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> The entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression *about* goods and services and the right of Government to regulate the *sales* of such goods and services."*

*Lawrence Tribe, *American Constitutional Law, p 903, 2nd Ed.*, 1988

I. INTRODUCTION

Writing for a unanimous Court in 1942, Justice Owen Roberts stated that the First Amendment posed "no . . . restraint on Government as respects purely commercial advertising."[1] The Court distinguished commercial from ideological speech and found no basis for First Amendment protection for the former. The Court rejected an attack on a New York City code provision forbidding commercial advertising on city streets, such as the particular handbill in this case. On this Court sat such stalwart future supporters of an expanded view of the First Amendment's speech clause as Hugo Black, William O. Douglas, and Frank Murphy. Yet the Court's opinion was brief and almost summarily dismissed the concept that commercial speech was entitled to any First Amendment protection as was political speech. And there the matter stood for a quarter of a century until the Court decided *Virginia Pharmacy Board v. Virginia Consumer Council* in 1976.[2]

II. THE STATE'S CONCERN FOR THE PROTECTION OF THE PUBLIC VERSUS THE PUBLIC'S RIGHT TO KNOW

A Virginia statute prohibited a licensed pharmacist from advertising the price for any drugs that may be dispensed only by prescription. Such a practice was, in the words of the statute, "unprofessional conduct." The Court ruled the statute unconstitutional on First Amendment grounds. Refusing to declare any broad doctrine regarding commercial speech, the Court adopted a narrower approach. Justice Blackmun wrote for the Court, "If there is a kind of commercial speech that lacks all First Amendment protection . . . it must be distinguished by its content...it cannot be simply on a commercial subject."[3] Rejecting as "simplistic" the expression "commercial speech" and attacking the statute as "paternalistic" and one by which the public was "kept in ignorance," the Court emphasized the public's right to know. "If there is a right to advertise there is a reciprocal right to receive such advertising."[4] Stressing that the issue in the case involved truthful information about lawful activity, the Court did not give priority to the State's concern for the possible misuse of that information. Blackmun wrote, "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available that the First Amendment makes for us."[5] The Court made clear that by rejecting the statute in this particular case it was not holding that "commercial speech can never be regulated any more than all 'political' speech is absolutely protected." Justice Stewart in his concurrence emphasizes that false or deceptive advertising is not protected. Unlike ideological expression, commercial price and product advertising is confined to the promotion of goods and services. ". . . factual claims . . . may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought."[6]

In his lone dissent, Justice Rehnquist gave credence to Virginia's concern for protecting the public, balancing that interest with the First Amendment. The State's attempt to discourage misuse of prescription drugs is a legitimate concern. "While prescription drugs are a necessary and vital part of medical care and treatment, there are sufficient dangers attending their widespread use that they simply may not be promoted in the same measure as hair cream, deodorants and toothpaste."[7] To Justice Rehnquist, public welfare determinations took precedence. Although a single dissenter here, Rehnquist would command a bare majority for his view a decade later.

III. THE SUBSTANTIAL STATE INTEREST TEST

Four years after the Virginia case, the Court decided *Central Hudson v. Public Service Commission of New York.*[8] There the State Commission ordered electric utilities to cease all advertising promoting the use of electricity because of insufficient supply due to the fuel shortage. The Commission extended the ban against promotional advertising to conserve energy.

The Court, through Justice Powell, articulated a four-part analysis for commercial speech cases[9] that differed somewhat from the *Virginia Pharmacy Board* case:

> (1) Is the expression protected? The questions here were simply, was it misleading and did it concern lawful activity? (2) Is the asserted governmental interest substantial? (3) If the answers to the above are positive, does the regulation directly advance the asserted interest? (4) Is the regulation more extensive than is necessary to serve that interest?

Echoing Justice Blackmun's and Justice Stewart's opinion in *Virginia Pharmacy Board,* the Court restates the theme that the First Amendment protects commercial speech from "unwarranted governmental regulation . . . it protects not only the speaker but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[10] Where *Central Hudson* differs from the *Virginia* case is in its concern for the interest of the State beyond the question of truthfulness of the expression of lawful activity. The State interest must be "substantial." Here the Court found such an interest in energy conservation. Yet the Court found the fourth part of the test (is the regulation more extensive than necessary), despite the substantial State interest, too extensive. The *total* ban was not necessary, since other measures were available to further the legitimate interest of New York.

It was this problem of the "substantial" state interest and too extensive a regulation that bothered Justices Brennan and Blackmun in their concurrence. They both felt the four-part test did not "provide adequate protection for truthful, non-misleading, non-evasive commercial speech. . . .(it was) not one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot regulate."[11] In the Court's opinion Powell defined commercial speech as "expression related solely to the economic interests of the speaker and its audience."[12] Brennan and Blackmun stated that they did not question the case as one even involving commercial speech. "There is no difference between commercial speech and other protected speech to justify suppression of commercial speech in order to influence public conduct

through manipulation of the availability of information."[13] To these Justices the distinction between "commercial" and "ideological" is blurred. While the Court protects the promotional advertising here because the State's regulation is too extensive, we begin to see questions of definition added to the issues of truthful expression, lawful activity, substantial state interest, and the extent of permissible state regulation.

Again, Rehnquist dissents. Neither questions of definition nor the four-part test seem paramount to him. The State interest in protecting the public is his rationale for upholding the State law. "I think it is constitutionally permissible for the Commission to decide that promotional advertising is inconsistent with the public interest in energy conservation . . . (it) falls within the scope of permissible state regulation of an economic activity of an entity . . . created by New York State."[14]

IV. DIVISIONS ON THE COURT

After dissenting in both the *Virginia Pharmacy Board* and *Central Hudson* cases, where he would have sustained State power as opposed to affirming First Amendment rights, Justice Rehnquist wrote for a bare majority in 1986 in *Posadas de Puerto Rico v. Tourism Co. of Puerto Rico, 92 LEd 2, 266* . In this case we begin to see more clearly the ideological split among the Justices as the Court worked its way through the question of the protection of commercial speech and the application of the four-part test. The problem of course was one of emphasis. The five Justice majority and the dissenters all accepted the *Central Hudson* test and came to different assessments. The deeper philosophical division was on the primacy of First Amendment considerations and the whole issue of defining commercial speech.

In this case a statute permitted certain forms of casino gambling to exist, however, no casino could advertise itself to the public. Interpreting the statute narrowly as one aimed only at the residents of the Commonwealth, but not at tourists, the Puerto Rico Superior Court upheld the measure. The Supreme Court accepted the assumption of the lower court and affirmed the decision as "passing muster" under the *Central Hudson* test. Since commercial speech is "no more than proposing a commercial transaction"[15] (quoting from *Virginia Pharmacy Board*), restricting such speech, as is done in this case is not violative of the Constitutional protection. Hence, all the majority did here was to go through the statute and examine it vis-a-vis the four-pronged test. The majority found the speech lawful and not misleading, the Commonwealth had a substantial interest in reducing gambling among its residents, the statute involved directly addressed that interest and was no more extensive than necessary.

Justice Brennan, writing for himself and Justices Marshall and Blackmun, discards the *Central Hudson* formula. There is, he wrote, ". . . no difference between commercial and other kinds of speech to justify protecting commercial speech less extensively where, as here the Government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities."[16] Brennan was perfectly willing to accept the *Central Hudson* test but claimed the statute failed it because it gave "Government unprecedented authority to eviscerate constitutionally protected expression."[17] The dissenters felt that once you established a lawful activity i.e., casino gambling in

Puerto Rico, the Government may not prohibit truthful information, "namely to keep its residents ignorant."[18] In his separate dissent Stevens wrote of the measure that it was a "grotesquely flawed regulation of speech."[19] By the time of the *Posadas* case the debate narrow down to two approaches to the issue. The dominant one to determine the rationale of the State interest once it determined that the speech not deceptive. That rationale was to apply the *Central Hudson* test with its implied assumption of legitimate State interest. The second approach is to determine solely the truthfulness of the speech. Once that is conceded, the State interest becomes secondary and First Amendment scrutiny applies.[20]

IV. THE MATERIAL AND DIRECT EFFECT TEST

In *Rubin v. Coors,*[21] all members of the Court agreed with the 10th Circuit that a provision in the Federal Alcohol Administration Act of 1935, prohibiting beer labels from displaying their alcohol content, was invalid. The governmental interest in question — the need to suppress the threat of "strength wars" and prevent alcoholism — was not considered substantial enough, and the regulation said the Court was "inconsistent with the protection granted to commercial speech."[22] Justice Thomas, writing for the Court, stated that "...the Government must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[23] In other words, the Government must show that the particular regulation advances its interest in a direct and material way. The Court claimed that no such proof was forthcoming. There was no proof that the goal of preventing strength wars was accomplished by this regulation. Nor, as in *Central Hudson*, did the Government use other options to attain the alleged interest. The Court mentioned that a regulation prohibiting marketing efforts emphasizing high liquor content would be "less intrusive to...First Amendment's rights."[24] Finally, Justice Thomas scorned the irrationality of the Government's regulatory scheme. While the regulation in question prohibits the disclosure of alcohol content on labels, federal regulations apply a contrary policy to beer advertising. "The failure to prohibit the disclosure of alcohol content in advertising which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the Government's true aim is to suppress strength wars."[25]

While all the Justices agreed on the result, Justice Stevens' concurrence is significant as it portends the differences that develop among the Justices regarding *Central Hudson*. He here agrees with Justice Blackmun's approach that the *truthfulness* of the commercial speech is of overriding concern. Rejecting what he calls the "formalism" of the four-part test in *Central Hudson*, Justice Stevens asserts that ". . . the Government's asserted interest, that consumers should be uninformed for their protection, does not suffice to justify restrictions on protected speech in *any* context. . . ."[26] Justice Stevens relies on the free speech clause of the First Amendment *alone*, "regardless of the standard of review,"[27] to deny the validity of the regulation involved. The public's right to know

is hampered by the asserted interest of the Government. The speech clause "mandates rejection of the Government's proffered justification for this restriction...this...provision is nothing more than an attempt to blindfold the public."[28]

VI. CONSISTENCY AND CONFUSION

In a case handed down in May of 1996, a state regulation restricting so-called "commercial" speech was again declared unconstitutional following the pattern set two decades earlier in *Virginia Pharmacy Board*, followed by *Central Hudson* and *Coors*, with only *Posadas* being a debatable exception. But in *44 Liquormart Inc. v. Rhode Island 134L.Ed 2, 711*, the Court was split on the basic standards for reviewing restrictions on commercial speech.

In *Liquormart*, Rhode Island placed a complete ban on liquor price advertising in any manner whatsoever, be it by vendors or through the news media. Justice Stevens, who concurred in *Coors*, wrote the Court's opinion. He begins by emphasizing not the four-part test of *Central Hudson*, but by stressing the importance of the truthfulness as the rationale, distinguishing it from the traditional ideological speech. "The greater objectivity of commercial speech justified affording the State more freedom to distinguish false commercial advertisements from true ones and that the greater 'hardiness' of commercial speech, inspired as it is by the profit motive likely diminishes the chilling effect that may attend its regulation."[29] Therefore, the Rhode Island statutes involved here are immediately suspect because of the truthfulness and non-deceptive, non-coercive character of the labels. At that point "there is far less reason to depart from the vigorous review that the First Amendment generally demands."[30] Again, Justice Stevens reiterates the skepticism of regulations that deprive the public of its right to know and "keep people in the dark for what the Government perceives to be their own good."[31] The Court's opinion does not pursue the four-part test of *Central Hudson.* Rhode Island must show that its interest in reducing alcohol consumption will be advanced by the statutory regulation to a material degree. ". . . We must determine whether the State has shown that the price advertising ban will significantly reduce alcohol consumption."[32] The State failed to do this despite its valid interest. In other words, Rhode Island failed 'to establish a reasonable fit' between its abridgment of speech and its temperance goal."[33]

In his concurring opinion, Justice Scalia recites his long held and often stated principle of Constitutional jurisprudence that in deciding a First Amendment ("an indeterminate text") case not involving the suppression of political ideas, " I will take my guidance as to what the Constitution forbids . . . from the long-accepted practices of the American people."[34] Scalia finds nothing of a "national consensus" with regard to that issue, hence he concurs solely on that ground.

Justice Thomas' concurrence is the broadest and in some ways most unusual. The author of the Court's opinion in *Coors*, Thomas goes much farther in his concurrence in *Liquormart*. It has been noted that "the most remarkable and characteristically non-minimalist opinion came from Justice Thomas . . . His opinion proposes to do so much so quickly and in a case in which none of this was necessary, it is fair to say that his is the most surprising opinion . . . an originalist should consult the historical record."[35]

He rejects the balancing test of *Central Hudson*: "I do not believe it should be applied to a

restriction of 'commercial speech' . . . when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark."[36] At one point he seems to see no distinction between commercial speech and other protected speech. "I would adhere to the doctrine . . . that all attempts to dissuade legal choices by citizens by keeping them ignorant is impermissible."[37] Thomas faults the Court's finding that Rhode Island failed to show that its assent was not advanced by the regulation. Justice Stevens' opinion for the Court "seems to imply that if the State had been more successful at keeping consumers ignorant...then the restriction might have been upheld."[38] To Thomas, it is a question of incommensurables — the value of knowledge versus the value of ignorance.

A most narrow view is that of Justice O'Connor with whom Justices Rehnquist, Souter, and Breyer concur. This concurrence also applies to the options available to the State (tax rates, minimum prices) through which the State could more constitutionally attain their interest in reducing alcohol consumption. Any new analysis of the standards of review for commercial speech was unnecessary to these four Justices.

VII. THE PROBLEM OF COERCED SPEECH AND PUBLIC POLICY

In a case handed down on June 25, 1997, the issue was, basically, whether *Glickman v. Wileman Brothers*[39] even involved commercial speech. The closely divided Court in a 5-4 decision held that the case did not concern First Amendment problems. The dissent, written by Justice Souter, found that the Court wrongfully denied First Amendment protection for what the dissent believed was a clear cut commercial speech case, to be governed by the *Central Hudson* test. The issue became one of identifying and defining what exactly commercial speech involved. The case was the first commercial subsidy case to come before the Court. In *Glickman*, the Secretary of Agriculture, pursuant to a 1937 statute, assessed producers of nectarines, plums, and peaches, and the cost of advertising those fruits on radio, television, and in newspapers. The advertising at issue attributed only positive statements regarding the fruit. A producer refused to pay the assessment, claiming it violated his First Amendment rights since it was compelled speech. The Ninth Circuit, relying on the *Central Hudson* test, held for the producer. The Supreme Court reversed in an opinion by Justice Stevens, joined by Justices O'Connor, Kennedy, Ginsburg, and Breyer. The Court decided that what was involved here was a question of economic policy by which Congress tried to control the overproduction of farm goods, among other measures, by developing anti-competitive features of the marketing orders such as are involved in this case. The aim of the statute was "designed to serve the producers'...common interest in promoting the sale of a particular product."[40] Since this involved a statutory economic regulation and not a First Amendment problem "the same strong presumption of validity that we accord to other policy judgments made by Congress"[41] should be applied to this particular feature of the Marketing Agreement Act of 1937.

The Court resolved that the program does not prevent a producer from communicating any message on his own, nor does it compel any person to engage in actual or symbolic speech, and that it was fair to assume that the producers agree with the message about the nature of the fruit being marketed. Therefore, being compelled to fund the advertisements raises no First Amendment issues regarding commercial speech. Justice Stevens, therefore, did not examine the usual tests applied to commercial speech cases. The Court views the issue as one of purely economic public policy. "Our cases provide . . . support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group." [42] The rationale of the assessment requirement, the Court reasoned, rests not on a First Amendment issue, but on the assumption that "in the volatile markets for agricultural commodities, the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market."[43]

Justice Souter's long and closely reasoned dissent was joined by the Chief Justice and Justices Scalia and Thomas. The opinion focuses on the commercial speech issue. The fact that the governmental regulation is valid does not validate coerced subsidies for implementing that policy. ". . . the very reasons for recognizing that commercial speech falls within the scope of First Amendment protection, likewise justifies the protection of those who object to subsidizing it against their will. . . . Forced payment for commercial speech should be subject to the same level of judicial scrutiny as any restriction on communication in that category." [44] Merely because the statute is a valid attempt to solve a national problem of agricultural production, and because the goal and purpose of the Marketing Act is constitutionally valid, does not permit the implementation by coerced assessments. "The challenged burden on dissenter's (producers) First Amendment rights is substantially greater than anything inherent in regulation of the Commercial transactions."[45] Whether the producers agree or disagree with the message is not the issue. Rather, the producers may wish a different form of expression. ". . . Laws requiring an individual to engage in or pay for expressive activities are reviewed under the same standard that applies to laws prohibiting one from engaging or paying for such activities. . . . What may not be suppressed may not be coerced."[46]

Once the dissent found the issue to be one of commercial speech, it went on to examine in great detail the four-pronged *Central Hudson* test. On all three counts the test failed. "*Central Hudson* calls for some showing of plausibility and there has been none here." [47]

Adhering to his disdain for the *Central Hudson* test, Justice Thomas wrote a separate dissent, joined by Justice Scalia. He again iterates the lack of difference between speech — commercial or ideological. Justice Thomas wrote of his concern for two "disturbing consequences."

"Either:

1. Paying for advertising is not speech while draft card burning public sleeping and nude dancing are

or

2. Compelling payment for third party communication does not

> implicate speech and thus the Government would be free to force payment for a whole variety of expressive conduct that it could not restrict.

In either case we have lost our way."[48]

This case is yet another illustration of the danger of labeling Justices as conservative or liberal. Three so-called liberal Justices (Stevens, Ginsburg, and Breyer) are joined in the Court's opinion by two "conservatives" (O'Connor and Kennedy) to make up the majority. The dissent, on the other hand, has a moderate (Souter) writing an opinion, joined by three of the most "conservative" justices.

At this juncture, this moderate, conservative Court is divided on at least one issue, the *Central Hudson* test. Justices Stevens, Kennedy, Ginsburg, and Breyer seem less tolerant of the test and prefer to test the veracity and non-deceptive character of the speech in question. Others seek to carefully scrutinize the "fit" between the restriction and the alleged or asserted State interest, while Justices Thomas and Scalia seem to question any necessary "fit."

On the issue of whether there should be a distinction between "commercial" and other speech, Thomas has been outspoken in questioning the distinction, although Stevens questioned the concept in *Coors*. Justice Thomas' position is indeed intriguing as it is closely allied to that of former Justices Brennan, Marshall, and Blackmun (and they certainly are not usually considered his ideological compatriots).

Since there are perhaps five Justices who question the validity of all four parts of the *Central Hudson* test, it is this group that bears watching as the issue of the Government's attempt to regulate commercial speech continues to be tested. The *Glickman* case needs to be distinguished. The majority in *Glickman* decided that *taken as a whole*, the statute did not involve the issue of commercial speech, while the dissenters were willing to *separate* various parts of the particular statute and focus on the issue of coerced speech. The split, I submit, was not so much on First Amendment issues, but rather on the nature of statutory construction and interpretation.

ENDNOTES

[1] *Valentine v. Chrestensen, 86 LEd 1262 at 1263.*

[2] *Virginia Pharmacy Board v. Virginia Consumer Council 48 LEd 2, 346 at 358.* Here the Court cited several cases which showed how difficult it was to define and distinguish what was "commercial speech," cases in which the Court upheld strictly non-political expressions: *Bigelow v. Virginia 421 U.S. 809; Breard v. Alexandria 341 U.S. 622; Pittsburgh Press v. Human Rights Commission 413 U.S. 376; Thornhill v. Alabama 310 U.S. 88.*

[3] *Id. p. 355.*

[4] *Id. p. 358.*

[5] *Id. p. 363.*

[6] *Id. p. 370*

[7] *65 LEd 2, 374.*

[8] *Id. p. 341.*

[9] *Id. p. 351.*

[10] *Id. p. 348.*

[11] *Id. pp. 355-356.*

[12] *Id. p. 348.*

[13] *Id. p. 359.*

[14] *Id. p. 365.*

[15] *Id. p. 279.*

[16] *Id. p. 287*

[17] *Id. p. 288.*

[18] *Id. p. 292.*

[19] *Id. p. 294.*

[20] A recent article contrasting *Posadas* with the *Liquormart* decision on commercial speech is: A. W. Langvardt and E. L. Richards, The Death of *Posadas* and the Birth of Change in Commercial Speech, *American Business Law Journal, vol. 34/4, Summer 1977.*

[21] *131 LEd 2, 532.*

[22] *Id. p. 536.*

[23] *Id p. 541.*

[24] *Id. p. 544.*

[25] *Id. p. 542.*

[26] *Id. p. 548.*

[27] *Id. p. 549.*

[28] *Id.*

[29] *134 LEd 2 711, 725.*

[30] *Id. p. 726.*

[31] *Id. p. 728.*

[32] *Id. p. 728 & 729.*

[33] *Id. p. 730.*

[34] *Id. p. 736.*

[35] Cass R. Sunstein, Leaving Things Undecided, *Harvard Law Review, Vol. 110, No. 4., November*

1996, p. 83.
[36] 134 LEd 2, Supra 740.
[37] Id. p. 742.
[38] Id. p. 740-741.
[39] 138 LEd 2, 585.
[40] Ibid p. 595.
[41] Ibid p. 604.
[42] Ibid 602.
[43] Ibid 603, 604.
[44] Ibid p. 605.
[45] Ibid p. 610.
[46] Ibid p. 613, 607.
[47] Ibid p. 62l.
[48] Ibid p. 622, 623.