FIRST AMENDMENT — COMMERCIAL SPEECH — NOTWITHSTANDING A STATE'S TWENTY-FIRST AMENDMENT POWER TO BAN THE USE OF ALCOHOL ENTIRELY, A STATE MAY NOT COMPLETELY PROHIBIT TRUTHFUL, NON-MISLEADING ADVERTISING OF LIQUOR PRICES — *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996).

Joseph T. Hanlon

I. INTRODUCTION

Freedom of speech is "one of the preeminent rights of Western democratic theory, the touchstone of individual liberty."[1] It is through free speech that this country's political heritage is preserved. Most importantly, freedom of speech allows the public to search for truth in the marketplace of ideas.[2] With the exception of a few categories of unprotected speech,[3] the Constitution

---

[1]JOHN E. NOWAK & RONALD D. ROTONDA, 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)).

The First Amendment reads:

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

U.S. CONST. amend. I (emphasis added).

[2]*See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."); *see also* JOHN STUART MILL, ON LIBERTY 115-18 (1859) (explaining that in suppressing opinions, society unequivocally loses: in suppressing true opinions, society is deprived of the truth; in suppressing what is perceived to be an entirely false opinion, society loses some truth, for all opinions commonly "contain a portion of truth"; and in suppressing false opinions, the holder of true opinion loses the opportunity to defend those true opinions, and the true opinion, therefore, becomes dead dogma in not being challenged).

[3]*See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words not protected by the First Amendment); Miller v. California, 413 U.S. 15 (1973) (obscenity not protected by the First Amendment); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel not pro-

guarantees that the government's attempt to regulate speech will be subject to strict scrutiny.[4]

Commercial speech is a recent arrival to the free speech arena,[5] and although distinguishable from more traditional forms of speech protected by the First Amendment,[6] it is equally significant to this country's political heritage.[7]

---

tected by the First Amendment); Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement to violence not protected by the First Amendment).

[4]*See, e.g.*, 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, 18 (1990) (citations omitted) ("In the normal course of [F]irst [A]mendment analysis, . . . [speech] is fully protected and may not be prohibited because of its content, unless the prohibition is the least restrictive means to accomplish a compelling government interest.").

[5]The Supreme Court did not find pure commercial speech protected until 1976 *in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). *See infra* note 9.

[6]The *Virginia Board* Court explained in an often-cited footnote:

> In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does no more than propose a commercial transaction and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the state, they nonetheless suggest that a different degree of protection is necessary to insure the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *Sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely. Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.

Id. at 771-72 n.24 (citations omitted) (internal quotations omitted).

In *The Regulation of Speech Incident to the Sale or Promotion of Goods and Services: A Multifactor Approach,* Charles Geyh explained:

> Beginning with *Virginia State Board of Pharmacy*, commercial speech was invited to join the [F]irst [A]mendment club; unlike other forms of protectable

> speech, however, it was not permitted to become a full-fledged member.
>
> . . .
>
> For the first time, the Court had created a specific category of truthful speech eligible for [F]irst [A]mendment protection that could be regulated on the basis of its content without triggering strict judicial scrutiny. As the Court subsequently elaborated, laws imposing content-based restriction upon commercial speech need not be the least restrictive means to accomplish a compelling government interest, but need only be no broader than necessary to further directly a substantial government interest.

Geyh, *supra* note 4, at 8-9 (citations omitted).

[7]*Virginia Board,* 425 U.S. at 762-65. Because the United States has a political heritage founded on principles of freedom, not only individual freedom, but freedom of the market, protecting commercial speech is as important, if not more important, than protecting more traditional forms of First Amendment speech. *See, e.g.*, Geyh, *supra* note 4, at 12 ("To the extent one subscribes to marketplace theory . . ., it is difficult to argue that truthful commercial advertising does not communicate information of public interest that can make a meaningful contribution to the exchange of ideas."); Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 652 (1990) [hereinafter *Who's Afraid?*]. *But see* 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."); Thomas H. Jackson and John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 6 (1979) ("Although disallowing state interference with commercial advertising serves other values that merit careful legislative consideration - aggregate economic efficiency and consumer opportunity to maximize utility in a free market - these values are not appropriate for judicial vindication under the [F]irst [A]mendment.").

In explaining the importance of protected commercial speech, Alex Kozinski and Stuart Banner quoted Aaron Director, the father of the law and economics movement, who stated:

> [T]he bulk of mankind will for the foreseeable future have to devote a considerable fraction of their active lives to economic activity. For these people freedom of choice as owners of resources in choosing within available and continually changing opportunities, areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government.

Kozinski, *Who's Afraid?*, *supra* note 7, at 652 (quoting Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 6 (1964)).

The *Virginia Board* Court expressed a similar sentiment, stressing:

> As to the particular consumer's interest in the free flow of commercial informa-

The Supreme Court first recognized the importance of protecting "*truthful* information about entirely lawful activity"[8] in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[9]

The first major case, subsequent to *Virginia Board,* addressing the issue of pure commercial speech was *Central Hudson Gas & Electric, Corp. v. Public Service Commission of New York.*[10] The *Central Hudson* Court created a four prong test to be used in commercial speech cases.[11] Although facially clear,

---

> tion, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . .
>
> So long as we preserve a predominately 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. . . . Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Virginia Board, 425 U.S. at 463-65.

[8]*Virginia Board*, 425 U.S. at 773 (emphasis added). Unlike truthful, nonmisleading commercial speech, untruthful commercial speech "has never been protected for its own sake." *Id.* at 771 (citations omitted). Further, deceptive, misleading commercial speech, even though not false, is due less protection than truthful, nonmisleading commercial speech. *Id.* It must be noted that varying the level of protection depending on the speech's content would not occur with more traditional forms of commercial speech. *See supra* note 6.

[9]425 U.S. 748 (1976); *see infra* part III.B for an extended discussion of the *Virginia Board* decision. Although the Court recognized the right to commercial speech before *Virginia Board, Virginia Board* was the first case to recognize protection for pure commercial speech. In a case of pure commercial speech, the idea communicated is simply: "I will sell you the X [product] at the Y price." *Virginia Board,* 425 U.S. at 761.

[10]447 U.S. 557 (1980); *see infra* part III.C for an extended discussion of the *Central Hudson* decision.

[11]*Id.* at 566. Justice Powell, speaking for the Court, proposed a four prong inquiry. The Justice stated:

> For commercial speech to [be protected by the First Amendment] . . . [1] it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquires 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.

cases subsequent to the *Central Hudson* test's introduction have demonstrated its allowance for *ad hoc* analysis.[12] As a result, the law of commercial speech has been troublesome and unpredictable.[13] Specifically, commentators have criticized commercial speech cases as providing watered-down constitutional protection.[14]

The Supreme Court, in apparent agreement with these commentators, recently revitalized the commercial speech doctrine; commercial speech analysis again has teeth.[15] In *44 Liquormart, Inc. v. Rhode Island,* the Court unanimously held that a complete prohibition on truthful, nonmisleading alcohol price advertising violated the First and Fourteenth Amendments of the United States Constitution.[16] While there was no majority opinion,[17] it is evident from the Court's four opinions that the *Central Hudson* test is not an easy constitu-

---

Id.

[12]*See, e.g.*, Kozinski, *Who's Afraid?*, *supra* note 7, at 631 ("[C]ases have been able to shed little light on *Central Hudson*, aside from standing as *ad hoc* subject-specific examples of what is permissible and what is not."); Note and Comment, *On Tap, 44 Liquormart, Inc. v. Rhode Island: Last Call for the Commercial Speech Doctrine*, 2 ROGER WILLIAMS U. L. REV. 57, 59 (1996) ("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]*See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-15, at 904 (2d ed. 1988) ("[T]he Court's commercial speech doctrine seems poised on a makeshift - and unsteady - foundation for the future."); David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359, 360 (1990) ("The Court has established and partially abandoned a test for determining when commercial speech should receive [F]irst [A]mendment protection that suffers from . . . doctrinal deficiencies and leads to irreconcilable results.").

[14]*See, e.g.*, Geyh, *supra* note 4, at 5 ("[F]irst [A]mendment protection for commercial speech has declined and is at risk of being stripped of all constitutional significance."). *See also* TRIBE, supra note 13, at 901-04; 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.

[15]44 Liquormart, Inc v. Rhode Island, 116 S. Ct. 1495 (1996) [hereinafter *Liquormart*].

[16]*Id.*; *see supra* note 1 for text of First Amendment. Although the First Amendment provides that "*Congress* shall make no law . . . abridging the freedom of speech, or of the press," U.S. CONST. amend. I (emphasis added), states are subject to its mandates under the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, Board of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 855 n.1 (1982); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Gitlow v. New York, 268 U.S. 652, 666 (1925).

[17]*See infra* note 120.

tional hurdle to overcome; truthful, nonmisleading commercial speech is to be taken seriously.[18]

II. STATEMENT OF THE CASE

At issue in *Liquormart* were two Rhode Island statutes. The first prohibited alcoholic beverage price "advertising in any manner whatsoever," when that beverage was to be sold in the state.[19] The second statute prohibited the news

---

[18]*See infra* part V for an analysis of the ramifications of the *Liquormart* decision. It is further evident from the decision that a state's power to forbid the use of alcohol, pursuant to the Twenty-first Amendment, will be of no consequence in commercial speech analysis. *Liquormart*, 116 S. Ct. at 1514-15 (Stevens, J., plurality), 1515 (Scalia, J., concurring), 1515 (Thomas, J., concurring), 1522-23 (O'Connor, J., concurring); *see infra* notes 150-52 and accompanying text and notes 153, 168 & 183.

The Twenty-first Amendment provides:

> *Section 1.* The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> *Section 2.* The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited.
>
> . . .

U.S. CONST. amend. XXI, §§ 1,2.

[19]*Liquormart*, 116 S. Ct. at 1501 (citing R.I. GEN. LAWS § 3-8-7 (1987)). The Rhode Island statute provided:

> No manufacturer, wholesaler, or shipper from without this state and no holder of a license issued under the provisions of this title and chapter 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 in accordance with rules and regulations of the department.

R.I. GEN. LAWS § 3-8-7 (1987).

The Rhode Island Supreme Court considered the constitutionality of section 3-8-7 in *S & S Liquor Mart, Inc. v. Pastore*. 497 A.2d 729 (R.I. 1985). In *Pastore*, a liquor retailer with a store in a town that bordered the State of Connecticut sought to enjoin the enforcement of

media from publishing or broadcasting any advertisements, even as to sales in neighboring states, that "ma[d]e reference to the price of any alcoholic beverage."[20]

Petitioners, 44 Liquormart, Inc., a Rhode Island alcoholic beverage retailer,[21] and Peoples Super Liquor Stores, a Massachusetts alcoholic beverage retailer with Rhode Island patrons,[22] filed an action against the Rhode Island

---

section 3-8-7 after being advised that advertising in a Connecticut paper would result in the revocation of his license. *Id.* at 730-31. Applying the four part test adopted in *Central Hudson, see supra* note 11, the court upheld the constitutionality of the statute on a First Amendment challenge. *Id.* at 735-36. In reaching this conclusion, the court noted that the Twenty-first Amendment gave the statute an added presumption of validity. *Id.* at 732.

[20]*Liquormart*, 116 S. Ct. at 1501 (citing R.I. GEN. LAWS § 3-8-8.1 (1987)). The statute provided:

> No 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 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. . . ."

R.I. GEN. LAWS § 3-8-8.1 (1987).

The Rhode Island Supreme Court considered the constitutionality of section 3-8-8.1 in *Rhode Island Liquor Stores Ass'n. v. Evening Call Pub. Co.*, 497 A.2d 331 (R.I. 1985). In *Evening Call,* the plaintiff sought to enjoin a Rhode Island newspaper from accepting alcohol price advertisements from a Massachusetts liquor retailer. *Id.* at 333. The court granted the injunction after concluding that section 3-3-8.1 survived the *Central Hudson*'s four prong commercial speech analysis. *Id.* at 338. Most importantly, the court found that the statute "directly advanced" the state's interest in the promotion of temperance, and that the statute, notwithstanding the existence of other means for furthering its interest, was no "more extensive that necessary to serve that interest." *Id.* at 335-36.

[21]*Liquormart*, 116 S. Ct. at 1503. Liquormart filed this suit when competitors complained about Liquormart's advertising of alcohol beverages in a Rhode Island newspaper. *Id.* Although Liquormart did not actually advertise the price of its alcoholic beverages, it pictured bottles of alcohol with the word "WOW" next to them. *Id.* In the same newspaper advertisement, Liquormart advertised low-priced potato chips, nuts and alcohol mixers. *Id.* The Rhode Island Liquor Control Administrator fined Liquormart $400 for violating R.I. Gen. Laws § 3-8-7. *Id.*; *see supra* note 19. The administrator found that the reference to low-priced snack foods, in combination with pictures of liquor bottles with the word "WOW" next to them, supported the implication that the liquor bottles were also low priced. *Id.* The administrator reached this conclusion notwithstanding the fact that Liquormart's advertisement also noted that "State law prohibits advertising liquor prices." *Id.*

[22]*Id.* Peoples advertised extensively in Massachusetts. *Id.* However, because of R.I. Gen. Laws § 3-8-8.1, it was unable to advertise in Rhode Island. *Id.* Peoples, therefore,

Liquor Control Administrator in the District Court for the District of Rhode Island.[23] The Petitioners sought a declaratory judgment, asking the court to determine whether the two Rhode Island statutes were unconstitutional as violative of the First Amendment's commercial speech doctrine.[24] In response, the State of Rhode Island, which replaced the Administrator as defendant, argued that the regulations were a legitimate effort by the Rhode Island Legislature to promote temperance.[25]

---

joined the suit instituted by Liquormart. *Id.*

[23]*Id.*

[24]44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993); *see supra* note 1 for the text of the First Amendment.

[25]44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993). As the advertisements at issue involved pure commercial speech, *see supra* note 9, the state, in order to claim that the regulations were legitimate, needed to prove that the regulations satisfied the *Central Hudson* Court's four part commercial speech analysis. *Id.* at 551; *see supra* note 11. Because the parties stipulated that the "proposed speech [1] [did] not concern illegal activity and presumably would not be false and misleading; and [2] the State of Rhode Island has a substantial interest in regulating the sale of alcoholic beverages" and in "fostering temperance," the defendant did not need to present arguments as to the first two prongs of the *Central Hudson* test. *Id.* at 545, 551.

As to the third prong, the state argued, first, that the Twenty-first Amendment diminished its burden, so as to only require a "reasonable relation" instead of a "direct" relation between the price advertising ban and promoting temperance. *Id.* at 551. In order to satisfy this reformulated burden, the state presented expert testimony supporting the finding that alcoholic beverage price advertising would have the effect of increasing consumption. *Id.* at 548. The defendant's expert, the court noted, proffered a "search cost" theory in support of the relation between the price advertising ban and promoting temperance. *Id.* The court explained the "search cost" theory as follows:

> The average price for alcohol would be lower if people could more easily find lower prices. The price advertising ban creates a greater variance of prices in the state than you would have without a ban, which gives people an incentive to shop around, increasing search costs. If there were no ban on price advertising, the variance of prices would probably decrease and there would be less search time. . . . [Thus, i]f the price advertising ban were abolished, it would lower average prices and increase consumption.

Id.

As to the fourth prong, the state argued that the price advertising ban was necessary "to increase the 'search costs' of consumers and reduce[] the incidence of 'price wars' between retailers, thus providing an 'artificial floor' for liquor prices." *Id.* at 554.

The district court disagreed with the state, finding the Rhode Island statutes unconstitutional pursuant to the four pronged *Central Hudson* test.[26] The court concluded that the prohibition on price advertising "did not 'directly advance' the state's interest in reducing alcohol consumption and was 'more extensive than necessary to serve that interest.'"[27] Further, the court found that the Twenty-first Amendment did not diminish the state's burden of demonstrating a statue's validity under the commercial speech analysis.[28]

The Court of Appeals for the First Circuit reversed the district court's decision.[29] The court found "inherent merit" in the state's suggested correlation between price advertising, an increase in sales, and the frustration of temperance.[30] In addition, the circuit court found merit in the contention that the Twenty-first Amendment "gave the statutes an added presumption of validity."[31]

The United States Supreme Court granted certiorari to determine whether "Rhode Island may, consistent with the First Amendment, prohibit truthful, nonmisleading price advertising regarding alcoholic beverages."[32] The Court held, in a plurality opinion,[33] that Rhode Island could not prohibit truthful, nonmisleading alcohol price advertising.[34] Notwithstanding an agreement as to the holding, a majority of the Court could not agree on the level of protection

---

[26]*Id.* at 554; *see supra* note 11.

[27]*Id.* at 555.

[28]*Id.*; *see supra* note 18 for the text of the Twenty-first Amendment.

[29]44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5 (1st Cir. 1994).

[30]*Id.* at 7.

[31]*Id.* at 8. Alternatively the court of appeals found that reversal was mandated by the Supreme Court's summary decision in *Queensgate Investment Co. v. Liquor Control Commission of Ohio*, 459 U.S. 807 (1982). *Id.* In *Queensgate,* Justice Stevens explained, the Court "dismissed the appeal from a decision of the Ohio Supreme Court upholding a prohibition against off-premises advertising of the prices of alcoholic beverages sold by the drink." 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1504. Justice Stevens found that the First Amendment issue originally avoided in *Queensgate* now demanded an analysis on the merits. *Id.*

[32]44 Liquormart, Inc v. Rhode Island, 115 S. Ct 1821 (1995).

[33]*See supra* note 120.

[34] 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1515 (1995).

that the First Amendment affords truthful, nonmisleading commercial speech.[35]

III. THE DEVELOPMENT OF A COMMERCIAL SPEECH DOCTRINE

A. THE EARLY YEARS

The First Amendment makes no distinction between commercial and noncommercial speech,[36] nor is there any indication that the Framers intended such a distinction be made.[37] In fact, the Supreme Court did not introduce the distinction until 1942 in *Valentine v. Chrestensen*.[38]

In *Valentine*, the Court, without significant elaboration, upheld a ban on the distribution of commercial advertising.[39] Respondent, Mr. Chrestensen,

---

[35] *See generally* section IV.

[36] *See supra* note 1 for the text of the First Amendment.

[37] Alex Kozinski and Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 756 (1993) [hereinafter *Anti-History*].

[38] 316 U.S. 52 (1942). Actually the *Valentine* Court did not distinguish commercial speech from noncommercial speech; rather, it distinguished the dissemination of information through "commercial advertising" as distinguished from noncommercial speech. *Id.* at 54. The first use of the phrase "commercial speech" came after *Valentine* in 1971 in *Business Executives' Move for Vietnam Peace v. FCC.* 450 F.2d 642, 658 n.38 (D.C. Cir. 1971), *rev'd sub nom.*, CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) ("Commercial advertising - indeed, any sort of *commercial speech* - is less fully protected than other speech, because it generally does not communicate ideas and thus is not directly related to the central purpose of the First Amendment.") (emphasis added). This late recognition of commercial advertising as being a form of speech is important because it was not until such a recognition that the courts and practitioners could talk about First Amendment protection. *See* Kozinski, *Anti-History, supra* note 37, at 757.

[39] Valentine v. Chrestensen, 316 U.S. 52 (1942). Specifically, the Court explained:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. *We are equally clear that the Constitution imposes no such restraint on governments as respects purely commercial advertising.* Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.

maintained a submarine for exhibition in a New York City harbor.[40] He attempted to distribute handbills advertising the exhibitions and protesting the "action of the City Dock Department" which challenged his ability to keep his submarine at the city pier.[41] The Police Commissioner, citing a local regulation forbidding the distribution of commercial advertising, stopped Mr. Chrestensen's attempted distribution of the handbills.[42] In response, Mr. Chrestensen sought to enjoin the cities interference with his advertising.[43]

The Supreme Court, denying the injunction, held that even though the handbill contained information protected by the Constitution, namely the protest, the presence of a commercial advertisement rendered the entire handbill unprotected.[44] The Court reasoned that Mr. Chrestensen should not have the ability to evade the prohibition against commercial advertising simply by affixing to his handbill a written protest.[45]

Although the *Valentine* decision left commercial advertising without a constitutional dimension, commentators have emphasized that commercial advertising has been an integral part of the cultural and political climate of our nation since its founding.[46] Commercial advertising is particularly important because it provides the public with "vital information about the market."[47] Notwithstanding its historical significance, pure commercial speech did not receive First Amendment protection until the Court's 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[48]

Id. at 54 (emphasis added).

[40]*Id.* at 52-53.

[41]*Id.* at 53.

[42]*Id.*

[43]*Id.* at 54.

[44]*Id.*

[45]*Id.* at 55.

[46]*See, e.g.*, BENJAMIN FRANKLIN, AN APOLOGY FOR PRINTERS, June 10, 1731, *reprinted in* 2 WRITINGS OF BENJAMIN FRANKLIN 172 (1907); *see also* J. WOOD, THE STORY OF ADVERTISING 21, 45-69, 85 (1958); J. SMITH, PRINTERS AND PRESS FREEDOM 49 (1988).

[47]44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1504 (1996) (Stevens, J, plurality); *see id.* at 1517-18 (Thomas, J., concurring); *see also* Brief for American Advertising Federation at 12-24, *Liquormart*, 116 S. Ct. 1495 (1996) (No. 94-1140).

[48]425 U.S. 748 (1976). *See generally* Kozinski, *The Anti-History, supra* note 37. The

B. THE *VIRGINIA BOARD* DECISION

In *Virginia Board,* a group of prescription drug consumers challenged, as violative of the First Amendment, a Virginia statute that made it a crime for a licensed pharmacist to advertise prescription drug prices.[49] Because only a licensed pharmacist could distribute prescription drugs in Virginia, the ban effectively foreclosed all advertising "of prescription drug price information" in the state.[50] In defense of the statute, the Virginia State Board of Pharmacy maintained that the First Amendment simply did not protect commercial speech.[51]

Writing for the majority, Justice Blackmun first noted that the *Valentine*

Valentine Court's decision to not give "commercial advertising" First Amendment protection was actually called into question before *Virginia Board. Virginia Board,* however, was the first case to squarely address the issue of whether pure commercial speech was entitled to constitutional protection. *Virginia Board,* 425 U.S. at 760-61. *See supra* note 9.

[49]*Virginia Board,* 425 U.S. at 749-50. Specifically the Virginia Statute provided:

> Any pharmacist shall be considered guilty of unprofessional conduct who (1) is found guilty of any crime involving grave moral turpitude, or is guilty of fraud or deceit in obtaining a certificate of registration; or (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

VA. CODE ANN. § 54-524.35 (Michie 1968).

Justice Blackmun, writing for the *Virginia Board* Court, first addressed the issue of whether the recipients of the prescription drug price information, namely the consumer respondents, had standing to challenge the Virginia statute. *Virginia Board,* 425 U.S. at 756-57. Petitioners argued that only the disseminators of the price information, namely the pharmacists, had standing to bring a First Amendment claim, because it was the pharmacists doing the speaking. *Id.* at 756. Justice Blackmun, rejecting this proposal, held that "where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both. . . . [Thus, i]f there is a right to advertise, there is a reciprocal right to receive the advertising . . ." *Id.* at 756-57.

[50]*Virginia Board,* 425 U.S. at 752.

[51]*Id.* at 758.

decision had been significantly limited by subsequent case law.[52] Notwithstanding, the Justice observed that the Court had yet to address whether pure commercial speech demanded First Amendment Protection.[53] With regard to the Virginia statute, Justice Blackmun explained, the issue of pure commercial speech was before the Court: the statute prohibited a simple commercial transaction - "I will sell you X prescription drug at the Y price."[54]

In determining whether pure commercial speech should be protected by the First Amendment, Justice Blackmun first considered the interests of the pharmacist, the consumer, and the public, in the free flow of commercial information.[55] As to pharmacists, the Justice noted that even if it were assumed that their interest is a "purely economic one,"[56] this fact does not prevent First Amendment protection.[57] As to consumers, the Justice proposed that their interest in commercial information is "keen, if not keener by far, than [their] in-

---

[52]*Id.* at 759-61. For example, in *Cammarano v. United States*, Justice Douglas remarked that the *Valentine* ruling "was casual, almost offhand[, a]nd it has not survived reflection." 358 US. 498, 514 (1959); *see* Lehaman v. City of Shaker Heights, 418 U.S. 298, 314, n.6. (1974).

One year prior to the *Virginia Board* decision, the Court more directly called into question *Valentine's* ruling. In *Bigelow v. Virginia*, the Court recognized that "[o]ur cases . . . clearly establish that speech in not stripped of First Amendment protection merely because it appears in [commercial] form." 421 U.S. 809, 818 (1975). At issue in *Bigelow* was whether a Virginia statute criminalizing the advertising of abortion services was violative of the First Amendment. *Id.* at 811. The Court, answering in the affirmative, *id.* at 825, limited the holding of *Valentine* to *"purely* commercial" speech. *Id.* at 819-21 (emphasis added). In striking down the Virginia statute, the *Bigelow* Court noted that, unlike the advertisement in *Valentine*, "[t]he advertisement published in the appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' . . . Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience. . . ." *Id.* at 822.

[53]*Virginia Board,* 425 U.S. at 760-61.

[54]*Id.*

[55]*Id.* at 762-65.

[56]*Id.* at 762.

[57]*Id.* Citing several supporting cases, the Justice noted that "[t]he interests of the contestants in a labor dispute are primarily economic . . . . We know of no requirement that, in order to avail themselves of First Amendment protection, the parties to a labor dispute need address themselves to the merits of unionism in general . . . ." *Id.* at 762-63 (citations omitted).

terest in the day's most urgent political debate."[58] The Justice recognized that the public also has a strong interest in the unencumbered flow of commercial information.[59] Not only do commercial advertisements sometimes provide the public with non-price information of interest,[60] the Justice stated, but more importantly, even tasteless and excessive advertising contains basic market information that is necessary to the proper functioning of our free enterprise economy.[61]

Against these substantial interests, Justice Blackmun weighed the state's interest in maintaining the professionalism of pharmacists.[62] Pharmacists, the Justice explained, have a duty to provide consumers with quality drugs; to this

---

[58]*Id.* at 763. For example, the Justice explained, older persons with dwindling resources and in need of low priced prescription drugs would be harmed by a price advertising ban; such a ban would keep useful price information from those most in need of it. *Id.* at 763-64. Justice Blackmun reasoned, "When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities." *Id.*

[59]*Id.* at 764.

[60]*Id.* at 764. In many instances, commercial speech includes not only price information, but information about the product itself that has independent importance to the public. *Id.* For example, the advertisement in *Bigelow v. Virginia* included information regarding the availability of abortions. *Id.; see supra* note 52. Presumably, absent the commercial motivation behind the advertisement, information about the product would not reach the public.

[61]*Id.* at 765. Justice Blackmun explained:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Id. (citations omitted); *see supra* note 7.

[62]*Id.* at 766.

end, pharmacists must properly compound, handle, package, label, and dispense their drugs.[63] The Justice determined that the state's primary fear with respect to professionalism is that price advertising would increase competition which, in turn, would result in lower prices.[64] In order to remain competitive, the Justice continued, not only would pharmacists have to cut prices, but presumably they would have to cut the services that would otherwise be provided to the consumer.[65] The Justice concluded that in the end the consumer's health would suffer.[66]

After weighing the interests at stake, Justice Blackmun proceeded to consider the constitutionality of the advertising ban.[67] Here, the Justice emphasized that the purpose of the First Amendment is to protect against "the dangers of suppressing information."[68] As the advertising ban at issue was premised on keeping consumers completely ignorant as to drug prices, it ran directly counter to this First Amendment principle.[69] Therefore, Justice Blackmun concluded that a complete ban on the dissemination of truthful, nonmisleading information about a lawful activity is categorically violative of the First Amendment.[70]

---

[63] *Id.* at 766-67.

[64] *Id.* at 767-68.

[65] *Id.* at 768.

[66] *Id.* at 767. The petitioners, the Justice noted, also argued that advertising would increase pharmacists cost and result in higher prices, that advertising would cause consumers to bargain shop, thereby jeopardizing the pharmacist-customer relationship, and that advertising would adversely affect the professional image of the pharmacist, delegating her to the "status . . . of a mere retailer." *Id.* at 768.

[67] *Id.* at 769.

[68] *Id.* at 770.

[69] *Id.* at 769-70.

[70] *Id.* at 773. Justice Blackmun noted that the holding did not preclude certain regulations of commercial speech. *Id.* at 770. For example, time, place and manner restrictions are sometimes permissible. *Id.* at 771. So too are regulations of false or misleading commercial speech. *Id.* at 771-72; *see supra* note 8. Finally, the Justice noted that the state was free to regulate advertisements that are themselves illegal. *Id.* at 772-73 (citing Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 389 (1973) ("Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which arguably might outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.").

In reaching this conclusion, Justice Blackmun criticized the paternalistic nature of complete prohibitions of advertising.[71] A complete ban on price advertising, the Justice explained, would have a direct effect on the conduct of pharmacists *only* if it were assumed that price advertising would cause drug consumers to substitute superior pharmaceutical services with low priced drugs.[72] Justice Blackmun stressed, however, that the First Amendment prevents the government from presuming how the consumer will react; in fact, the First Amendment commands that consumers be allowed access to market information, notwithstanding any potential misuse of that information.[73]

C. *CENTRAL HUDSON* DECISION

The next major case to address the constitutionality of a complete ban on pure commercial speech was *Central Hudson Gas & Electric, Corp. v. Public Service Commission of New York.*[74] At issue before the *Central Hudson* Court was a New York Public Service Commission regulation which completely banned electric utilities from engaging in promotional advertising.[75] Applying

---

[71]*Id.* at 770.

[72]*Id.* at 769.

[73]Justice Blackmun explained:

> There is, of course, an alternative to [Virginia's] highly paternalistic approach. That alternative is to assume that this information is not harmful in itself, 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. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.

Id. at 770 (citations omitted).

[74]447 U.S. 557 (1980).

[75]*Id.* at 558-59.

a four part test,[76] the Court concluded that the regulation at issue violated the First Amendment.[77] Although the complete prohibition at issue did not pass constitutional muster, the Court intimated that the four part test would permit some complete prohibitions of truthful, nonmisleading commercial speech about lawful activity to survive First Amendment scrutiny.[78] This proposition is of particular significance because it calls into question the *Virginia Board* Court's holding that such prohibitions are absolutely violative of the First Amendment.[79]

While the *Central Hudson* Court reaffirmed much of the reasoning adopted by the *Virginia Board* Court,[80] the *Central Hudson* Court found that commercial speech deserves less protection than other forms of speech protected by the First Amendment.[81] The Court stated that the level of protection commercial speech receives is a function of both the nature of the expression and the nature of the government interest at stake.[82] In the end, the Court observed, the First Amendment is concerned with protecting "the informational function of advertising."[83]

Considering these factors, the Court noted that the government has a strong interest in prohibiting the dissemination of inaccurate commercial speech because such speech is "more likely to deceive the public than to inform it."[84] Given this strong government interest, the Court found that bans on deceptive advertising are constitutional.[85] In contrast, the Court gave less weight to the

---

[76]*See supra* note 11.

[77]*Central Hudson*, 447 U.S. at 570.

[78]*See generally id.* at 565-67.

[79]*See supra* notes 70-73 and accompanying text.

[80]*Id.* at 561-63.

[81]*Id.* at 562-63.

[82]*Id.* at 563.

[83]*Id.*

[84]*Id.* at 563-64 (citing Friedman v. Rogers, 440 U.S. 1, 13, 15-16 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464-65 (1978)).

[85]*Id.* Justice Powell remarked that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Id.* at 563.

government's interest in suppressing nonmisleading speech about lawful activity.[86]

It is for nonmisleading speech about lawful activity that the *Central Hudson* Court developed the four part commercial speech analysis.[87] The *Central Hudson* Court first noted that, in order to receive any First Amendment protection, the commercial speech at issue must at least relate to "lawful activity and not be misleading."[88] Even if the speech concerned lawful activity and was not misleading, the state could nevertheless regulate the speech if it could demonstrate: that it had a substantial governmental interest in regulating the speech; that the interest would be directly advanced by the regulation; and that the regulation "is not more extensive than necessary to serve that interest."[89] Applying this analysis, the Court concluded that New York's advertising ban was unconstitutional.[90]

---

[86]*Id.* at 564.

[87]*Id.* at 564, 566.

[88]*Id.* at 566.

[89]*Id.*

[90]*Id.* at 570. First, the Court noted that "the Commission [did] not claim that the expression at issue [was] either inaccurate or relate[d] to unlawful activity." *Id.* at 566. Therefore, the Court proceeded to determine whether the government's asserted interests satisfied the remaining three steps.

The New York Public Service Commission, the Court explained, proffered two interests in support of its complete prohibition of promotional advertising by electric utilities: energy conservation and the prevention of an inequitable rate structure. *Id.* at 568-69. First, the government asserted that because the advertising of energy sources would result in increased energy consumption, prohibiting advertising would promote energy conservation. *Id.* at 568. Second, the government asserted that because the utility rate structure was not based on marginal cost, an increase in energy consumption during off peak hours would raise rate prices for all consumers. *Id.* at 568-69.

While the Court acknowledged that both of the government's interests were substantial, each was insufficient to support an outright ban on promotional advertising by the utilities. *Id.* First, the Court found that link between a ban on advertising and maintaining an equitable rate structure was, at most, tenuous. *Id.* at 569. Therefore, the state's first asserted interest failed part three of the *Central Hudson* analysis; the interest was not directly advanced by the advertising ban. *Id.* Although the state's interest in conserving energy was directly advanced by prohibiting advertising, *id.*, the Court concluded that a complete ban on advertising was more extensive than necessary to achieve that interest. *Id.* at 569-70. First, the Court noted that the ban prohibited the advertising of all energy related products, *including* ones that were energy efficient. *Id.* at 570. In addition, the Court explained, the state failed to rule out the existence of less intrusive means of conserving energy; the state, for example,

D. *CENTRAL HUDSON*'S PROGENY

While there are a number of cases applying the *Central Hudson* four part analysis,[91] three deserve particular attention: *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico;*[92] *Trustees of the State University of New York v. Fox;*[93] and *Edenfield v. Fane.*[94] In each of these decisions, the Court liberally construed the fourth prong of the *Central Hudson* test. With this liberal construction, the *Central Hudson* test, a test which had dealt a significant blow to *Virginia Board*'s categorical rule against advertising bans, itself was diluted.[95]

---

could have restricted the format and content of the utility's advertisements. *Id.* at 570-71.

[91]*See, e.g.,* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2381 (1995) (holding a 30-day ban on lawyer advertising constitutional pursuant to the *Central Hudson* analysis); Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1591-94 (1995) (holding as violative of *Central Hudson*'s fourth prong a federal regulation prohibiting beer manufacturers from displaying the alcohol content on beer labels); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 411 (1993) (holding an order to remove newsracks containing "commercial handbills" for esthetic and safety reasons violative of *Central Hudson*'s fourth prong); United States v. Edge Broadcasting Co., 509 U.S. 418, 434-35 (1993) (holding constitutional, pursuant to *Central Hudson,* a regulation prohibiting radio broadcasts of lottery advertisements); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 646-47 (holding it unconstitutional, pursuant to *Central Hudson,* for a state to prohibit an attorney from soliciting legal business through a truthful and nonmisleading newspaper advertisement); Bolger v. Youngs Drug Products, Corp., 463 U.S. 60, 75 (1983) (holding as violative of *Central Hudson*'s four part test a statute prohibiting the mailing of unsolicited contraceptive advertisements); *In re* R.M.J., 455 U.S. 191, 205-07 (1982) (holding statute requiring attorney advertisements to contain specific language violative of *Central Hudson*'s four part test); and Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981) (White, J., plurality) (holding regulation of billboards, as applied to commercial billboards, constitutional under *Central Hudson*'s four part test).

[92]478 U.S. 328 (1986).

[93]492 U.S. 469 (1989).

[94]507 U.S. 761 (1993).

[95]It should be noted that for the *Central Hudson* Court, the fourth prong involved a "critical inquiry." *Central Hudson,* 447 U.S. at 569. As the *Central Hudson* Court explained, "[T]he First amendment mandates that speech restrictions be 'narrowly drawn.'" *Id.* at 565 (citation omitted). Continuing, the Court noted, "The regulatory technique may extend *only* as far as the interest it serves. The state cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well." *Id.* (citation omitted) (emphasis added).

In *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto,*[96] a Puerto Rican gambling casino challenged the constitutionality of a Puerto Rico statute that prohibited gambling advertisements targeting Puerto Rican residents.[97] Applying the four part *Central Hudson* test,[98] Justice Rehnquist held that the Puerto Rican statute was constitutional.[99] Of particular significance, Justice Rehnquist, addressing the fourth part of the *Central Hudson* analysis, found that it was within the legislature's discretion to decide the effectiveness of the means chosen to achieve the government's desired end.[100] Thus, the party with the burden of proving that a particular regulation (the means) is "no more extensive than necessary" to serve the government's interest (the end), was left with the ultimate decision as to the effectiveness of the regulatory scheme

---

[96]478 US. 328 (1986).

[97]*Id.* at 330-31.

[98]*Id.* at 340-44. Justice Rehnquist first noted that the commercial speech being regulated - "advertising of casino gambling aimed at the residents of Puerto Rico" - was lawful and not misleading; therefore, Justice Rehnquist concluded that the Puerto Rico regulation would be unconstitutional, unless it could be demonstrated that the regulation satisfied the remaining three prongs of the *Central Hudson* test. *Id* at 340-41. Moving to the second prong, Justice Rehnquist concluded that Puerto Rico's interest in reducing the demand for casino gambling in order to protect "the health, safety, and welfare of its citizens constitute[d] a 'substantial' governmental interest." *Id.* at 341. Thus, an analysis of the third and fourth prongs was warranted. It was with the "last two steps of the *Central Hudson* analysis[,]" the Justice explained, that the Court considers the "'fit' between the legislature's ends and the means chosen to accomplish those ends." *Id.* Justice Rehnquist concluded that the third prong, which asks whether the challenged regulation "'directly advance[s]' the government's asserted interest[,]" was clearly met in this case. *Id.* The Justice explained that the Legislature's belief "that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised . . . [was] a reasonable one." *Id.* at 342. Finally, Justice Rehnquist propounded, "We think it clear beyond peradventure that the challenged statute and regulations satisfy the fourth and last step of the *Central Hudson* analysis, namely, whether the restrictions on commercial speech are no more extensive than necessary to serve the government's interest." *Id.* at 343; *see infra* notes 100-01 and accompanying text for a full explanation of Justice Rehnquist's analysis of the fourth prong.

[99]*Id.* at 344.

[100]*Id.* The appellants, Justice Rehnquist explained, argued that the First Amendment required the Puerto Rican government to reduce the residents demand for gambling, "not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it." *Id.* at 344 (emphasis in original). Rejecting this argument, Justice Rehnquist declared, "We think it is up to the legislature to decide whether or not such a "counterspeech" policy would be as effective in reducing the demand for casino gambling as a restriction on advertising." *Id.*

adopted.[101]

The "fit" between the legislature's means and end became even less demanding in *Trustees of the State University of New York v. Fox.*[102] In *Fox*, a corporation and students challenged a University of New York regulation that prohibited corporations involved in "commercial enterprises" from conducting product demonstrations on school grounds.[103] Before remanding the case to the district court for an application of the *Central Hudson* test,[104] Justice Scalia explained the scope of the "no more extensive than *necessary*" language of the fourth part of the *Central Hudson* test.[105] While Justice Scalia recognized that *dicta* in past Supreme Court commercial speech cases, including *Central Hudson* itself, supported a strict interpretation of the word "necessary,"[106] the Justice concluded that a looser interpretation was more appropriate in light of commercial speech's "subordinate position in the scale of First Amendment values."[107] Thus, instead of requiring that a regulation be the "least-restrictive-means" of achieving the government's end,[108] Justice Scalia adopted a more flexible "narrowly tailored" standard.[109] Under this standard, a regu-

---

[101]In *Bolger v. Young Drug Products Corp.*, the Court explained that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." 463 U.S. 60, 71 n.20 (1983). Therefore, in commercial speech cases that party would invariably be the government.

[102]492 U.S. 469 (1989).

[103]*Id.* at 472.

[104]*Id.* at 486.

[105]*Id.* at 476-81.

[106]*Id.* at 476. In *Central Hudson*, Justice Scalia noted, the Court posited that "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.* at 476 (citing Central Hudson Gas & Elec., Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 564 (1980)). This strict interpretation Justice Scalia explained would translate into a requirement that the government use the "least-restrictive-means" to achieve its desired end. *Id.* In fact, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, Justice Scalia explained, the Court in dicta "assumed . . . the validity of the 'least-restrictive-means' approach." *Id.* (citing *Zauderer*, 471 U.S. at 644, 651 n.14).

[107]*Id.* at 478.

[108]*See supra* notes 105-07 and accompanying text discussing the strict interpretation of the word "necessary" and its relation to the "least-restrictive-means" test.

[109]*Id.* at 479. Justice Scalia found support for the looser, "narrowly tailored," interpre-

lation would be upheld "so long as [it is] 'narrowly tailored' to serve a significant governmental interest."[110] Explaining the new formulation, Justice Scalia noted that the "fit" between the regulation and the government's end need not necessarily be perfect, but reasonable.[111]

In *Edenfield v. Fane,*[112] the Court again reformulated the language of the fourth prong of the *Central Hudson* analysis. While Justice Kennedy affirmed a court of appeals decision which found that a ban on personal solicitation by certified public accountants violated the First Amendment,[113] the Justice dropped the *"narrowly"* tailored language out of *Central Hudson*'s fourth prong.[114] Instead of focusing on the closeness of the "fit" between the government's regulation and the government's desired end, Justice Kennedy focused on the reasonableness of the "fit".[115] Specifically, the Justice stated that in commercial speech cases the regulation "need only be tailored in a *reasonable* manner to serve a substantial state interest in order to survive First

---

tation of the word "necessary" in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). *Id.* at 477. In *Clark*, Justice Scalia explained, the Court found the *Central Hudson* test to be "'substantially similar' to the application of the test for validity of time, place, and manner restrictions upon protected speech . . . ." *Id.* The time, place, and manner test, the Justice observed, did not require that the government find the least restrictive means to achieve its desired end. *Id.* at 477-78. Rather, Justice Scalia explained, the government regulation need only not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 478 (citation omitted).

[110]*Id.* at 478.

[111]*Id.* at 480. More Specifically, Justice Scalia found:

> What our decisions require is a fit between the legislature's ends and the means chosen to accomplish those ends - a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decision makers to judge what manner of regulation may best be employed.

Id. (citations omitted) (internal quotation marks omitted) .

[112]507 U.S. 761 (1993).

[113]*Id.* at 764-65.

[114]*Id.* at 767.

[115]*Id.*

Amendment scrutiny."[116]

IV. *44 LIQUORMART, INC. V. RHODE ISLAND*[117]

In 1995, the Supreme Court granted certiorari to determine the constitutionality of two Rhode Island statutes completely prohibiting truthful, nonmisleading alcohol price advertisements.[118] The Court concluded, in a plurality opinion, that the blanket bans contained in the statutes were unconstitutional.[119] While the decision did not clarify the present state of the commercial speech doctrine with respect to complete regulations of truthful, nonmisleading commercial speech, each of the Court's four opinions did evidence a dissatisfaction with the development of the commercial speech doctrine. In particular, the Court, through its opinion, has called into question the development of the *Central Hudson* analysis.

---

[116]*Id.* (emphasis added). Justice Kennedy also noted that in conducting the *Central Hudson* analysis "we must ask whether the state's interests . . . are substantial, whether the challenged regulation advances these interests in a direct and material way, and whether the extent of the restriction on protected speech is in a *reasonable proportion* to the interests served." *Id.* (emphasis added).

The import of the diluted formulation of *Central Hudson*'s fourth prong was not made evident in the *Edenfield* decision. While the *Edenfield* Court held that the regulation of CPA solicitation was unconstitutional, the Court did not reach *Central Hudson*'s fourth prong; instead the Court held that the state failed to satisfy the third prong of the *Central Hudson* test. *Id.* at 770-71.

[117]For a discussion of *Liquormart*'s facts and procedural history, see part II.

[118]44 Liquormart, Inc. v. Rhode Island, 115 S. Ct. 1821 (1995); *see supra* notes 19-20 & 32 and accompanying text.

[119]44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

A. THE PLURALITY OPINION[120]

Justice Stevens began the plurality opinion for the Court by tracing both the philosophical foundations of commercial speech and supporting case law.[121] The Justice noted that the primary purpose behind protecting commercial speech has long been to ensure the availability of accurate product information to the consuming public.[122]

The Justice, quoting *Virginia Board,* emphasized that the free flow of commercial information is necessary to the preservation of a free market economy and, therefore, is in the public's interest.[123] The Justice further reiterated *Virginia Board's* poignant observation that while the state has an interest in consumer protection, the paternalistic tendency to regulate truthful, nonmisleading commercial information will not serve to protect that interest.[124] In fact, the Justice explained, the First Amendment rejects the suppression of commercial speech in favor of allowing a free flow of information; it is irrelevant that the truthful, nonmisleading information, not harmful in itself, might later be misused by the consumer.[125]

Notwithstanding the protection afforded truthful, nonmisleading commercial speech, Justice Stevens did find that there are some instances when a state may

---

[120] Justice Stevens' divided the plurality opinion into eight sections. A majority of the Court joined only with respect to sections I. II. VII. and VIII. Section I, which discussed the Rhode Island statutes at issue and Rhode Island cases addressing the statutes, was joined by Justices Scalia, Kennedy, Souter, Thomas, and Ginsburg. Section II, which set forth the facts and procedural history, was joined by Justices Scalia, Kennedy, Souter, Thomas, and Ginsburg. Section III, which outlined the history of the commercial speech doctrine through *Central* Hudson, was joined by Justices Kennedy, Souter, and Ginsburg. Section IV, which proposed that a strict level of review should apply to blanket regulations of truthful, nonmisleading commercial speech, was joined by Justices Kennedy and Ginsburg. Section V, which applied the standard of review developed in section IV, was joined by Justices Kennedy, Souter, and Ginsburg. Section VI, which addressed the State of Rhode Island's arguments, was joined by Kennedy, Thomas, and Ginsburg. Section VII, which contained the analysis of the Twenty-first Amendment issue, was joined by Justices Scalia, Kennedy, Souter, Thomas, and Ginsburg. Section VIII, which set forth the holding of the Court, was joined by Justices Scalia, Kennedy, Souter, and Ginsburg.

[121] *Id.* at 1504-07 (Stevens, J., plurality).

[122] *Id.* at 1504 (Stevens, J., plurality).

[123] *Id.* at 1505 (Stevens, J., plurality); *see supra* notes 7 & 61 and accompanying text.

[124] *Id.*; *see supra* notes 71-73 and accompanying text.

[125] *Id.*; *see supra* note 73 and accompanying text.

regulate more freely than it could otherwise - specifically when the regulation does serve the consumer's interest.[126] On this point, the Justice conceded that there are certain "commonsense differences" between commercial speech and more traditional forms of speech afforded First Amendment protection.[127] These differences, the Justice explained, warrant that states sometimes be given more deference when regulating in the commercial speech arena.[128] For example, Justice Stevens observed, the state may regulate commercial speech in order to prevent deceptive advertising[129] or to prevent undue influence over consumers.[130]

---

[126]*Id.*

[127]*Id.* at 1506 (Stevens, J., plurality) (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976); *see supra* note 6 for full text *Virginia Board's* footnote 24.

[128]*Id.* The Justice explained that this is particularly because of the grater objectivity and greater hardiness of commercial speech as compared with more traditional First Amendment speech. *Id.* (citing *Virginia Board*, 425 U.S. at 771 n.24); *see supra* note 6 for full text *Virginia Board's* footnote 24.

[129]*Id.* at 1505-06 (Stevens, J., plurality) (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976)); *see supra* note 6 for full text of *Virginia Board's* footnote 24.

[130]*Id.* (citing Bates v. State Bar of Arizona, 433 U.S. 350, 366 (1977). The Justice also recognized that more deference is generally due state regulation of commercial speech because commercial speech relates to "'an area traditionally subject to government regulation[,]'" namely the selling of goods and services. *Id.* Elaborating, Justice Stevens quoted Laurence Tribe who explained, "The entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services." *Id.* (citing TRIBE, *supra* note 13, at 903 (emphasis in original)). Similarly, Charles Geyh noted:

> Commercial speech is a hybrid of commerce and speech. It is related both to the sale of goods and services and to ideas about those goods and services. As it relates to the sale or promotion of goods and services, it occupies the so-called marketplace of goods and services, where government regulation is regarded as presumptively valid.

Geyh, *supra* note 4, at 3 (citations omitted).

"Nevertheless," Justice Stevens declared, "the State retains less regulatory authority when its commercial speech restrictions strike at the 'substance of the information communicated' rather than [at] the 'commercial aspect of [it].'" 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1506 (1996) (Stevens, J., plurality) (quoting Linmark Assoc's, Inc. v. Willingboro, 431 U.S. 85, 96 (1977); citing Carey v. Population Services Int'l, 431 U.S.

The Justice explained that the purpose of permitting states to regulate commercial speech more freely in such instances is to enable the state to protect the consumer from misleading commercial information, thereby preserving the fair bargaining process.[131] In contrast, Justice Stevens emphasized that a blanket ban on truthful and nonmisleading commercial speech does not have as its end the preservation of the fair bargaining process and, as such, is subject to a more careful review.[132] The Justice intimated that a blanket ban is more likely to have as its end a "nonspeech-related policy" such as promoting energy conservation.[133] In these circumstances, the Justice explained, the state pursue a hidden governmental policy under the guise of regulating commercial speech.[134]

678, 701 n.28 (1977)).

[131]*Liquormart*, 116 S. Ct. at 1507 (Stevens, J., plurality).

[132]*Id.* Specifically, Justice Stevens concluded that "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.*

[133]*Id.* at 1506-07. In *Central Hudson,* the state proffered as one of the ends of its regulation of promotional advertising the promotion of energy conservation. Central Hudson Gas & Elec., Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 568-69 (1980).

[134]*Id.* In so concluding, Justice Stevens relied primarily on *Central Hudson. Id.* at 1506-07 (Stevens, J., plurality). In *Central Hudson,* the Justice explained, a majority of the Court recognized that:

> [A]lthough the special nature of commercial speech may require less than strict review of its regulation, special concerns arise from "regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." In those circumstances, "a ban on speech could screen from public view the underlying governmental policy." As a result, the Court concluded that "special care" should attend the review of such blanket bans, and it pointedly remarked that "in recent years this Court has not approved a blanket ban on commercial speech unless the speech itself . . . was deceptive or related to unlawful activity."

Id. (quoting Central Hudson Gas & Elec., Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566 n.9 (1980)).

Although Justice Stevens did not make clear how strict the review of complete bans of truthful, nonmisleading commercial speech should be, it is clearly a more strict standard than that applied by cases subsequent to *Central Hudson.* In cases subsequent to *Central Hudson,* the Court has required of the fourth prong only a "reasonable fit" between the state's regulation and its substantial interest. *See, e.g.,* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2380-81 (1995); Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993);

Given that the regulations at issue were blanket regulations of truthful, nonmisleading commercial speech and had as their end a nonspeech related policy, unrelated to the fair bargaining process, Justice Stevens reviewed them under the strict four prong inquiry first introduced in *Central Hudson.*[135] The Justice was mindful, in reviewing the state's regulations, that "prohibitions, [such as those at issue] rarely survive constitutional review."[136]

First, Justice Stevens determined that Rhode Island sought to regulate truthful, nonmisleading commercial speech about lawful products; therefore, the state satisfied *Central Hudson's* first prong.[137] Moving to the second prong,

---

Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989). In *Fox*, Justice Scalia, applying *Central Hudson's* fourth prong, explained:

> What our decisions require is a fit between the legislature's ends and the means chosen to accomplish those ends - a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decision makers to judge what manner of regulation may best be employed.

492 U.S. 469, 480 (1989) (citations omitted) (internal quotation marks omitted); *see supra* notes 102-11 and accompanying text discussing the *Fox* decision.

In the plurality opinion, Justice Stevens explicitly rejected the *Fox* requirement of a "reasonable fit," in favor of a "more stringent constitutional review." *Liquormart*, 116 S. Ct. at 1510 (Stevens, J., plurality). A more rigorous review is particularly important because blanket bans, such as those at issue, generally foreclose alternative means of making available the regulated speech. *Id.* at 1507 (Stevens, J., plurality).

Thus, it is evident that Justice Stevens may, in fact, have meant to require the least restrictive means of reaching the government's desired objective. Justice Stevens' interpretation would certainly give the *Central Hudson* test teeth, at least with respect to blanket bans on truthful, nonmisleading commercial speech.

[135]*Liquormart*, 116 S. Ct. at 1508 (Stevens, J., plurality) (citing *Central Hudson*, 447 U.S. at 566 n.9); *see supra* note 132 discussing Justice Stevens abandonment of the *Central Hudson* analysis that developed in cases such as *Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *see also supra* part III.D discussing *Central Hudson*'s progeny; notes 12-14 and accompanying text discussing the troubles encountered subsequent to the introduction of the *Central Hudson*'s analysis.

[136]*Liquormart*, 116 S. Ct. at 1508 (Stevens, J., plurality) (citing *Central Hudson*, 447 U.S. at 566 n.9).

[137]*Id.* The Justice stated that "there is no question that Rhode Island's price advertising ban constitutes a blanket prohibition against truthful, nonmisleading speech about a *lawful*

the Justice conceded that the state had a substantial interest in promoting temperance.[138] Thus, it was with the third and fourth prongs of the *Central Hudson* test that Justice Stevens found issue.

As to the third prong, the state argued that the alcohol beverage price regulations directly advanced the promotion of temperance.[139] Considering this claim, Justice Stevens emphasized that "a commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose'";[140] rather, the state must advance its interest "'to a material degree.'"[141] As such, the Justice determined that the state had the burden of showing that the regulation *significantly* reduced alcohol consumption.[142] Because the state failed to offer any evidence to make the required demonstration, Justice Stevens concluded that the state had failed to meet its burden.[143]

Justice Stevens next considered the fourth and final prong of the *Central Hudson* test.[144] Here, the Justice also concluded that the state failed to meet its burden.[145] In particular, the Justice observed that the state did not demonstrate that the alcohol price advertising ban was "no more extensive than neces-

---

product." Id. (emphasis added).

[138]*Id.* at 1509 (Stevens, J., plurality).

[139]*Id.*

[140]*Id.* (quoting Central Hudson Gas & Elec, Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 564 (1980)).

[141]*Id.* (quoting Edenfield v. Fane, 507 U.S. 761, 771 (1993)).

[142]*Id.* (emphasis in original).

[143]*Id.* at 1509-10 (Stevens, J., plurality). The Justice added that merely making a claim that the alcohol price advertising ban would directly promote temperance, without offering supporting evidence of such a result, would have the court engage in constitutional speculation. *Id.* at 1510 (Stevens, J., plurality) (citing *Edenfield*, 507 U.S. at 770). Specifically, the Justice pointed to the district judge's finding that the state had not identified a price level that would "lead to a significant reduction in alcohol consumption, nor has it identified the amount that it believes prices would decrease without the ban." *Id.* Justice Stevens observed that to speculate on the effects of a regulation when First Amendment concerns are at issue would erroneously validate the state's paternalistic ends. *Id.*

[144]*Id.*

[145]*Id.*

sary."[146] Justice Stevens noted several alternative means that the state could have used in order to achieve the end of promoting temperance, including regulations of the price of alcohol, increased taxation of alcohol, and educational campaigns directed at deterring alcohol consumption.[147] The Justice concluded that because the state could not meet even the "reasonable fit" test generally applicable in commercial cases,[148] the state's "price advertising ban [certainly could not] survive the more stringent constitutional review that *Central Hudson* itself concluded was appropriate for the complete suppression of truthful, nonmisleading commercial speech."[149]

---

[146]*Id.*

[147]*Id.*

[148]*Id.* (citing Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 459, 480 (1989) (other citations omitted)); *see supra* notes 102-11, 134 explaining the origins of the "reasonable fit" test.

[149]*Liquormart*, 116 S. Ct. at 1510 (Stevens, J., plurality) (citing Central Hudson Gas & Elec., Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566 n.9 (1980)).

Justice Stevens closed his analysis of the First Amendment issue by addressing three arguments that the state claimed saved the regulations at issue. *Id.* at 1510-11 (Stevens, J., plurality). The state's first contention, the Justice explained, was that the decision to regulate the advertising of price was a *reasonable* choice by the legislature and, therefore, was due deference. *Id.* at 1511 (Stevens, J., plurality). The state primarily relied on the Court's decision in *Posadas de Puerto Rico Assoc. v Tourism Co. of Puerto Rico* in which the Court found it to be the state's prerogative to choose between available alternatives in achieving its desired end. *Id.* According to Justice Stevens the *Posadas* Court gave the state the power, through its choice, to effectively circumvent *Central Hudson's* fourth prong. *Id.* The *Posadas* Court's interpretation, the Justice proclaimed was erroneous and out of line with many prior cases. *Id.; see* Posadas de Puerto Rico Assoc. v Tourism Co. of Puerto Rico, 478 U.S. 328, 350 (Brennan, J., dissenting) (listing cases). Therefore, the Justice rejected the state's first argument for adopting a highly deferential approach to analyzing blanket commercial speech prohibitions. *Liquormart*, 116 S. Ct. at 1511-12 (Stevens, J., plurality).

Next, Justice Stevens addressed the state's second argument which also relied on the *Posadas* decision. *Id.* at 1512 (Stevens, J., plurality). In *Posadas,* Justice Stevens explained, the Court concluded that the state's power to completely ban gambling, included the lesser power to completely ban advertising of gambling. *Id.* (citing *Posadas*, 478 U.S. at 345-46). In rejecting this claim, Justice Stevens first noted that a prior case had already disposed of the "greater includes the lesser" argument. *Id.* (citing Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995)). In addition, Justice Stevens found troubling the contention that the power to ban the activity of gambling was a greater power than that of banning speech about gambling. *Id.* The First Amendment, the Justice posited, presumes that the regulation of speech is dangerous and, therefore, the state's power regulate speech is scrutinized; in turn, the state's power over speech is diminished and is, in fact, less than its power of regulating conduct. *Id.* at 1512-13 (Stevens, J., plurality).

Justice Stevens concluded the plurality opinion by addressing the state's and the court of appeals' position that the Twenty-first Amendment gave Rhode Island's alcohol price advertising ban a presumption of validity.[150] Justice Stevens found that although the Twenty-first Amendment gives "the states the power to prohibit commerce in, or the use of, alcoholic beverages," this does not diminish or change the state's duties under other constitutional provisions.[151] Therefore, Justice Stevens concluded that, notwithstanding the state's power under the Twenty-first Amendment, both of the Rhode Island statutes regulating alcohol price advertising were unconstitutional.[152]

B. JUSTICE THOMAS' OPINION

Justice Thomas concurred in the judgment that the Rhode Island statutes violated the First Amendment, but reached that result without relying on *Central Hudson*.[153] Justice Thomas found the state's regulations *per se* illegiti-

---

Finally, Justice Stevens considered the state's third argument that the regulation should be permitted pursuant to a "vice" exception to the commercial speech doctrine. *Id.* at 1513 (Stevens, J., plurality). Rejecting this argument, the Justice noted that not only is it difficult to determine what constitutes a vice activity, but given that the activity at issue, the selling of alcohol, is lawful it would be anomalous to classify it as a vice. *Id.* Further, a vice exception would permit state's to circumvent the First Amendment by merely placing the vice label on an activity. *Id.*

[150]*Liquormart,* 116 S. Ct. at 1514 (Stevens, J., plurality).

[151]*Id.* The Eighteenth Amendment prohibited "the manufacture, sale, or transportation of intoxicating liquors" from 1919 through 1933. *Id.* The Twenty-first Amendment repealed the Eighteenth Amendment and gave the power to regulate and prohibit alcohol use and trade to the states. *Id.*; *see supra* note 18 for the text of the Twenty-first Amendment.

Justice Stevens distinguished the case relied on by the state, *California v. LaRue,* 409 U.S. 109 (1972). *Liquormart,* 116 S. Ct. at 1514 (Stevens, J., plurality). In *LaRue,* Justice Stevens explained, the Court found constitutional a California prohibition of sexually explicit exhibitionism in "premises licensed to serve alcoholic beverages." *Id.* According to the Justice, the Court buttressed its decision by finding that "the Twenty-first Amendment required that the prohibition be given an added presumption in favor of its validity." *Id.* (citing *LaRue,* 409 U.S. at 118-19). Justice Stevens opined that given the state's inherent power to regulate such "bacchanalian revelries" as existed in the case, the *LaRue* did not need to rely on the Twenty-first Amendment. *Id.* (citing *LaRue,* 409 U.S. at 118). In addition *Capital Cities Cable, Inc. v. Crisp,* decided nearly 10 years after *LaRue,* explained that the Twenty-first Amendment "does not license the states to ignore their obligations under other provisions of the Constitution." *Id.* (citing 467 US. 691, 712 (1984)).

[152]*Liquormart,* 116 S. Ct. at 1515 (Stevens, J., plurality).

[153]*Id.* at 1516 (Thomas, J., concurring). Justice Thomas did agree with Justice Stevens'

mate.[154] For Justice Thomas, *Virginia Board* was the controlling precedent.[155] Justice Thomas opined that the *Virginia Board* Court left no room for second guessing the illegitimacy of prohibitions on truthful, nonmisleading commercial speech—prohibitions which keep the consuming public ignorant as to their market choices.[156] Accordingly, Justice Thomas found the four prong inquiry of the *Central Hudson* Court to be inapplicable to the regulations at issue.[157]

In fact, Justice Thomas criticized the *Central Hudson* test and the subsequent decisions applying it.[158] The Justice found that Courts applying *Central Hudson*'s four prong test have permitted states to manipulate consumer choices *via* commercial speech regulations.[159] The Justice opined that, according to these decisions, if the government can show that a manipulation is in fact successful, then the manipulation will be found constitutional.[160] More specifically, the Justice asserted that *Central Hudson's* third prong would permit, in the case at bar, a ban on alcohol price advertising so long as the state could show that such a ban would significantly decrease consumption.[161] In other words, the Justice reasoned that the more successful a state's manipulation, the greater the likelihood that it will be upheld. For Justice Thomas, this analysis ignored the rationale of the *Virginia Board* Court, namely that the protection of

---

analysis of the Twenty-first Amendment issue. *Id.* at 1515 (Thomas, J., concurring).

[154]*Id.*

[155]*Id.* at 1516-17 (Thomas, J., concurring).

[156]*Id.* at 1518 (Thomas, J., concurring). Specifically, Justice Thomas declared, "I do not believe that [the *Central Hudson* test] . . . should be applied to a restriction of "commercial" speech, at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark." *Id.*

[157]*Id.*

[158]*Id.* at 1517 (Thomas, J., concurring).

[159]Id.

[160]*Id.* (citing Posadas de Puerto Rico Associates v. Tourism Co. of P.R., 478 U.S. 328, 341-42 (1986); United States Edge Broadcasting, 509 U.S. 418, 425, 433-34 (1993)). In *Posadas* and *Edge*, the Justice explained, "the Court simply presumed that advertising of a product or service leads to increased consumption; since, as in *Central Hudson,* the Court saw nothing impermissible in the government's suppressing information in order to discourage consumption, it upheld the advertising restrictions. . . ." *Id.* (citations omitted).

[161]*Id.* at 1518 (Thomas, J., concurring); *see supra* notes 139-43 and accompanying text for a similar analysis of the third prong by Justice Stevens.

truthful commercial speech is of utmost importance to the free market economy and simply should not be prohibited.[162]

Justice Thomas also noted that Justices Stevens' plurality opinion and O'Connor's concurring opinion adopted a stricter interpretation of the fourth prong of the *Central Hudson* test than had other Justices.[163] Under these more demanding interpretations of *Central Hudson*, Justice Thomas explained, a complete prohibition of truthful commercial speech would rarely, if ever, survive, because less restrictive alternatives would almost always be available.[164] As such, Justice Thomas proposed that it would be better to simply adopt the categorical rule initially set forth in *Virginia Board* - "that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible".[165]

---

[162]*Id.* at 1518 (Thomas, J., concurring). Earlier in the opinion, Justice Thomas emphasized the significance of the protection given commercial speech. *Id.* at 1517 (Thomas, J., concurring). The Justice propounded:

> In case after case following *Virginia Pharmacy*, the Court, and individual Members of the Court, have continued to stress the importance of the free dissemination of information about commercial choices in a market economy; the anti-paternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; the near impossibility of severing "commercial" speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.

Id. (citations omitted). In fact, Justice Thomas "did not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *Id.* at 1518 (Thomas, J., concurring).

[163]*Id.* at 1518-19 (Thomas, J., concurring); *see supra* 131-34 and accompanying text and *infra* note 182.

[164]*Id.* at 1519 (Thomas, J., concurring). The Justice explained:

> [I]t would seem that *directly* banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be, and thus virtually all restrictions with such a purpose would fail the fourth prong of the *Central Hudson* test.

Id. (emphasis added).

[165]*Id.*

C. JUSTICE SCALIA'S OPINION

Although Justice Scalia agreed with Justice Thomas' conclusion that the *Central Hudson* test is troublesome[166] and with Justice Stevens' criticism of paternalistic governmental regulation of commercial speech,[167] the Justice was unwilling to join either opinion. For reasons largely attributable to *stare decisis,* Justice Scalia concluded that the current formulation of *Central Hudson* would have to apply.[168] Therefore, Justice Scalia wrote separately merely to concur in the final judgment.[169]

D. JUSTICE O'CONNOR'S OPINION

Justice O'Connor concurred in the judgment, joined by Chief Justice Rehnquist and Justices Souter and Breyer.[170] Justice O'Connor explicitly rejected most of Justice Stevens' analysis finding the development of a stricter standard for analyzing commercial speech regulation unnecessary under the facts of the case.[171] Specifically, Justice O'Connor, quoting Justice Stevens, concluded that "even under the less than strict standard that generally applies in commercial speech cases, the State has failed to establish a reasonable fit between its abridgment of speech and its temperance goal."[172] Thus, Justice

---

[166]*Id.* at 1515 (Scalia, J., concurring). Justice Scalia proclaimed that the *Central Hudson* test seemed to have "nothing more than policy intuition to support it." *Id.*

[167]*Id.*

[168]*Id.* Specifically, Justice Scalia stated, "Since I do not believe we have before us the wherewithal to declare *Central Hudson* wrong—or at least the wherewithal to say what ought to replace it—I must resolve this case in accord with our existing jurisprudence." *Id.* Without engaging in the *Central Hudson* analysis, Justice Scalia found that the Rhode Island statutes violated the First Amendment. *Id.* Justice Scalia also agreed that Justice Stevens' analysis of the Twenty-first Amendment issue was correct. *Id.*

[169]*Id.* The Justice noted, "I am not disposed to develop new law, or reinforce old, on this issue, and accordingly I merely concur in the judgment of the Court." *Id.*

[170]*Id.* at 1520 (O'Connor, J., concurring).

[171]*Id.* at 1522 (O'Connor, J., concurring).

[172]*Id.* (citing *Liquormart,* 116 S. Ct. at 1510 (Stevens, J., plurality)). Thus, it is with the application of the *Central Hudson*'s fourth prong that Justice O'Connor parts from Justice Stevens First Amendment analysis. *See supra* note 134 and accompanying text for a discussion of the implications of Justice Stevens' analysis on the fourth prong.

O'Connor applied the formulation of the *Central Hudson* four prong test that had developed in cases subsequent to *Central Hudson*.[173]

First, Justice O'Connor recognized that the parties had already stipulated that the state satisfied the first two prongs of the *Central Hudson* test.[174] Next, the Justice assumed *arguendo* that the alcohol price advertisement bans directly advanced the state's interest in promoting temperance; thus, the state also satisfied the third prong.[175] Therefore, Justice O'Connor needed only to consider *Central Hudson's* fourth prong.[176]

For Justice O'Connor, *Central Hudson*'s fourth prong demanded only a "reasonable fit" between the price advertising ban and the state's interest in promoting temperance.[177] Justice O'Connor explained that if less burdensome alternatives exist which would serve the state's interest, then the fit between the regulations and the state's interest should not be considered reasonable.[178] Conversely, the Justice observed that if a commercial speech regulation does not unduly foreclose alternative means of disseminating the regulated information, then the regulation is likely reasonable.[179]

Applying these principles, Justice O'Connor concluded that the regulations at issue were unconstitutional.[180] Justice O'Connor pointed to the many less burdensome alternatives for promoting temperance, including fixing minimum prices, increasing sales taxes, limiting purchases, and implementing deterrent educational campaigns.[181] Further, the Justice noted that the alcohol price ad-

---

[173]*Id.* at 1521-22 (O'Connor, J., concurring); *see supra* part III.D. Justice O'Connor did not fully agree with the Court's subsequent interpretation of the *Central Hudson* test. *See infra* note 182.

[174]*Id.* at 1521 (O'Connor, J., concurring).

[175]*Id.*

[176]*Id.*

[177]*Liquormart*, 116 S. Ct. at 1521 (O'Connor, J., concurring) (citing Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989); Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2380-81 (1995); Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993)); *see supra* notes 102-111, 134 discussing *Trustees of State Univ. of N.Y. v. Fox*.

[178]*Liquormart*, 116 S. Ct. at 1521 (O'Connor, J., concurring) (citing Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1593-94 (1995); *Cincinnati*, 507 U.S. at 1510 n.13).

[179]*Id.* (citing *Florida Bar*, 115 S. Ct. at 2380-81).

[180]*Id.* at 1523 (O'Connor, J., concurring).

[181]*Id.* at 1521-22 (O'Connor, J., concurring).

vertising ban foreclosed almost all avenues for disseminating information about price.[182] Finally, Justice O'Connor concluded that the Twenty-first Amendment did not change the state's burden under the *Central Hudson* analysis.[183]

V. CONCLUSION

The *Liquormart* decision has been called the most important commercial speech decision handed down by the Court since *Bigelow v. Virginia.*[184] The importance of the *Liquormart* decision, however, is not attributable to the Court's holding. Both Justices Stevens and O'Connor recognized that the Rhode Island statutes at issue in *Liquormart* were unconstitutional "even under the less strict standard that generally applies in commercial speech cases."[185]

---

[182]*Id.* at 1522 (O'Connor, J., concurring). Before concluding the analysis of the First Amendment issue, Justice O'Connor briefly addressed, the state's reliance on the *Posadas* decision. *Id.* (citing Posadas se Puerto Rico Associates v. Tourism Co. of P.R., 478 U.S. 328 (1986)). In *Posadas*, Justice O'Connor explained, the State of Puerto Rico attempted to ban advertising of gambling as to Puerto Rican residents, but allow advertising as to tourists. *Id.* The Court, Justice O'Connor continued, accepted the reasonableness of the ban without a searching inquiry; it did not question the legislatures findings that the ban "furthered the government's interest and [was] no more extensive than necessary to serve that interest." *Id.*

Relying on *Posadas*, Rhode Island argued that its challenged regulations were similarly reasonable, and, therefore, constitutional. *Id.* Justice O'Connor flatly rejected this suggestion noting that several cases subsequent to *Posadas* have applied a more searching inquiry. *Id.* (citations omitted). Justice O'Connor explained that "[t]he closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson*, by requiring the state to show that the speech restriction directly advances its interest and is narrowly tailored." *Id.*

[183]*Id.* at 1522-23 (O'Connor, J., concurring). Justice O'Connor rejected the Court of Appeal's reliance on *California v. LaRue*, 409 U.S. 109, 118-19 (1972), for essentially the same reasons as did Justice Stevens. *Id.* at 1523 (O'Connor, J., concurring); *see supra* note 148 discussing Justice Stevens' rejection of the Court of Appeals interpretation of *LaRue*.

[184]*See, e.g., 1995-1996 Term: Decisions -- First Amendment -- 44 Liquormart, Inc. v. Rhode Island*, THE NATIONAL LAW JOURNAL, July 29, 1996, at C13 ("Although the dispute focused solely on advertisments for liquor, the [*Liquormart*] ruling seemed to be far broader, and may become the Court's most important statement on commercial speech since its landmark 1975 decision in *Bigelow v. Virginia*, 421 U.S. 809, which said commercial speech is entitled to some First Amendment Protection.").

[185]44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1510 (1996) (Stevens, J., plurality); *id.* at 1522 (O'Connor, J., concurring).

The case simply did not present the Court with a fact scenario that demanded a reevaluation of the commercial speech doctrine. Notwithstanding, several of the Justices were committed to re-examining the level of First Amendment protection afforded truthful, nonmisleading commercial speech.[186] It is because of this re-examination that the *Liquormart* decision is important.

Basically, the Court's four opinions grapple with the question of whether the "reasonable fitness" formulation of *Central Hudson's* fourth prong[187] should apply when reviewing blanket bans of truthful, nonmisleading speech about lawful activity. Considering the *Liquormart* Court's opinions, there is evidence that a majority of the Justices are dissatisfied with the development of the commercial speech doctrine since *Central Hudson.*

In section IV of the plurality opinion, Justice Stevens, joined by Justices Kennedy and Ginsburg, proposed that commercial speech should be afforded a different level of protection depending on what type of commercial speech the government was regulating.[188] For Justice Stevens, commercial speech that is deceptive and misleading is due less protection than commercial speech that is truthful and nonmisleading.[189] It can be intimated from Justice Stevens' opinion that the level of review the Justice would apply to regulations of truthful, nonmisleading commercial speech is more strict than the level of review that has developed in cases subsequent to *Central Hudson.*[190] It is a level of review, the Justice proclaimed, under which regulations rarely survive.[191]

The other three opinions also questioned the development of the commercial speech doctrine. Justice Thomas proposed a standard of review for regulations of truthful, nonmisleading commercial speech that was even more restrictive than Justice Stevens' standard of review. For Justice Thomas blanket bans on truthful, nonmisleading commercial speech should be *per se* illegitimate.[192] In support of this proposal, the Justice relied on the categorical rule adopted by the *Virginia Board* Court, under which "all attempts to dissuade

---

[186] *Id.* at 1507-08 (Stevens, J., plurality); *id.* at 1515-1520 (Thomas, J., concurring).

[187] *See supra* part III. D and note 134.

[188] *Liquormart,* 116 S. Ct. at 1507; *see generally* supra notes 126-34.

[189] *Liquormart,* 116 S. Ct. at 1507.

[190] *See supra* note 134.

[191] *Liquormart,* 116 S. Ct. at 1508.

[192] *Id.* at 1516.

legal choices by citizens by keeping them ignorant are impermissible."[193] In reaching this conclusion, Justice Thomas rejected any reliance on *Central Hudson* or its progeny.[194] In agreement with Justice Thomas, Justice Scalia also expressed a "discomfort with the *Central Hudson* test[,]" noting that the test "seems . . . to have nothing more than policy intuition to support it."[195] Finally, although, Justice O'Connor did rely on the reasonable fitness test of *Central Hudson's* progeny, the Justice rejected the extreme deference with which the *Posadas* Court provided the state legislature when it makes a choice as to the means of achieving an asserted end.[196]

In conclusion, it is clear that the *Liquormart* decision does lay the groundwork for constructive change of the commercial speech doctrine. It is not entirely clear, however, what that change will be, but it is probable that the *Central Hudson* test will be revitalized. As the above indicates, several of the Justices agree that presently the protection afforded truthful, nonmisleading commercial speech is weak. As such, the continued application of the "reasonable fitness" formulation of the *Central Hudson* test to truthful, nonmisleading speech seems questionable.

---

[193] *Id.* at 1520.

[194] *Id.* at 1515-18.

[195] *Id.* at 1515.

[196] *Id.* at 1522; *see supra* note 182.