A DOCTRINE IN DISARRAY: WHY THE FIRST AMENDMENT DEMANDS THE ABANDONMENT OF THE *CENTRAL HUDSON* TEST FOR COMMERCIAL SPEECH

INTRODUCTION

The First Amendment to the United States Constitution declares that "Congress shall make no law . . . abridging the freedom of speech."[1] At first glance, one might imagine that no tenet of law could be more simply stated or easily interpreted.[2] Yet as any student of American jurisprudence is quick to realize, there is perhaps no section of the Constitution more fervently debated than the First Amendment. This is particularly apparent with regard to commercial speech.[3]

Commercial speech is traditionally defined as speech containing a profit motive, often involving the advertising of a service or product.[4] The doctrine of commercial speech has been created largely in the last

---

[1] U.S. CONST. amend. I. The First Amendment provides in full that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Id.

[2] *See* Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960). Justice Black considered the First Amendment's free speech clause to be clear in language and absolute in effect. *See id.* The Justice declared that while free speech necessarily involves a balancing of competing interests, the Framers had already done this balancing in writing the Constitution. *See id.* at 879; *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1011 (2d ed. 1991) (noting that Justice Black's view has never been accepted by a majority of the Supreme Court but rather, the Court has always felt that the First Amendment needs interpretation and that appropriate restraints on the freedom of speech are permitted, depending on the circumstances).

[3] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-15, at 903 (2d ed. 1988). The doctrine of commercial speech is premised on achieving a fine balance between the individual's rights to *speak* and *hear* about products and services offered in the marketplace and the government's right to regulate these transactions. *See id.* The commercial speech doctrine represents an attempt by the Court to create an intermediate category between fully protected and entirely unprotected speech. *See id.* § 12-18, at 931.

[4] *See* BLACK'S LAW DICTIONARY 271 (6th ed. 1990).

fifty years.[5] In fact, the United States Supreme Court initially dealt with the First Amendment's effects on commercial messages in 1942.[6] In that case, *Valentine v. Chrestensen*,[7] the Court declared commercial speech to be unworthy of First Amendment protection.[8]

Over time, the Supreme Court began to recognize limited protection for commercial speech, particularly when it was commingled with higher forms of speech.[9] Not until the 1970s, did the Supreme Court officially recognize First Amendment protection for pure commercial speech.[10] Even then the Court granted only limited protection to commercial messages.[11] In the 1980 landmark case of *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[12] the Supreme Court developed a balancing test for deciding commercial speech cases.[13] This test requires courts to weigh the individual's right to free speech against the government's asserted interest in suppressing it.[14]

The *Central Hudson* balancing test has received much criticism for allowing the government to restrict commercial messages that are truth-

---

[5] *See* MICHAEL G. GARTNER, ADVERTISING AND THE FIRST AMENDMENT 13 (1989). For the first 150 years of the United States, commercial speech restrictions were uncommon. *See id.* This lack of desire to regulate speech content was largely due to a vigorous press, supported by substantial advertising. *See id.* Government restrictions on the press were virtually nonexistent from the nineteenth into the early twentieth centuries. *See id.*; *see also* Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 756 (1993) (explaining that the term "commercial speech" was not even used in a published opinion until 1971); *id.* at 757, 758 (stating that early commercial speech cases did not focus on the First Amendment, but rather viewed advertising simply as another business activity).

[6] *See* GARTNER, *supra* note 5, at 13 (noting that the Supreme Court did not consider the First Amendment's effects on commercial speech until 1942).

[7] 316 U.S. 52 (1942).

[8] *See id.* at 54. "We are equally clear that the Constitution imposes no such [First Amendment] restraint on government as respects purely commercial advertising." *Id.*

[9] *Cf.* Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384-85 (1973) (drawing a distinction between advertisements simply proposing commercial transactions (unprotected) and advertisements advocating an opinion on social or political issues (protected by the First Amendment)).

[10] *See* Bigelow v. Virginia, 421 U.S. 809, 826 (1975). The Court declared that advertising is not completely deprived of all protection under the First Amendment. *See id.*; *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) (clarifying that the First Amendment protects speech, even though money is spent to disseminate it, as in paid advertisements).

[11] *See Virginia Pharmacy*, 425 U.S. at 770. In particular, the Court explained that commercial speech may still be regulated by time, place, and manner restrictions. *See id.*

[12] 447 U.S. 557 (1980).

[13] *See id.* at 566.

[14] *See id.*

ful, not misleading, and regard lawful activities.[15] Additionally, the test has often been applied inconsistently, resulting in uncertain First Amendment protection for commercial speech.[16] There are several reasons why the *Central Hudson* test fails to provide an adequate basis for deciding commercial speech cases. First, at the most basic level, the Court has never been able to develop a satisfactory definition of commercial speech.[17] Second, many scholars simply disagree with the premise that truthful, nonmisleading commercial speech about lawful activities is less deserving of full First Amendment protection than other types of speech.[18] Finally, the application of the *Central Hudson* test has led to

---

[15] *See* TRIBE, *supra* note 3, § 12-15, at 904 (arguing that the legacy of the *Central Hudson* test is to allow government restrictions on even truthful advertising of a lawful product or service).

[16] *See, e.g.*, Florida Bar v. Went for It, Inc., 115 S. Ct. 2371, 2381 (1995); Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1592 (1995); Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 324 (1986); Metromedia v. City of San Diego, 453 U.S. 490, 512-23, 521 (1981). The inconsistent application of the *Central Hudson* test has resulted in uncertain First Amendment protection for commercial speech. *See* Note, *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 224, 225 (1993); *see also* TRIBE, *supra* note 3, § 12-15, at 904 (arguing that the doctrine of commercial speech has been built on an insecure foundation, not wholly consistent with First Amendment values). For a further discussion of the inconsistent results that often occur under the *Central Hudson* test see *infra* note 19 and accompanying text; *see also* Part II.B.

[17] *See* GARTNER, *supra* note 5, at 15. The pronouncement of some "commonsense difference" between political and commercial speech has never been adequately demonstrated. *See id.* As Justice Brennan noted, it is illogical for some types of commercial speech to receive First Amendment protection while others do not. *See id.* at 19. It is futile to attempt to draw a bright-line distinction between commercial and political speech. *See id.* In reality, they cannot be separated. *See id.* at 21. Drawing clear distinctions between speech disseminating ideas, on one hand, and speech for the distribution of goods, on the other, is a futile exercise in a modern, sophisticated economy. *See id.; see also* TRIBE, *supra* note 3, § 12-18, at 942 (postulating that the various categories of speech created by the Supreme Court are unsatisfactory because they lack clear definition); *id.* at 943 (observing that this ambiguity is particularly apparent with regard to commercial speech); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1215 (1983) (arguing that it is extremely difficult for the Court to make clear distinctions between commercial and noncommercial speech).

[18] *See Posadas*, 478 U.S. at 350 (Brennan, J., dissenting) (explaining that there is no apparent reason for commercial speech to be granted less First Amendment protection than other types of speech, particularly when the government attempts to deprive consumers of truthful information about lawful activities); *see also* GARTNER, *supra* note 5, at 14 (arguing that restrictions on commercial speech are more severe than they were ten years earlier). Like the historic abuse of civil rights of African Americans, speech restrictions are an affront to democracy. *See id.; see also* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1518 (1996) (Thomas, J., concurring) (failing to find a historical or philosophical basis for treating commercial speech as a lower type of speech).

unpredictable results and failed to provide consistent guidelines for advertisers and regulators.[19]

Despite the incongruous results produced by the *Central Hudson* test, recent cases may indicate that the Court is embarking on a new era of greater protection for commercial messages.[20] Although the Court should be lauded for its new found concern for commercial speech, it has steadfastly clinged onto the last vestiges of the *Central Hudson* test in these decisions.[21] Several Justices have expressed displeasure with the test but have continued to reluctantly apply it, due to the lack of a satisfactory alternative.[22]

---

[19] *See* Matthew L. Miller, Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 COLUM. L. REV. 632, 635 (1985). Although all courts were applying the same *Central Hudson* test to analyze commercial speech restrictions, they were reaching unpredictable and inconsistent results. *See id.* The lack of precise standards for applying the *Central Hudson* test has left judges with only their own proclivities to guide them. *See id.* This has resulted in troubling methods of reasoning that have undercut critical First Amendment values. *See id.*; *see also* ROSS D. PETTY, THE IMPACT OF ADVERTISING LAW ON BUSINESS AND PUBLIC POLICY 10 (1992) (maintaining that other factor-oriented approaches generate the same unpredictable results as the *Central Hudson* test).

As an illustration of the debilitating effects of the *Central Hudson* test on free speech by advertisers, see James J. Morgan, *A Plan to Keep Kids from Smoking Tobacco: Limit Advertising, Get Rid of Vending Machines—But Don't Restrict Adults' Choices*, L.A. TIMES, June 13, 1996, at B9. Morgan, President and Chief Executive Officer of Philip Morris U.S.A., insisted that advertising does not cause anyone to begin smoking. *See id.* Immediately after making that assertion, Morgan desperately conceded, "[n]evertheless we're willing to accept new restrictions on our advertising and promotion in order to put politics aside and act now to address this problem." *Id.* The author then detailed his own plan to voluntarily restrict advertising of cigarettes to minors. *See id.* Regulating advertising not based on its content, but because it proposes an unlawful activity (e.g., selling cigarettes to minors), would be more faithful to First Amendment values.

[20] *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428 (1993) (rejecting the City's argument "that the 'low value' of commercial speech" justified a ban on news racks dispensing commercial handbills); *see also* Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1594 (1995) (invalidating 27 U.S.C. § 205(e)(2) ("Federal Alcohol Administration Act"), which prohibited the display of alcohol content on beer labels, because the government regulation was more extensive than necessary); *44 Liquormart*, 116 S. Ct. at 1510 (striking down two Rhode Island laws that prohibited the inclusion of prices in advertisements for alcoholic beverages).

[21] *See Discovery Network*, 507 U.S. at 416 (holding that the lower courts were correct in applying the *Central Hudson* test to judge the city's ban on news racks containing commercial handbills); *Coors Brewing*, 115 S. Ct. at 1594 (invalidating Federal Alcohol Administration Act that prohibited the display of alcohol content on beer labels because the restriction did not pass the *Central Hudson* test); *44 Liquormart*, 116 S. Ct. at 1510 (invalidating two Rhode Island statutes that banned alcohol price advertising because they failed *Central Hudson*'s stringent constitutional review).

[22] *See, e.g.*, *44 Liquormart*, 116 S. Ct. at 1515 (Scalia, J., concurring) (accepting the majority's application of the test because the Justice did not believe that the Court had the means to replace *Central Hudson* with a better alternative); *id.* at 1515-16 (Thomas, J., concurring) (believing that the *Central Hudson* test should not have been applied because

This Comment examines the current commercial speech doctrine and argues that the *Central Hudson* test should be abandoned. In its place, this Comment proposes a simplified approach that would provide commercial speech with full First Amendment protection. Part I traces the origin and development of the commercial speech doctrine and discusses the Court's historic difficulty in defining commercial speech. Part II critiques the *Central Hudson* test and reviews its application in several cases. Part III analyzes the 1996 case of *44 Liquormart, Inc. v. Rhode Island*,[23] and discusses its potential impact on the commercial speech doctrine. Part IV advocates full First Amendment protection for commercial speech and argues that these messages often provide consumers with important market information and lifestyle choices. Part V proposes a new analysis for deciding commercial speech cases that would provide full First Amendment protection for commercial speech while continuing to allow appropriate government regulation for the protection of consumers.

I. OVERVIEW OF THE DEVELOPMENT OF COMMERCIAL SPEECH

The First Amendment to the United States Constitution does not specify different categories of speech.[24] Yet throughout our country's history, the Supreme Court has felt it necessary to carve out speech classifications for varying degrees of First Amendment protection.[25] The doctrine of commercial speech has been a relatively recent phenomenon in constitutional jurisprudence, having been developed almost entirely within the past fifty years.[26] Throughout this brief history, the Supreme

---

the government's interest was to restrict the flow of truthful commercial information about lawful products); *Coors Brewing*, 115 S. Ct. at 1594 (Stevens, J., concurring) (arguing that instead of relying on *Central Hudson*'s "formulaic approach" the Court should query whether the commercial speech doctrine was even relevant to a regulation that restricted truthful, nonmisleading information).

[23] 116 S. Ct. 1495 (1996).

[24] *See* U.S. CONST. amend. I (proclaiming that "Congress shall make no law . . . abridging the freedom of speech"); *see also* GARTNER, *supra* note 5, at 10 (acknowledging that the First Amendment specifies only one type of speech: free).

[25] *See* STONE ET AL., *supra* note 2, at 1024 (noting that the Court has historically treated certain categories of speech as low value speech because they do not further the purposes of the First Amendment); *see also* R.A.V. v. City of Saint Paul, 505 U.S. 377, 392 (1992) (hate speech); New York Times Co. v. United States, 403 U.S. 713, 718 (1971) (expression that discloses confidential information); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (libel); Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (commercial speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (fighting words); Bridges v. California, 314 U.S. 252, 270-71 (1941) (expression that criticizes the judicial process).

[26] *See* Kozinski & Banner, *supra* note 5, at 758 (arguing that *Chrestensen* was not a commercial speech case at all, but a case about business activity); *see also* TRIBE, *supra*

Court has experienced difficulty in defining what types of messages constitute commercial speech.[27] This failure to precisely define the contours of commercial speech has naturally doomed the Court's efforts to develop a workable doctrine for regulating it.

In its first commercial speech case, *Valentine v. Chrestensen*,[28] the Supreme Court rather perfunctorily stated that commercial speech enjoys no First Amendment protection.[29] In *Chrestensen*, the respondent challenged part of the New York City Sanitation Code that prevented him from distributing handbill advertisements for tours of a submarine.[30] The Court upheld the city's regulation because it found that Chrestensen was engaging in commercial advertising, even though his handbill also included a political protest against the ordinance.[31] In particular, the Court

---

note 3, § 12-15, at 895 (contending that the doctrine of commercial speech, though only in its infancy, has nonetheless been the subject of many Supreme Court cases).

[27] *See Chrestensen*, 316 U.S. at 54. The Court made the rather cursory announcement, "the Constitution imposes no such [First Amendment] restraint on government as respects purely commercial advertising." *Id.; see also* Breard v. Alexandria, 341 U.S. 622, 642 (1951) (refining the criteria for commercial speech by stating, "selling, however, brings into the transaction a commercial feature."); PETTY, *supra* note 19, at 9 (discussing Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), a case involving the distribution of pamphlets about venereal disease with a condom manufacturer's name printed on the bottom, the Court noted the following: "(1) the pamphlets were produced as traditional advertisements (not public service announcements), (2) referred to specific products, and (3) were prepared with a profit motive." *Id.* On balance, the Court decided that these factors all combined to cover the pamphlet under the rubric of commercial speech). Petty further opined that:

> [d]espite the well-articulated different levels of First Amendment protection for commercial and political speech, the Supreme Court has provided less guidance on how to distinguish one from the other. It has stated that it relies on a "common-sense" approach and [has] defined commercial speech as that which does "no more than propose a commercial transaction."

Id. (footnote omitted); *see* also GARTNER, *supra* note 5, at 23 (concluding that, in all truth, there is no significant difference between commercial and political speech). *See generally supra* note 17 and accompanying text (describing the inadequacy of the Court's attempts to define commercial speech).

[28] 316 U.S. 52 (1942).

[29] *See id.* at 54. The Court declared that although states and cities may not unduly burden the dissemination of opinions and information in public places, the Constitution provides no protection for strictly commercial advertising. *See id.*

[30] *See id.* at 53, 54.

[31] *See id.* at 55. The Court noted that the Police Commissioner, Valentine, had informed Chrestensen that he would not run afoul of the ordinance if his handbills contained only information or a public protest. *See id.* at 53; *accord Breard*, 341 U.S. at 645 (upholding a municipal ordinance that prohibited door-to-door solicitation). The Court explained that the plaintiff was not denied First Amendment protection because he sold the magazine, but the "selling, [brought] into the transaction a commercial feature." *Id.* at 642. The Court declared that it would be an improper use of the First Amendment to invalidate municipal ordinances that kept residents from being annoyed by door-to-door salesmen. *See id.* at 645.

rejected the notion that attaching a political protest to a commercial advertisement would entitle the speech to full First Amendment protection.[32]

In *New York Times Co. v. Sullivan*,[33] the Court showed a new willingness to distinguish between commercial speech that involved purely commercial transactions and commercial speech that contained other forms of expression.[34] In a libel suit brought by a white city official against the New York Times, the Court held that an advertisement by four black clergymen citing civil rights abuses in the South did not constitute commercial speech because it contained political speech as well.[35] Nine years later, however, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[36] the Court distinguished gender-specific employment advertisements from the editorial at issue in *Sullivan*.[37] The majority found that these advertisements did not contain political information, but instead were more analogous to the unprotected commercial speech found in *Chrestensen*.[38] Using this criterion, the Court upheld re-

---

[32] *See Chrestensen*, 316 U.S. at 55. The Court stated that it appeared Chrestensen had attached the protest to his advertisement in a bald attempt to evade the ordinance. *See id.*

[33] 376 U.S. 254 (1964).

[34] *See id.* at 266. The Court rejected the notion that a paid editorial in a newspaper was unprotected commercial speech. *See id.* The Court reasoned that:

> [t]he publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, [and] protested claimed abuses . . . . That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.

Id.

[35] *See id.* (granting full First Amendment protection for a paid advertisement because it contained political speech). *But see Chrestensen*, 316 U.S. at 55 (denying full First Amendment protection to an advertisement that contained political speech).

[36] 413 U.S. 376 (1973).

[37] *See id.* at 385. The Pittsburgh Press Company was convicted of violating a city ordinance that prohibited the listing of help-wanted advertisements by gender preference. *See id.* at 380. The Court held that the advertisements did not express opinions but simply listed employment opportunities. *See id.* at 385.

[38] *See id.* The Court also rejected Pittsburgh Press's argument that its exercise of editorial discretion in running the advertisements took them out of the commercial speech context and into full First Amendment protection under the aegis of freedom of the press. *See id.* at 387. The Court declared that the combination of the advertisement with the newspaper's decision to place it in a gender-specific column was in fact "an integrated commercial statement." *Id.* at 388. The Court also deflated the commercial speech issue by noting that even if commercial speech were fully protected, this speech concerned an unlawful activity because it advocated employment discrimination on the basis of sex. *See id.* at 388-89. Interestingly, the Court did note that speech is not made commercial simply because it is part of an advertisement. *See id.* at 384 (citing *Chrestensen*, 316 U.S. at 55).

strictions on the publishing of the advertisements, despite First Amendment objections.[39]

Gradually, the Supreme Court began to afford a limited degree of First Amendment protection to commercial speech.[40] In *Bigelow v. Virginia*,[41] the Court overturned the conviction of a Virginia man who had violated a state law prohibiting the sale or distribution of any publication containing information on how to obtain an abortion.[42] Writing for the majority, Justice Blackmun announced that commercial speech was not entirely unprotected by the First Amendment.[43] The Court stressed that the speech in *Bigelow* contained other forms of expression besides those merely proposing commercial transactions.[44] It remained unclear, however, whether pure commercial speech would be granted First Amendment protection.

This question was answered in the 1976 decision of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[45] where the Court acknowledged for the first time that even pure commercial speech is protected by the First Amendment.[46] The opinion recognized that speech does not fail to garner First Amendment protection simply because it appears as an advertisement.[47] Furthermore, the Court de-

---

[39] *See id.* at 391.

[40] *See* Bigelow v. Virginia, 421 U.S. 809, 829 (1975) (protecting advertisements for abortion services on free speech grounds); *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976) (overturning restrictions on price advertising for prescription drugs).

[41] 421 U.S. 809 (1975).

[42] *See id.* at 829.

[43] *See id.* at 820 n.6. Justice Blackmun explained that the *Chrestensen* holding was limited and that advertising was not per se unprotected by the First Amendment. *See id.* at 819-20. Justice Blackmun quoted a concurring opinion by Justice Douglas, who was a member of the *Chrestensen* Court: "[the Chrestensen] ruling was casual, almost offhand. And it has not survived reflection." *Id.* at 820 n.6 (citation omitted); *see also id.* (citing Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting) (doubting whether the distinction drawn between commercial speech and political speech in *Chrestensen* remained valid).

[44] *See id.* at 822 (noting that the advertisement about abortion services involved more than the simple proposition of a commercial transaction).

[45] 425 U.S. 748 (1976).

[46] *See id.* at 762. Justice Blackmun proclaimed:

> Our question is whether speech which does "no more than propose a commercial transaction," is so removed from any "exposition of ideas," and from "'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,'" that it lacks all protection. Our answer is that it is not.

Id. (citations omitted).

[47] *See id.* at 761. The Court declared that speech is not denied all First Amendment protection simply because money is spent to disseminate it. *See id.* The Court cited paid advertisements as one form of this type of speech. *See id.* The *Virginia Pharmacy* deci-

cleared that the government may not completely prohibit the distribution of truthful commercial information about lawful activities.[48] Yet this victory would soon prove a pyrrhic one for proponents of full First Amendment protection for commercial speech. Just four years later, the Court developed the *Central Hudson* test, virtually stripping commercial speech of full First Amendment protection and allowing restrictions on even truthful commercial messages.[49]

The Court's failure to precisely define what constitutes commercial speech has left unsettled the question of how much First Amendment protection this type of speech receives.[50] In response to the Court's lack of clarity, several commentators have attempted to create their own formulations for commercial speech.[51] Many of these approaches have proven as unworkable as those put forth by the Court.[52]

---

sion is premised on three ideas. *See* TRIBE, *supra* note 3, § 12-15, at 893. The first notion is that the Constitution prohibits the regulation of activities in order to keep individuals ignorant about their choices. *See id.* at 893-94. The second idea is that free speech rights encompass more than just political speech but rather all speech that informs individual choices. *See id.* at 894. The third rationale is that commercial messages play a critical role in allowing individuals to form ideas about the free enterprise system. *See id.*

[48] *See Virginia Pharmacy*, 425 U.S. at 773. The Court noted, in the abstract, that the government may not completely suppress this type of speech. *See id.* The Court explained that this case only involved commercial speech restrictions on pharmacists and expressly left open the question of the constitutionality of speech restrictions on other professions. *See id.* at 773 n.25. The Court also recognized the continuing validity of reasonable time, place, and manner restrictions; restrictions on false or misleading commercial speech; and restrictions on commercial speech about unlawful activities. *See id.* at 771, 772.

[49] *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980) (creating a four-part test that balances the government's interest in suppressing commercial speech against the advertiser's First Amendment rights); *see, e.g.*, Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2381 (1995) (utilizing the *Central Hudson* test to uphold the Florida Bar Association's restrictions on attorney advertising); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 344 (1986) (applying the *Central Hudson* test to uphold a ban on casino advertising directed at Puerto Rican residents but allowing the advertisements if directed at nonresidents).

[50] *See* TRIBE, *supra* note 3, § 12-18, at 942. The Court's failure to explain the criteria it utilizes in creating new speech categories has prevented it from developing a coherent body of law. *See id.* Affording varying degrees of First Amendment protection to different categories of speech has allowed courts to disguise political decisions by claiming that they have used their discretion within narrowly defined limits. *See id.* at 943; *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.26, at 1062 (5th ed. 1995) (asserting that the Court's traditional definition of commercial speech as speech that "proposes a commercial transaction" is imprecise and has been inconsistently applied).

[51] *See* PETTY, *supra* note 19, at 10-11. The author states that:

> [m]arketing commentators Heath & Nelson [1983] suggest that five factors should be examined: (1) content, (2) purpose, (3) context (e.g., level of political controversy), (4) audience, and (5) channels. Cutler & Muehling [1989] propose seven factors: (1) topic, (2) identification of sponsor including brand names and trademarks, (3) what other industry members are

II. THE *CENTRAL HUDSON* ANALYSIS

A. The Four Prongs of the Test

In *Central Hudson Gas & Electric Corp. v. Public Service Commission,*[53] the Supreme Court developed a four-part balancing test for determining whether government regulations of commercial speech are valid under the First Amendment.[54] In applying the test, it is first determined whether the speech regards lawful activity and whether the speech is not misleading.[55] Second, it is asked whether the government's interest in

---

> doing, (4) whether the campaign is deducted from taxes as a business expense, (5) whether the sponsoring firm is dominant in the industry, (6) media used for dissemination, and (7) amount and percentage of advertising budget devoted to the speech in question.
>
> In contrast to these proposals that are focused on business-oriented factors, Lin [1988] urges the balancing of nine public policy rationales: (1) the likelihood of false belief, (2) the seriousness of resulting injury, (3) the concentration of the harm from the erroneous statements, (4) the strength of the ideological (noncommercial) motives for speaking, (5) the ease of review, (6) the objective verifiability of the message, (7) the strength of the speaker's motive (likelihood of "chilling"), (8) the severity of regulatory penalties, and (9) the likelihood that the penalties will be incorrectly applied to true speech.
>
> . . . Farber [1979] and Whelan [1987] suggest a simpler approach. Farber suggests that regulations be examined to see whether they relate to the informational function or the contractual function of speech. The former would be fully protected under the First Amendment, the latter protected only as commercial speech. Whelan provides a specific test for this approach. He proposes that speech that would create an express warranty under contract law would constitute commercial speech.

Id. Petty then proposes his own test. *See id.* at 11-13. "If the audience of allegedly misleading speech is likely to be deceived in their capacity as consumers, the speech should be deemed commercial. If the ads would deceive the audience in their capacity as members of the electorate or the general populace, the ads are fully protected speech." *Id.* at 12; *see also* Thomas W. Merrill, Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 236 (1976). The author defines commercial speech as:

> (1) speech that refers to a specific brand name product or service, (2) made by a speaker with a financial interest in the sale of the advertised product or service, in the sale of a competing product or service, or in the distribution of the speech, (3) that does not advertise an activity itself protected by the [F]irst [A]mendment.

Id.

[52] *See* PETTY, *supra* note 19, at 10. Of the methodologies offered by Heath & Nelson, Cutler & Muehling, and Lin, Petty writes that such factor-oriented approaches produce the same inconsistent results as the *Central Hudson* test. *See id.* Citing Farber and Whelan's approaches, Petty acknowledges that both proposals are interesting, but that they define commercial speech in very narrow terms. *See id.* at 11.

[53] 447 U.S. 557 (1980).

[54] *See id.* at 566.

[55] *See id.*

regulating the speech is substantial.[56] If the answer to these first two questions is affirmative, the analysis continues.[57] Third, it is determined whether the regulation directly advances the asserted government interest.[58] Fourth, it is decided whether the regulation is narrowly tailored to serve the government's interest.[59] In *Central Hudson*, the Court used this analysis to invalidate a New York Public Service Commission regulation that completely banned promotional advertising by utility companies.[60] After *Central Hudson*, however, the test has often been used to uphold advertising restrictions by the government.[61]

The origins of the *Central Hudson* test suggest that public policy may have played a more substantial role in its development than sound constitutional doctrine.[62] Indeed, the test's inconsistencies with First Amendment jurisprudence did not go unnoticed at the time.[63] Justice Blackmun complained that the new test was inconsistent with prior case law and failed to adequately protect truthful commercial speech.[64] Apart from the constitutional difficulties, the test also failed to deliver predictable results.[65]

---

[56] *See id.*

[57] *See id.*

[58] *See Central Hudson*, 447 U.S. at 566.

[59] *See id.*

[60] *See id.* at 571. The Court in *Central Hudson* held that although the complete ban on advertising passed the first, second and third prongs of the test, it failed the fourth prong because it was more extensive than necessary to serve the government's interest in promoting energy conservation. *See id.* at 566, 569, 571.

[61] *See* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2381 (1995) (upholding the Florida Bar's restrictions on attorney advertising); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 344 (1986) (upholding a ban on casino advertising directed at Puerto Rican residents but allowing the advertisements if directed at nonresidents).

[62] *See* GARTNER, *supra* note 5, at 15. The *Central Hudson* test was created during the peak years of the consumer movement. *See id.* In these pre-Reagan years, governmental regulation of consumer affairs was expected. *See id.* Beginning with President Lyndon Johnson in 1964, protection of consumers was often sought to be accomplished through advertising restrictions. *See id.*

[63] *See* Jonathan Weinberg, Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 729 (1982). *Central Hudson*'s acceptance of restrictions on truthful commercial speech would hardly be tolerated in other areas of First Amendment jurisprudence. *See id.*

[64] *See Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring) (expressing concern that the new test fails to honor the dictates of stare decisis and does not provide adequate safeguards for truthful commercial speech).

[65] *See* Miller, *supra* note 19, at 635 (proffering that the *Central Hudson* test has been inconsistently applied because it provides insufficient guidance to judges).

B. *Applications of the* Central Hudson *Test*

In *Metromedia, Inc. v. City of San Diego*,[66] the Court applied the *Central Hudson* test to a municipal ordinance prohibiting off-premises advertising displays.[67] First, the Court determined that the regulations were directed at truthful, nonmisleading commercial speech.[68] Second, the Court found that the city had a substantial interest in maintaining traffic safety and protecting the aesthetic qualities of the city.[69] Next, the Court decided that the regulations passed the fourth prong, because if the billboards were found to be distracting and unattractive, banning them would be no more extensive than necessary.[70]

Finally, the Court focused on the third prong of the test and attempted to determine whether the regulations directly advanced the asserted government interest.[71] In considering this question, the Court deferred to the judgments of local officials, even in the absence of objective data, that the billboards posed a dangerous distraction to pedestrians and motorists and were harmful to the appearance of the city.[72] Despite this, the Court held the ordinance unconstitutional because it unduly restricted truthful noncommercial speech, but noted in dicta that such restrictions, as applied solely to commercial speech, would pass the *Central Hudson* test.[73] Thus under a *Central Hudson* analysis, an ordinance banning all commercial messages appearing on off-premises billboards could theoretically be held constitutional.[74]

---

[66] 453 U.S. 490 (1981).

[67] *See id.* at 507 (noting that even the appellants agreed that the *Central Hudson* test was the proper approach for deciding this case); *see also id.* at 493-95 (explaining that San Diego's Ordinance No. 10795 prohibited outdoor advertising display signs and billboards not located on the premises of a business). The Ordinance made exceptions for on-site advertising displays and off-site displays falling within twelve enumerated categories, including religious, political and government signs. *See id.*

[68] *See id.* at 507.

[69] *See id.* at 507-08.

[70] *See id.* at 508.

[71] *See Metromedia*, 453 U.S. at 508 (explaining that the Court considered its application of the third prong to present the most important issue in the case).

[72] *See id.* at 509. The Court hesitated to contradict the judgments of local lawmakers who considered the billboards to be a traffic hazard. *See id.* The Court found nothing unreasonable in these conclusions. *See id.* The majority reached a similar conclusion with respect to the city's second interest, that of protecting the aesthetics of the area. *See id.* at 510. The Court agreed that garish billboards may cause aesthetic harm. *See id.*

[73] *See id.* at 512-13, 521 (reasoning that the First Amendment protects mixed speech but affords only limited protection to pure commercial speech).

[74] *See id.* at 512-13. *But see* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) (holding that speech cannot be restricted solely because of its commercial nature).

In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[75] the Court again refused to strike down legislation that banned advertising of lawful activities.[76] The case concerned a Puerto Rican statute that legalized casino gambling but prohibited advertising directed at residents.[77] Puerto Rican officials justified the law by claiming that the increased demand for gambling would have a deleterious effect on the local population.[78] The Court applied the *Central Hudson* analysis because the statute restricted commercial speech.[79] In satisfying the first prong, the Court noted that the commercial speech at issue was lawful and not misleading.[80] Second, the Court agreed that Puerto Rico had a substantial interest in protecting the welfare and health of its citizens.[81] Third, the Court deferred to the legislature's conclusion that the advertising ban directly advanced its interest.[82] Fourth, the Court concluded that the re-

---

[75] 478 U.S. 328 (1986).

[76] *See id.* at 344.

[77] *See id.* at 330. The Games of Chance Act authorized casino gambling for the purpose of attracting tourists, but prohibited advertising to the Puerto Rican public. *See* P.R. LAWS ANN., tit. 15 § 77 (1995). The statute allowed advertising if directed at nonresidents. *See id.*

[78] *See Posadas*, 478 U.S. at 341 (noting that the Puerto Rico legislature was concerned about organized crime, prostitution, and general moral decay, all ostensibly linked to casino gambling).

[79] *See id.* at 340.

[80] *See id.* at 340-41.

[81] *See id.* at 341.

[82] *See id.* at 341-42 (finding that the Puerto Rico legislature's belief that advertising would increase the demand for casino gambling was reasonable). *But see id.* at 350 (Brennan, J., dissenting) (finding no reason for consumers to be denied access to truthful commercial messages regarding lawful activities). Justice Brennan proffered that the government's interest in suppressing truthful commercial speech should be analyzed under a strict scrutiny standard. *See id.* at 351 (Brennan, J., dissenting); *see also* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1511 (1996) (rejecting the deferential approach employed in *Posadas*). The Court explained that:

> Given our longstanding hostility to commercial speech regulation of this type, *Posadas* clearly erred in concluding that it was "up to the legislature" to choose suppression over a less speech-restrictive policy . . . .
> Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach.
> Instead, in keeping with our prior holdings, we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.

Id.; *see also* GARTNER, *supra* note 5, at 17 (describing *Posadas* as a disturbing deviation from the underlying principles of the commercial speech doctrine). The *Posadas* opinion, while retaining the *Central Hudson* test, legitimized restrictions on all types of commercial speech that do not emanate from underlying constitutional activity. *See id.* In addi-

strictions were no more extensive than necessary to serve the government's interest.[83] In a now infamous statement, then-Justice Rehnquist stated, "[i]n our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[84] This "greater-includes-the-lesser" logic has been heavily criticized by other Justices and commentators.[85]

Two 1995 cases further illustrated the inconsistent results obtained under the *Central Hudson* test.[86] In *Rubin v. Coors Brewing Co.*,[87] the Court invalidated § 205(e)(2) of the Federal Alcohol Administration Act,[88] which prohibited the display of alcohol content on beer labels.[89] Recognizing that the statute regulated commercial speech, the Court ap-

---

tion, *Posadas* has left commercial speech largely unprotected, and allowed legislatures to exercise great discretion in regulating it. *See id.*

[83] *See Posadas*, 478 U.S. at 343 (noting that the restrictions would only apply to residents of Puerto Rico, but not tourists).

[84] *Id.* at 345-46 (claiming that because Puerto Rico had the power to ban gambling itself, it could also ban advertising about gambling).

[85] *See id.* at 354 n.4 (Brennan, J., dissenting). Justice Brennan did not agree that prohibiting advertisements about casino gambling was less intrusive than banning casino gambling itself. *See id.* The Justice clarified that the "strange constitutional doctrine" that prevented Puerto Rico from restricting commercial speech is called the First Amendment. *See id.* at 354-55 n.4 (Brennan, J., dissenting); *see also* GARTNER, *supra* note 5, at 17 (arguing that the reasoning in the *Posadas* opinion is untenable). The *Posadas* decision permits government restrictions on virtually all types of advertisements because only a small number of services or products receive constitutional protection. *See id.* The Reagan administration publicly disapproved of the *Posadas* decision. *See id.* In 1987, one Justice Department official informed Congress that the administration considered the decision to be erroneous. *See id.* The official explained that the Court misconstrued the government's authority to regulate behavior with its comparative lack of authority to restrict speech. *See id.; see also 44 Liquormart*, 116 S. Ct. at 1512 (rejecting arguments that relied on the *Posadas* "greater-includes-the-lesser" logic). Although, in the abstract, greater powers often include lesser ones, that proposition is not applicable when a state contends that its police power to regulate commercial activity also allows it to restrict truthful commercial speech. *See id.* The Court noted that restrictions on speech are often more intrusive than regulations of behavior. *See id.* The majority rejected the notion that free speech is less essential to basic freedoms than behavior, or that the government's power to regulate activity assumes that it may also restrict speech. *See id.* The Court stated that the *Posadas* reasoning was an affront to the First Amendment. *See id.* The underlying assumption of the First Amendment is that restrictions on speech are more menacing than regulations of behavior. *See id.*

[86] *See, e.g.*, Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1594 (1995) (invalidating 27 U.S.C. § 205(e)(2) (Federal Alcohol Administration Act), which prohibited the display of alcohol content on beer labels); Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2381 (1995) (upholding the Florida Bar's restrictions on direct mail solicitation by attorneys).

[87] 115 S. Ct. 1585 (1995).

[88] 27 U.S.C. § 205(e)(2) (1996).

[89] *See Coors Brewing*, 115 S. Ct. at 1594 (citing 27 U.S.C. § 205(e)(2) (1996)).

plied the *Central Hudson* test.[90] First, the majority agreed with the lower courts that the respondent's displays of alcohol content on beer labels did not constitute untruthful or misleading speech.[91] Second, the majority acknowledged that the government had a substantial interest in protecting citizens from strength wars, whereby brewers would compete on the basis of higher alcohol content.[92] The Court, however, rejected the government's argument that the federal law assisted states' efforts to regulate alcohol pursuant to the Twenty-First Amendment.[93]

Third, the Court held that the federal regulation did not directly advance the government's interest in preventing strength wars.[94] While the federal regulation banned all displays of alcohol content on beer labels, the Court explained that it would have no affect on beer advertisements.[95] Furthermore, the Court noted that the regulations permitted alcohol content to be displayed on wines and distilled spirits and allowed the use of the term "malt liquor" to denote high alcohol content beer.[96] Acknowledging that the law could be easily circumvented, the Court reasoned that the ban could not materially advance its aim of preventing strength wars.[97]

Fourth, the majority stated that the regulation was more extensive than necessary to serve the government's interest.[98] The Court agreed with the respondents' argument that less intrusive alternatives were available.[99] These included directly regulating beer's alcohol content, prohib-

---

[90] *See id.* at 1589 n.2 (stating that the government objected to the application of the *Central Hudson* test because it felt its analysis was too strict, and that consequently, the government argued for a more deferential approach).

[91] *See id.* at 1590.

[92] *See id.* at 1591 (agreeing with the government that strength wars could possibly lead to increased rates of alcoholism); *see also* Debra M. Wallin, Note, 27 SETON HALL L. REV. 319, 355 (1996) (postulating that the government's stance in seeking to restrict the display of alcohol content on labels contradicted other government efforts to compel disclosure of product ingredients through labeling laws).

[93] *See Coors Brewing*, 115 S. Ct. at 1591 (doubting that the States were even in need of federal support); *see also* U.S. CONST. amend. XXI, § 2 (repealing prohibition, but allowing individual states to prohibit the sale, use, transportation, or importation of intoxicating liquors within their own borders).

[94] *See Coors Brewing*, 115 S. Ct. at 1592 (describing the entire regulation as irrational).

[95] *See id.* (citing 27 U.S.C. § 205(f)(2) (1996) (noting that in much of the country, even if the regulation was upheld, brewers would still be allowed to disclose alcohol content in their advertisements, if not on their product labels)).

[96] *See id.* (postulating that a more effective ban would prohibit displays of alcohol content on the strongest liquors as well as the weakest ones).

[97] *See id.* at 1593.

[98] *See id.* (finding that the regulations were not sufficiently tailored to the government's interest).

[99] *See Coors Brewing*, 115 S. Ct. at 1593-94.

iting marketing efforts that stressed high alcohol content, or limiting the ban to malt liquors.[100]

In another 1995 case, *Florida Bar v. Went For It, Inc.*,[101] the Court applied the *Central Hudson* test to uphold the Florida Bar's thirty-day waiting period on direct-mail solicitation targeted at accident victims.[102] Writing for the majority, Justice O'Connor articulated that the *Central Hudson* test is a form of intermediate judicial review that grants limited First Amendment protection to commercial speech.[103] Applying the test, the Court satisfied the first prong by recognizing that the advertising at issue was truthful and not misleading.[104] Analyzing the second prong, the Court agreed that Florida had two substantial interests in regulating this type of commercial speech.[105] First, the Bar had a substantial interest in promulgating professional standards for attorneys licensed in the state.[106] Second, it had a compelling interest in protecting the tranquillity, well-being, and privacy of Florida citizens.[107]

Reaching the third prong, the Court found that the thirty-day waiting period directly advanced the government's interest.[108] In discussing the fourth prong, the Court noted that in commercial speech cases, the state need not use the least restrictive means, but need only show a "reasonable fit" between the state's interests and its regulations.[109] The Court found that the thirty-day waiting period was not more extensive than necessary and thus upheld the regulation.[110]

---

[100] *See id.* at 1593.

[101] 115 S. Ct. 2371 (1995).

[102] *See id.* at 2381; *see also* William F. Clarke, Jr., Note, 26 SETON HALL L. REV. 1213, 1242 (1996) (observing that the unsettling effect of this decision was to uphold restrictions on truthful, nonmisleading commercial speech, simply because some people found it offensive).

[103] *See Went For It*, 115 S. Ct. at 2375-76.

[104] *See id.* at 2376.

[105] *See id.*

[106] *See id.*

[107] *See id.*

[108] *See Went For It*, 115 S. Ct. at 2378. The Court cited the Florida Bar's 106-page summary of a two-year study it had conducted on the impact of attorney advertising. *See id.* at 2377. The report concluded that targeted mail solicitation of accident victims and survivors immediately following an accident was an invasion of privacy and reflected poorly on the legal profession. *See id.*

[109] *See id.* at 2380 (quoting Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).

[110] *See id.* (stating that the regulation's failure to distinguish the severity of injuries to victims was not relevant, as it would be virtually impossible to fashion a rule with that level of detail).

III. *44 LIQUORMART, INC. V. RHODE ISLAND*

In the 1996 case of *44 Liquormart, Inc. v. Rhode Island,*[111] the Supreme Court invalidated two Rhode Island statutes that banned prices from being displayed on any advertisement for liquor, except through in-store displays.[112] While the Court's decision was unanimous, it was remarkable for the wide disparity of reasoning that the individual Justices utilized in reaching the same conclusion.

The petitioners, one a Rhode Island liquor retailer and the other a Massachusetts liquor retailer, sought a declaratory judgment that the laws violated the First Amendment.[113] Rhode Island claimed that the purpose of the statutes was to increase temperance and discourage alcohol abuse.[114] The Rhode Island store, 44 Liquormart, was fined $400 when it ran an advertisement that identified various brands of liquor with the word "WOW" beside them, but displayed prices only for non-alcoholic items like peanuts, potato chips, and mixers.[115] The United States District Court for the District of Rhode Island held that both laws violated the plaintiffs' First Amendment rights of free speech.[116]

The State appealed the decision to the United States Court of Appeals for the First Circuit, which reversed the district court's decision.[117] The Supreme Court granted certiorari to hear the case.[118] Utilizing the *Central Hudson* test, the Court invalidated both Rhode Island laws.[119] Writing for the Court, Justice Stevens first recognized that 44 Liquor-

---

[111] 116 S. Ct. 1495 (1996).

[112] *See id.* at 1501-02 nn.2-3. Rhode Island General Law § 3-8-7 prohibited all advertising of prices of alcoholic beverages by vendors, excepting only in-store display advertising not visible from the exterior. R.I. GEN. LAWS § 3-8-7 (1987) (declared unconstitutional in *44 Liquormart*, 116 S. Ct. at 1515). Rhode Island General Law § 3-8-8.1 prohibited the media from publishing or broadcasting any advertisements that referred to the price of alcoholic beverages. R.I. GEN. LAWS § 3-8-8.1 (1987) (declared unconstitutional in *44 Liquormart*, 116 S. Ct. at 1515).

[113] *See 44 Liquormart*, 116 S. Ct. at 1503.

[114] *See id.* at 1509 n.14.

[115] *See id.* at 1503 (noting that the store first paid the fine, then filed an action challenging the statutes).

[116] *See* 44 Liquormart, Inc. v. Racine, 829 F. Supp. 543, 555 (D.R.I. 1993), *rev'd*, 39 F.3d 5 (1st Cir. 1994), *rev'd*, 116 S. Ct. 1496 (1996) (applying the *Central Hudson* test to find that the statutes did not directly advance Rhode Island's interest in reducing alcohol consumption and that the statutes were more extensive than necessary).

[117] *See* 44 Liquormart v. Rhode Island, 39 F.3d 5, 7, 9 (1st Cir. 1994), *rev'd*, 116 S. Ct. 1495 (1996) (explaining that the appeals court found merit in the government's argument that lower prices and price-based advertising would result in more alcohol sales).

[118] *See* 44 Liquormart, Inc. v. Rhode Island, 115 S. Ct. 1821 (1995).

[119] *See 44 Liquormart*, 116 S. Ct. at 1508, 1515 (noting that *Central Hudson*'s analysis required the Court to review the restrictions with special care).

mart's advertisement was truthful and not misleading.[120] Second, the Court agreed that Rhode Island had a substantial interest in promoting responsible drinking.[121] Third, the Court held that the regulations did not directly advance the government's interest in promoting temperance.[122] Fourth, the Court found that the regulations were more extensive than necessary to serve the government's interest.[123]

Justice Scalia concurred in the result but expressed unease with the four-part test announced in *Central Hudson*.[124] The Justice declared that it would be preferable to review the historical context of commercial speech and decide the issue based upon "the long accepted practices of the American people."[125] In the absence of this information, however, the Justice resolved to accept the *Central Hudson* test for the purposes of deciding the case.[126]

Justice Thomas, concurring in the result, expressed even greater displeasure with the *Central Hudson* test than Justice Scalia.[127] The Justice declared that the test should not be used where the government's purpose is to keep truthful information about lawful products or services out of the hands of the public.[128] Justice Thomas suggested that the *Central Hudson* test encouraged courts to uphold only those regulations that successfully manipulate consumers' behavior, because only then can the government show that the regulation directly advances its interest.[129] The

---

[120] *See id.* at 1503.

[121] *See id.* at 1509.

[122] *See id.* The Court rejected the government's argument that its ban on advertising prices would significantly promote temperance. *See id.*

[123] *See id.* at 1510. The State's own expert admitted that the State could force higher prices through price regulation or taxes if it chose to do so. *See id.*

[124] *See 44 Liquormart*, 116 S. Ct. at 1515 (Scalia, J., concurring). Justice Scalia expressed his concern that the test was more a creation of public policy than sound constitutional doctrine. *See id.*

[125] *Id.* The Justice bemoaned the fact that none of the briefs submitted to the Court provided any illumination on this issue, as each party had simply accepted *Central Hudson* as the guiding doctrine. *See id.*

[126] *See id.* The Justice submitted that the Court was currently unable to declare the test wrong or suggest what might replace it. *See id.*

[127] *See id.* at 1515-16 (Thomas, J., concurring). Justice Thomas suggested that the government's policy sought to manipulate individuals in the marketplace by keeping them ignorant. *See id.*

[128] *See id.* The Justice declared that the government's interest was per se illegitimate and could not justify regulating commercial speech anymore than it could justify regulating noncommercial speech. *See id.* at 1516 (Thomas, J., concurring).

[129] *See 44 Liquormart*, 116 S. Ct. at 1517 (Thomas, J., concurring). Justice Thomas insinuated that the Court is more willing to accept regulations that successfully manipulate consumers. *See id.*

Justice questioned the logic of using the third prong of the test in such situations.[130]

Finally, Justice Thomas noted that the fourth prong's strict requirement that the regulation be narrowly tailored may imply a broader holding than that intended by the majority.[131] Justice Thomas suggested that application of the fourth prong would lead to the invalidation of all speech restrictions that could be replaced by a direct ban on the product or service itself.[132] The Justice explained that all direct regulations on products and services are necessarily more narrowly tailored than bans on advertising.[133] In addition, the Justice noted that direct regulations would satisfy the third prong of the test because they would directly advance the government's interest.[134] Thus, while welcoming the outcome, Justice Thomas would simply hold all restrictions on truthful commercial speech about lawful services or products as per se invalid.[135]

Throughout the concurrence, Justice Thomas criticized previous efforts to distinguish commercial speech from noncommercial speech.[136] The Justice claimed that the *Central Hudson* test has led to inconsistent results and has allowed judges too much unguided discretion in deciding commercial speech cases.[137] In closing, Justice Thomas called for the Court to return to its reasoning in *Virginia Pharmacy* and hold that restrictions on truthful commercial speech are impermissible.[138]

Justice Thomas's reasoning echoes the earlier strains of Justices Holmes and Brandeis. Recognizing the penultimate place of the First

---

[130] *See id.* at 1518 (Thomas, J., concurring). The Justice claimed that *Central Hudson's* third prong seems to indicate that the more successful the State had been at keeping consumers ignorant, the more likely the restriction would be upheld. *See id.*

[131] *See id.* at 1518-19 (Thomas, J., concurring).

[132] *See id.* at 1519 (Thomas, J., concurring).

[133] *See id.* Justice Thomas pointed out that because direct regulations are inherently more narrowly tailored than advertising restrictions, most commercial speech restrictions would fail *Central Hudson's* fourth prong. *See id.*

[134] *See supra* note 129 and accompanying text (arguing that the *Central Hudson* test seems to reward speech restrictions that successfully manipulate consumers).

[135] *See 44 Liquormart*, 116 S. Ct. at 1519-20 (Thomas, J., concurring). Justice Thomas referred the Court back to the reasoning in *Virginia Pharmacy*, which the Justice would have applied in this case. *Id.*

[136] *See id.* at 1518 (Thomas, J., concurring). The Justice explained that there is no philosophical nor historical basis for declaring commercial speech to be of low value. *See id.*

[137] *See id.* at 1520 (Thomas, J., concurring). Justice Thomas explained, "the *Central Hudson* test asks the courts to weigh incommensurables—the value of knowledge versus the value of ignorance—and to apply contradictory premises—that informed adults are the best judges of their interests, and that they are not." *Id.*

[138] *See id.* The Justice declared that the application of the *Central Hudson* test is inappropriate where the government is seeking to suppress information about lawful products or services. *See id.*

Amendment in our constitutional democracy, Justices Holmes and Brandeis admonished censors with the refrain of "more speech, not less speech."[139] By applying the *Central Hudson* test to restrictions of truthful commercial speech, the Court fails to recognize not only each citizen's interest in receiving commercial information, but also each citizen's right to receive messages that form part of an exposition of ideas.[140]

IV. COMMERCIAL SPEECH DESERVES FULL FIRST AMENDMENT PROTECTION

A. *Commercial Speech Provides Important Information and Forms Part of an Exposition of Ideas*

Commercial speech conveys important information and plays an integral role in the consumer's process of rational decision-making when purchasing products and services.[141] Moreover, modern commercial messages are increasingly geared toward creating lifestyle and value choices rather than simply providing information about product attributes and prices.[142] These messages, for better or worse, often play a significant role in shaping one's self-image.[143] Thus, content-based restrictions on truthful commercial speech not only deny consumers relevant market in-

---

[139] *See infra* notes 162-163, 165 and accompanying text (citing the comments of Justices Holmes and Brandeis, advocating a broad interpretation of First Amendment free speech rights).

[140] *See* TRIBE, *supra* note 3, § 12-15, at 903 (explaining that the First Amendment protects not only the right to *speak* but also the right to *hear* speech) (emphases added).

[141] *See* Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (noting that a free flow of commercial information is indispensable to our free enterprise economy, in order to keep consumers' decisions intelligent and well informed); *see also* J. HOWARD BEALES & TIMOTHY J. MURIS, STATE AND FEDERAL REGULATION OF NATIONAL ADVERTISING 7-9 (1993) (arguing that advertising is crucial to economic competitiveness because it lowers the consumer's cost of obtaining information and provides manufacturers with an incentive to introduce newer and better products). A study by the Federal Trade Commission found that advertising claims detailing the benefits of fiber to lower cancer risks led to the introduction of cereals with higher fiber content. *See id.*; *see also* PAULINE M. IPPOLITO & ALAN D. MATHIOS, FEDERAL TRADE COMMISSION, BUREAU OF ECONOMICS STAFF REPORT ("BE FIBER STUDY"), HEALTH CLAIMS IN ADVERTISING AND LABELING: A STUDY OF THE CEREAL MARKET, 42, 47 (Aug. 1989).

[142] *See* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 433 (1971). In this excellent article on the value of commercial speech, the author explains that modern commercial messages rarely serve only an informational function. *See id.* Redish contends that advertising often creates new needs in consumers, which, when attained, result in greater social well-being for the individual. *See id.* at 432.

[143] *See id.* at 442 (recognizing that the individual's sense of dignity is not served solely by allowing free speech in the political sphere, but also in the private sphere where one may choose to act as he or she desires).

formation needed for informed choices, but also deny consumers a potential forum for self-fulfillment.

Many Americans value their ability to obtain commercial information as highly as their right to freely gather political information.[144] For this reason, the notion that truthful commercial speech is somehow of lower value than other types of speech finds little support among many scholars.[145] Indeed, the whole argument of whether commercial speech is of high or low value misses the point.[146] The First Amendment exists precisely to keep majorities from suppressing speech that they consider to be of low value.[147] In the commercial speech context, the Court fails to recognize that consumer choices are made for a myriad of reasons, not dictated solely by prices or product attributes.[148] Quite often, the choices that consumers make help them to define themselves as individuals and play a significant role in their pursuit of self-fulfillment.[149]

B. *Distinctions Between Commercial and Noncommercial Speech Are Largely Artificial*

Commercial messages are more difficult than ever to separate from noncommercial messages.[150] Advertisers, like individuals, often engage in several types of speech simultaneously and commercial messages often cannot be attributed to a single motivational factor.[151] For example, one

---

[144] *See Virginia Pharmacy*, 425 U.S. at 763 (arguing that consumers' interests in receiving accurate commercial information often vastly outweighs their interests in political issues).

[145] *See* Kozinski & Banner, *supra* note 5, at 752 (rejecting the argument that the First Amendment protects only political speech).

[146] *See id.*

[147] *See id.* at 751, 752, 753-54 (considering the rather provocative notion that most articles advocating limited First Amendment protection for commercial speech are written by well-educated people who do not care much for television or advertising).

[148] *See* Redish, *supra* note 142, at 433.

[149] *See id.* at 442 (describing the self-realization function of commercial speech).

[150] *See id.* at 443. Distinctions in First Amendment protection between speech in the political and private spheres are irrational because much political speech is directed toward bettering people's material welfare. *See id.* The author also offers his own examples to illustrate the difficulties encountered when one tries to separate commercial speech from noncommercial speech. *See id.* In one hypothetical, Redish questions the justification for protecting speech about proposed government price controls designed to save consumers money, but prohibiting the distribution of supermarket leaflets touting low prices, which would also allow consumers to save money. *See id.*; *see also supra* notes 17, 27 (illustrating the Court's difficulties in attempting to form a workable definition of commercial speech).

[151] *See* Charles Gardner Geyh, *The Regulation of Speech Incident to the Sale or Promotion of Goods and Services: A Multifactor Approach*, 52 U. PITT. L. REV. 1, 2 (1990) (noting that speech is often motivated by a combination of desires, namely to make the world better and to make a profit).

may complain about the effects of combustion engines on global warming while recommending an environmentally-friendly fuel source. One may worry about the spread of sexually transmitted diseases while recommending a certain brand of condom. One may complain about the prime lending rate while recommending a bank that offers lower interest rates than competitors. These few examples underscore the problem of trying to draw a bright-line distinction between commercial and noncommercial speech. In reality, this distinction is an artificial one, created by the Supreme Court in an attempt to impose a multi-tiered level of review for First Amendment cases.[152] The clear drawing of a distinction between commercial and noncommercial speech may well be unattainable.[153]

C. *Commercial Speech Is Deserving of Full First Amendment Protection*

While some scholars claim that the First Amendment does not protect commercial speech, there is little evidence to suggest that commercial speech was singled out for separate treatment under the First Amendment.[154] Furthermore, the historical record suggests that the Framers did not pigeonhole speech into neatly defined categories.[155] Indeed, the Framers' writings strongly suggest that commercial expression was valued as highly as political expression.[156]

---

[152] *See* James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 192 (1984). This article contains a rather amusing graphic that satirizes the levels of protection afforded to different categories of speech recognized by the Supreme Court. *See id.* at 193. The author places commercial speech on the intermediate level, below political speech and just above the "black hole" of labor speech. *See id.*

[153] *See* Geyh, *supra* note 151, at 2. The Court's attempts to distinguish between commercial and noncommercial speech have resulted in arbitrary distinctions that sacrifice substance for form. *See id.*

[154] *See* Brief Amici Curiae of American Advertising Federation et al. at 12-24, 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996) (No. 94-1140). The brief cites various authorities to show that the Framers of the Constitution equated freedom with property and did not envision different levels of First Amendment protection for commercial and noncommercial speech. *See id.*

[155] *See id.*

[156] *See 44 Liquormart*, 116 S. Ct. at 1504 (noting that Benjamin Franklin used his decision to print an advertisement for cruises to Barbados as an early defense of free speech); *see also* BENJAMIN FRANKLIN, HIS LIFE AS HE WROTE IT 94 (Esmond Wright ed., 1989) (suggesting that the business of printing does not always indicate approval of the content of the printed messages); JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM 49 (1988) (noting that colonial newspapers considered advertising an important form of expression); JAMES PLAYSTED WOOD, THE STORY OF ADVERTISING 85-86 (1958) (explaining that colonial era newspapers often contained more advertisements than news articles); *id.* at 46 (referring to Benjamin Franklin "as the father, or at least the patron saint, of American advertising"); Kent Richards Middleton, Commercial Speech and the First Amendment 25 (1978) (unpublished Ph.D. dissertation, Univ. of Minn.) (on file with the

Other categories of speech that are of seemingly lower value than commercial speech nonetheless receive greater First Amendment protection.[157] For example, the libel doctrine requires a public figure to show "actual malice" in order to prevail in a libel suit.[158] Similarly, a plaintiff must show that speech advocating unlawful conduct is directed to provoking *imminent* lawless action and is *likely* to produce such action in order to sustain a conviction.[159] Even a hate speech restriction can survive only if the government meets the formidable task of proscribing all, not just some, hate speech.[160] Although one could argue that these types of speech convey some information, none are as seriously involved in the process of rational decision-making as commercial speech.[161]

D. Counter-Speech, Not Censorship

The argument that the prescription for bad speech is good speech is an axiom of American constitutional law.[162] Its necessary corollary is that the best method for trading information is to allow a "marketplace of ideas" to flourish.[163] As Justices Stevens, Blackmun, and Kennedy have

---

Univ. of Minn. Library) (citing a statement made by Richard Henry Lee, while calling for a Bill of Rights, "[a] free press is the channel of communication to *mercantile* and public affairs") (emphasis added).

[157] See *infra* notes 158-160 and accompanying text, for an illustration of the protection provided to libel, speech advocating unlawful activity, and hate speech, respectively.

[158] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 283, 288 (1964) (reversing a jury verdict awarding damages in a libel case because the plaintiffs failed to prove actual malice).

[159] *See* Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (invalidating an Ohio statute that prohibited advocacy of violence to achieve industrial or political change or of assembling any group with the purpose of teaching criminal syndicalism).

[160] *See* R.A.V. v. City of Saint Paul, 505 U.S. 377, 393-94 (1992). The Court invalidated a city ordinance prohibiting the display of a burning cross, swastika, or other symbol likely to arouse feelings of hatred on the basis of color, creed, gender, race, or religion. *See id.* at 380, 391.

[161] *See supra* notes 141-143 and accompanying text (explaining the high value of commercial speech to consumers).

[162] *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Justice Brandeis uttered his famous statement, "the fitting remedy for evil counsels is good ones." *Id.*

[163] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes argued that:

> the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Id. It is interesting to note that Justice Holmes drew an analogy to the marketplace in his defense of free speech. *See id.*

explained, these notions apply to commercial speech.[164] Counter-speech is not only more protective of First Amendment rights than censorship, it is also a more effective means of promoting public discourse.[165] Speech and counter-speech form the fabric of the First Amendment and elevate the democratic ideal to its highest form.[166]

V. TOWARDS A NEW APPROACH

A. A Simplified Analysis for Deciding Commercial Speech Cases

The commercial speech doctrine illustrates the Court's struggle to achieve a balance between protecting First Amendment rights while simultaneously protecting consumers from the unbridled claims of advertisers.[167] The *Central Hudson* test's lack of predictability is unsettling to advertisers, and under-protective of consumers.[168] But perhaps most importantly, it is also under-protective of First Amendment rights.[169] Thus, both Justices and commentators have suggested that a new approach is needed.[170]

---

[164] *See* Bigelow v. Virginia, 421 U.S. 809, 826 (1975). Justice Blackmun rationalized that speech does not lose its value in a marketplace of ideas simply because it is uttered in a marketplace of services or products. *See id.* Justice Stevens pointed out that the First Amendment requires the Court to be particularly wary of government attempts to restrict speech in order to keep citizens ignorant. *See 44 Liquormart*, 116 S. Ct. at 1508. The Justice explained that this maxim is equally applicable to restrictions on commercial speech. *See id.* Justice Kennedy acknowledged that both vital and trivial information is openly traded in the commercial marketplace. *See* Edenfield v. Fane, 507 U.S. 761, 767 (1993). Thus, the Justice reasoned that even purely commercial messages must receive protection under the First Amendment. *See id.*

[165] *See Whitney*, 274 U.S. at 375 (Brandeis, J., concurring). Justice Brandeis declared "that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . . [b]elieving in the power of reason as applied through public discussion, [the Founders] eschewed silence coerced by law—the argument of force in its worst form." *Id.* at 375-76.

[166] *See supra* notes 162-164 and accompanying text (describing the principles of counter-speech).

[167] *See* TRIBE, *supra* note 3, § 12-18, at 931.

[168] *See* Miller, *supra* note 19, at 635; *see also supra* Part II.B.

[169] *See* Miller, *supra* note 19, at 635; *see also* NOWAK & ROTUNDA, *supra* note 50, § 16.29, at 1066. The Court's transactional definition of commercial speech may subsume some forms of political advertising. *See id.* For example, some political advertisements propose transactions, such as "[v]ote for me, and I'll lower your taxes." *Id.*

[170] *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 438 (1993) (Blackmun, J., concurring). "I am heartened by the Court's decision today to reject the extreme extension of *Central Hudson*'s logic, and I hope the Court ultimately will come to abandon *Central Hudson*'s analysis entirely in favor of one that affords full protection for truthful, noncoercive commercial speech about lawful activities." *Id.* The commercial speech doctrine reminds one of Justice Holmes's comments about the evolution of legal doctrine. *See* Kozinski & Banner, *supra* note 5, at 775. Justice Holmes proffered:

If the Court is to develop a workable First Amendment doctrine for commercial messages, it must first abandon its attempts to draw a bright-line distinction between commercial and noncommercial speech.[171] The analysis proposed in this Comment would provide full First Amendment protection for commercial speech while continuing to allow the government to protect consumers. This approach would abandon the dissatisfying efforts to create a distinction between commercial and noncommercial speech.[172] Rather, the approach would fully protect truthful, nonmisleading commercial speech about lawful activities while providing no protection to untruthful speech, misleading speech, or speech about unlawful activities.

This new approach would preclude the government from restricting the *content* of truthful, nonmisleading commercial speech about lawful activities.[173] Four specific types of commercial speech restrictions would remain valid under this new approach. First, the government could continue to regulate untruthful or misleading commercial speech. Second, the government could restrict commercial speech about unlawful activities. Third, the government could place reasonable time, place, and manner restrictions on commercial speech.[174] Fourth, the government

---

> [t]he reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (1948).

[171] *See* Geyh, *supra* note 151, at 5. Geyh states that his multi-factor analysis for deciding commercial speech cases, "eschews the creation of artificially distinct lines separating commercial from noncommercial speech." *Id.*

[172] *See* TRIBE, *supra* note 3, § 12-18, at 942 (criticizing the Court's categorization of speech for its lack of precision).

[173] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976) (recognizing that in the abstract, the government may not completely prohibit truthful speech about lawful activities).

[174] *See* Christopher Mumma, *Flap over Condom Ad—Sky Off-Limits?—FAA Probes Teterboro Complaint*, RECORD, Oct. 17, 1995, at A-3. The article describes complaints received from fans at Giants Stadium when a plane flew overhead carrying a giant banner advertisement in the shape of a condom. *See id.* The plane had flown over the stadium twice before but on its third attempt was prevented from taking off at Teterboro Airport. *See id.* Under the new approach proposed in this Comment, the Court might uphold a law that restricted the flying of this banner to night-time hours, but would invalidate the restriction if based solely on the content of the advertisement.

could continue to regulate commercial speech through compelled-disclosure laws.[175]

In our sometimes cynical and media-savvy citizenry, individuals are quite capable of deciding for themselves which products or services they find most worthy of supporting, provided that they receive accurate information.[176] If commercial speech is untruthful or misleading, however, the government may properly step in to protect the public.[177] Protecting the public is, after all, the government interest most often found to justify restrictions on free speech.[178] While the government may be effective at protecting the public from misinformation, it is the most inappropriate institution for deciding what consumers should and should not hear.[179] This is the basis for the First Amendment.[180] If commercial speech is truthful, not misleading, and regards lawful activities, the government may not suppress it in order to keep the public ignorant, regardless of whether the speech is for profit or not.[181]

B. Positive Effects of the New Analysis

This new approach to commercial speech would have several positive effects. First, by focusing only upon the distinction between truthful and untruthful speech, courts would act as fact-finders, not jugglers per-

---

[175] *See, e.g.*, 21 U.S.C. § 343 (1988) (Federal Food, Drug, and Cosmetic Act governing misbranded food); 15 U.S.C. § 781 (1988) (Securities Exchange laws governing filing requirements for financial statements).

[176] *See Virginia Pharmacy*, 425 U.S. at 770. In striking down Virginia's advertising restriction, Justice Blackmun stated:

> [t]here is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Id.

[177] *See id.* at 771. In striking down this particular advertising restriction, Justice Blackmun was careful to point out that government may continue to restrict untruthful or misleading commercial speech. *See id.*

[178] *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993). The Court noted that the protection of consumers is the most common reason used to justify governmental restriction of commercial speech. *See id.*

[179] *See* Edenfield v. Fane, 507 U.S. 761, 767 (1993) (noting that the general rule is for the audience and the speaker to assess the relative value of speech, not the government).

[180] *See* Kozinski & Banner, *supra* note 5, at 752. "If all it takes to remove First Amendment protection from a given kind of speech is that a sufficiently large number of people finds the speech less valuable than other kinds, we may as well not have a First Amendment at all." *Id.*

[181] *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1508 (1996). The Court noted that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Id.*

forming balancing tests.[182] As such, courts would limit their inquiry to whether the speech at issue is truthful or untruthful. This fact-based approach would allow courts to avoid such controversial and dubious questions as whether the government interest in suppressing speech outweighs the individual's First Amendment rights.[183] Such an inquiry would likely satisfy both originalists, who often favor an absolutist view of the First Amendment, and judicial activists, who are concerned with protecting consumers.[184] Under the new approach, courts would seek hard evidence of a product's performance and attributes to expose false and misleading claims.[185] By contrast, current commercial speech cases are often decided on the basis of congressional deference, ad hoc inquiries, and the proclivities of judges.[186]

In the current climate it is no surprise that there is a great degree of uncertainty in the outcome of many commercial speech cases.[187] It seems quite evident that if protecting consumers is the real goal of commercial speech restrictions, then a new approach that prohibits only untruthful or misleading messages would not frustrate this purpose.[188] The *Central Hudson* test is often utilized to uphold restrictions that keep consumers ignorant under the guise of consumer protection.[189] Too often, under *Central Hudson*, courts have abdicated their responsibility to perform meaningful judicial review and instead have opted to defer to the judg-

---

[182] *See id.* at 1520 (Thomas, J., concurring). Justice Thomas explained his concern that courts lack the ability to apply the *Central Hudson* test in a consistent manner. *See id.*

[183] *See id.* (noting that the *Central Hudson* test requires courts to balance concepts and ideals that are simply not quantifiable).

[184] *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring) (declaring that the *Central Hudson* test fails to protect truthful, nonmisleading commercial speech); *see also 44 Liquormart*, 116 S. Ct. at 1518 (Thomas, J., concurring) (arguing that the *Central Hudson* test is not appropriate for adjudicating cases involving truthful, nonmisleading commercial speech); *id.* at 1515 (Scalia, J., concurring) (criticizing the *Central Hudson* test for allowing the government to keep truthful commercial information out of the hands of consumers). These few examples illustrate the wide ideological spectrum represented by Justices who seek to abandon the *Central Hudson* test.

[185] *See Virginia Pharmacy*, 425 U.S. at 772 n.24 (explaining that the advertiser is usually in the best position to attest to the truthfulness of its claims because it is presumably more knowledgeable about the products or services than anyone else).

[186] *See supra* Part II.B; *see, e.g.*, Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (demonstrating how extreme legislative deference invariably leads to the upholding of restrictions on commercial speech).

[187] For a review of the unpredictable results engendered by the Central Hudson analysis see *supra* Part II.B.

[188] *See 44 Liquormart*, 116 S. Ct. at 1508. "[B]ans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms." *Id.*

[189] *See id.*

ments of local lawmakers.[190] By contrast, the new approach would place the courts back in their traditional domain of competence—that of fact-finders and protectors of constitutional rights. It would accomplish this by re-focusing the commercial speech analysis on the narrow issue of whether the regulation unlawfully restricts truthful, nonmisleading messages about lawful products or services.

Second, the new approach focuses on the veracity of the speech, thereby providing more predictability to advertisers. Thus, advertisers who do not make false or misleading claims would receive full First Amendment protection, subject only to reasonable time, place, and manner restrictions or compelled-disclosure laws.[191] Conversely, advertisers who misrepresent product benefits or make false claims could expect to receive no protection.[192] The consistent application of this approach would provide greater predictability for First Amendment protection of commercial speech.

Third, this new approach would avoid the flawed reasoning in *Posadas* that allowed the government to regulate speech about an activity simply because it had the power to regulate the activity itself.[193] By focusing on the activity itself, the new approach would encourage regulations that more directly advance the government's aims.[194] For example, the government would be encouraged to restrict the sale of nicotine as an addictive substance within the purview of the FDA, rather than solely restrict its advertising.[195] Thus, if the FDA outlawed over-the-counter sales of cigarettes, it could also restrict such advertising as proposing an illegal

---

[190] *See, e.g.*, *Posadas*, 478 U.S. at 342 (finding the Puerto Rico legislature's belief that advertising restrictions would protect the welfare of the public to be reasonable); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981) (hesitating to disagree with local lawmakers that billboards were hazardous to traffic safety).

[191] *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (acknowledging that even fully protected political speech is subject to "reasonable time, place, or manner restrictions").

[192] *See Virginia Pharmacy*, 425 U.S. at 771 (illustrating that untruthful commercial speech has never been protected under the First Amendment).

[193] For criticisms of the *Posadas* holding see *supra* note 85.

[194] *See 44 Liquormart*, 116 S. Ct. at 1513-14. Justice Stevens explained that merely describing alcohol as a "vice product" is an insufficient reason for upholding a restriction on its advertising, because alcohol is not an illegal substance. *See id.* The Justice explained that the restrictions should only be upheld if the product or activity was itself illegal. *See id.* The Justice noted that allowing commercial speech restrictions based solely on a "vice products" definition, would encourage states to restrict commercial speech by simply labeling products and activities as "vice." *See id.*

[195] See *Virginia Pharmacy*, 425 U.S. at 781 (Rehnquist, J., dissenting). The Justice stated the result of this opinion is that Congress may not prohibit truthful advertising of any product unless it outlaws the product first. *See id.*

transaction.[196] Again, this approach would encourage the government to formulate policies that deal squarely with the activity itself, rather than restricting speech. These types of regulations would discourage the dilution of First Amendment rights under the guise of protecting the public welfare.[197]

Fourth, the Court's commercial speech doctrine would gain credibility by focusing on the veracity of the speech rather than the asserted government interest in restricting it.[198] This would avoid the tricky question of determining what government interests could be substantial enough to justify complete bans on truthful commercial speech about lawful activities.[199]

Finally, this new approach would encourage the free flow of information that is critical to maintaining a well-informed citizenry.[200] The government would not constrict the flow of accurate information to consumers by allowing reasonable time, place, and manner restrictions; restrictions on untruthful or misleading speech; restrictions on speech about unlawful activities and compelled-disclosure laws.[201] In addition, this new approach would not hinder existing government efforts to pursue advertisers who make false or misleading claims. This approach is consistent with the notion that truthful commercial speech should be protected because it provides accurate information, whereas untruthful speech should receive less protection because it provides inaccurate information.[202]

C. *The New Approach Is Consistent with Constitutional Doctrine and Rectifies Problems with the* Central Hudson *Test*

The new approach would rectify inherent problems in each prong of the *Central Hudson* test. The quandary posed by the first prong is that it overtly assumes that the government can, and occasionally should, re-

---

[196] *See id.*

[197] *See* NOWAK & ROTUNDA, *supra* note 50, § 16.30, at 1067 (arguing that speech restrictions, unlike economic regulations, tend to prevent the public from obtaining important information about their options in the marketplace).

[198] *See* TRIBE, *supra* note 3, § 12-18, at 942 (describing how the imprecise definition of commercial speech has lessened the credibility of the Court's approach).

[199] *See Virginia Pharmacy*, 425 U.S. at 771 (reasoning that bans on untruthful or misleading advertising do not implicate constitutional rights).

[200] See *supra* notes 141-142 arguing that truthful commercial speech serves both an informational function and a self-realization function.

[201] *See* NOWAK & ROTUNDA, *supra* note 50, § 16.30 at 1067 (noting that restrictions on truthful speech tend to suppress the flow of important information to consumers).

[202] *See supra* notes 141-142.

strict the content of truthful commercial messages.[203] The new analysis would cure this defect by providing full First Amendment protection for truthful commercial speech about lawful activities. It simultaneously would avoid being overbroad by continuing to allow regulation of untruthful or misleading speech, speech about unlawful activities, reasonable time, place, and manner restrictions, and compelled-disclosure of information for the protection of consumers. The new approach recognizes *only* these four enumerated exceptions.

Central Hudson's second prong seemingly validates the first prong by declaring that the government may occasionally have a legitimate reason for restricting the content of truthful commercial messages.[204] Moreover, the test invites the government to devise post hoc rationalizations to justify restrictions on truthful commercial speech.[205] Conversely, the new approach would require the government to justify its regulations under one of the four enumerated exceptions listed above.

The third prong of *Central Hudson* has the ironic effect of upholding those restrictions that are most successful in suppressing speech, no matter how draconian they may be.[206] As Justice Thomas explained, this prong essentially allows the restriction to become a self-fulfilling prophecy.[207] If the government can show that its restriction is successful in proscribing speech, then it will likely be upheld because the restriction directly advances the government's interest.[208] The new approach would avoid this circular reasoning because it would never reach such a question. Under the new approach, if the speech could be regulated under one of the four exceptions noted above it would be upheld. If the restriction does not fall under one of those exceptions, it would be invalidated.

As Justice Thomas noted in *44 Liquormart*, *Central Hudson*'s fourth prong is inherently flawed because speech restrictions are never narrowly

---

[203] *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring) (criticizing the *Central Hudson* test for allowing restrictions on truthful commercial speech).

[204] *See* TRIBE, *supra* note 3, § 12-15, at 904 (suggesting that the *Central Hudson* test simply allows the government to assert an interest in suppressing truthful commercial speech about lawful activities).

[205] For an example of how the government might manufacture a substantial interest for restricting commercial speech see *supra* note 194.

[206] *See* 44 Liquormart v. Rhode Island, 116 S. Ct. 1495, 1518 (1996) (Thomas, J., concurring) (arguing that regulations that are most successful in quelling speech will thus directly advance the government's interest in suppressing the speech).

[207] *See id.*

[208] *See id.*

tailored if the activity itself could be directly regulated.[209] Again, the new approach would avoid this quagmire because this question is irrelevant under its analysis. Under this approach, if the regulation fits under one of the enumerated exceptions, it would be upheld. If the regulation improperly restricts a commercial message based upon its content, it would be invalidated.

CONCLUSION

By balancing the government's interest in protecting consumers against the individual's right to engage in free speech under the First Amendment, the *Central Hudson* test goes awry. Current commercial speech doctrine unnecessarily requires commercial messages to be categorized as a form of "low value" speech, even where they are truthful and provide valuable information to consumers. The *Central Hudson* test also requires courts to measure imponderables, such as whether the government's asserted interest in suppressing speech outweighs the individual's First Amendment right to utter it.

The Court's misplaced emphasis on attempting to distinguish commercial from noncommercial speech leads to several difficulties. First, efforts to draw a bright-line distinction between commercial and noncommercial speech have largely proven unsatisfactory and a workable definition of commercial speech has not yet been reached. Second, even if a widely-accepted definition of commercial speech could be developed, most commercial messages are a hybrid of both commercial and noncommercial speech and involve multiple forms of expression. Third, the current approach requires courts to undervalue the importance of commercial speech to justify regulating it. By focusing the inquiry on the veracity of commercial speech, the Court would provide it with full First Amendment protection, while continuing to allow appropriate government regulation for the protection of consumers. This new approach would encourage the government to regulate social problems directly, by striking down laws that seek to restrict *speech* about problems, and upholding laws that deal with the *problems* themselves.

This new approach would focus on the truthfulness of commercial speech rather than on its supposed value. Furthermore, it would return the process of "valuing" speech to where it belongs—with the individual. The First Amendment exists to ensure that individuals may exercise both the right to express themselves and the right to hear expression that they deem worthy of their attention. The approach proposed in this

[209] *See id.* at 1519 (Thomas, J., concurring) (arguing that direct regulations are invariably more narrowly tailored than speech restrictions because direct regulations deal precisely with the activity itself).

Comment seeks to ensure that this promise of the First Amendment is fully realized in the context of commercial speech.

Brian J. Waters