Roger Williams University Law Review

Volume 2 | Issue 1 Article 3

Fall 1996

On Tap, 44 Liquormart, Inc. v. Rhode Island: Last Call for the Commercial Speech Doctrine

Michael W. Field
Roger Williams University School of Law

Notes and Comments

On Tap, *44 Liquormart, Inc. v. Rhode Island*: Last Call For The Commercial Speech Doctrine

> *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.*
>
> The Honorable Harry A. Blackmun[1]

INTRODUCTION

The First Amendment to the United States Constitution protects perhaps the most fundamental human right upon which our nation is built — freedom of speech.[2] Full constitutional protection is provided to core First Amendment areas, such as political, religious and scientific speech.[3] Commercial speech,[4] on the other

1. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 438 (1993) (Blackmun, J., concurring).

2. *See, e.g.*, John E. Nowak & Ronald D. Rotunda, Constitutional Law, § 16.2, at 986 (5th ed. 1995) (citing Knights of Ku Klux Klan v. Arkansas State Highway and Transp. Dept., 807 F. Supp. 1427, 1433 (W.D. Ark. 1992) (stating that "[f]reedom of speech long has been recognized as one of the preeminent rights in this country, the touchstone of individual liberty")).

3. Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 Case W. Res. L. Rev. 411, 437 (1992). Restrictions on core First Amendment speech are subject to strict scrutiny. *Id.* at 477. Under this level of protection, the government must demonstrate that the regulation represents a "compelling" interest and is also the "least restrictive means" available. *Id.* at 477-78. Strict scrutiny analysis has varied. *Compare* Sherbert v. Verner, 374 U.S. 398, 407 (1963) (stating strict scrutiny analysis requires that "no alternative forms of regulation" exist), *with* Bush v. Vera, 116 S. Ct. 1941, 1960 (1996) (rejecting the least restrictive means requirement as "impossibly stringent"). *See infra* note 108 and accompanying text.

hand, has traditionally been allotted less protection.[5] Over the past half century, however, the United States Supreme Court has issued a confusing array of decisions regarding the precise parameters of the commercial speech doctrine.[6]

In *Valentine v. Chrestensen*,[7] the Court ruled commercial speech was not entitled to any constitutional protection.[8] Thirty-four years later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[9] the Court altered its view, and held that purely commercial speech was entitled to First Amendment protection.[10] Four years later, in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,[11] the Supreme Court re-examined *Virginia Pharmacy*, and decided commercial speech could be regulated if the state satisfied a four-prong test.[12] The *Central Hudson* test has subsequently been used

---

4. Commercial speech has been defined as speech which does "no more than propose a commercial transaction." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

5. Commercial speech restrictions are reviewed under intermediate scrutiny. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980). Under this test, the government must assert a substantial interest and the regulation must be in proportion to this interest. *Id.*

6. Courts have struggled to apply this doctrine. *Compare* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (advertising commercial information, no matter how tasteless, is indispensable to the public interest), *with* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (stating that the Constitution imposes no restraints on government to restrict purely commercial speech). Scholars have also disagreed as to the extent of protection that should be afforded to commercial speech. *Compare* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627 (1990) (arguing full First Amendment protection for commercial speech), *with* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 20 (1971) ("Constitutional protection should be accorded only to speech that is explicitly political.").

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

8. *See infra* notes 33-41 and accompanying text.

9. 425 U.S. 748 (1976).

10. *Id.* at 762. The *Virginia Pharmacy* Court noted that the pharmacist who wished to communicate "pure commercial speech" did not attempt to editorialize on a cultural, philosophical or political subject; but instead only wished to advertise "X prescription drug at the Y price." *Id.* at 761.

11. 447 U.S. 557 (1980).

12. *See id.* For commercial speech to come within *Central Hudson*'s four-part test it must "[1] concern lawful activity and not be misleading. Next we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest." *Id.* at 566.

to determine the constitutionality of all commercial speech restrictions.

While the Court may have envisioned a uniform test to provide a consistent analytical framework, the *Central Hudson* test has proven to be nothing more than an inconsistently applied ad hoc balancing test.[13] During the past sixteen years, the Court has decided at least seventeen commercial speech cases;[14] each case representing an opportunity to further clarify the four-prong test.

---

13. *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1515 (1996) (Scalia, J., concurring) (stating the *Central Hudson* test has "nothing more than policy intuition to support it."); *id.* at 1520 (Thomas, J., concurring) ("[T]he *Central Hudson* 'test' [is] as a general matter, very difficult to apply with any uniformity.").

14. *44 Liquormart*, 116 S. Ct. 1495 (restricting the price advertising of alcohol unconstitutional); Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995) (upholding thirty day moratorium on solicitation of accident victims); Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) (prohibiting beer labels from displaying alcohol content violates First Amendment); Ibanez v. Florida Dept. of Bus. and Prof'l Regulation, 114 S. Ct. 2084 (1994) (censuring attorney for referring to "CPA" and "CFP" credentials unconstitutional); United States v. Edge Broad. Co., 509 U.S. 418 (1993) (upholding a federal statute prohibiting radio broadcast of lottery advertisements by licensees located in a state that does not allow the lottery); Edenfield v. Fane, 507 U.S. 761 (1993) (banning personal solicitation by certified public accountants unconstitutional); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (ordering the removal of newsracks containing "commercial handbills," while allowing similar newsracks containing "newspapers" unconstitutional); Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91 (1990) (barring attorney from advertising as a trial specialist unconstitutional); Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) (holding the fourth prong analysis does not require the absolute least restrictive means), *dismissed as moot by* Fox v. Board of Trustees of the State Univ. of N.Y., 764 F. Supp. 747 (N.D.N.Y. 1991), *aff'd*, 42 F.3d. 135 (2nd Cir. 1994), *cert. denied*, 115 S. Ct. 2634 (1995); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (prohibiting attorneys from sending truthful and nondeceptive letters to potential clients known to be facing a particular problem abridges free speech); Posadas de P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328 (1986) (advertising casino gambling only to tourists constitutional); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (barring attorney from placing truthful and nonmisleading advertisements in the newspaper unconstitutional); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (holding state law requiring cable television systems operators to delete all alcohol advertisements appearing in out-of-state signals retransmitted within state unconstitutional); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983) (holding statute prohibiting the mailing of unsolicited advertisements for contraceptives unconstitutional); *In re* R.M.J., 455 U.S. 191 (1982) (restricting attorney advertising to specified language unconstitutional); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (White, J., plurality) (invalidating ordinance that permitted commercial billboards while prohibiting noncommercial); *Central Hudson*, 447 U.S. 557 (holding regulation completely banning promotional advertising by electrical utility unconstitutional).

Instead of developing clear rules, however, the Court has wavered from nearly extending full First Amendment protection to commercial speech in 1976,[15] to granting the state great deference in restricting commercial speech in 1986,[16] and back to establishing strict rules that make it more difficult for states to restrict commercial speech in 1993.[17] The frequency with which the Court has ruled on commercial speech cases, combined with the inconsistent application of the *Central Hudson* test, has left the legal community guessing the outcomes of future cases.[18]

Often, interested parties had no way to gauge their chances for success until after a decision had been issued.[19] For sixteen years, the Court has accepted the *Central Hudson* test and the confusion it caused. But now, after years of inconsistently applying the test, the Supreme Court is ready to return to the clear rule established in *Virginia Pharmacy*: "all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible."[20]

---

15. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976) (holding that the state may not completely suppress the dissemination of truthful information relating to a lawful activity). *See also* Mary B. Nutt, *Trends in First Amendment Protection of Commercial Speech*, 41 Vand. L. Rev. 173, 185 (1988) ("*Virginia Board* and its progeny represent the peak of constitutional protection for commercial speech.").

16. *See Posadas*, 478 U.S. at 341-42. *See also infra* note 64; *44 Liquormart*, 116 S. Ct. at 1522 (O'Connor, J., joined by Rehnquist, C.J., & Souter & Breyer, JJ., concurring) (criticizing *Posadas* as accepting, "without further inquiry" the legislature's assertions that the regulations "furthered the government's interest and were no more extensive than necessary to serve that interest").

17. *See Edenfield*, 507 U.S. at 770-71 (stating the third prong cannot be satisfied by speculation or conjecture, but only if the government demonstrates that the harms are real, and the restriction will alleviate these harms to a material degree); *Discovery Network*, 507 U.S. at 417 n.13 (stating that the existence of numerous and obvious less burdensome alternatives is a relevant consideration in the fourth prong analysis). *But see Edge Broad. Co.*, 509 U.S. at 427 ("It is readily apparent that [the third prong's analysis] cannot be answered by limiting the inquiry to [Edge Broadcasting alone]. . . . [but to the] general application to others . . . .").

18. *See* Felix H. Kent, *Re-affirmation of First Amendment in Commercial Speech*, N.Y. L.J., April 16, 1993, at 3 (stating the Supreme Court's protection of commercial speech has been "a Supreme Court-made roller coaster ride").

19. *See* Dennis William Bishop, Note, *Building the House on a Weak Foundation:* Edenfield v. Fane *and the Current State of the Commercial Speech Doctrine*, 22 Pepp. L. Rev. 1143, 1143 (1995) (stating a participant "could only wonder which way the pendulum of commercial speech protection would swing on his day in court").

20. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1520 (1996) (Thomas, J., concurring). *See also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

In *44 Liquormart, Inc. v. Rhode Island*,[21] the United States Supreme Court unanimously held that Rhode Island's ban on the price advertising of alcoholic beverages violated the First Amendment.[22] Despite the unanimous holding, the Court once again failed to establish the parameters of the commercial speech doctrine clearly. Instead, the Court issued four separate opinions — none receiving a majority.[23] Three of the four opinions, however, mark a dramatic shift in the commercial speech rationale. These opinions explicitly and implicitly demonstrate the Justices' discontent with the *Central Hudson* test and suggest the Court is ready to abandon it.

This Note examines the Supreme Court's decision in *44 Liquormart* and discusses its impact on the evolution of the commercial speech doctrine. Part I traces the development of the doctrine from its inception in *Valentine v. Chrestensen* in 1942, through the end of the 1995 Term. Part II analyzes the four opinions in *44 Liquormart* and elucidates how the Supreme Court has laid the foundation for abandoning the *Central Hudson* test. Part III discusses the untenable distinction between commercial and noncommercial speech, and projects the future of the commercial speech doctrine. In conclusion, this Note proposes that truthful, nonmisleading commercial speech relating to a lawful activity demands the full protection of the First Amendment.[24]

---

21. 116 S. Ct. 1495 (1996).

22. *Id.*

23. Justice Stevens wrote the Court's principal opinion. Justices Scalia and Thomas issued separate concurring opinions, while Justice O'Connor also wrote an opinion concurring in the judgment which Chief Justice Rehnquist, Justice Souter and Justice Breyer signed.

24. While this Note proposes to extend full First Amendment protection to truthful, nonmisleading information relating to a lawful activity, this Note does not suggest that commercial information can never be restricted. For instance, President William J. Clinton has recently instructed the Federal Drug Administration to restrict tobacco advertisements aimed at minors. Peter T. Kilborn, *Clinton Approves a Series of Curbs on Cigarette Ads*, N.Y. Times, Aug. 24, 1996, at A1. In accordance with the rules proposed in this Note, the new regulations would survive constitutional scrutiny because the regulated activity is not lawful. *See, e.g.*, S.C. Code Ann. § 16-17-500 (Law Co-op. 1976) (selling cigarettes to minors is illegal).

I. HISTORICAL BACKGROUND

The First Amendment states:

> 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.[25]

The Amendment seems to be clear and unambiguous.[26] No distinction is made between commercial and noncommercial speech.[27] Additionally, no exception is provided for speech proposing commercial transactions.[28] The plain language of the First Amendment simply prohibits Congress from making *any* law abridging the freedom of speech.[29]

Not only does the text of the First Amendment treat commercial and noncommercial speech equally, but early America also did not distinguish between the two types of speech. In fact, one of the earliest arguments for the freedom of the press was in defense of a commercial advertisement.[30] To many Colonial Americans, com-

---

25. U.S. Const. amend. I.

26. *See* Ahkil Reed Amar, *Some Notes on the Establishment Clause*, 2 Roger Wms. U. L. Rev. 1, 6 (1996) ("[T]he First Amendment open[s] with words suggesting an utter lack of enumerated power . . . to restrict speech . . . ."); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 874 (1960) ("The phrase 'Congress shall make no law' is composed of plain words, easily understood.").

27. *See* Kozinski, *supra* note 6, at 631.

28. *Id.*

29. Amar, *supra* note 26, at 6.

30. Brief for Amici Curiae of American Advertising Federation at 15-17, 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996) (No. 94-1140) (citing Verner W. Crane, Benjamin Franklin's Letters to the Press, 1758-1775 xvi (1950)). In 1731, Benjamin Franklin placed an advertisement in a newspaper seeking a ship's captain for an upcoming voyage. *Id.* at 17. A portion of the advertisement enraged the local clergy by stating "No Sea Hens [women of ill-repute] nor Black Gowns [members of the local clergy] will be admitted on any Terms." *Id.* Defending his decision to print the advertisement, Franklin published his "Apology for Printers." Franklin stated, "Printers are educated in the Belief, that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick . . . ." Benjamin Franklin, *An Apology for Printers*, Penn. Gazette, June 10, 1731, *reprinted in* Leonard W. Levy, Freedom of the Press From Zenger to Jefferson 5 (1966). Franklin continued that, it was unreasonable "'[t]hat Printers ought not to print any Thing but what they approve;' since . . . an End would thereby be put to Free Writing, and the World would afterwards have nothing to read but what happen'd to be the Opinions of Printers." *Id.* at 6.

mercial advertisements were as important as news reports.[31] Advertisements were regarded as one of the most important parts of a newspaper since they provided valuable information to the public on commercial matters.[32] Nevertheless, when *Valentine* reached the Supreme Court in 1942, the Court, for the first time, distinguished commercial speech from noncommercial speech. This case marked the beginning of the commercial speech exception to the First Amendment.

Chrestensen, the owner of a former Navy submarine, distributed single-sided handbills advertising tours for a fee.[33] He was warned that distributing the handbills violated the Sanitary Code, but that he could freely distribute handbills devoted to "information or a public protest."[34] Chrestensen promptly responded by printing a two-sided handbill.[35] One side of the handbill contained an advertisement for the submarine tour, while the opposite side consisted entirely of a protest against the City Dock Department.[36]

The Supreme Court unanimously held Chrestensen's right to distribute the handbills was not protected.[37] In a brief opinion,[38] where no authority was cited, the Court merely concluded that "the Constitution imposes no restraint on government as respects

---

31. Commercial advertisements were such an integral part of early America that the American daily newspaper naturally evolved from the large demand for advertising. In 1771, the *Pennsylvania Packet and Daily Advertiser* began as a biweekly newspaper. Frank Presbrey, *The History and Development of Advertising* 162 (1929). By September 21, 1784, the demand for advertising space became so great the newspaper was transformed into a daily paper. *Id.* As its title indicates, the daily newspaper was largely devoted to advertising. The entire front page of the newspaper consisted of advertising, as were between ten and thirteen columns of the sixteen column newspaper. *Id.* at 161.

32. Daniel J. Boorstin, The Americans: The Colonial Experience 328 (1958). As one prominent colonial printer-historian observed, "[advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention . . . ." Isaiah Thomas, History of Printing in America with a Biography of Printers, and an Account of Newspapers (1810) (quoted in Daniel J. Boorstin, The Americans: The Colonial Experience 328 (1958)).

33. Valentine v. Chrestensen, 316 U.S. 52, 53 (1942).

34. *Id.* (quoting the Police Commissioner's advice concerning the type of handbills that may be distributed).

35. *Id.*

36. *Id.*

37. *See id.* at 55.

38. The entire opinion, including footnotes, comprises just over three pages in the United States Reports. *Id.* at 52-55.

purely commercial advertising."[39] The Court never mentioned the First Amendment, and referred to it only once to pose the question whether the statute was an "unconstitutional abridgement of the freedom of the press and of speech."[40] In addition, the Court never explained why commercial speech should receive less than full protection.[41] Nonetheless, with this ruling, the commercial speech exception to the First Amendment was recognized.

Slowly, the exception enunciated in *Valentine* eroded. Justice Douglas noted that the *Valentine* rule was "casual, almost offhand," and that the decision "ha[d] not survived reflection."[42] Throughout the early 1970s, the Supreme Court continued to chip away at *Valentine*.[43] Finally, in the mid 1970s, in *Bigelow v. Virginia*,[44] the Supreme Court first recognized that commercialism did not, in itself, prevent the First Amendment from being applicable.[45]

In *Bigelow*, the State of Virginia challenged the legality of an advertisement placed in one of its newspapers for abortions being performed in New York.[46] The Supreme Court held the advertise-

---

39. *Id.* at 54. *See* Kozinski, *supra* note 6, at 628.

40. *Valentine*, 316 U.S. at 54. *See* Kozinski, *supra* note 6, at 628.

41. *See* Kozinski, *supra* note 6, at 634.

42. Cammarano v. United States, 358 U.S. 498, 514 (1958) (Douglas, J., concurring).

43. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 314 (1974) (Brennan, J., dissenting) (doubting the validity of the distinction stated in *Valentine*). *See also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 393 (1973) (Burger, C.J., dissenting); *id.* at 397-98 (Douglas, J., dissenting); *id.* at 401 (Stewart, J., dissenting); Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 905 (1971) (Douglas, J., dissenting from denial of certiorari) (stating the *Valentine* decision was "ill-conceived and has not weathered subsequent scrutiny").

44. 421 U.S. 809 (1975).

45. *Id.* at 818.

46. The advertisement in the Virginia Weekly stated in part:

UNWANTED PREGNANCY
LET US HELP YOU
Abortions are now legal in New York.
There are no residency requirements.
FOR IMMEDIATE PLACEMENT IN ACCREDITED
HOSPITALS AND CLINICS AT LOW COST
Contact
WOMEN'S PAVILION

Id. at 812.

Virginia challenged the placement of this advertisement under Va. Code Ann. § 18.1-63 which read "If any person, by publication, lecture, advertisement, or by sale or circulation of any publication, or in any other manner, encourage or prompt

ment was protected by the First Amendment since the speech was not purely commercial and "did more than simply propose a commercial transaction."[47] Specifically, the Court noted the advertisement contained "factual material of clear 'public interest.'"[48] While *Bigelow* held the First Amendment applicable to speech that does "more than propose a commercial transaction," the question of whether the First Amendment applied to purely commercial speech was left unanswered until one year later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[49]

In *Virginia Pharmacy*, consumers of prescription drugs filed suit claiming Virginia's statute prohibiting price advertising of prescription drugs "in any manner whatsoever" was unconstitutional.[50] The Board attempted to justify the ban as necessary to preserve the professional standards of pharmacists.[51] The

---

the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." *Id.* at 812-13 (quoting Va. Code Ann. § 18.1-63 (Michie 1960) (repealed 1975)).

47. *Id.* at 822.

48. *Id.* The Court found that in addition to soliciting abortions, the phrase "Abortions are now legal in New York," also communicated factual material to those interested in the subject matter of abortion laws. *Id.* Consequently, the advertisement was taken out of the realm of "purely commercial" advertising. *Id. See* Roe v. Wade, 410 U.S. 113 (1973) (legalizing abortion).

The apparent conflict between *Valentine* (appended protest against the City Dock Department did not take the advertisement out of the commercial speech realm) and *Bigelow* (appended message communicated factual information to those interested in abortion laws which took the advertisement out of the purely commercial speech realm) was addressed by the Court. The Court distinguished *Valentine* as a "regulation of the manner in which commercial advertising could be distributed." *Bigelow,* 421 U.S. at 819. The *Valentine* Court noted that "the message of asserted 'public interest' was appended solely for the purpose of evading the ordinance and therefore did not constitute an 'exercise of the freedom of communicating information and disseminating opinion.'" *Id.* (citing *Valentine*, 316 U.S. at 54). The conflict between these two cases can, in large part, be attributed to the differences in the way judges view the facts, *see infra* note 144.

49. 425 U.S. 748 (1976).

50. *Id.* at 750 (quoting Va. Code Ann. § 54-524.35 (Michie 1974) (repealed 1988)). The Virginia statute stated that a pharmacist will be guilty of unprofessional conduct if he "publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs . . . which may be dispensed only by prescription." *Id.* at 750 n.2.

51. *Id.* at 751. The Board concluded that if prices were advertised, consumers would choose the low-cost, low-quality service, and consequently drive the "professional" pharmacist out of business. *Id.* at 768. The Board also feared if consumers were to go from one pharmacist to another, following the discounts, the pharmacist-consumer relationship would be destroyed. *Id.*

Supreme Court disagreed, however, and found that the "free flow of commercial information is indispensable."[52]

The eight-to-one decision in *Virginia Pharmacy*, is generally regarded as the closest the Court has come to extending full First Amendment protection to commercial speech.[53] The Court recognized society's strong interest in receiving commercial information in order to make intelligent and well-informed decisions.[54] The interest is so strong, the Court noted, that "[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price."[55] The rule of law after *Virginia Pharmacy* was clear: the state could not completely suppress the dissemination of truthful information relating to a lawful activity.[56] Several years later, however, the Court backtracked and modified the clear holding of *Virginia Pharmacy* when it enunciated the controversial *Central Hudson* test.[57]

In *Central Hudson*, the Court announced a four-part test to determine whether a state's restriction on commercial speech was constitutional.[58] In order to be suppressed, the restriction on commercial speech must: (1) relate to a lawful activity and not be misleading, (2) assert a substantial governmental interest, (3) directly advance that asserted interest, and (4) be no more extensive than necessary.[59] If the state's restriction satisfies the four prongs,

---

52. *Id.* at 765.

53. *See* Bishop, *supra* note 19, at 1146; Nutt, *supra* note 15, at 185.

54. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764-65 (1976). Emphasizing the importance of commercial speech, the Court noted that "[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

55. *Id.* at 765.

56. *Id.* at 773. At the close of the majority opinion, Justice Blackmun, stated the issue as "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* The Court answered this "in the negative." *Id.*

57. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

58. *Id.*

59. *Id.* at 566. The *Central Hudson* test is sometimes known as a three-prong test. In those instances, the first prong is treated as a threshold question which must be satisfied before addressing the remaining prongs. *See generally* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995).

commercial speech may be restricted.[60] Although the Court may have established the *Central Hudson* test to determine the constitutionality of commercial speech restrictions consistently, controversy began immediately.[61]

One of the most controversial decisions was *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*.[62] *Posadas* involved a statute enacted by the Commonwealth of Puerto Rico which prohibited casino gambling advertisements from being directed toward residents.[63] The Court granted great deference to the legislature's assertion that the restriction directly advanced a substantial government interest, and thus the third prong was satisfied.[64]

---

60. *Central Hudson*, 447 U.S. at 566.

61. *See id.* at 573 (Blackmun, J., concurring) (stating that the *Central Hudson* test is not consistent with prior cases and should not be applied where a state seeks to suppress commercial information in order to manipulate consumer decisions).

62. 478 U.S. 328 (1986). *See* Philip B. Kurland, Posadas de Puerto Rico v. Tourism Company: *"'Twas Strange, 'Twas Passing Strange: 'Twas Pitiful, 'Twas Wondrous Pitiful."* 1986 Sup. Ct. Rev. 1. *See infra* note 67.

63. *Posadas*, 478 U.S. at 320. Puerto Rico Regulation 76a-1(7) states, "[n]o concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico." *Id.* at 332. This statute was designed to protect Puerto Rico's residents from the harmful effects incident to gambling. *Id.* at 341.

64. *Id.* at 341-42. The determination that Puerto Rico's statute constitutionally protected its residents from the harmful effects of gambling was made with little discussion or analysis. The Court noted the proposed advertisement related to a lawful activity and was not misleading. *Id.* at 340-41. *See* P.R. Laws Ann. tit. 15, § 71 (1995) (legalizing gambling since 1948). Deference was also granted to the legislature's belief that the advertising ban was necessary to protect the substantial interest of "health, safety, and welfare of its citizens." *Posadas,* 478 U.S. at 341. The bulk of the Court's discussion was quoted from the Tourism Company's brief. The brief stated the legislature's belief as follows:

> [e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.

Id. (alteration in original). Relying on this quote, the Court stated "[w]e have no difficulty in concluding that the Puerto Rico Legislature's interest . . . constitutes a 'substantial' governmental interest." *Id.* Additionally, the Court held the legislature was "reasonable" in its belief that a statute restricting casino advertisements from residents would also decrease the demand for casino gambling among residents. *Id.* at 342. The Court reasoned that any restriction on advertising would advance the state's interest. *Id.*

The Court then addressed the fourth prong claim that the restriction was more extensive than necessary. The appellants claimed that the First Amendment only permitted Puerto Rico to promulgate additional speech to discourage residents from gambling and did not permit a ban on the promotional commercial speech.[65] The Court rejected this claim, and again deferred to the legislature's judgment to determine whether alternative measures, such as "counterspeech," would be as effective as the chosen means.[66]

The controversy generated by *Posadas* illustrates the weaknesses of the *Central Hudson* test.[67] Subsequent cases permitted certified public accountants to solicit clients in person,[68] while prohibiting attorneys from doing the same.[69] Similarly, a federal statute prohibiting radio stations from broadcasting lottery advertisements in non-lottery states was upheld, because it advanced the health, safety and welfare of residents;[70] but a federal statute

---

65. *Id.* at 344.

66. *Id.*

67. Writing for the five-to-four majority, then Justice Rehnquist introduced the controversial "greater includes the lesser" syllogism. *Id.* 345-46. Justice Rehnquist stated Puerto Rico's greater power to ban casino gambling in its entirety includes the lesser power to ban advertising of casino gambling. *Id. But see* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1512 (1996) (calling the *Posadas* syllogism "less defensible"); *Posadas*, 478 U.S. at 352 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting) (stating the *Posadas* majority did little more than tip its hat to the *Central Hudson* standards while deferring to the findings of Puerto Rico's Legislature). *See generally* Kurland, *supra* note 62.

68. Edenfield v. Fane, 507 U.S. 761 (1993). The Court held Florida's ban on personal solicitation by certified public accountants threatened the public's interest in receiving complete and accurate information which the First Amendment was designed to protect. *Id.* at 768-69. Writing for the eight-to-one majority, Justice Kennedy stated that despite the state's substantial interest in protecting its citizens, the Florida Board of Accountancy failed to present any evidence that personal solicitation by CPA's directly advanced this interest. *Id.* at 771.

69. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995). In *Florida Bar*, the Court upheld a thirty day moratorium on lawyers' solicitation of accident victims or their relatives. *Id.* The Court held that the ban did "directly advance" the Florida Bar's goal of protecting the legal profession's reputation from overzealous attorneys who raced to represent injured plaintiffs. *Id.* at 2377. Additionally, the Court also emphasized the lack of "numerous and obvious less-burdensome alternatives" to the Florida Bar's temporary ban. *Id.* at 2380 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993)).

70. United States v. Edge Broad. Co., 509 U.S. 418 (1993). At issue in *Edge Broadcasting* was 18 U.S.C. § 1304 (1988 ed. & Supp. III) which provides in part:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operat-

seeking to promote the health, safety and welfare of citizens by prohibiting alcohol content on labels was found unconstitutional.[71]

As these cases demonstrate, the *Central Hudson* test has been applied inconsistently and has yielded little certainty to commercial speech litigants.[72] Unless confronted with an identical fact pattern from a previously decided case, there is no way to accurately predict a case's outcome.

Justice Blackmun has said the *Central Hudson* test does not provide sufficient protection for truthful, noncoercive speech relating to a lawful activity.[73] Justice Stevens has also consistently criticized the *Central Hudson* test and the commercial/noncommercial speech distinction.[74] Recently, both Justices Scalia and Thomas have expressed discomfort with the *Central Hudson* test.[75]

On many occasions the Court has attempted to clarify the four-prong test by refining the individual prongs, but this has only

---

ing any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Id. at 422 n.1 (quoting 18 U.S.C. § 1304 (1988 ed. & Supp. III)). The Court held the statute did "directly advance" the government's goal, and in doing so, refused to limit the inquiry to Edge Broadcasting alone. *Id.* at 427-28. Instead, the Court stated, the question should be directed more broadly toward the "general application to others" on a state or national basis. *Id.* at 427. Additionally, the Court held the fourth prong was satisfied since the statute furthered the interests of nonlottery states while not impeding on the rights of lottery states. *Id.* at 429-30.

71. Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995). Finding no credible evidence supporting the government's argument that the disclosure of alcohol content would promote "strength wars," the Court dismissed the anecdotal evidence and educated guesses brought forth by the government. *Id.* at 1593. Though not necessary, the Court stressed the unconstitutionality of the statute by briefly addressing the fourth prong, and finding that several less intrusive restrictions were available, all of which would have advanced the government's interest. *Id.* at 1593-94.

72. *See* Bishop, *supra* note 19, at 1143 (stating that commercial speech is "an area of the law fraught with inconsistency"); Kent, *supra* note 18, at 3. ("It is clear that the Supreme Court has not been consistent and . . . much depends on the makeup of the Court.").

73. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 431 (1993) (Blackmun, J., concurring).

74. *See* David O. Stewart, *Change Brewing in Commercial Speech,* A.B.A. J., July 1996, at 44, 44. *See also Central Hudson*, 447 U.S. at 579-83 (Stevens, J. concurring).

75. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1515 (1996) (Scalia, J., concurring); *id.* at 1520 (Thomas, J., concurring).

added to the confusion. The Court has stated an analysis of the last two prongs requires a reasonable "fit."[76] Later cases caution that restrictions must be "narrowly tailored,"[77] cannot "burden substantially more speech than necessary,"[78] and that the existence of numerous and obvious less-burdensome non-speech alternatives is a "relevant consideration" in determining whether a reasonable "fit" exists.[79] The use of these vague terms provides little guidance to courts, legislatures, or potential litigants, and allows judges the discretion to determine cases based on personal preferences.[80]

As long as the Court continues to use ambiguous terms, the legal community will be left guessing each time a commercial speech case is heard.[81] The Court must resist this temptation and determine categorical rules for commercial speech. In *44 Liquormart*, the Court does not make the leap to promulgate any bright line rules. The Court does, however, break from tradition. Instead of creating additional terms in an attempt to define the procrustean *Central Hudson* test, the Justices lay the groundwork to abandon the test.

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

A. *Facts*

In late 1991, 44 Liquormart, Inc., a retail store located in Johnston, Rhode Island, placed an advertisement in a Rhode Island daily newspaper.[82] The advertisement included pictures of various brand name liquors, but nowhere did the price of alcohol appear. In fact, the advertisement noted "State law prohibits advertising liquor prices."[83] However, next to some of the pictures of

76. Posadas de P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986).

77. Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 478 (1989).

78. United States v. Edge Broad. Co., 509 U.S. 418, 430 (1993).

79. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993).

80. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1520 (1996) (Thomas, J., concurring).

81. *Id.*

82. See accompanying page for the relevant portion of the advertisement. The other half of the advertisement promoted peanuts, potato chips and Schweppes mixers for sale at specific prices. This advertisement was reprinted from *The Providence Journal Bulletin*, November 21, 1991, at Metro West II page 5.

83. *44 Liquormart*, 116 S. Ct. at 1503.


44 LIQUOR
39 PUTNAM PIKE • In the 44 Plaza • 232-7700
BEEFEATER GIN
750 ML
It's Martini time!
WOW!
Perfect for after Thanksgiving dinner. Don't forget the coffee.
ROMANA SAMBUCA
750 ML
Perfect gift to bring to dinner.
DI SARONNO AMARETTO
750 ML
WOW!
POPOFF VODKA
80°
1.75 Liters
Great with mixed drinks
CAPTAIN MORGAN SPICED RUM
1 Liter
Rum drinkers' delight
E & J BRANDY
1 Liter
From Gallo to you
WOW!
SEAGRAM'S 7
750 ML
Gift boxed and ready to go
JACK DANIELS
750 ML
There's only one Jack Black!
J & B SCOTCH
750 ML
Perfect for gift giving
OPEN MONDAY-SATURDAY 9-10

brand name liquors the highlighted word "WOW" appeared.[84] As a result of this advertisement, the Rhode Island Liquor Control Administration held a hearing and determined Rhode Island's statute prohibiting the price advertisement of alcohol had been violated.[85]

After paying the four hundred dollar fine, 44 Liquormart joined with People's Super Liquor Stores, Inc.,[86] and appealed to the Federal District Court of Rhode Island claiming a violation of their First Amendment rights.[87] The parties stipulated that the advertisement constituted commercial speech.[88] Pursuant to *Central Hudson*, the district court applied the four-prong test to determine whether Rhode Island's ban on the advertising of alcohol prices was constitutional. The parties agreed the advertisement in question was truthful, nonmisleading, and related to a lawful activity. 44 Liquormart also agreed that "Rhode Island has a substantial interest in fostering temperance and . . . 'protect[ing] its citizens from the evils incident to alcohol.'"[89] Therefore, the first two prongs of the *Central Hudson* test were satisfied and only the last two prongs of the test were in dispute.[90]

---

84. *Id.*

85. *Id.* Rhode Island General Law § 3-8-7 provides:

> [N]o holder of a [liquor] license . . . shall cause or permit the advertising in *any manner whatsoever of the price* of any malt beverage, cordials, wine or distilled liquor offered for sale in this state; provided, however, that the provisions of this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises . . . .

R.I. Gen. Laws § 3-8-7 (1987) (emphasis added).

86. 44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543, 545 (D.R.I. 1993). 44 Liquormart was a co-plaintiff with People's Super Liquor Stores, Inc., a Massachusetts corporation which operated licensed retail stores in Massachusetts. *Id.* People's, who had previously attempted to advertise the price of alcohol in Rhode Island newspapers, joined 44 Liquormart in challenging the constitutionality of the advertising price ban. *Id.* Specifically, People's challenged Rhode Island General Law § 3-8-8.1. *See infra* note 101.

87. *44 Liquormart*, 116 S. Ct. at 1503. 44 Liquormart's appeal to the district court was filed against Kate F. Racine, Administrator for the Rhode Island Liquor Control Administration. Prior to reaching the Court of Appeals, the State of Rhode Island was substituted as the defendant. *Id.*

88. *44 Liquor Mart*, 829 F. Supp. at 551.

89. *Id.* at 551 (quoting S & S Liquor Mart, Inc. v. Pastore, 497 A.2d 729, 732 (R.I. 1985)).

90. Rhode Island contended that the legislature's ban on advertising the price of alcohol need only be "reasonably related to," and not "directly advance" its goal of promoting temperance. *Id.* As support, the State claimed that under the Twenty-first Amendment the Rhode Island statute was entitled to an "added presumption" of validity, and the burden of proof shifted to the plaintiffs to show the statute "unconstitutional beyond a reasonable doubt." *Id.*

In an extensive and well-reasoned opinion, the district court held the price ban violated the third prong of the *Central Hudson* test.[91] The court found, as a matter of fact, "that Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island."[92] In addition, the district court also found that the statute violated the fourth prong since the prohibition was more extensive than necessary to serve the State's interest.[93]

On appeal, the First Circuit reversed, stating that the district court erred when it decided the State's evidence was unpersuasive.[94] Instead, the Court of Appeals found "inherent merit" in the State's assertion that competitive advertising will lead to lower prices, and consequently, more sales.[95] In May, 1995, the Supreme Court granted certiorari to determine whether Rhode Island may, consistent with the First Amendment, prohibit truthful, nonmisleading price advertising concerning alcohol.[96]

B. *The Decision*

Although the Court unanimously ruled the price ban was unconstitutional, there was no majority consensus regarding the rationale.[97] Four separate opinions highlight the split among the Justices. The importance of *44 Liquormart* lies not in its holding,

---

91. *Id.* at 554.

92. *Id.* at 549. In arriving at this decision, the court found the state's expert testimony unpersuasive. *Id.* at 548. Additionally, the court noted that with the price ban in effect Rhode Island ranked in the top 30% in per capita consumption. *Id.* at 546. The court also referred to a 1985 Federal Trade study which found "no evidence to believe alcohol advertising significantly affects alcohol abuse." *Id.*

93. Specifically, the district court observed that the state's goal could be achieved through the imposition of a higher sales tax or minimum consumer prices. *Id.* at 554.

94. 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 7 (1st Cir. 1994). The appeals court stated "[t]he district court held that it was an issue for it [the district court] to decide, unfettered, between competing witnesses, and since, on its weighing the evidence, the [district] court was not persuaded that the State was correct, it failed." *Id.* The First Circuit held the burden in establishing whether the evidence directly advanced the state's restriction was not as strict as "correctness," but should have only been whether the restriction was reasonable. *Id.* The court also found that the Twenty-first Amendment added a presumption of constitutionality to the statute. *Id.* at 8.

95. *Id.* at 7.

96. 44 Liquormart, Inc. v. Rhode Island, 115 S. Ct. 1821 (1995) (granting certiorari).

97. *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

but in the perspective the various opinions reveal about the current state of the commercial speech doctrine. Two opinions openly express dissatisfaction with the *Central Hudson* test,[98] while a third strongly implies a lack of commitment.[99] In light of these opinions, the continued viability of the *Central Hudson* test is in doubt.

1. *The Principal Opinion: Justice Stevens*[100]

Although Justice Stevens did not explicitly express his dissatisfaction with the *Central Hudson* test, the practical effect of his principal opinion is to signal a discontinuance of the existing doctrine. Justice Stevens began the opinion by describing the facts and background surrounding the *44 Liquormart* case.[101] The opinion stressed the important role advertising has played in our na-

98. The two opinions were written by Justices Scalia and Thomas. *Id.* at 1515 (Scalia, J., concurring); *id.* at 1520 (Thomas, J., concurring).

99. Justice Stevens's opinion. *Id.* at 1508-10 (Stevens, J., plurality).

100. Justice Stevens's principal opinion was divided into eight sections; only sections I, II, VII and VIII received a majority. The Justices in favor of each section are as follows:

I. Rhode Island Precedent:	Justices Stevens, Scalia, Kennedy, Souter, Thomas and Ginsburg.
II. Facts and Background:	Justices Stevens, Scalia, Kennedy, Souter, Thomas and Ginsburg.
III. Historical Background:	Justices Stevens, Kennedy, Souter and Ginsburg.
IV. Level of Protection:	Justices Stevens, Kennedy and Ginsburg.
V. Commercial Speech Analysis:	Justices Stevens, Kennedy, Souter and Ginsburg.
VI. Rhode Island's Arguments:	Justices Stevens, Kennedy, Thomas and Ginsburg.
VII. The Twenty-first Amendment:	Justices Stevens, Scalia, Kennedy, Souter, Thomas and Ginsburg.
VIII. The Holding:	Justices Stevens, Scalia, Kennedy, Souter and Ginsburg.

101. *44 Liquormart*, 116 S. Ct. at 1501. Justice Stevens noted the two statutes prohibiting the price advertisement of alcohol were enacted into law by the Rhode Island Legislature in 1956. *Id.* The opinion continued by noting the constitutionality of both statutes had previously been reviewed by the Rhode Island Supreme Court. *Id.* at 1502.

In *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729, 731 (R.I. 1985), the Rhode Island Supreme Court upheld Rhode Island General Law § 3-8-7 in which a liquor retailer in Westerly, Rhode Island, attempted to advertise the price of alcohol in a Connecticut newspaper. Finding the statute did "directly advance" the legislature's goal of promoting temperance, and the price prohibition was no "more extensive than necessary," the court found the statute to be constitutional. *Id.* at 734-35. *See generally id.* at 738-39 (Murray, J., dissenting).

tion's history, and traced the constitutional protection afforded to commercial speech since *Bigelow v. Virginia*.[102] Significantly, Justice Stevens ignored the last sixteen years of doctrinal confusion in this area, and ended the historical background portion of his opinion in 1980 with the establishment of the *Central Hudson* test.[103] Even more dramatic than the absence of historical precedent over the past sixteen years is Justice Stevens's commercial speech analysis.

Prior to reviewing the constitutionality of the price ban statute, the principal opinion rejected Rhode Island's assertion that all commercial speech regulations should be subject to intermediate review.[104] Instead, Justices Stevens, Kennedy and Ginsburg established two categories for reviewing commercial speech restrictions. Regulations which protect consumers from misleading, deceptive, or aggressive sales practices (or which require additional information to be disclosed for the consumer's benefit) should be reviewed under less than strict review.[105] On the other hand, prohibitions against truthful and nonmisleading commercial

---

On the same day that *S & S Liquor Mart* was decided, the Rhode Island Supreme Court also decided *Rhode Island Liquor Stores Association v. Evening Call Pub. Company*, 497 A.2d 331, 333 (R.I. 1985), where the plaintiff, Liquor Stores Association, sought to enjoin the defendants from seeking and publishing advertisements for the price of alcohol. This case centered around Rhode Island General Law § 3-8-8.1 which states:

> [n]o newspaper, periodical, radio or television broadcaster or broadcasting company or any other person, firm or corporation with a principal place of business in the state of Rhode Island which is engaged in the business of advertising or selling advertising time or space shall accept, publish, or broadcast any advertisement in this state of the price or make reference to the price of any alcoholic beverages.

Id. at 332 n.1 (quoting R.I. Gen. Laws § 3-8-8.1 (1987)).

The court followed its reasoning in *S & S Liquor Mart* and found this statute also passed the constitutional scrutiny of the *Central Hudson* test. *Id.* at 337. Specifically, the court stated it was not "unreasonable for the State of Rhode Island to believe that price advertising will result in increased sales of alcoholic beverages generally." *Id.* at 336. *See generally id.* at 338-42 (Weisberger, J., dissenting); *id.* at 342-43 (Murray, J., dissenting).

Although the Rhode Island Supreme Court found both statutes to be constitutional, the court ironically states "[i]t may be that some day, in some litigated case, evidence will be adduced that will support the proposition that these advertising restrictions do not further temperance objectives." *S & S Liquor Mart*, 497 A.2d at 734.

102. *44 Liquormart*, 116 S. Ct. at 1504-07 (Stevens, J., plurality).

103. *Id.* at 1504-07.

104. *Id.* at 1507.

105. *Id. See supra* note 3.

speech should be subject to the more "rigorous review that the First Amendment generally demands."[106] However, applying this strict review to the "no more extensive than necessary" (fourth) prong of the *Central Hudson* test will result in a "least restrictive means" analysis, something the Court has been unwilling to accept in previous commercial speech cases.[107] At least three members of the Court, however, now seem willing to apply the First Amendment's "least restrictive means" test to commercial speech.[108]

Once strict review is applied to the fourth prong, it becomes apparent the *Central Hudson* test is doomed. According to Justice Stevens, the existence of any non-speech alternative indicates that the restriction is more extensive than necessary.[109] Justice Stevens's opinion noted an unbroken line of precedent striking down regulations of truthful, nonmisleading advertising when "non-speech alternatives were available."[110] Thus, since some non-speech alternatives will almost always exist, the fourth prong will never be satisfied.[111]

---

106. *44 Liquormart*, 116 S. Ct. at 1507.

107. According to strict scrutiny's "least restrictive means" test, the government may regulate speech only "to promote a compelling interest if it chooses *the least restrictive means* to further the articulated interest." Melville B. Nimmer, Nimmer on Freedom of Speech § 3.02[4][A] n.239 (1994) (quoting Sable Communications of Cal., Inc. v. Federal Communications Comm'n, 492 U.S. 115, 126 (1988) (emphasis added)).

During Oral Argument in *44 Liquormart*, Chief Justice Rehnquist responded to Petitioner 44 Liquormart by stating "we don't apply a least-restrictive means test in that fourth prong of *Central Hudson*." United States Supreme Court Oral Argument Transcript, 44 Liquormart, Inc. v. Rhode Island, 1995 WL 641127, at *4 (No. 94-1140) Nov. 1, 1994. *See* Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 476 (1989) (rejecting a "least restrictive means" test).

108. The three members are: Justices Stevens, Kennedy and Ginsburg. *44 Liquormart*, 116 S. Ct. 1507-08 (Stevens, J., plurality). *See id.* at 1510. ("It is perfectly obvious that alternative forms of regulation that would not involve *any* restriction on speech would be more likely to achieve the State's goal of promoting temperance.") (emphasis added).

109. *Id.* at 1510. Justice Stevens's statement that the existence of "alternative forms of regulation[s] that would not involve *any* restriction on speech" marks a dramatic change in the fourth prong analysis. *Id.* (emphasis added). In *Discovery Network*, Justice Stevens, writing for the majority, stated only that the existence of "numerous and obvious less-burdensome alternatives . . . is certainly a relevant consideration" in the fourth prong analysis. City of Cincinnati v. Discovery Network, 507 U.S. 410, 417 n.13 (1993).

110. *44 Liquormart*, 116 S. Ct. at 1511 (Stevens, J., plurality) (citing *Posadas*, 478 U.S. at 350 (Brennan, J., dissenting) (listing cases)).

111. This view is also espoused by Justice Thomas. *See infra* Part II.B.2.

The practical effect of Justice Stevens's application of strict review is the abandonment of the *Central Hudson* test. Moreover, while the use of strict review clearly allows this inference to be drawn, additional support for this conclusion can also be surmised from Justice Stevens's commercial speech analysis.

Upon initial inspection, it appears as though the *Central Hudson* test permeates Justice Stevens's analysis. After a careful reading, however, a significant omission becomes apparent. For the first time since the Supreme Court enunciated the *Central Hudson* test, the Court's commercial speech analysis is noticeably absent of any mention of the *Central Hudson* test and its four prongs.[112] The likelihood that the principal opinion merely overlooked using the words that have been at the heart of every commercial speech case since 1980 is extremely remote. The combination of the apparently purposeful omission of any reference to the "prongs," or the "four-prong test," along with Justice Stevens ending the historical background material at *Central Hudson*, clearly signals his dissatisfaction with the evolution of the commercial speech doctrine.

2. *The Concurring Opinions: Justices O'Connor, Scalia and Thomas*

In addition to Justice Stevens's principal opinion, the three concurring opinions which comprise the *44 Liquormart* decision also express dissatisfaction with the current commercial speech doctrine. Justice O'Connor, who was joined by Chief Justice Rehnquist, Justice Souter and Justice Breyer, decided this case on the narrowest grounds. Using *Central Hudson*, Justice O'Connor found Rhode Island's price advertising ban unconstitutional.[113] Stating that the Rhode Island statute failed "even the less stringent standard set out in *Central Hudson*," Justice O'Connor determined it was unnecessary to consider an alternative to the present commercial speech analysis used in this case.[114]

Similarly, Justice Scalia's concurring opinion also determined this case using the existing *Central Hudson* framework.[115] Unlike

112. *44 Liquormart*, 116 S. Ct. at 1508-10 (Stevens, J., plurality).
113. *Id.* at 1520-22 (O'Connor, J., joined by Rehnquist, C.J., & Souter & Breyer, JJ., concurring).
114. *Id.* at 1522.
115. *Id.* at 1515 (Scalia, J., concurring).

Justice O'Connor, however, Justice Scalia made it clear that he is not satisfied with the current *Central Hudson* analysis. Justice Scalia began his opinion by stating the *Central Hudson* test has "nothing more than policy intuition to support it."[116] Nevertheless, Justice Scalia resolved the case using *Central Hudson* since the Court had not been briefed with an alternative.[117] Justice Scalia warned, however, he was "not disposed to develop new law, or reinforce old."[118] With this hint, Justice Scalia is apparently inviting future parties to submit briefs that propose an alternative commercial speech analysis.

The most far-reaching opinion in *44 Liquormart,* however, was written by Justice Thomas. Justice Thomas, like Justice Scalia, found the *Central Hudson* test to be nothing more than a case-by-case balancing test, unaccompanied by any categorical rules and often governed by the pretenses of individual judges.[119] As a result, Justice Thomas found the Rhode Island statute unconstitutional without applying the *Central Hudson* test.[120] Justice Thomas stated that regulating commercial speech in order to manipulate choices of legal products is not legitimate, and cannot be justified any more than a regulation on "noncommercial" speech.[121] Thus, such regulations are "*per se* illegitimate."[122]

Justice Thomas conceded that Justices Stevens's and O'Connor's analysis of the fourth prong would eventually reach the same result.[123] The Stevens and O'Connor opinions argue a commercial speech restriction that operates to withhold truthful, nonmisleading information from consumers will not survive scrutiny of the fourth prong if any non-speech alternative exists. Given the numerous alternatives available, such as rationing, price controls, taxing, "counterspeech" designed to educate consumers on the dangers of a product, and even prohibiting a product from being sold, it

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 1520 (Thomas, J., concurring).
120. *Id.* at 1518.
121. *Id.* at 1516.
122. *Id.*
123. *Id.* at 1519.

is almost certain that some non-speech alternative will always exist.[124]

Realizing the fourth prong can never be satisfied, Justice Thomas's analysis went one step further.[125] Instead of applying the *Central Hudson* test to reach the "inevitable result," Justice Thomas advocated abandoning the *Central Hudson* test in favor of returning to the rule established in *Virginia Pharmacy*.[126] Under that rule "all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible."[127]

The four opinions in *44 Liquormart* accentuate the Court's division on the subject of commercial speech. On one end of the spectrum is Justice O'Connor, who found it unnecessary to consider a more protective First Amendment analysis since the facts of *44 Liquormart* do not even survive the less stringent *Central Hudson* test. Although Justice O'Connor used the intermediate protection framework established in *Central Hudson*, her opinion stops short of endorsing the four-prong test. At the other end of the spectrum is Justice Thomas, who argued that the *Central Hudson* test should be abandoned.[128]

The implication is clear: the *Central Hudson* test does not provide a sufficient amount of protection. Whether commercial speech will be allotted full First Amendment protection is unknown. It is apparent, however, that the Court is providing commercial speech with more constitutional protection than it has received in the past.[129]

III. THE COMMERCIAL/NONCOMMERCIAL SPEECH DISTINCTION

The Court's dissatisfaction with *Central Hudson* has been building for years, and *44 Liquormart* finally signals the end of

---

124. *Id.* at 1510 (Stevens, J., plurality), *id.* at 1519 (Thomas, J., concurring), *id.* at 1522 (O'Connor, J., joined by Rehnquist, C.J., & Souter & Breyer, JJ., concurring).

125. *Id.* at 1519-20 (Thomas, J., concurring).

126. *Id.* at 1520.

127. *Id. See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 574 (1980) (Blackmun, J., joined by Brennan, J., concurring) (citations omitted).

128. *44 Liquormart*, 116 S. Ct. at 1520 (Thomas, J., concurring).

129. *See* Burt Neuborne, *Pushing Free Speech Too Far*, N.Y. Times, July 15, 1996, at A13 ("The current Supreme Court is the fiercest defender of the First Amendment in the Court's history.").

this test.[130] However, before the Court enunciates a new doctrine, it must first examine the foundation of commercial speech.[131]

A. *Attempting to Define Commercial Speech*

A distinction between commercial and noncommercial speech was first recognized in *Valentine v. Chrestensen*.[132] While the Supreme Court has not recently focused its attention on this distinction, one must question whether it should.[133] The Court has defined commercial speech as speech which does "no more than propose a commercial transaction."[134] This definition seems simple enough to understand and categorize, but once an advertisement is broken down and micro-analyzed, the Court's definition cannot be sustained.

Virginia Pharmacy demonstrates the simplest scenario: pure commercial speech. In that case, the Court correctly categorized "I will sell you the X prescription drug at the Y price" as commercial speech.[135] The speech considered by the Court contained nothing

---

130. In *Central Hudson*, Justice Blackmun disagreed with the four-prong test the majority believed had developed from past commercial speech cases. *Central Hudson*, 447 U.S. at 573 (Blackmun, J., joined by Brennan, J., concurring). Justice Blackmun stated the test was "not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech." *Id.* Recently, Justice Stevens remarked the *Central Hudson* Court's approach to the test was "misguided." Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1595 (Stevens, J., concurring). *See also Central Hudson*, 442 U.S. at 579-83 (Stevens, J., joined by Brennan, J., concurring). *Cf.* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2048 (1994) (O'Connor, J., concurring) (In the area of the First Amendment "fairly precise rules are better than more discretionary and more subjective balancing tests."); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring) ("[T]he use of . . . traditional legal categories is preferable to the sort of ad hoc balancing [tests]."). *See also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1187 (1989) ("For my sins, I will probably write some . . . opinions that use [balancing tests], [a]ll I urge is that th[e]se modes of analysis be avoided where possible.").

131. Since *Central Hudson*, the Court has never really examined the underpinnings of the commercial speech doctrine. *See* Kozinski, *supra* note 6, at 634.

132. 316 U.S. 52 (1942). Recall the commercial/noncommercial speech distinction enunciated in *Valentine* was founded without citing any authority. *See supra* notes 33-41 and accompanying text.

133. For additional discussion on the distinction between commercial and noncommercial speech, *see generally* Kozinski, *supra* note 6, at 634-48.

134. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

135. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

more than a pharmacist explicitly proposing to sell "X prescription" for "Y price." Hence, in this instance, defining commercial speech as that which does "no more than propose a commercial transaction" fits into the *Virginia Pharmacy* model. The problem, however, is that most speech does not fit into this category as neatly.

Few would argue that an advertisement stating "To be eligible for the fifty million dollar jackpot, buy a one dollar ticket" is commercial speech. This advertisement fits into the *Virginia Pharmacy* model where a transaction is explicitly proposed, i.e., providing a specific product or service in exchange for a stated price. But what if the advertisement only mentions the product or service and omits any reference to the price? Take for example an advertisement heard weekly in most states: "Tonight's jackpot is fifty million dollars." The purpose of the advertisement is clearly to entice consumers into buying a one dollar ticket in hopes of hitting the jackpot, but the advertisement does not explicitly propose a commercial transaction. Certainly the advertisement does not expressly propose that consumers spend "Y price" to have a chance at the jackpot. Yet, one would be hard-pressed to believe states advertise their weekly jackpot solely as a public service to the community and not with the intent of implicitly proposing a commercial transaction. Additional examples further illustrate the difficulty of classifying speech as commercial or noncommercial.

A ten second advertisement by Hallmark that "Mother's Day is Sunday," followed by Hallmark's trademark, would implicitly propose buying a card for mother at "Y price," and thus fall into the same category as the second lottery advertisement. And yet, a news report alerting millions of Americans about the upcoming holiday, and suggesting specific gifts for a stated price, is not considered commercial speech. Looking strictly at the definition of commercial speech, the news report would seem to fit into the *Virginia Pharmacy* model better than Hallmark's advertisement. The news report is explicitly informing consumers about "X product" on sale for "Y price," while the Hallmark advertisement is only stating that "Sunday is Mother's Day." According to the Supreme Court, the news report is entitled to more constitutional protection than

the Hallmark advertisement,[136] but the result of each is the same, viz., millions of dollars spent on Hallmark products.

While the above example shows the importance of the speaker's intent, further illustrations demonstrate that the intent of the listener is of equal importance.[137] For example, upon hearing "the Yankees will host the Boston Red Sox at the Stadium tonight," a life-long fan of the New York Yankees may be enticed to purchase tickets. Certainly, this speech does not explicitly propose a commercial transaction. But does it fit into the same category as the lottery and Hallmark advertisements where a commercial transaction is implicit? The life-long Yankee fan could see this announcement as implying "X product" for "Y price," while others may interpret the statement as only an announcement of an upcoming sports event. The examples go on ad infinitum.[138]

As the above examples demonstrate, a strict reading of an advertisement provides that no speech is commercial, while a liberal reading indicates that all speech is commercial. Millions of husbands and children would agree a strict interpretation of "Sunday is Mother's Day" is that it disseminates only useful information averting certain future strife. But common sense and economic markets make it hard to believe Hallmark was not proposing a commercial transaction. Upon reflection, it is apparent that categorizing speech as commercial or noncommercial is not as easy as the Supreme Court may have first suggested.

A good example of liberal interpretation is *Bigelow v. Virginia*.[139] In order to find the advertisement constitutionally protected, the Court stretched to interpret the advertisement as

---

136. *Compare* New York Times Co. v. Sullivan, 376 U.S. 254 (1964), *with* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

137. While focusing on the intent of the listener or the speaker may be the only way to accurately categorize speech as commercial or noncommercial, the Supreme Court has expressly stated that intent may not be considered. *See* Kozinski, *supra* note 6, at 639-40 (citing *Virginia Pharmacy*, 425 U.S. at 761-65).

138. For example, one would not argue that the weather portion of a newscast is noncommercial, and thus entitled to full First Amendment protection. But what if the weather report were sponsored by a company who manufactures raingear? What if instead of sponsoring a weather report, the company decided to run a thirty second infomercial on days when rain was likely to fall? Again, this would seem to implicitly propose a commercial transaction.

139. 421 U.S. 809 (1975). Recall that this case involved an advertisement that stated, "Abortions are now legal in New York." *Id.* at 812.

proposing more than just a commercial transaction.[140] The Court reasoned that, in addition to proposing abortions, the advertisement also served to inform those interested in abortion laws that abortions are now legal in New York.[141] This case illustrates that an expressly commercial transaction can also be found to contain newsworthy information.[142]

Not only is it difficult to define commercial speech, but as *Bigelow* demonstrates, a few words appended to a purely commercial message can yield full First Amendment protection. For instance, take Mr. Chrestensen's attempt in *Valentine*.[143] Although unsuccessful, Chrestensen's effort illustrates how one might add newsworthy information to an otherwise purely commercial advertisement in order to claim full First Amendment protection.[144] For example, "Cigarettes cost $3.00, but the Surgeon General warns that smoking may be harmful to your health," or "A six pack of beer costs $5.00, but remember to drink responsibly." Instantly, these purely commercial messages, which were to receive only intermediate protection under the *Central Hudson* test, now "do more than propose a commercial transaction" and are apparently entitled to full First Amendment protection.

The above examples demonstrate the difficulty in defining commercial speech.[145] Even if definable, speech can easily be mod-

---

140. *See supra* notes 46-48 and accompanying text.

141. *Bigelow*, 421 U.S. at 822.

142. Newsworthy information can be found in almost any commercial advertisement. *See* Kozinski, *supra* note 6, at 653. The opposite is also true. Certain newsworthy information can expressly or implicitly propose a commercial transaction, such as the financial pages of the stock market, the weather report, *see supra* note 138, or even the sports pages, *see supra* p. 82.

143. *See supra* notes 33-41 and accompanying text.

144. The "public interest" statement may not be appended to the commercial message solely to avoid the advertisement from being classified as commercial speech. *See Bigelow*, 421 U.S. at 819 ("The [*Valentine*] Court found that the message of asserted 'public interest' was appended solely for the purpose of evading the ordinance and therefore did not constitute an 'exercise of the freedom of communicating information and disseminating opinion.'" (citing *Valentine*, 316 U.S. at 54)). This holding, however, places the burden on judges to determine when speech is "appended solely for the purpose of evading the ordinance." *Id.* Judges will be forced to determine whether a beer company really wants their customers to drink responsibly, or whether this message was added only to receive full First Amendment protection. *See* Kozinski, *supra* note 6, at 653 (stating a commercial aspect can be found in almost any First Amendment case).

145. In *Central Hudson*, a landmark commercial speech case, the Court could not even agree on whether the speech in question was commercial. *See* Central

ified in order to gain a greater amount of constitutional protection by appending public service messages. A review of the public policy arguments used to justify less than full protection to commercial speech will further demonstrate the weak foundation upon which the commercial speech doctrine is built.

B. *Attempting to Comprehend the "Commonsense Differences"*

The Supreme Court first enunciated two "commonsense differences" between commercial and noncommercial speech in *Virginia Pharmacy*.[146] These two "commonsense differences" consist of the Court's belief that (1) commercial speech is more easily verifiable by its speaker than other types of speech, and (2) commercial speech is more durable and therefore less likely to be chilled by regulations.[147] Although the Court states commercial speech should be given less protection because of these two differences, it never explains why the distinctions are important.[148] After examination, the Court's rationale for the two distinctions cannot be justified.

First, commercial speech is not necessarily more verifiable than noncommercial speech.[149] There are many instances where commercial claims are inherently more difficult to verify. Take, for example, a commercial stating that three out of four dentists approve of a particular product. The only way to verify this statement empirically is to survey all practicing dentists. In contrast, there are many noncommercial claims which can be easily verified. For instance, a political candidate might truthfully remind the public that his opponent voted for or against a certain bill while in Congress. The veracity of this statement is easily verifiable. Yet, no one argues the candidate's statement is entitled to less than full constitutional protection.

Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 583 (1980) (Stevens, J., joined by Brennan, J., concurring) (believing *Central Hudson* is not a commercial speech case).

146. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

147. *Id.*

148. *See* Kozinski, *supra* note 6, at 634. ("[T]he two differences are never questioned; at no time has any member of the Court suggested that [the two reasons] do not justify a lower level of protection for commercial speech.").

149. *See id.* at 636.

The verifiability of the claim should not determine the applicable level of protection. Even if the Court were correct in stating that commercial claims are more easily verifiable, no reason exists to justify less protection for speech which can be verified. Nonetheless, the Supreme Court has stated commercial advertisements are easier to verify and should therefore receive less protection.[150]

The second reason the Court gives to justify less protection for commercial speech is that the speaker has a self-interest in disseminating the information, and therefore, the speech is more durable and less likely to be chilled.[151] But once again the Supreme Court fails to explain why this is important.[152] Even assuming this rationale is important, the Court's distinction is so broad it would seem to include almost all speech.[153]

The *New York Times*, for instance, has an economic interest in selling subscriptions to its newspaper, but no one advocates their speech is more durable and not worthy of full constitutional protection. Authors spend years writing books which, if sold, will represent a significant portion of their incomes, and yet, this speech receives full First Amendment protection. Under the Supreme Court's reasoning, even politicians could be said to have a self-interest in their speeches, and therefore receive less protection.[154] Yet, no one supports the view that political speech represents a durable type of speech, and is therefore entitled to less than full protection.

The *Virginia Pharmacy* Court cites several cases involving books, motion pictures, and religious literature supporting its conclusion that speech is protected even though it is "sold for profit."[155] The Court, however, does not explain the differences between speech appearing in books for sale and speech advertising

150. *Virginia Pharmacy*, 425 U.S. at 772 n.24.

151. *Id.*

152. *See supra* note 148; Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1223 (1983) ("The Court has not explained why commercial speech deserves a subordinate place in a hierarchy of protected speech . . . .").

153. *See* Kozinski, *supra* note 6, at 653 n.53.

154. A politician who decides not to give speeches will be forced to change careers after Election Day.

155. *Virginia Pharmacy*, 425 U.S. at 761 (citing Smith v. California, 361 U.S. 147, 150 (1959) (books); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (motion pictures); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) (religious literature).

books for sale. Although the two seem to be "inextricably linked," the Court affords the latter less protection.[156]

Just as the Court's definition of commercial speech does not survive the most basic examples, neither do the two reasons supporting the "commonsense differences." Although the two differences may have originally justified less protection when promulgated in *Virginia Pharmacy*, later cases question the validity of the distinctions. Justice Blackmun, who wrote the majority opinion in *Virginia Pharmacy*, has subsequently stated that the Court "ha[s] not suggested that the 'commonsense differences' between commercial speech and other speech justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech."[157] Other opinions have echoed Justice Blackmun's sentiments.[158]

In fact, the First Amendment clearly supports the conclusion that commercial speech which is truthful, nonmisleading and related to a lawful activity should receive full First Amendment protection. Justice Oliver Wendell Holmes theorized that "the First Amendment prohibits government suppression of ideas because the truth of any idea can only be determined in the 'marketplace' of competing ideas."[159] But by granting commercial speech less protection, the Court is implicitly stating that consumers have less of a right to commercial information.[160]

The result of the Court's commercial speech doctrine has been to place speech which relates to a commercial activity on a different plateau than speech which communicates other ideas.[161] This

---

156. *See supra* notes 3, 5.

157. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 578 (1980) (Blackmun, J., joined by Brennan, J., concurring). Justice Blackmun continued his attack on the "commonsense differences" by stating that "[n]o differences between commercial speech and other protected speech justify suppression of commercial speech." *Id.*

158. *See also* Posadas de P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 351 (1986) (Brennan, J., joined by Marshall, & Blackmun, JJ., dissenting) ("[N]o differences between commercial and other kinds of speech justify protecting commercial speech less extensively . . . .").

159. Nowak, *supra* note 2, at 992 (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

160. *Central Hudson*, 447 U.S. at 574 (Blackmun, J., joined by Brennan, J., concurring) (stating that regulation restricting "commercial" speech "strikes at the heart of the First Amendment"). *Id.*

161. Commercial speech has been placed in the same category as pornography, defamation and offensive speech. Eberle, *supra* note 3, at 437.

has been done despite the fact that commercial information affects consumer decisions every day of every year.[162]

The Court in *Virginia Pharmacy* recognized society's "strong interest in the free flow of commercial information"[163] when it stated:

> Advertising, however, tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[164]

Despite the "indispensable" role commercial speech has on an individual's daily decision, and the questionable foundation upon which the doctrine is built, the Court has steadfastly held to its decision in *Valentine*: commercial speech is not entitled to full First Amendment protection.[165] An analysis of the cases decided since *Central Hudson*, however, leads to the conclusion that even though the Court says commercial speech is to be afforded less protection, the Court has almost always found restrictions on truthful, nonmisleading commercial speech to be unconstitutional.

Since 1980, the Court has decided at least seventeen commercial speech cases.[166] Of these cases, the Court has found that the restrictions in fourteen of these cases violated the First Amendment.[167] Furthermore, the three cases where a restriction was found not to violate the freedom of speech rest on specious grounds.

---

162. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976) (stating that commercial speech "may be as keen, if not keener by far, than [one's] interest in the day's most urgent political debate").

163. *Id.* at 764.

164. *Id.* at 765 (citations omitted).

165. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

166. *See supra* note 14.

167. The three cases where restrictions on commercial speech did not violate the First Amendment are Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995), United States v. Edge Broad. Co., 509 U.S. 418 (1993), and Posadas de P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328 (1986). Additionally, the Court in *Metromedia, Inc. v. City of San Diego* found a San Diego ordinance restricting the use of commercial advertisements on billboards satisfied the requirements of the *Central Hudson* test, but declared the ordinance to be unconstitutional since it in-

Florida Bar stands on special ground because of the unique attention the Court has paid to attorney advertising.[168] In addition, the five-to-four decision could be considered an anomaly as *Florida Bar* is only the second attorney advertising case to uphold significant restrictions on an attorney's right to advertise.[169] The other two cases where restrictions on commercial speech were upheld are in an even more precarious position.

Posadas, decided in 1986, was all but explicitly overruled by *44 Liquormart*. Justice Stevens stated that "*Posadas* erroneously performed the First Amendment analysis."[170] In addition, Justice O'Connor's concurring opinion criticized *Posadas* as accepting, "without further inquiry," Puerto Rico's assertions that the gambling regulation furthered the commonwealth's interest and was no more extensive than necessary.[171] *44 Liquormart* also severely limited the holding in *Edge Broadcasting* by explaining the federal statute was upheld because it "regulate[d] advertising about an activity that had been deemed illegal in th[at] jurisdiction . . . ."[172]

The Court's decision in *44 Liquormart* to re-examine and modify the holding of both *Posadas* and *Edge Broadcasting* clears the

---

truded too far into the arena of protected speech. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 521 (1981) (White, J., plurality). The view that the ordinance constitutionally restricted commercial speech, however, did not receive a majority of the Court as only Justices White, Stewart, Marshall, and Powell supported this view. *Id.* at 493. Interpretations of this decision have characterized the plurality decision in *Metromedia* as "dicta." Discovery Network, Inc. v. City of Cincinnati, 946 F.2d 464, 470 n.9 (6th Cir. 1991).

168. The Court has heard no less than five lawyer advertising cases since 1980: *Florida Bar*, 115 S. Ct. 2371; Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91 (1990); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985); and *In re* R.M.J., 455 U.S. 191 (1982). For an overview of the protection the Court has allotted to lawyer advertising see Jodi Vanderwater, Note, Florida Bar v. Went For It, Inc., *Restricting Attorney Advertising to Preserve the Image of the Legal Profession*, 27 Loy. U. Chi. L.J. 765, 773-80 (1996). *See also* Kozinski, *supra* note 6, at 630; Model Rules of Professional Conduct Rule 7.1-7.5 (1983).

169. *See The Supreme Court, 1994 Term - Leading Cases - Commercial Speech - Attorney Advertising*, 109 Harv. L. Rev. 190, 195 (1995). The first case to uphold restrictions on attorney advertising was *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (holding an attorney may not personally solicit clients).

170. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1511 (1996) (Stevens, J., plurality).

171. *Id.* at 1522 (O'Connor J., joined by Rehnquist, C.J., & Souter & Breyer, JJ., concurring).

172. *Id.* at 1511 (Stevens, J., plurality). *See supra* note 70.

way for the Court to give truthful, nonmisleading commercial speech relating to a lawful activity full First Amendment protection. The Court can now look to its precedent since *Central Hudson*, with the possible exception of *Florida Bar*, and unequivocally state that restrictions which suppress truthful, nonmisleading commercial information relating to a lawful activity have been held unconstitutional.

Prior to *44 Liquormart*, the Court had maintained that commercial speech receives only "a limited measure of protection."[173] But, as the majority of cases make clear, restrictions on truthful, nonmisleading commercial speech are rarely upheld. Now, after *44 Liquormart*, the few cases upholding restrictions on commercial speech as constitutional, have been modified. Having determined that nearly all commercial speech restrictions since *Central Hudson* are unconstitutional, the time has come for the Court to reexamine the definition of commercial speech and the two "commonsense differences." After reviewing the two commercial speech components, the Court will realize their rationale is no longer valid. The only remaining question is what will be the parameters of the new commercial speech doctrine.

CONCLUSION

No rational reason exists to distinguish truthful and nonmisleading commercial speech from other fully protected speech. The Court has repeatedly tried to define commercial speech, but as the cases demonstrate, the definition has been either too broad or too narrow. The Court has stated "commonsense differences" exist that necessitate the differing levels of constitutional protection afforded to commercial and noncommercial speech. But, while the differences may be common, they do not make sense. The Court has even gone so far as to suggest that if commercial speech were given more protection, this would somehow take away from First Amendment protection allotted to noncommercial speech.[174] The First Amendment, however, does not maintain a constant amount of protection which must be shared by all forms of speech.[175] Addi-

173. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2375 (1995).

174. Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 481 (1989) (citing *Ohralik*, 436 U.S. at 456).

175. *See also* Kozinski, *supra* note 6, at 648.

tionally, one need look no further than *Posadas* to see that commercial speech cases have not received proper protection.[176]

With *44 Liquormart* at bar, the Court announced the last call for the *Central Hudson* test. Rather than trying to support an already saturated doctrine, the Court flicks the lights, and signals the end of *Central Hudson*'s dominance over cases involving truthful, nonmisleading commercial speech related to a lawful activity.[177]

Michael W. Field

176. *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1511 (1996) (Stevens, J., plurality) ("[W]e are now persuaded that *Posadas* erroneously performed the First Amendment analysis.").

177. *See id.* at 1520 (Thomas, J., concurring) ("Rather than continuing to apply a test [*Central Hudson*] that makes no sense . . . I would return to the reasoning and holding of *Virginia Pharmacy Bd.*"); Posadas de P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328, 351 (1986) (Brennan, J., joined by Blackmun & Marshall, JJ., dissenting) ("I believe that where the government seeks to suppress the dissemination of nonmisleading commercial speech relating to legal activities . . . such regulation should be subject to strict judicial scrutiny."); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 573 (1980) (Blackmun, J., joined by Brennan, J., concurring) ("[T]he Court's four-part test is [not] the proper one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly."). *See also* Eberle, *supra* note 3, at 476 (arguing that regardless of the lawfulness of the activity, truthful, nondeceptive, and noncoercive commercial speech may not be restricted, except pursuant to strict scrutiny).