconsistent with the *Virginia Board* holding that a state may not seek to further its aims by keeping its citizens in

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113. *Id.* at 572.

114. *Id.* at 573 (Blackmun, J., concurring).

115. *Id.* at 573, 576-78. Justice Blackmun cited a number of prior Supreme Court decisions invalidating restraints designed to deprive consumers of information about legally offered goods and services. *Id.* at 574; *see* Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (legal services); Carey v. Population Servs. Int'l, 431 U.S. 678, 700-02 (1977) (contraceptives); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (homes for sale); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (pharmaceutical prices); Bigelow v. Virginia, 421 U.S. 809 (1975) (abortions); *see also The Supreme Court, 1979 Term*, 94 HARV. L. REV. 1, 168 (1980) (arguing that the Court's four-part analysis inadequately protects commercial speech; in order to further the core values of the first amendment, content-based regulation of commercial speech should be subject to full first amendment protection).

At the other end of the spectrum, Justice Rehnquist's dissent criticized the majority's decision for allowing too much deference to commercial speech and termed the Court's actions a return to the *Lochner* era when the Court struck down state economic regulations. *Central Hudson*, 447 U.S. at 589 (Rehnquist, J., dissenting). Justice Rehnquist further condemned the Court for unlocking a Pandora's Box by giving commercial speech co-equal status with political speech. *Id.*

116. *Central Hudson*, 447 U.S. at 575 (Blackmun, J., concurring).

117. *Id.* at 574-75.

118. *Id.* at 576.

ignorance.[119] Justice Blackmun ended his concurrence by voicing concern about the far-reaching ramifications of allowing a state to prohibit information about a lawful product in order to decrease public demand for it. Rather than suppressing groups from advertising their products and services in order to deter the public from using them, he advocated an approach whereby the state would directly regulate the use of the product or service.[120]

The Supreme Court has applied the *Central Hudson* analysis inconsistently in subsequent cases.[121] In *Metromedia, Inc. v. City of San Diego*,[122] for example, the Court, while claiming to apply the intermediate standard of review mandated by *Central Hudson*, actually employed a more deferential test.[123] At issue was the constitutionality of a city ordinance restricting commercial and noncommercial billboard advertising[124] in order to improve traffic safety and aesthetics.[125] The *Metromedia* plurality applied a diluted version of the *Central Hudson* test to the commercial component of the ordinance and found that the city's assessment of the risks the signs posed was "not manifestly unreasonable."[126] First, the advertising at issue concerned a lawful activity and was not misleading. Second, the twin goals of traffic safety and city appearance were substantial governmental interests. Third, because billboards have a distracting effect which contributes to traffic accidents and poses an aesthetic harm, the ordinance directly advanced the asserted governmental interest. With respect to the fourth prong, however, the Court ignored the least restrictive means question and deferred to the city's judgment.[127] The Court summarily rejected the

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119. *Id.* (citing *Virginia Board*, 425 U.S. at 770).

120. *Id.* at 579.

121. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (holding that a prohibition on the mailing of unsolicited advertisements for contraceptives violated the first amendment's protection of commercial speech); *In re* R.M.J., 455 U.S. 191 (1982) (holding that restrictions on attorney advertisements violate the first amendment); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (holding that a city ordinance restricting the erection of outdoor advertising displays, insofar as it affected commercial speech, met the constitutional requirements of *Central Hudson*).

122. 453 U.S. 490 (1981).

123. *Id.* at 34-35 n.12 (Brennan, J., concurring); *see also* Note, *supra* note 7, at 782-83; Comment, *supra* note 7, at 910-11.

124. Under the ordinance, the occupant of the property could advertise his own goods and services, but could not advertise others' goods and services. *Metromedia*, 453 U.S. at 503 (plurality opinion).

125. *Id.* at 493.

126. *Id.* at 509. Some commentators have compared the *Metromedia* standard of review to the "rational basis" test used in substantive due process analysis of economic regulations. *See* Comment, *supra* note 7, at 910; Note, *supra* note 7, at 783 (stating that the *Metromedia* analysis "reduced *Central Hudson*'s commercial speech test to a rational basis standard of review").

127. *Metromedia*, 453 U.S. at 507-10.

claim that the ordinance was broader than necessary by saying, "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them."[128]

Although the ordinance purportedly satisfied the four *Central Hudson* criteria insofar as it regulated commercial speech, the Court subjected the noncommercial component to stricter scrutiny because case precedent indicated noncommercial speech is entitled to "a greater degree of protection than commercial speech."[129] The Court held the ordinance unconstitutional because the public interest in restricting on-site advertising did not sufficiently outweigh the private interest in non-commercial communication.[130]

Metromedia and *Central Hudson* may be reconciled by focusing on whether the regulation of commercial expression is content-based or content-neutral.[131] The Court employed deferential review in *Metromedia* in which the regulation of commercial speech was content-neutral. On the other hand, the Court applied an intermediate level of scrutiny in *Central Hudson* where the regulation of commercial speech was content-based.[132] This bifurcation is consistent with the two levels of review for noncommercial speech—a strict standard for content-based restrictions and a more relaxed one for content-neutral regulations.[133] Moreover, "[b]ecause commercial speech requires less protection than noncommercial speech, the two levels of review for regulations of commercial expression should be more lenient than the standards applied in reviewing analogous regulations of non-commercial speech."[134]

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128. *Id.* at 508.

129. *Id.* at 513. "Because our cases have consistently distinguished between the constitutional protection afforded commercial as opposed to noncommercial speech, in evaluating appellants' contention we consider separately the effect of the ordinance on commercial and noncommercial speech." *Id.* at 504-05.

130. *Id.* at 521.

131. *See* Comment, *supra* note 7, at 917.

132. *Id.* at 916-17; *see also* Note, *supra* note 7, at 783 (stating that "it is siguificant that the San Diego ban was directed only at the form of the advertising, not its content" and that "*Metromedia* did not necessarily alter *Central Hudson*'s intermediate standard of review for content based regulations designed to suppress information about a particular product").

133. *See* Comment, *supra* note 7, at 916.

134. *Id.* at 914 (footnote omitted).

III. Recent Developments

A. Zauderer v. Office of Disciplinary Counsel

In 1985 the Supreme Court addressed the regulation of commercial speech by attorneys in *Zauderer v. Office of Disciplinary Counsel.*[135] The Court focused on whether a state may discipline an attorney for running nondeceptive newspaper advertisements to solicit business, and whether a state may seek to prevent the public from being deceived by requiring attorneys to disclose fee arrangements in their advertisements.[136] Zauderer, an attorney practicing in Ohio, had run two advertisements in Ohio newspapers. The first advertisement informed readers that his firm would represent defendants charged with drunk driving and would refund the legal fees if the client were convicted of drunk driving.[137] The second advertisement, featuring a drawing of the Dalkon Shield accompanied by the caption "Did you use this IUD?", advised the public of Zauderer's willingness to represent women injured by their use of the Dalkon Shield Intrauterine Device.[138] The Office of Disciplinary Counsel subsequently filed a complaint charging the appellant with numerous disciplinary violations stemming from the publication of the two advertisements.[139] Zauderer's principal defense was that

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135. 471 U.S. 626, 629 (1985).

136. *Id.* at 629.

137. *Id.*

138. *Id.* (capitalizations omitted). The advertisement also contained the following information:

> "The Dalkon Shield Interuterine *[sic]* Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients."

Id. at 631.

139. *Id.* at 632-33. The complaint alleged that in offering representation on a contingent-fee basis in a criminal case, the appellant had violated Ohio Disciplinary Rule 2-101(A), which provides that "[a] lawyer shall not . . . use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." Ohio Code of Professional Responsibility DR 2-101(A) (1970), *quoted in Zauderer*, 471 U.S. at 631 n.3. Concerning the Dalkon Shield advertisement, the complaint alleged that by running the advertisement and accepting employment from respondents, the appellant had violated a number of other disciplinary rules. First, the appellant violated Ohio DR 2-101(B), which prohibits the use of illustrations in advertisements for attorney services. *Zauderer*, 471 U.S. at 632 (citing Ohio Code of Professional Responsibility DR 2-101(B) (1970)). Second, appellant violated Ohio DR 2-103(A), which prohibits an attorney from recommending himself for employment "to a nonlawyer who has not sought his advice regarding employment of a lawyer." *Id.* at 633 (quoting Ohio Code of Professional Responsibility DR 2-103(A) (1970); *see also supra* note 102 (reprinting text of DR 2-103(A)). Third, appellant violated DR 2-104(A) by accepting employment as a result

the rules governing the content of attorney advertising failed to withstand first amendment scrutiny and were, therefore, unconstitutional.[140]

Because Zauderer's advertisements "undeniably propose[d] a commercial transaction," the Court deemed the advertisements to fall within the bounds of commercial speech.[141] As commercial speech, the advertisements were entitled only to limited first amendment protection.[142] Applying the test enunciated in *Central Hudson*,[143] the Court concluded that blanket prohibitions on price advertising by attorneys and bans against the use of nondeceptive terminology in attorney advertisements were impermissible.[144] The Court found unconvincing Ohio's contention that a broad prophylactic rule against attorney advertising was essential to carry out the substantial government interest in ensuring that citizens were not encouraged to institute litigation based on inaccurate and ambiguous statements.[145] The Court understood the State's argument to proceed from the premise that differentiating false, deceptive advertisements from truthful, beneficial advertisements is inherently difficult. To the contrary, the Court determined that assessing the validity of the information and legal advice in the advertisements was not necessarily complex.[146] Moreover, the Court found the accuracy of Zauderer's statements regarding the Dalkon Shield litigation to be

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of giving unsolicited advice to a layman. *Zauderer*, 471 U.S. at 633; *see also supra* note 102 (reprinting text of DR 2-104(A)). Finally, the appellant's failure to disclose the client's potential liability for costs as opposed to legal fees in an unsuccessful suit violated DR 2-101(A) because the advertisement was "misleading" and also violated DR 2-101(B)(15), which requires that advertisements mentioning contingent-fee rates "disclos[e] whether percentages are computed before or after deduction of court costs and expenses." *Zauderer*, 471 U.S. at 632 n.4.

140. *Zauderer*, 471 U.S. at 634. In support of his claim, the appellant relied on Bates v. State Bar of Arizona, 433 U.S. 350 (1977), and *In re* R.M.J., 455 U.S. 191 (1982). *Zauderer*, 471 U.S. at 634.

141. *Zauderer*, 471 U.S. at 637. In identifying the advertisements as commercial speech, the Court noted that statements in the advertisements regarding the legal rights of women injured by the Dalkon Shield did not transform the advertisements into noncommercial speech deserving the full panoply of first amendment protections. *Id.* at n.7.

142. *Id.* at 637.

143. 447 U.S. 557, 566 (1980).

144. *Zauderer*, 471 U.S. at 638. The *Zauderer* Court distinguished its decision in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), by stating that the unique regulatory difficulties presented by in-person solicitation justified the adoption in *Ohralik* of a prophylactic rule banning lawyers from soliciting for monetary gain. "[I]n-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services." 471 U.S. at 641-42 (quoting *Ohralik*, 436 U.S. at 455). Because the printed advertisements at issue in *Zauderer* were "more conducive to reflection and the exercise of choice on the part of the consumer" than face-to-face solicitation by an attorney, the Court found lacking the substantial government interests that had justified the restriction imposed in *Ohralik*. *Id.* at 642.

145. *Zauderer*, 471 U.S. at 644.

146. *Id.* at 645-46.

easily verifiable.[147] Based on these findings, the Court concluded that an attorney may not be disciplined for the solicitation of legal business through printed advertising that contains truthful, nondeceptive information and advice about the legal rights of potential clients.[148] The Court went on to state that the mere possibility that some members of the public might find the advertising embarrassing or offensive could not justify the information's suppression.[149]

The Court next addressed whether a state may affirmatively require disclosure in commercial advertising. The Court recognized that in some situations a compulsion to speak may be equally as violative of the first amendment as a prohibition against speech. However, Zauderer's interest in not disclosing particular factual information about fee arrangements in his advertisements was minimal because the benefit that such commercial speech provides to consumers is the primary justification for the extension of first amendment protection to commercial speech.[150] The Court held, therefore, that an advertiser's rights receive adequate protection as long as disclosure requirements are reasonably related to a state's interest in preventing the deception of consumers.[151] Applying this reasoning, the Court found that the State's argument that it is deceptive to use advertising referring to contingent fee arrangements without mentioning the client's liability for legal costs was sufficiently reasonable to support a requirement that the advertising disclose the client's liability for costs.[152]

B. Pacific Gas & Electric Co. v. Public Utilities Commission of California

At issue in the 1986 case of *Pacific Gas & Electric Co. v. Public Utilities Commission of California*[153] was whether a state public utilities commission may compel a privately owned utility to include in its billing envelopes speech of another party with which the utility disagrees.[154] Pacific Gas & Electric Company (PG & E) had distributed for

147. *Id.* at 645.

148. *Id.* at 647.

149. *Id.* at 648 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977)).

150. *Id.* at 651 (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)).

151. *Id.* The Court noted that because the first amendment interests raised by disclosure requirements were weaker than those at issue when speech was prohibited, a less stringent standard of review was appropriate. Consequently, the Court rejected the appellant's contention that the disclosure requirements be analyzed under the "least restrictive means" analysis and struck down if there were any other means to serve the State's purposes. *Id.* at n.14.

152. *Id.* at 653.

153. 106 S. Ct. 903 (1986).

154. *Id.* at 905.

over sixty years in its monthly billing statement a newsletter that included political editorials, tips on energy conservation, and other matters of public interest.[155] California's Public Utilities Commission had determined that the "extra space" in the billing envelope, after insertion of the monthly bill and any necessary legal notices, was the property of the ratepayers.[156] Proceeding from the assumption that ratepayers would benefit from exposure to a variety of opinions, the Commission permitted a third party to use the space to publicize views contrary to the views held by PG & E.[157] In response to PG & E's claim of first amendment protection from being forced to disseminate messages with which it disagreed, the Supreme Court considered whether requiring a private corporation to provide a forum for opposing views infringes on the corporation's freedom of speech.[158] The Court found that, notwithstanding the Commission's definition of the relevant property rights to the extra space, "compelled access" penalizes and deters the expression of ideas and forces speakers to tailor their speech to the opponent's agenda.[159] The Court stated that regardless of who owned the extra space, the Commission's order forced PG & E to use its own property—the envelopes—to distribute the opponent's message.[160]

Given these burdens on PG & E's protected speech, the Court postulated that the Commission's order would be upheld only if narrowly tailored to serve a "compelling state interest."[161] The Court addressed

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155. *Id.*

156. *Id.* at 906.

157. *Id.*

158. *Id.* at 908. Justice Powell, delivering the plurality opinion in which Chief Justice Burger and Justices Brennan and O'Connor joined, recognized that concomitant with the first amendment freedom from restraints on voluntary speech is a freedom not to speak publicly that serves the same goal as freedom of affirmative speech. *Id.* at 909. Justice Rehnquist took the opposite view, stating that the "negative free speech rights, applicable to individuals and perhaps the print media, should [not] be extended to corporations generally." *Id.* at 917 (Rehnquist, J., dissenting). Justice Rehnquist also adopted the position that case precedent could not be reconciled with the notion that "the First Amendment prohibits governmental action that only *indirectly* and *remotely* affects a speaker's contribution to the overall mix of information available to society." *Id.* (emphasis in original). Justice Rehnquist conceded, however, that the first amendment "does prohibit governmental action affecting the mix of information available to the public if the effect of the action approximates that of direct content-based suppression of speech." *Id.* at 918.

159. *Id.* at 908 (plurality opinion). Compelled access consists of forcing a private corporation "to provide a forum for views other than its own [that] may infringe on the corporation's freedom of speech." *Id.*

160. *Id.* at 912.

161. *Id.* at 913 (citing Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535 (1980), and First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978)). The Court rejected the Commission's alternative argument that the order was an acceptable time, place, or manner restriction that served a "significant governmental interest" and left open "ample alternative channels for communication." *Id.* at 914. The Court stated that a valid time, place, or manner restriction must be content-neutral. *Id.*

in turn each of the two assertedly compelling state interests furthered by the access order. First, the Court stated that while the State's interest in fair and effective ratemaking may be compelling, that interest could be advanced through other means, such as fees and awards, that would not abridge first amendment rights.[162] On the facts presented, the Court found no significant relationship between the access rule and the asserted state interest.[163] Second, the Court noted that the content-based regulation at issue would not further the asserted state interest in promoting speech by disseminating diverse views.[164] The restriction was not a narrowly tailored means of serving the state interest. Finally, the Court declared that the "State cannot advance some points of view by burdening the expression of others."[165]

C. City of Renton v. Playtime Theatres, Inc.

On the same day it struck down the *Pacific Gas* restriction as violative of the first amendment, the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*[166] upheld on first amendment grounds the validity of a zoning ordinance prohibiting adult motion picture theaters from locating within 1000 feet of any residential zone, single or multiple family dwelling, church, park, or school.[167] Justice Rehnquist, delivering the opinion of the Court, analyzed the ordinance as a time, place, and manner regulation because the ordinance merely restricted the location of adult theaters, but did not ban them entirely.[168] As a content-neutral regulation, the ordinance was constitutional as long as it was designed to serve a substantial governmental interest and did not unreasonably

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162. *Id.* at 913.

163. *Id.*

164. *Id.* at 914. Because the order awarded access on the basis of disagreement with the utility's views, the Court characterized the order as content-based. *Id.* at 910-11. Justice Rehnquist disagreed with the plurality's characterization of the regulation, instead viewing the order as content-neutral: "[T]he central reason for the access order—to provide for an effective ratepayer voice—would not vary in importance if PG & E had never distributed the inserts or ceased distributing them tomorrow." *Id.* at 919 (Rehnquist, J., dissenting).

165. *Id.* at 914 (plurality opinion). Justice Rehnquist disagreed with the proposition that the access order abridged first amendment values. He viewed first amendment protection of corporate speech as arising not from the interest in self-expression as for individuals, but from the purpose of "fostering a broad forum of information to facilitate self-government." *Id.* at 921 (Rehnquist., J., dissenting) (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)). Justice Rehnquist noted that the same "societal interest in receiving information and ideas" that supported editorial speech also served as the basis for the protection of the corporate speech at issue. Because PG & E was trying to suppress the presentation of opposing views, Justice Rehnquist characterized its constitutional interest as de minimus. *Id.* (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)).

166. 106 S. Ct. 925 (1986).

167. *Id.* at 926-27.

168. *Id.* at 928.

limit alternative channels of communication.[169] Thus, the Court distinguished content-neutral restrictions, such as the zoning ordinance at issue, from content-based regulations, which presumptively violate the first amendment.[170] The Court justified its characterization of the ordinance as content-neutral by emphasizing that the ordinance was aimed "not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community."[171] The Court cited crime prevention, maintenance of property values, protection of retail trade, and preservation of the quality of urban life among the values that the city sought to advance by enacting the ordinance.[172] Furthermore, because the ordinance was deemed content-neutral rather than content-based, the ordinance did not violate the principle that a state may not grant the use of a forum to persons whose views the state finds acceptable but deny use to persons wishing to express less favored or more controversial views.[173]

After determining that the appropriate inquiry for content-neutral restrictions focuses on whether the regulation serves "a substantial government interest" and allows for "reasonable alternative avenues of communication,"[174] the Court proceeded to analyze the local ordinance. The Court found first that the ordinance served the city's interest in preserving the quality of life[175] and that no constitutional infirmity

169. *Id.* The dissent, viewing the ordinance as a content-based restriction, applied a higher standard of review than the majority. "[T]he ordinance, like any other content-based restriction on speech, is constitutional 'only if the [city] can show that [it] is a precisely drawn means of serving a compelling [governmental] interest.' " *Id.* at 937 (Brennan, J., dissenting) (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980)). The dissent further stated that "[o]nly this strict approach can insure that cities will not use their zoning powers as a pretext for suppressing constitutionally protected expression." *Id.* The dissent criticized the majority for being too deferential to the city. *Id.*

170. *Id.* at 928 (majority opinion).

171. *Id.* at 929 (emphasis in original). Justice Brennan, joined by Justice Marshall, dissented, characterizing the ordinance as a content-based restriction on certain kinds of speech. That the deleterious secondary effects of adult theaters arguably constituted a compelling justification for the ordinance did not transform the regulation into a content-neutral ordinance. *Id.* at 934 (Brennan, J., dissenting). The dissent theorized that the purpose of the regulation in reality was to discriminate against adult theaters on the basis of the content of the films they exhibit. *Id.* In support of its contention, the dissent pointed out that after the lawsuit the city council amended the regulation by providing that the policy underlying the ordinance was the protection and preservation of "the quality of urban life through effective land use planning." *Id.* at 935.

172. *Id.* at 929 (majority opinion).

173. *Id.* (citing Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972)).

174. *Id.* at 930.

175. *Id.* In finding that the ordinance furthered a substantial governmental interest, the Court held that the city was entitled to rely on the experiences and studies of nearby cities in enacting adult theater zoning ordinances. *Id.* at 930-31. The first amendment did not require that the city conduct new studies as long as the outside evidence was "reasonably believed to be relevant to the problem that the city addresses." *Id.* at 931.

tainted the means adopted by Renton to advance its substantial state interest.[176] The ordinance was "narrowly tailored" to affect only those theaters shown to produce the undesired secondary effects.[177] Second, the Court found that the zoning regulation left open ample alternative avenues of communication.[178] The ordinance provided 520 acres, approximately five percent of the land in Renton, for use as adult theater sites.[179] Therefore, the Court rejected the first amendment challenge to the ordinance because the ordinance was a valid governmental response to the serious problems posed by adult theaters.[180]

D. Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico

In July of 1986 the Supreme Court in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*[181] rejected a first amendment challenge[182] to the constitutionality of a Puerto Rico statute and regulations that restricted gambling parlor advertising aimed at residents of Puerto Rico.[183] Justice Rehnquist, writing for the majority,[184] stated

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176. *Id.* at 931. The Court stated that cities may regulate adult theaters by dispersing or by centralizing them, but that it was not the province of the courts to appraise the wisdom of the method chosen. *Id.*

177. *Id.* The Court rejected the contention that the statute was underinclusive for failing to regulate other adult businesses likely to produce similar secondary effects. *Id.* The Court stated that no such businesses were in Renton at the time the statute was enacted and that the city had not focused on certain theaters for discriminatory treatment. *Id.* The Court seemed to endorse a step-by-step approach by stating that the city might "in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kind of secondary effects as adult theaters." *Id.* at 932. The dissent, on the other hand, stated that, in light of the first amendment interests at stake, such a gradual approach was inappropriate. *Id.* at 934 (Brennan, J., dissenting).

178. *Id.* at 932 (majority opinion).

179. *Id.* The Court rejected the argument that the 520 acres were not truly available because the land either was already occupied by existing businesses, not for sale or lease, or not "commercially viable." *Id.* The Court stated that the theater owners, like any other prospective purchasers, must fend for themselves in the market for real estate. *Id.* The dissent, however, indicated that operators of adult theaters are not on an equal footing with some other potential buyers and lessees because theaters must operate under some restrictions not levied on other businesses. *Id.* at 938 (Brennan, J., dissenting). By denying the theater owners sites for their businesses, the zoning ordinance was an effective prohibition against a form of protected speech. *Id.*

180. *Id.* at 932 (majority opinion).

181. 106 S. Ct. 2968 (1986).

182. The Court noted that Puerto Rico is subject to the first amendment free speech clause. *Id.* at 2971 n.1 (citing Balzac v. Porto Rico, 258 U.S. 298, 314 (1922)).

183. *Id.* at 2971. The Games of Chance Act of 1948 (Act), permits the playing of roulette, dice, and cards at licensed gambling casinos in Puerto Rico. *Id.* at 2972 (discussing § 2 of the Games of Chance Act of 1948, *codified as amended at* P.R. LAWS ANN. tit. 15, § 71 (1972)). Subsequent statutes added bingo and slot machines to the Act's list of authorized games. *See id.* at 2972 (discussing Act of June 7, 1948, No. 21, § 1 (bingo) and Act of July 30, 1974, No. 2, pt. 2, § 2 (slot

that the case involved the restriction of purely commercial speech[185]

machines)). The legislative intent underlying legalization of certain forms of gambling was

> to contribute to the development of tourism by means of the authorization of certain games of chance which are customary in the recreation places of the great tourist centers of the world, and by the establishment of regulations for and the strict surveillance of said games by the government, in order to ensure for tourists the best possible safeguards, while at the same time opening for the Treasurer of Puerto Rico an additional source of income.

Id. (citing Games of Chance Act of 1948 § 1, *codified as amended at* P.R. LAWS ANN. tit. 15, § 71 (1972)).

The Act further provides that " '[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico.' " *Id.* (citing Games of Chance Act of 1948 § 8, *codified as amended at* P.R. LAWS ANN. tit. 15, § 77 (1972)). The government issued two regulations to implement the advertising restriction in § 8 of the Act. The first, Regulation 76-218, essentially reiterated the terms of § 8. *Id.* at 2972 (citing P.R. R. & REGS. tit. 15, § 76-218 (1972)). The second, Regulation 76a-1(7), as amended in 1971, prohibited gambling casinos from advertising

> to the public in Puerto Rico. The advertising of our games of chance is hereby authorized through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by the Tourism Development Company of the advertisement to be submitted in draft to the Company.

Id. at 2972 (quoting P.R. R. & REGS. tit. 15, 76à-1(7) (1972)). The Tourism Company interpreted these restrictions to prohibit the use of the word "casino" in any manner that might be accessible to the Puerto Rican public. *Id.* at 2973. Viewing this interpretation as too broad, the Superior Court of Puerto Rico issued a narrowing construction of the Act, stating that "the only advertisement prohibited by law originally is that which is contracted with an advertising agency, for consideration, to attract the resident to bet at the dice, card, roulette and bingo tables." *Id.* at 2973 (quoting the decision of the Superior Court of Puerto Rico).

The Puerto Rican court also set forth a narrowing construction of Regulation 76a-1(7):

> Advertisements of the casinos in Puerto Rico are prohibited in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casinos.
>
> . . . .
>
> We hereby allow, within the jurisdiction of Puerto Rico, advertising by the casinos addressed to tourists, provided they do not invite the residents of Puerto Rico to visit the casino, even though said announcements may incidentally reach the hands of a resident.
>
> . . . .
>
> . . . [A]ny other situation or incident relating to the legal restriction must be measured in light of the public policy of promoting tourism. If the object of the advertisement is the tourist, it passes legal scrutiny.

Id. at 2973-74 (quoting the decision of the Superior Court of Puerto Rico). This narrowing construction ensured that the advertising restrictions would not inhibit the freedom of the press to report on casino gambling or the freedom of individuals to comment on such matters of public concern as legislation related to gambling. *Id.* at 2976 n.7; *see* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 n.7 (1985) (stating that Ohio's prohibition against advertising legal services in Dalkon Shield cases placed no ban on the right to publish facts or express opinions about Dalkon Shield litigation); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) (holding that the government cannot forbid comments on the ordinance, commission enforcement practices, or the propriety of gender-based preferences in employment); Jackson & Jeffries, *supra* note 64, at 35 n.125 (stating that political dialogue lies at the core of the first amendment).

184. Justice Rehnquist's majority opinion was joined by Chief Justice Burger and Justices White, Powell, and O'Connor.

185. Pure commercial speech is speech that does "no more than propose a commercial transaction." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S.

and concluded that the principles enunciated in *Central Hudson* should guide the first amendment analysis.[186] Purportedly applying the four-pronged *Central Hudson* test, the Court found first that the commercial speech at issue—the advertising of casino gambling—concerned a lawful activity, was not misleading, and was therefore entitled to limited first amendment protection.[187] Second, the Court determined that Puerto Rico had a substantial interest in reducing the demand for casino gambling by its residents in order to protect their health, safety, and welfare against the harmful effects caused by casino gambling.[188] Third, the Court found that because the legislature reasonably believed that advertising casino gambling to residents of Puerto Rico would increase demand for the service advertised, the challenged restrictions "directly advance[d]" the asserted governmental interest.[189] Fourth, the Court stated that the restrictions on commercial speech, because they affected only advertising directed toward residents of Puerto Rico, were no more extensive than necessary to further the government's interest in protecting its citizens.[190] Thus, the statute and regulations passed the

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376, 385 (1973)).

186. *Posadas*, 106 S. Ct. at 2976 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)). For a discussion of the *Central Hudson* test, see *supra* notes 103-13 and accompanying text.

187. *Posadas*, 106 S. Ct. at 2976-77.

188. *Id.* at 2977. Among the secondary effects cited by the Tourism Company, the agency empowered to administer the Games of Chance Act, were: "disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." *Id.* at 2977 (quoting Brief for Appellee at 37); *see* City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925, 932 (1986) (noting that the city has a substantial interest in preserving the quality of urban life).

189. *Posadas*, 106 S. Ct. at 2977; *see* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981) (plurality opinion) (finding the third part of the *Central Hudson* test satisfied when the legislative belief was "not manifestly unreasonable"). For a discussion of the *Metromedia* standard of review, see *supra* note 126 and accompanying text.

190. *Posadas*, 106 S. Ct. at 2978. The Court rejected the contention that a more appropriate means of reducing the demand for casino gambling by residents of Puerto Rico would be for the government to engage in a counterspeech campaign rather than to suppress entirely advertising of casino gambling directed at residents. *Id.* First, a determination of the effectiveness of an active campaign to discourage gambling by publicizing its risks vis-a-vis a restriction on advertising casino gambling was for the legislature to make. *Id.* Moreover, the legislature apparently concluded that despite the Puerto Rican public's awareness of the harmful effects of gambling, the residents were likely to succumb to gambling if barraged with widespread advertising of the opportunity. *Id.* The Court cited approvingly cases restricting alcohol and tobacco advertising. *See, e.g.*, Dunagin v. City of Oxford, Miss., 718 F.2d 738, 751 (5th Cir. 1983) (en banc) (stating that "[w]e do not believe that a less restrictive time, place, and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol. . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers"), *cert. denied*, 467 U.S. 1259 (1984); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 585 (D.D.C. 1971) (asserting that "Congress had convincing evidence that the Labeling Act of 1965 had not materially reduced the incidence of cigarette smoking"), *aff'd*, 405 U.S. 1000 (1972).

Central Hudson test of constitutionality, and the Court upheld the statute's validity.[191]

The Court distinguished its previous decisions in *Carey v. Population Services International*[192] and *Bigelow v. Virginia*[193] by pointing out that in those cases the underlying conduct subject to the regulations was constitutionally protected.[194] Gambling, on the other hand, was an activity that the legislature properly could prohibit.[195] According to the Court, the greater power to ban completely casino gambling necessarily encompassed the lesser power to ban the advertising of casino gambling. *Carey* and *Bigelow* were therefore inapposite.[196] The Court further stated that legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, traditionally has varied from outright prohibition to legalization of the products or activities with restrictions on stimulation of their demand.[197] Therefore, the Court held the statute and regulations, which merely regulated advertising, did not facially violate the first amendment.[198]

In his dissent Justice Brennan, joined by Justices Marshall and Blackmun, stated that government suppression of "nonmisleading" commercial speech relating to legal activities should be subject to "strict judicial scrutiny"[199] rather than the more relaxed standard applied by the majority.[200] When the government suppressed commercial expression to deprive consumers of truthful information about lawful activities, Justice Brennan found no justification for according commercial speech less protection than other types of speech.[201] Moreover, Jus-

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191. *Posadas*, 106 S. Ct. at 2980.

192. 431 U.S. 678 (1977).

193. 421 U.S. 809 (1975).

194. *Posadas*, 106 S. Ct. at 2979. The Court in *Carey* struck down a prohibition against the "advertisement or display" of contraceptives. 431 U.S. at 700-02; *see supra* notes 77-81 and accompanying text. In *Bigelow* the Court reversed a criminal conviction for violating a ban against the advertising of abortion clinics. 421 U.S. at 829; *see supra* notes 34-41 and accompanying text.

195. *Posadas*, 106 S. Ct. at 2979.

196. *Id.* The Court stated, "[I]t is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising." *Id.* (emphasis in original).

197. *Id.* at 2979-80.

198. *Id.* at 2980.

199. *Id.* at 2982 (Brennan, J., dissenting).

200. *Id.*

201. *Id.* at 2981-82. In support of his statement, Justice Brennan quoted Justice Blackmun's concurring opinion in *Central Hudson*:

> Even though "commercial" speech is involved, [this kind of restriction] strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice. . . . [T]he State's policy choices are insulated

tice Brennan stated that the majority was more deferential to the actions of Puerto Rico's legislature than the *Central Hudson* intermediate standard of review warranted.[202]

The dissent questioned the substantiality of the asserted state interest in protecting the residents of Puerto Rico from the effects of legalized gambling.[203] First, Justice Brennan stated that discouraging residents from patronizing gambling parlors would not further the goals asserted in the Games of Chance Act[204]—namely, the development of tourism, protection of tourists, and production of additional revenue.[205] Second, Justice Brennan asserted that Puerto Rico had not sustained its burden of proving that the interests the government sought to advance were substantial.[206] Specifically, the government failed to demonstrate that "deleterious consequences" would follow if residents were encouraged to gamble.[207] Third, even assuming a substantial interest in preventing serious harmful effects, the dissent doubted whether the regulations would further that interest.[208] Justice Brennan pointed out that Puerto Rico promoted its gambling establishments primarily to tourists; the problems of organized crime, prostitution, and corruption would likely persist regardless of whether Puerto Rico's residents were encouraged to gamble.[209] Finally, Justice Brennan stated that more limited measures could be adopted to achieve the same results. Puerto Rico could step up its monitoring of gambling halls, vigorously enforce its criminal statues, establish betting limits, and engage in a program of counterspeech. Such efforts would address the problems perceived by the government and avoid the first amendment problems posed by gov-

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from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them. . . .

Id. at 2982 (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 574-75 (1980) (Blackmun, J., concurring)).

202. *Id.* at 2982. Justice Brennan wrote:

While tipping its hat to [the *Central Hudson*] standards, the Court does little more than defer to what it perceives to be the determination by Puerto Rico's legislature that a ban on casino advertising aimed at residents is reasonable. The Court totally iguores the fact that commercial speech is entitled to substantial First Amendment protection, giving the government unprecedented authority to eviscerate constitutionally protected expression.

Id. at 2983.

203. *Id.*

204. For the text of the Statement of Motives in the Games of Chance Act, see *id.* at n.2 (quoting Games of Chance Act of 1948 § 1, *codified as amended at* P.R. LAWS ANN. tit. 15, § 71 (1972)); *see also supra* note 183 (reprinting the legislative history).

205. *Id.* at 2983 n.2.

206. *Id.* at 2983-84.

207. *Id.*

208. *Id.* at 2984-85.

209. *Id.* at 2985.

ernment regulation of protected speech.[210] Justice Brennan concluded that the statute and regulations were unconstitutional and lamented that the Court's action limits the scope of first amendment protection available to commercial speech and gives government officials "unprecedented authority to eviscerate constitutionally protected expression."[211]

IV. ANALYSIS

When a state enacts a content-based restriction on editorial, noncommercial expression, the Supreme Court employs a strict standard of review. Consistent with this standard, the Court in *Pacific Gas* scrutinized a public utilities order regulating billing envelope content in an attempt to determine whether the order was narrowly tailored to serve a compelling state interest.[212] The *Pacific Gas* decision emphasized corporations' entitlement to the full panoply of first amendment protections when speaking out on matters of public importance, even though the speech may affect the entity's economic well-being.[213] The Court rejected California's contention that the regulation was a content-neutral time, place, and manner restriction of editorial speech[214] in which case the applicable test would have been the intermediate scrutiny of whether the regulation served a significant governmental interest and left open ample alternative channels for communication.[215]

The Court employed the intermediate standard in *City of Renton v. Playtime Theatres, Inc.*[216] to review the constitutionality of a local adult theater ordinance. The Court characterized the ordinance as a mere time, place, and manner regulation; as such, the ordinance was valid as long as it was designed to further a substantial government interest and did not unreasonably limit other means of communication.[217] The standard adopted by the Court was less stringent than the test used in *Pacific Gas*. Had the regulation been enacted for the purpose of restraining speech on the basis of its content,[218] the ordinance would have been presumptively violative of the first amendment.[219]

The *Playtime Theatres* dissent, however, persuasively argued that the ordinance would be characterized more appropriately as a content-

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210. *Id.*
211. *Id.* at 2986.
212. 106 S. Ct. 903, 913 (1986).
213. Abrams, *Good Year for the Press, But Not for Advertisers*, Nat'l L.J., Aug. 11, 1986, at S-14, col. 3.
214. *Pacific Gas*, 106 S. Ct. at 914.
215. *See supra* note 161 and accompanying text.
216. 106 S. Ct. 925 (1986).
217. *See supra* notes 168-80 and accompanying text.
218. *Pacific Gas*, 106 S. Ct. at 928.
219. *Id.*

based restriction because the regulation effectively discriminated against theaters on the basis of film content.[220] By characterizing the ordinance as content-neutral, the majority could support more readily its deference to city judgment and thereby minimize judicial scrutiny of a restriction on lawful, albeit controversial, activity.

Judicial treatment of restrictions on noncommercial speech, as exemplified by the Court's opinions in *Pacific Gas* and *Playtime Theatres*, closely parallels the analysis of regulations on commercial speech. In botb the commercial and the noncommercial spheres, the Court scrutinizes content-neutral regulations less rigorously than content-based regulations. States, however, have greater flexibility to promulgate restrictions on commercial speech than comparable restrictions on editorial expression. The Court accords commercial speech only limited first amendment protection. Consequently, the Court scrutinizes content-based restrictions on commercial expression under the four-part intermediate test enunciated in *Central Hudson*[221] and reviews content-neutral regulations under a more deferential standard.[222]

In accordance with the intermediate standard for content-based regulations, the Court in *Zauderer* imposed on the State the burden of demonstrating that the probibition of truthful, nondeceptive attorney advertising directly advanced a substantial governmental interest.[223] Tbe Court, however, refused to apply the "least restrictive means" analysis to strike down disclosure requirements relating to clients' potential liability for legal costs.[224] Consequently, the Court held that an

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220. *But see supra* notes 168-71 and accompanying text.

221. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983); *In re* R.M.J., 455 U.S. 191 (1982); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

222. *See* Note, *supra* note 7, stating that:

> Under well-estahlished first amendment analysis, a government regulation aimed at the content of the communication itself, as opposed to a regulation which is content neutral, is presumptively unconstitutional unless the expression falls within several unprotected categories of speech. Arguably, a similar distinction may be made in the commercial speech area. Thus, while a content neutral advertising regulation need only satisfy a rational basis test, a restriction directed at a particular product still should be subject to *Central Hudson*'s intermediate level of review.

Id. at 783 n.26 (citation omitted); *see also* Comment, *supra* note 7, which argues:

> Because commercial speech requires less protection than noncommercial speech, the two levels of review for regulations of commercial expression should be more lenient than the standards applied in reviewing analogous regulations of noncommercial speech. Content-based regulations of commercial speech should therefore receive intermediate scrutiny, and content-neutral regulations should be reviewed even more leniently, perhaps according to the deferential rational basis test employed in *Metromedia*.

Id. at 914 (footnotes omitted). For a discussion of the different standards of review, see *supra* notes 131-34 and accompanying text.

223. 471 U.S. 626, 642 (1985).

224. "Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appro-

advertiser's rights are sufficiently safeguarded when the disclosure requirements reasonably relate to a state's interest in preventing deception.[225]

When a content-based regulation impinges on advertising the availability of a lawful activity, the Court apparently concedes the applicability of the stricter *Central Hudson* test. Nevertheless, when the underlying activity is controversial in nature, the Court, while purporting to apply the *Central Hudson* standard, recently has exhibited greater deference to local decisionmaking. In *Posadas* the prohibition against casino advertising to residents of Puerto Rico was based on a fear that the content of the messages would encourage residents to gamble. Faced with a content-based regulation, the Court was obliged to apply the *Central Hudson* test. The Court, however, applied the test loosely, especially the fourth prong, which requires a state to demonstrate affirmatively that a more limited regulation would not achieve the asserted legitimate governmental interest.[226] The Court refused to consider a "counterspeech campaign" as an alternative means of serving Puerto Rico's interest because the Court regarded the adoption of such a measure as a matter for the legislature. Instead, the Court unquestioningly accepted Puerto Rico's characterization of its own ordinance as the least restrictive means of achieving the governmental objective.[227]

The Court's rationale in *Posadas* is troublesome. That a state may impose, with minimal judicial scrutiny, outright prohibitions on nondeceptive advertising of the availability of a lawful activity or product creates serious doubts about the continued viability of first amendment protection of commercial speech.[228] The Court's decision in *Posadas* appears to retreat to the position in *Valentine v. Chrestensen* that commercial advertising is wholly unworthy of constitutional pro-

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priate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized." *Id.* at 652 n.14.

225. *Id.* at 651.

226. *See supra* notes 112-13 and accompanying text.

227. *See supra* note 190 and accompanying text; *see also* Welkowitz, *The* Posadas *Adventure: Commercial Speech Treading Water in Rough Constitutional Seas*, N.Y.L.J., Sept. 5, 1986, at 5, col. 2 (stating that "[t]he greater willingness to defer to unsubstantiated legislative judgment is a great contrast to *Central Hudson* and other commercial speech cases. . . . [T]he majority had deemed mere *assertions* of governmental interest, without record evidence to support them, to be sufficient. In prior cases, the burden was placed on the government to substantiate its interest").

228. One commentator, however, has distinguished the outright prohibition against casino advertising aimed at residents of Puerto Rico from proposals to ban cigarette and alcoholic beverage advertising altogether. The former is a partial restriction, while the latter would accomplish a total ban. That commentator contends that *Virginia Board*, rather than *Posadas* which is precedent for only a partial ban, provides the relevant constitutional standard for such measures. *See* Kmiec, *The Wrong Solution*, 72 A.B.A. J., Dec. 1, 1986, at 39.

tection.[229] In fact, Justice Rehnquist, who authored the opinion in *Posadas*, previously had expressed a desire to return to *Chrestensen* in his dissenting opinions in *Virginia Board*,[230] *Bates*,[231] and *Central Hudson*.[232]

The Court's apparent shift to a more deferential standard of review for content-based prohibitions on commercial speech relating to a lawful, though not constitutionally protected, activity or product poses broad and potentially harmful ramifications. Advocates of a total ban on tobacco advertising already are relying on *Posadas* to support their contention that such a measure is constitutional.[233] Moreover, because the Constitution protects so little commercial activity from legislative prohibition, the *Posadas* logic enables a state to enact wholesale bans on the advertising of any politically vulnerable product.[234] The government, for example, could rely on the *Posadas* rationale to justify not only prohibitions on tobacco and alcohol advertising promulgated to protect public health and safety, but also bans on foreign car advertisements enacted to decrease the demand for foreign cars and reduce the trade deficit.[235] Thus, the Court appears to have left the choice of whether to suppress expression almost entirely to state and local discretion, subject to only minimal judicial scrutiny.

V. CONCLUSION

Central to the first amendment is the assurance of a free flow of information to facilitate enlightened public decisionmaking. Commercial speech, because it alerts individuals to the availability of products and services, promotes rational decisionmaking in the economic arena. Fostering the free exchange of ideas in the marketplace is an important value that should not be compromised by judicial deference to paternalistic regulations that seek to decrease the demand for a lawful good or service by sheltering citizens from receiving information about its availability. Rather, the Court should adhere firmly to the intermediate

229. *See supra* notes 17-20 and accompanying text.

230. *See supra* notes 62-67 and accompanying text.

231. *See supra* notes 88-91 and accompanying text.

232. *See supra* note 115.

233. The Court in *Posadas* cited as support its decision in Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972), upholding a ban on the broadcast advertising of cigarettes. 106 S. Ct. at 2980 n.10; *see* Synar, *A Habit That Kills*, 72 A.B.A. J., Dec. 1, 1986, at 38. *See generally* Roberts, *Curbs on Tobacco, Alcohol Ads Boosted*, L.A. Daily J., July 8, 1986, at 5, col. 1 (stating that the *Posadas* decision "sent lawyers and lobbyists for the tobacco, alcohol, and advertising industries scrambling to define the holding narrowly and deflect the hinted support for curbing such messages").

234. *See* Mercurio, *Commercial Speech: Court Takes Step Backward*, Legal Times, July 28, 1986, at 4, col. 1.

235. *See* Welkowitz, *supra* note 227; *see also* Mercurio, *supra* note 234.

standard of scrutiny set forth in *Central Hudson*. When determining the constitutionality of a content-based ban on nondeceptive advertising of a lawful activity, the Court should scrutinize the regulation to ensure that it is no more extensive than necessary to further a substantial governmental interest.

Mary B. Nutt