FIRST AMENDMENT—COMMERCIAL SPEECH—FIRST AMENDMENT PROHIBITS LAWS THAT FAVOR NEWSRACKS CONTAINING NON-COMMERCIAL PUBLICATIONS OVER DISPENSING DEVICES CONTAINING COMMERCIAL PUBLICATIONS—*City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993).

Traditionally, commercial speech[1] was not protected by the First Amendment.[2] Despite the importance of commercial

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[1] The Supreme Court of the United States has defined commercial expression as speech that "does 'no more than propose a commercial transaction.'" Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)). The Court has also defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 561 (1980) (citations omitted). For further definition and discussion of commercial speech, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.29 (4th ed. 1991) (discussing the incorporation of commercial speech into the First Amendment); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-15 (2d ed. 1988) (defining commercial speech); BLACK'S LAW DICTIONARY 271 (6th ed. 1990) (explaining that commercial speech "advertise[s] a product or service for profit or for business purpose").

Several commentators have also explored definitions of commercial speech. *See, e.g.*, Todd F. Simon, *Defining Commercial Speech: A Focus on Process Rather Than Content*, 20 NEW ENG. L. REV. 215, 218-19, 237-45 (1984-85) (offering a definition of commercial speech that accommodates the realities of advertising); David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 382-90 (1990) (discussing the Court's difficulties in attempting to define commercial speech).

Despite these definitions of commercial speech, the Supreme Court has recognized "the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978) (citation omitted). The Court's definition, however, has not clearly distinguished commercial and non-commercial speech. *See* Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289, 289 n.1 (1987) (citation omitted) (observing that an investment newsletter can function as an advertisement soliciting business and as a source of general information); *see also* Frederick Schauer, *Commercial Speech And The Architecture Of The First Amendment*, 56 U. CIN. L. REV. 1181, 1183 (1988) (noting that the category of commercial speech is much larger than the limited class of commercial advertising).

For a discussion of the free speech doctrine as it generally applies to political speech and other "core" speech, see NOWAK & ROTUNDA, *supra*, ch. 16; TRIBE, *supra*, ch. 12.

[2] Paul A. Blechner, *First Amendment: Supreme Court Rejection Of The Least Restrictive Alternative Test*, 1990 ANN. SURV. AM. L. 331, 333 (1991). State legislatures were free to regulate commercial speech without running afoul of the First Amendment. *Id.*; *see also* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (stating that the United States Constitution proposes no restraint on governmental power to regulate purely commercial advertising).

The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

speech,[3] the Supreme Court of the United States failed to extend First Amendment protection to such expression until 1976.[4] Even when the Supreme Court finally afforded such protection to commercial speech, however, the Court did not bestow the same level of constitutional protection to commercial speech as it had to non-commercial expression.[5]

Moreover, in failing to provide commercial speech full consti-

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Two of the principal theories underlying the First Amendment are: (1) the "marketplace of ideas"; and (2) the notion that free speech is essential "to intelligent self-government in a democratic system." TRIBE, *supra* note 1, § 12-1, at 786. Justice Holmes introduced the notion of the marketplace of ideas in *Abrams v. United States*. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating that "the ultimate good desired is better reached by the free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

[3] *See* Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093, 1109 & n.55 (1991) (observing that "the sole or primary purpose of speech [including commercial speech] is to help listeners make informed decisions"); Donald Meiklejohn, *Commercial Speech and the First Amendment*, 13 CAL. W. L. REV. 430, 454-55 (1977) (stating that commercial speech and advertising are "essential to both private and public decision-making"). Justice Blackmun has also expressed similar views. *See Virginia Pharmacy*, 425 U.S. at 763 (stating that the interest in the dissemination of commercial information may be much stronger than the interest in the most important political issues).

[4] *Virginia Pharmacy*, 425 U.S. at 770. One year earlier in *Bigelow v. Virginia*, the United States Supreme Court held that an ordinance prohibiting the advertisement of out-of-state abortions was unconstitutional. Bigelow v. Virginia, 421 U.S. 809, 811, 829 (1975). The *Bigelow* Court, however, decided the case from the standpoint of protecting the communication of a constitutionally protected activity. *See* TRIBE, *supra* note 1, § 16.31, at 1019 (explaining that *Virginia Pharmacy* indicated that *Bigelow* stood only for the narrow proposition that a state may not ban advertising for activities that are constitutionally protected).

[5] *See* Martin H. Redish, *The Value Of Free Speech*, 130 U. PA. L. REV. 591, 630 (1982) (pointing out that the *Virginia Pharmacy* Court's analysis in providing commercial speech First Amendment protection "contained the seeds of its own destruction"). Specifically, Professor Redish criticized the Court's reasoning that commercial speech is more verifiable than political speech and "hardier" than fully protected speech. *Id.* at 633. This criticism lead Professor Redish to reject the Court's decision to afford commercial speech less First Amendment protection than core speech. *Id.*

Political speech receives full First Amendment protection. NOWAK & ROTUNDA, *supra* note 1, § 16.26, at 1011. When a government regulation is directed at the communicative impact of core speech, the "regulation is unconstitutional unless government shows that the message being suppressed poses a 'clear and present danger,' constitutes a defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the [F]irst [A]mendment from those open to government regulation with only minimal due process scrutiny." TRIBE, *supra* note 1, § 12-2, at 791-92. Where the government regulation seeks to restrict the noncommunicative impact of speech or an act, the regulation is constitutional, as long as the regulation does not overly restrict the circulation of information. *Id.* at 792. Here, the Court balances the interests of the speaker against those of the government. *Id.*

tutional protection, the United States Supreme Court has not consistently applied one standard.[6] Initially, the Court employed a balancing approach, weighing the governmental interest in regulating the commercial speech against the value of the speech itself.[7] Later, however, the Court formulated a four-part test requiring that a regulation affecting commercial speech directly advance the government's asserted interests and not be more extensive than necessary to serve the government's reasons for the regulation.[8] At times, the Court has required the government to satisfy this standard by showing that the regulation at issue was the least restrictive alternative available.[9] But in more recent decisions, the Supreme Court has provided governmental authorities greater latitude to regulate commercial speech.[10]

In a recent case, *City of Cincinnati v. Discovery Network, Inc.*,[11]

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6 *See* Blechner, *supra* note 2, at 331-32 (observing that the Supreme Court's recent rejection of the least restrictive alternative analysis as part of the *Central Hudson* test has decreased the protection afforded to commercial speech to the same level provided prior to *Virginia Pharmacy*).

In *Virginia Pharmacy*, the Court balanced the government's interest in suppressing speech against persons' interests in trying to communicate and receive ideas. *Virginia Pharmacy*, 425 U.S. at 763-68. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court employed a four-part test to measure the constitutionality of the government's actions. Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566 (1980). *See infra* notes 40-90 and accompanying text (discussing the standards the Court has applied when evaluating regulations on commercial speech).

7 *Virginia Pharmacy*, 425 U.S. at 763-70. The Court balanced the interests of the consumers, as receivers of information, and pharmacists, as communicators of information, against the state's interest in regulating the professionalism of pharmacists. *Id.* See *infra* notes 51-57 and accompanying text for a further discussion of the balancing approach employed in *Virginia Pharmacy*.

8 *Central Hudson*, 447 U.S. at 566. For a discussion of the *Central Hudson* test, see *infra* notes 60-63 and accompanying text.

9 *See, e.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73, 75 (1983) (finding that a complete ban on mailing contraceptive advertisements was broader than necessary); *Central Hudson*, 447 U.S. at 570-71 (explaining that the government must use other measures to further its interests or show that other measures are ineffective).

The *Central Hudson* Court asserted that this "least restrictive" alternative test was satisfied by two criteria. *Central Hudson*, 447 U.S. at 564-66. First, the Court asserted, the regulation was required to directly further the state's interest. *Id.* at 564. Second, requiring a "narrowly drawn" regulation, the Court stated that an excessive restriction would be struck down. *Id.* at 566 (citation omitted).

10 *See, e.g.*, Board of Trustees of the State Univ. of New York v. Fox, 109 S. Ct. 3028, 3033 (1989) (requiring that the state's means of regulating commercial speech be "narrowly tailored" to serve governmental interests); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S 328, 344 (1986) (stating that the legislature must decide whether other alternatives would suffice in curtailing the demand for casino gambling). *See infra* notes 73-83 and accompanying text (discussing the *Posadas* decision) and *infra* notes 84-90 and accompanying text (analyzing *Fox*).

11 113 S. Ct. 1505 (1993).

the United States Supreme Court applied the *Central Hudson Gas & Electric v. Public Service Commission of New York*[12] test and required the city to demonstrate a reasonable fit between the ends asserted and the means advanced for regulating commercial speech.[13] Specifically, the Court struck down a Cincinnati ban on the use of free-standing newsracks for commercial handbill distribution.[14] The Court held that the city failed to establish a reasonable fit between its interests in safety and aesthetics and the means chosen to achieve those interests.[15]

Beginning in 1989, the City of Cincinnati had permitted Discovery Network, Inc. (Discovery) to distribute approximately one-third of its magazines, which advertised Discovery's programs, through thirty-eight newsracks placed on public sidewalks.[16] The city also authorized Harmon Publishing Company, Inc. (Harmon) to distribute magazines, which advertised real estate for sale, through twenty-four newsracks at specific locations.[17] In the spring of 1990, the city's Director of Public Works revoked Harmon's and Discovery's dispensing device permits and gave the companies thirty days to remove the racks.[18] Notices to Harmon and Discovery explained that section 714-23 of the Cincinnati Municipal Code (the Code)[19] prohibited distribution of magazines on public property because the magazines were considered "commercial hand-

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12 447 U.S. 557 (1980).

13 *Discovery Network*, 113 S. Ct. at 1510, 1516 (citation omitted).

14 *Id.* at 1507-08. The Court stated that the city "seriously underestimates" the value of commercial speech by discriminating against the handbills. *Id.* at 1511. Striking down the ban, the majority applied the *Central Hudson* test to determine that the Cincinnati regulation was unconstitutional. *Id.* at 1510, 1517.

15 *Id.* at 1511.

16 *Id.* at 1508. Discovery provided educational, recreational, and social television programs to adults in the Cincinnati area. *Id.* Discovery's magazines promoted its programs and also contained articles concerning current events. *Id.*

17 *Id.* In addition to advertisements, Harmon's magazines provided data about real estate market trends and mortgage interest rates. *Id.* Harmon achieved approximately 15% of its distribution through newsracks placed on Cincinnati sidewalks. *Id.*

18 *Id.*

19 Cincinnati Municipal Code § 714-23 provides:

> No person shall throw or deposit any commercial or non-commercial handbill in or upon any sidewalk, street or other public place within the city. Nor shall any person hand out or distribute or sell any commercial handbill in any public place. Provided, however, that it shall not be unlawful on any sidewalk, street or other public place within the city for any person to hand out or distribute, without charge to the receiver thereof, any non-commercial handbill to any person willing to accept it, except within or around the city hall building.

CINCINNATI MUNICIPAL CODE § 714-23 (1992).

bills" as defined in section 714-1-C of the Code.[20] Although the city refused to abandon its position on the commercial newsrack ban when challenged by the companies, it did agree to stay removal of the racks until a judicial determination regarding the constitutionality of the city's decision was made.[21]

Thereafter, Harmon and Discovery filed a suit requesting declaratory and injunctive relief against the city in the United States District Court for the Southern District of Ohio.[22] After an evidentiary hearing,[23] the district court ruled in favor of the plaintiffs on the claim that the city's actions violated their First Amendment rights.[24] The court found that both publications were commercial speech within the meaning of the First Amendment.[25] Because the magazines did not promote unlawful activities and were not misleading, the court concluded that the publications were entitled to First Amendment protection.[26] Although the court recognized the city's substantial interest in safety and aesthetics, the court held that the city failed to establish that the means chosen to correct the

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[20] *Discovery Network*, 113 S. Ct. at 1508. Cincinnati Municipal Code § 714-1-C provides:

> "Commercial handbill" shall mean any printed or written matter, dodger, circular, leaflet, pamphlet, paper, booklet or any other printed or otherwise reproduced original or copies of any matter of literature:
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> (a) Which advertises for sale any merchandise, product, commodity or thing; or
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> (b) Which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of directly promoting the interest thereof by sales; or
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> (c) Which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

CINCINNATI MUNICIPAL CODE § 714-1-C (1992).

[21] *Discovery Network*, 113 S. Ct. at 1508. The city refused to lift the ban at administrative hearings and at a review by the Sidewalk Appeals Committee. *Id.*

[22] Discovery Network, Inc. v. City of Cincinnati, No. C-1-90-437, slip op. at 1 (S.D. Ohio Aug. 23, 1990), *aff'd*, 946 F.2d 464 (6th Cir. 1991), *aff'd*, 113 S. Ct. 1505 (1993).

[23] At the hearing before the district court, the city contended that the commercial newsracks were aesthetically problematic because they were not uniform in color and design. Discovery Network, Inc. v. City of Cincinnati, 946 F.2d 464, 466 (6th Cir. 1991). The city also claimed that the dispensing devices posed a safety problem because the racks were placed near city crosswalks and bus stops. *Id.*

[24] *Discovery Network*, No. C-1-90-437, slip op. at 10. The district court, however, ruled for the city on the plaintiffs' claim that the city's procedure for appealing the administrative hearings on the ordinance violated their right to procedural due process. *Id.* Procedural due process is guaranteed by the Fourteenth Amendment, which provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of the law." U.S. CONST. amend. XIV, § 1.

[25] *Discovery Network*, No. C-1-90-437, slip op. at 6-7. See *supra* note 1 for an explanation of the Supreme Court's definition of commercial speech.

[26] *Discovery Network*, No. C-1-90-437, slip op. at 7.

problem reasonably fit with the accomplishment of these interests.[27]

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the lower court decision.[28] Focusing its analysis on the fourth prong of the *Central Hudson* test, the court of appeals agreed with the district court's holding that the city had failed to establish a reasonable fit between the asserted ends of improving safety and aesthetics and the means selected to achieve these goals.[29] Additionally, the court rejected Cincinnati's contention that it could favor non-commercial newspapers over commercial expression because commercial speech deserved less protection.[30] Under the *Board of Trustees of the State University of New York v. Fox*[31] interpretation of the *Central Hudson* test, the court opined that Cincinnati's ordinance was unwarranted because the city would realize only a paltry gain in safety and aesthetics from the regulation, while

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[27] *Id.* at 7-8. The court applied the four-part test promulgated by the Supreme Court in *Central Hudson*. *Id.* at 7. See *infra* notes 60-63 and accompanying text for an explanation of the *Central Hudson* test. Focusing on part four of the test, the court adopted the *Board of Trustees of State University of New York v. Fox*'s interpretation of this prong, which stated that the means chosen to enforce a regulation affecting commercial speech must reasonably fit with the ends advanced. *Discovery Network*, 946 F.2d at 467. See *infra* notes 84-90 and accompanying text for a discussion of *Fox*. The *Discovery Network* court reasoned that a reasonable fit was not present because the plaintiffs' newsracks constituted only 62 of the approximately 2,000 newsracks on the city's sidewalks and that commercial and non-commercial racks caused the same problems. *Discovery Network*, C-1-90-437, slip op. at 8.

[28] *Discovery Network*, 946 F.2d at 473. Discovery and Harmon did not cross-appeal the district court's judgment on the procedural due process claim. *Id.* at 468 n.5.

[29] *Id.* at 468. The plaintiffs and the city did not dispute the first three prongs of the *Central Hudson* test because the publications were within the Supreme Court's definition of commercial speech, the city had a substantial interest in safety and aesthetics, and the city's actions directly advanced these interests. *Id.* See *infra* notes 60-63 and accompanying text for a discussion of the *Central Hudson* test.

[30] *Id.* at 469. The court of appeals noted that the city's "lesser value" of commercial expression argument was critical to the success of its appeal. *Id.* Because the publications were not false or misleading advertising and the regulation did not alleviate problems particular to the commercial speech at issue, the court of appeals further asserted that the magazines had "high value" under the *Fox* interpretation of the *Central Hudson* test. *Id.* at 471.

Relying on Supreme Court precedent, the court of appeals illustrated that Cincinnati was not trying to mitigate a harm caused by the content of the publications. *Id.* (citing Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341, 348 (1986) (upholding a ban on advertising of casino gambling because the ban lessened problems of increased crime and prostitution); Young v. American Mini Theatres, Inc., 427 U.S. 50, 72-73 (1976) (upholding a zoning ordinance requiring businesses engaged in sexual entertainment to be at least 1000 feet apart because the law alleviated the problems directly flowing from the concentration of these establishments)).

[31] 109 S. Ct. 3028 (1989).

substantially burdening Harmon and Discovery's free expression rights.[32] Finally, the court observed that Cincinnati's ordinance was not permissible as either a time, place, and manner restriction[33] or as a valid content-based restriction on speech.[34]

The United States Supreme Court granted certiorari to address the First Amendment implications of the city's restrictions.[35] Applying the *Central Hudson* test, the Supreme Court held that the ban on newsracks containing commercial handbills did not reasonably fit with the city's substantial interests in aesthetics and safety.[36] The majority also rejected the city's argument that the regulation was a valid time, place, and manner restriction on commercial speech, noting that the Cincinnati ordinance did not satisfy the content neutrality requirement for this type of restriction.[37] Emphasizing that its holding was narrow, the Court left open the possi-

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[32] *Discovery Network*, 946 F.2d at 471. The court of appeals suggested that the city could achieve its ends by implementing regulations mandating uniform color and size schemes for all newsracks or by establishing a maximum number of newsracks allowed on city sidewalks. *Id.* at 472.

[33] *Id.* (citations omitted). The court explained that because the Cincinnati ordinance was not content-neutral, it could not satisfy the requirements of a valid time, place, and manner restriction. *Id.* (citations omitted).

The time, place, and manner doctrine was initially expounded in *Kovacs v. Cooper.* Kovacs v. Cooper, 336 U.S. 77, 86-89 (1949); Blechner, *supra* note 2, at 349. Later in *Heffron v. International Society for Krishna Consciousness*, the Court articulated a three-part test to determine the constitutionality of time, place, and manner regulations. *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981). Specifically, the *Heffron* test considered: (1) whether the regulation was "justified without reference to the content of the regulated speech;" (2) whether the regulation served a "significant governmental interest;" and (3) whether the regulation left open "ample alternative channels for communication of the information." *Id.* (citations omitted).

[34] *Discovery Network*, 946 F.2d at 473. The court noted that valid content-based restrictions must be "'narrowly drawn to accomplish a compelling governmental interest.'" *Id.* (quoting Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2474 (1991) (White, J., dissenting) (quoting *Sable Communications of Cal., Inc. v. Federal Communications Comm'n*, 109 S. Ct. 2829, 2836 (1989))). Under the *Sable* standard, the court reasoned, the city had to choose the least restrictive means to further its goals. *Id.* (citing *Sable*, 109 S. Ct. at 2836). Because the ordinance was more burdensome than necessary to achieve its desired ends, the court continued, it failed this analysis. *Id.*

[35] *Discovery Network*, 113 S. Ct. at 1509; Discovery Network, Inc. v. City of Cincinnati, 112 S. Ct. 1290 (1992).

[36] *Discovery Network*, 113 S. Ct. at 1510. The Court observed that the newsracks the city sought to ban were no more harmful than dispensing devices containing noncommercial publications unaffected by the ban. *Id.* at 1511. The Court added that the commercial dispensing devices only minimally impacted the overall quantity of newsracks on the sidewalks. *Id.*

[37] *Id.* at 1517. Although the city did not intend to discriminate based on the actual ideas contained within the commercial publications, the Court pointed out that the city's regulation focused on the difference in content between ordinary newspapers and commercial publications. *Id.* at 1516.

bility that a city may be able to justify differential regulation of commercial and non-commercial newsracks.[38] The Court observed that Cincinnati, however, failed to justify its regulation because the distinction the city made between commercial and non-commercial speech was irrelevant to its asserted interests in aesthetics and safety.[39]

For many years, the Supreme Court refused to provide even minimal protection to commercial speech,[40] allowing state legislatures to freely regulate such expression without violating the First Amendment.[41] In *Valentine v. Chrestensen*,[42] which promulgated the traditional approach towards commercial speech,[43] the Court considered a New York City ordinance prohibiting the distribution of commercial handbills on city streets.[44] The Court held that a two-sided flyer, advertising a submarine exhibition on one side and criticizing the city for denying the submarine exhibitor use of a city pier on the other side, was commercial speech and therefore deserved no First Amendment protection.[45] Justice Roberts, writing for the majority, opined that the submarine exhibitor could not

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38 *Id.*

39 *Id.* Upholding the ordinance, the majority rejected the city's contention that it could disfavor the commercial publications based on their low First Amendment value. *Id.*

40 *See* Redish, *supra* note 5, at 630 (observing that the Court "casually dismissed" even limited protection for commercial speech in *Valentine v. Chrestensen.*

41 Blechner, *supra* note 2, at 333; *see* Breard v. City of Alexandria, 341 U.S. 622, 642, 645 (1951) (holding that the First Amendment did not protect a person's right to sell magazines door to door); Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (holding that commercial speech does not deserve First Amendment protection).

42 316 U.S. 52 (1942). For a discussion of the early commercial speech doctrine and the *Valentine* decision, see Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Value of Free Expression*, 39 GEO. WASH. L. REV. 429, 448-58 (1970-71).

43 *See* Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process And The First Amendment*, 65 VA. L. REV. 1, 1 (1979) (observing that it was not until recently that the Supreme Court afforded commercial speech First Amendment protection).

44 *Valentine*, 316 U.S. at 52 (footnote omitted). The litigation over the ordinance began in federal district court where the plaintiff succeeded in obtaining an interlocutory injunction against enforcement of the ordinance. *Id.* at 54 (citation omitted). After a trial, the district court granted a permanent injunction. *Id.* The Court of Appeals for the Second Circuit later affirmed the district court's decision. *Id.* (citation omitted).

45 *Id.* at 53-55. The New York City Police Department gave the plaintiff permission to distribute a handbill containing only the protest. *Id.* at 53.

Justice Douglas later criticized the *Valentine* Court for its "casual, almost offhand" assumption that commercial speech was not constitutionally protected. Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring); *see also* Albert P. Mauro, Jr., Comment, *Commercial Speech After* Posadas *And* Fox: *A Rational Basis Wolf In Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931, 1934 (1992) (pointing out that the

avoid a commercial speech classification by merely affixing a political message to his handbills.[46]

Although the *Valentine* decision endured in American courts and received no notable comment by the Supreme Court for almost twenty years,[47] the Court slowly began to retreat from *Valentine* in the 1970s.[48] It was not until *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[49] however, that the Court abandoned the *Valentine* holding.[50] In *Virginia Pharmacy*, the Court examined a Virginia statute prohibiting the advertisement of prescription drug prices.[51] Justice Blackmun, writing for the Court,

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Valentine Court made the assumption that commercial speech received no constitutional protection without any citation to precedent or other authority).

46 *Valentine*, 316 U.S. at 55. Addressing the plaintiff's contention that his speech was not commercial expression, the Court charged that the plaintiff was trying to evade the ordinance by affixing the protest to one side of the flyer. *Id.* Continuing, the majority stated that, if the plaintiff successfully avoided the ordinance, "every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command." *Id.*

47 Meiklejohn, *supra* note 3, at 432.

48 *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 811, 829 (1975) (extending protection to advertisements informing readers of the availability of out-of-state abortions); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384-85, 391 (1973) (holding that the city could forbid the grouping of job opportunity advertisements by gender because gender discrimination was an illegal activity, but conceding that some commercial speech deserved protection). One commentator observed that the Supreme Court distinguished *Pittsburgh Press* and *Bigelow* from *Valentine*. Meiklejohn, *supra* note 3, at 434-38. *Pittsburgh Press*, Meiklejohn explained, was distinguished on the grounds that the underlying activity, sex discrimination, was illegal. *Id.* at 434-35 & n.34, 437. Meiklejohn pointed out that *Bigelow*, however, was decided on the grounds that the advertisements contained information of clear public interest—the availability of abortions, a constitutionally protected activity. *Id.* at 437; *see* Roe v. Wade, 410 U.S. 113, 152-53 (1973) (prohibiting absolute state regulations on abortions by categorizing abortion as a fundamental privacy right under the Fourteenth Amendment).

49 425 U.S. 748 (1976). For a discussion and analysis of *Virginia Pharmacy*, see Redish, *supra* note 5, at 630-33 and Jackson & Jeffries, *supra* note 43, at 14-41.

50 Lively, *supra* note 1, at 294; *see also* Redish, *supra* note 5, at 630 (observing that in *Virginia Pharmacy* the Court granted constitutional guarantees to commercial expression for the first time).

51 *Virginia Pharmacy*, 425 U.S. at 749-50. The plaintiff challenged the statute, which stated:

> 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

invalidated the statute and held that the First Amendment protected speech which did "no more than propose a commercial transaction."[52] The majority observed that consumers, as recipients of information, and advertisers, as communicators of information, both had First Amendment interests that outweighed the governmental interest in regulating the professionalism of pharmacists.[53]

Recognizing that the *Valentine* Court had denied commercial speech First Amendment protection, the Court justified its holding by relying on *Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights*,[54] which held that another type of commercial speech, job advertisements not reflecting illegal discrimination, might be afforded constitutional protection.[55] Moreover, Justice Blackmun rejected the state's argument that permitting the advertisement of prescription drugs would lower the professional quality of pharmaceutical services and observed that the state could have taken alternative measures to regulate professionalism without infringing on speech.[56] Although the majority granted protection to commercial speech,[57] the *Virginia Pharmacy* Court maintained that commercial

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terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

Id. at 750 (quoting VA. CODE ANN. § 54-524.35 (Michie 1974)). The plaintiffs, consumers of prescription drugs, brought suit in federal district court, and the court enjoined enforcement of the aforementioned statute. *Id.* The district court voided the statute, and the Virginia State Board of Pharmacy appealed. *Id.*

52 *See id.* at 762, 773 (quoting *Pittsburgh Press*, 413 U.S. at 385). Although acknowledging that the advertiser had a purely economic interest in the transaction proposed by the advertisement, Justice Blackmun stated that the advertiser should not be disqualified from receiving First Amendment protection. *Id.* at 762. To illustrate, the Justice asserted that contestants in labor disputes have primarily economic interests. *Id.* Nevertheless, the Justice pointed out, employers and employees both receive protection under the First Amendment when they express themselves to influence the outcome of the labor dispute. *Id.* (citations omitted).

53 *Id.* at 763, 764, 766, 770. The Court emphasized that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

54 413 U.S. 376 (1973).

55 *Virginia Pharmacy*, 425 U.S. at 758-59, 760-61 (citations omitted). The majority also relied on *Bigelow v. Virginia* to bolster its position that the Court had previously stated that commercial speech was deserving of constitutional protection. *Id.* at 759-60 (citing Bigelow v. Virginia, 421 U.S. 809 (1975)). *See supra* note 48 (distinguishing *Bigelow* from *Valentine*).

56 *Virginia Pharmacy*, 425 U.S. at 768. The Court countered the state's contention that allowing the advertisements would lower the professionalism of pharmacists by pointing out that close regulation already maintained the high professional standards of pharmacists. *Id.* The case at hand, the majority also noted, concerned retail sales by pharmacists, not professional standards. *Id.*

57 *Id.* at 770. The Court emphasized that "a State may [not] completely suppress

expression did not deserve full First Amendment protection.[58]

In subsequent decisions, the Court continued to protect commercial speech using the *Virginia Pharmacy* balancing approach.[59] In 1980, however, the Supreme Court promulgated a four-part test to evaluate the constitutionality of governmental restrictions on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[60] Under the test's first prong, the

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the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 773.

58 *Id.* at 770. Because advertising was less susceptible to chilling by regulation and was more readily verifiable than political speech, the Court maintained it did not require the same level of protection as fully protected speech. *Id.* at 771-72 n.24; *cf.* Lively, *supra* note 1, at 296-97 (criticizing the chilling and verifiability rationales); Daniel A. Farber, *Commercial Speech And First Amendment Theory*, 74 Nw. U. L. REV. 372, 385-86 (1979) (observing that non-commercial speech can be as hardy and/or as verifiable as commercial speech).

In a lone dissent, Justice Rehnquist expressed the view that commercial speech was not worthy of First Amendment protection and that the courts should not determine how state legislatures regulate their economic and professional markets. *See Virginia Pharmacy*, 425 U.S. at 783-84, 790 (Rehnquist, J., dissenting). For a criticism of Justice Rehnquist's economic regulation rationale, see McGowan, *supra* note 1, at 441 (arguing that commercial speech should not be treated as economic activity because it is impossible to separate the real speech from the underlying economic activity). *But see* Jackson & Jeffries, *supra* note 43, at 38 (criticizing the *Virginia Pharmacy* decision as a resurrection of economic due process "in the guise of the freedom of speech"). Furthermore, the dissent maintained, the trivial decision of buying shampoo should not occupy the same level of First Amendment values as political speech. *Virginia Pharmacy*, 425 U.S. at 787 (Rehnquist, J., dissenting).

Expressing the fear that the majority's decision would lead to overprescription and misuse of prescription drugs, the Justice expostulated that the First Amendment's essential goal was to protect speech which enables the public to make decisions on political, public, and social issues. *Id.* at 787, 788-89 (Rehnquist, J. dissenting). Justice Rehnquist further emphasized that the information sought by the appellees did not have any ideological content and that they could easily obtain the information themselves and publish it. *Id.* at 790 (Rehnquist, J., dissenting). Reminding the majority that the pharmacists, who were affected by the statute, were not even before the Court, the dissent contended that there was a stronger societal interest against promoting the use of prescription drugs for illnesses. *Id.*

59 *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) (stating that a state's interest in protecting citizens from the dangers of fraud, intimidation, and overreaching present in in-person solicitation outweighed the interest in free speech); Bates v. State Bar of Ariz., 433 U.S. 350, 379 (1977) (overturning a ban on truthful price advertising by lawyers because the state's interest in maintaining lawyer professionalism was outweighed by the lawyer's right of expression); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 94-96 (1977) (finding that the value of free speech outweighed the town's important interest in integrated housing because the city failed to demonstrate that a ban on real estate "for sale" signs was necessary to achieve the integration).

60 447 U.S. 557, 566 (1980). For a more detailed evaluation of *Central Hudson*, see Dennis Piercey, Comment, *Legislative Choice and Commercial Speech:* Central Hudson Gas & Electric Corp., 830 UTAH L. REV. 831 (1981) and Archibald Cox, *Freedom of*

Court considered whether the expression was misleading or involved unlawful activity.[61] Next, the Court posited that the government had to assert a substantial interest to restrict commercial speech, and third that the regulation had to directly advance that interest.[62] Finally, the Court examined the regulation to determine if it was more extensive than necessary to further the asserted interest.[63]

Applying the four-part test to a New York regulation banning electrical utility companies from promoting the use of electricity through advertising, the *Central Hudson* Court recognized that the state had a substantial interest in encouraging energy conservation and maintaining equitable utility rates.[64] Justice Powell, writing for the majority, agreed that the ban was directly linked to the state's interest in energy conservation.[65] The Court held, however, that the regulation failed the fourth prong of the test because it was more extensive than necessary to further the state's interest in saving energy.[66]

Expression in the Burger Court, Scope of Protection for Commercial Speech, 94 HARV. L. REV. 77, 159-68 (1979).

61 *Central Hudson*, 447 U.S. at 563, 566. If the commercial speech under scrutiny is misleading or promotes illegal activity, the Court asserted, the government may ban it. *Id.* at 563. Because the advertisement did not involve unlawful activity and was not misleading, the Court found that the first prong of the test was satisfied. *Id.* at 566-68.

62 *Id.* at 566.

63 *Id.*

64 *Id.* at 568-69. The plaintiff, an electrical utility company, challenged a policy statement issued by the Public Service Commission of New York, which declared that "all promotional advertising [of electricity was] contrary to the national policy of conserving energy." *Id.* at 559. To implement this policy, the Commission ordered New York electric utilities to stop all advertising that "promot[es] the use of electricity." *Id.* at 558 (citation omitted). The electric utility company challenged the order in state court, and the trial court, intermediate appellate court, and the New York Court of Appeals all upheld the commission's order. *Id.* at 560-61. Because consumers did not have any choice regarding the selection of an electric utility company, the New York Court of Appeals denied that "'promotional advertising of electricity might contribute to society's interest in "informed and reliable" economic decisionmaking.'" *Id.* at 561 (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 390 N.E.2d 749, 757 (N.Y. 1979)).

65 *Id.* at 569. The Court, however, did not agree with the state's position that the advertising ban directly advanced the interest in maintaining equitable utility rates. *Id.* Analyzing the third prong of the test, the Court opined that there was, at most, a tenuous link between the ban on advertising and the rate structure. *Id.* The majority characterized any such link between equitable rates and the advertising ban as "highly speculative" and stated that "conditional and remote eventualities" could not justify the prohibition of the utility company's advertising. *Id.* The majority, however, agreed that the Commission's order directly advanced the interest in energy conservation, charging that the utility company would not have contested the advertising ban if it did not believe that the promotion would not increase sales. *Id.*

66 *Id.* at 569-70. Justice Powell also emphasized that the state failed to show "that a

One year later, the Court utilized the newly developed *Central Hudson* test in *Metromedia, Inc. v. City of San Diego*[67] and invalidated a city ordinance because of its effects on non-commercial speech even though it would have been constitutional if applied only to certain types of commercial billboards.[68] Focusing on the third

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more limited restriction on the content of promotional advertising would not serve adequately the State's interests." *Id.* at 570.

Justice Blackmun, concurring with the Court's result, disagreed with the application of the newly enunciated test. *Id.* at 573 (Blackmun, J., concurring). Justice Blackmun contended that truthful, nondeceptive commercial speech deserved more protection than the intermediate level of scrutiny provided by the majority's test. *Id.* The concurring Justice opined that the Court probably "would permit the State to ban all direct advertising of air conditioning, assuming that a more limited restriction on such advertising would not effectively deter the public from cooling its homes." *Id.* at 579 (Blackmun, J., concurring). Justice Blackmun continued that the Court's prior decisions did not allow such a prohibition of advertising and that if the government believed that air conditioning use was a serious problem, the government had to confront the problem directly by banning air conditioning or employing other means which did not infringe on the right of expression. *Id.*

One commentator observed that the *Central Hudson* analysis and "the implicit holding that narrowly drawn content-based regulation of accurate commercial speech would be constitutional [were] . . . inconsistent with the principles underlying the [F]irst [A]mendment." Cox, *supra* note 60, at 164. Because commercial speech advanced the same values and interests as core speech, the commentator asserted, content-based regulation of commercial speech deserved full First Amendment protection. *Id.*

Reiterating his views on commercial speech from the *Virginia Pharmacy* decision, Justice Rehnquist dissented and would have upheld the state's advertising ban. *Central Hudson*, 447 U.S. at 584 (Rehnquist, J., dissenting). Justice Rehnquist stated: "Unfortunately, although the 'marketplace of ideas' has a historically and sensibly defined context in the world of political speech, it has virtually none in the realm of business transactions." *Id.* at 597 (Rehnquist, J., dissenting). Continuing, Justice Rehnquist posited that the had Court opened a "Pandora's box" by elevating commercial speech to the same level as political speech in *Virginia Pharmacy*. *Id.* at 598 (Rehnquist, J., dissenting) (citation omitted). The dissent viewed the Commission's order as an economic regulation, and Justice Rehnquist asserted that it was well established that a State possessed a great degree of latitude to impose economic regulations. *See id.* at 589 (Rehnquist, J., dissenting).

67 453 U.S. 490 (1981). For an additional analysis of *Metromedia*, see Terry T. Johnson, Note, Metromedia, Inc. v. City of San Diego: *Constitutionality of Billboard Regulation*, 69 CAL. L. REV. 1027, 1031-51 (1981) and Mauro, *supra* note 45, at 1943.

68 *Metromedia*, 453 U.S. at 493 n.1, 512, 521. Metromedia, a billboard company, challenged the San Diego ordinance, which provided:

> B. OFF-PREMISE OUTDOOR ADVERTISING DISPLAY SIGNS PROHIBITED
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> Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall be permitted. The following signs shall be prohibited:

prong of the *Central Hudson* test, the *Metromedia* Court determined that the city ordinance prohibiting offsite commercial billboards directly advanced the city's interests in traffic safety and aesthetics.[69] Additionally, the Court stated that the connection between these interests and the ordinance was reasonable.[70] The city's failure to ban onsite commercial advertising, the Court reasoned, was justified because offsite advertising presented a greater problem than onsite advertising.[71] Justice White, writing for the Court, however, invalidated the San Diego ordinance because it also banned signs carrying non-commercial advertising.[72]

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1. Any sign identifying a use, facility or service which is not located on the premises.
2. Any sign identifying a product which is not produced, sold or manufactured on the premises.
3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located.

SAN DIEGO ORDINANCE NO. 10795 (New Series) (1972).

Metromedia challenged the ordinance in a California trial court. *Metromedia*, 453 U.S. at 490. The trial court and the intermediate appellate court both ruled in favor of Metromedia. *Id.* Reversing the decisions of the lower courts, the California Supreme Court narrowed the term "advertising display sign" to "a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display or, a commercial or other advertisement to the public." *Id.* at 493. Using this narrowed definition, the California Supreme Court later upheld the ordinance. *Id.*

69 *Metromedia*, 453 U.S. at 508-12. Agreeing with the California Supreme Court, the United States Supreme Court also averred that the city had a substantial interest in safety and aesthetics, and therefore, satisfied the second prong of the *Central Hudson* test. *Id.* at 507-08.

70 *Id.* at 509, 510. Analyzing the third prong, the majority acknowledged that the California Supreme Court was correct when it found that the legislature was not "manifestly unreasonable" when it determined that billboards created traffic hazards. *Id.* at 509. The Court hesitated to disagree with the "accumulated, common-sense judgments of local lawmakers" that the billboards created traffic safety problems. *Id.* Stating that aesthetics determinations were subjective, the Court applied "careful scrutiny" in reviewing these determinations. *Id.* at 510. Noting that the city did not harbor an ulterior motive in suppressing the expression on billboards, and that the judgment did not raise suspicion, the Court upheld the ordinance. *Id.* at 510, 512.

Harshly criticizing the majority's conclusion that billboard advertising impaired traffic safety, Justice Brennan, in concurrence, observed that the city failed to provide any evidence demonstrating that the ban improved traffic safety. *Id.* at 528 (Brennan, J., concurring).

71 *Id.* at 511. Despite the fact that onsite advertising was permitted, the Court stated that the offsite advertising prohibition directly advanced the city's interest in improving traffic safety and aesthetics. *Id.* The majority posited that the city could have determined that offsite advertising was particularly problematic because of its periodically changing content. *Id.* (citation omitted).

72 *Id.* at 512-13. The San Diego ordinance, the Court pointed out, contained ex-

Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico[73] marked the beginning of the erosion of the First Amendment protection afforded to commercial speech in previous Supreme Court decisions.[74] In *Posadas*, the Court upheld a law restricting casino gambling advertisements directed at Puerto Rico residents even though gambling was a lawful activity.[75] Chief Justice Rehnquist, writing for the majority, reasoned that if the government had the greater power to completely prohibit an activity that it deemed harmful, the legislature could exercise the lesser power to ban speech promoting that activity.[76] Applying the *Central Hudson* anal-

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ceptions for signs displaying religious symbols, commemorative plaques of recognized historical organizations, signs carrying news items or indicating the time or temperature, signs serving a governmental function, and temporary political campaign signs. *Id.* at 514 (footnote omitted). The majority observed that the city had inverted the Court's prior holdings by providing commercial speech a greater degree of protection than non-commercial speech. *Id.* at 513.

The Court also rejected the claim that the San Diego ordinance was a valid time, place, and manner restriction, noting that the advertising prohibition did not impose a general ban on billboard advertising as an improper manner of communication. *Id.* at 515-16. Rather, the Court pointed out, the ordinance allowed various types of signs, and banned signs were prohibited everywhere at all times. *Id.* See *supra* note 33 for a discussion of the requirements for a valid time, place, and manner restriction.

[73] 478 U.S. 328 (1986). *See generally* Lively, *supra* note 1, at 299-304 (discussing *Posadas*); Gary Weeks, Note, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico: *Promising Precedent for Proponents of Tobacco Advertising Prohibition?*, 40 ARK. L. REV. 877 (1987) (claiming that the *Posadas* holding posed a considerable threat to tobacco industry advertising).

[74] *See* Blechner, *supra* note 2, at 335 (stating that "the diminution of [F]irst [A]mendment protection of commercial speech began to unfold" in *Posadas*); *see also* Lively, *supra* note 1, at 299 (observing that in *Posadas* the Court, for the first time since *Chrestensen*, upheld a governmental restraint on truthful expression regarding a lawful activity).

[75] *Posadas*, 478 U.S. at 340-41, 348. The Puerto Rico legislature, the Court observed, legalized casino gambling in 1948 to aid the development of tourism. *Id.* at 331-32. This law, the majority added, allowed advertisements outside of Puerto Rico. *Id.* at 332-33 (citation omitted). Although the law banned casino gambling advertisements, the Court noted it did not apply to advertising for other types of gambling, such as horse racing, cockfighting, small games of chance at fiestas, and lotteries. *Id.* at 342. The Superior Court of Puerto Rico upheld the statute, and the Supreme Court of Puerto Rico dismissed the appeal. *Id.* at 331.

[76] *Id.* at 345-46. The majority reasoned that the forms of gambling not prohibited were not harmful because they were "'traditionally part of the Puerto Rican's roots,'" thus allowing the legislature to be more flexible. *Id.* at 342 (citation omitted). Justice Rehnquist posited that it would be "a Pyrrhic victory for casino owners" to prevail on their First Amendment claim and to "thereby force the legislature into banning casino gambling by residents altogether." *Id.* at 346. The majority continued by explaining that it would be a strange constitutional doctrine to allow the legislature to ban a product or activity without also giving it the power to prohibit the stimulation of demand for the same commodity through advertising. *Id.*

The greater power/lesser power analysis has been criticized by at least one commentator. *See* Lively, *supra* note 1, at 299-300 n.64 (observing that the "Court could

ysis, the majority agreed that Puerto Rico had a substantial interest in restricting these advertisements because casino gambling could seriously affect the health, safety, and welfare of residents.[77] Moreover, Justice Rehnquist declared that the third and fourth prongs of the *Central Hudson* test were satisfied because the ordinance directly advanced the government's interest in health and safety,[78] and the governmental restrictions were no more extensive than necessary to serve those interests.[79]

Justice Brennan, joined by Justices Marshall and Blackmun, dissented.[80] The dissent attacked the majority's relaxed scrutiny of the government's actions.[81] If health and safety were truly legiti-

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have avoided overextending its analysis by confining the focus to genuine legislative action rather than unexercised power").

77 *Posadas*, 478 U.S. at 340-41 (citation omitted). The Court acknowledged Puerto Rico's concern with the "'disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.'" *Id.* at 341 (quoting Brief for Appellees at 37, Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (No.84-1903)).

78 *Id.* Justice Rehnquist characterized the casino owners' argument that the restrictions were underinclusive as misplaced because the regulation directly advanced the legislature's interest in health and safety by reducing the residents' demand for casino gambling. *Id.* at 342. Deferring to legislative judgment, Justice Rehnquist reasoned that the third step of the *Central Hudson* test was satisfied because the legislature thought that the risks associated with casino gambling posed a greater danger than those pertaining to traditional gambling in Puerto Rico. *Id.* at 343 (footnote omitted).

79 *Id.* Because the government's interests could be furthered by speech countering the casino gambling advertising, the Court also rejected the appellants contention that the regulation was not the least restrictive means. *Id.* at 344. The majority opined that it was "up to the legislature to decide" if a counterspeech policy would effectively reduce the Puerto Ricans' demand for casino gambling. *Id.* Reasoning that the legislature could have concluded that the residents were already aware of the dangers posed by casino gambling, the majority stated that the legislature could have determined that the residents would have nonetheless been persuaded to participate in casino gambling. *Id.* (citations omitted).

Justice Rehnquist compared the validity of the Puerto Rico legislature's concerns to those advanced in cases upholding bans on alcohol and cigarette advertising. *Id.* (citing Dunagin v. City of Oxford, 718 F.2d 738, 740-41, 753 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)). The *Dunagin* court rejected the argument that disclaimers warning of the dangers of alcohol would be effective in deterring alcohol consumption. *Dunagin*, 718 F.2d at 751. In so doing, the court observed that the state was not concerned with the public's awareness of the dangers of alcohol, but the promotion of alcohol despite known dangers. *Id.* (footnote and citation omitted).

80 *Posadas*, 478 U.S. at 348 (Brennan, J., dissenting).

81 *Id.* at 351 (Brennan, J., dissenting). Chiding the majority, Justice Brennan accused the Court of "tipping its hat" to constitutional standards and deferring to the legislature's perceived determinations that the prohibition on casino gambling was reasonable. *Id.* at 352 (Brennan, J., dissenting). The dissent added that courts should not merely speculate about the reasons the government had for enacting legislation impinging on free speech, but demanded that the government must justify the chal-

mate concerns, the dissent suggested, the government would have banned all forms of gambling and not just casino advertising within Puerto Rico.[82] Justice Brennan also asserted that the state had less restrictive alternatives available to further its interests in health and safety.[83]

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lenged regulation by proving that the asserted interests were real and substantial. *Id.* at 355 (Brennan, J., dissenting) (citations omitted).

[82] *Id.* at 352-54 (Brennan, J., dissenting). The dissent opined:

> Indeed, it is surely not farfetched to suppose that the legislature chose to restrict casino advertising not because of the "evils" of casino gambling, but because it preferred that Puerto Ricans spend their gambling dollars on the Puerto Rico lottery. In any event, in light of the legislature's determination that serious harm will *not* result if residents are permitted and *encouraged* to gamble, I do not see how Puerto Rico's interest in discouraging its residents from engaging in casino gambling can be characterized as "substantial," even if the legislature had actually asserted such an interest which, of course, it has not.

Id. at 353-54 (Brennan, J., dissenting) (citations omitted).

[83] *Id.* at 357 (Brennan, J., dissenting). Specifically, Justice Brennan suggested alternatives, which included: close monitoring of casino gambling to prevent the infiltration of organized crime and corruption, and the promulgation of additional speech to counter the casino advertising. *Id.* at 356-57 (Brennan, J., dissenting) (citations omitted).

Justice Stevens filed a separate dissent criticizing the majority's application of the greater power/lesser power analysis. *Id.* at 359 (Stevens, J., dissenting). Justice Stevens asserted that the question of whether the state could prohibit the advertising of an activity when it could just as well prohibit the activity itself was "an elegant question of constitutional law." *Id.* Because the legislature's actions were "so plainly forbidden by the First Amendment," Justice Stevens stated that the majority should not have even addressed the greater power/lesser power question. *Id.*

Professor Rotunda commented that the *Central Hudson* ruling was contrary to the majority's holding in *Posadas* and that the *Posadas* Court did not overrule *Central Hudson.* Ronald D. Rotunda, *The Constitutional Future Of The Bill Of Rights: A Closer Look At Commercial Speech And State Aid To Religiously Affiliated Schools*, 65 N.C. L. REV. 917, 925 (1987). Specifically, Professor Rotunda observed that the *Central Hudson* Court could have allowed New York to exercise the greater power to ban the use of electricity for certain items. *Id.* The *Central Hudson* Court, however, Rotunda noted, did not allow New York to exercise the lesser power to ban electricity advertising which would limit its use. *Id.*

This greater power/lesser power analysis was also sharply criticized two years after *Posadas* in *City of Lakewood v. Plain Dealer Publishing Co.*, where the Court invalidated a city ordinance giving the city's mayor the discretion to grant or deny newspaper rack permits. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 762-63, 772 (1988). The relevant portion of the ordinance reads as follows:

> Applications may be made to and on forms approved by the Mayor for rental permits allowing the installation of newspaper dispensing devices on public property along the streets and thoroughfares within the City respecting newspapers having general circulation throughout the City.
>
> The Mayor shall either deny the application, stating the reasons for such denial or grant said permit . . . .

Id. at 754 n.2 (quoting CODIFIED ORDINANCES, CITY OF LAKEWOOD § 901.181 (1984)). This statute was facially challenged by a non-commercial newspaper publisher, and the case did not involve a restriction on commercial speech. *Id.* at 754, 755.

The declining level of First Amendment protection afforded to commercial speech continued in *Board of Trustees of the State University of New York v. Fox*.[84] The *Fox* majority upheld the constitutionality of a State University of New York resolution prohibiting commercial enterprises from operating on campus.[85] Initially, the majority rejected Fox's claim that the speech at issue was non-commercial because the presentations by American Future Systems[86] divulged information about how to run an efficient home and save money.[87] After concluding that the university had a substantial interest in promoting an educational atmosphere, the Court focused its analysis on *Central Hudson's* fourth prong.[88] Justice Scalia, writing for the Court, loosely interpreted the *Central Hudson* test and explicitly rejected the least restrictive means test.[89] Requiring only

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Although the federal district court ruled in the city's favor, the Court of Appeals for the Sixth Circuit reversed, holding that the ordinance was unconstitutional. *Id.* at 754-55.

The *Plain Dealer* majority pointed out that the Court had rejected the greater power doctrine in First Amendment cases. *Id.* at 764 (citations omitted). In *Saia v. New York*, the *Plain Dealer* Court observed, the Court had invalidated an ordinance giving the chief of police unbridled discretion to prohibit the use of sound trucks. *Id.* (citing Saia v. New York, 334 U.S. 558 (1948)). Only seven months later in *Kovacs v. Cooper*, the *Plain Dealer* Court remarked, a city was permitted to exercise the greater power to impose an outright ban on soundtrucks. *Plain Dealer*, 486 U.S. at 764 (citing Kovacs v. Cooper, 336 U.S. 77 (1949)). Furthermore, the *Plain Dealer* majority recognized the inherent dangers in vesting government officials with unbridled discretion to directly license speech or conduct closely associated with speech. *Id.* at 767-68. If the government wished to entirely ban a manner of speech, the Court maintained that there would be no problem with governmental censorship because both favored and disfavored speech would be prohibited. *Id.* at 768.

84 109 S. Ct. 3028 (1989); *see* Blechner, *supra* note 2, at 340 (arguing that when the *Fox* majority evaluated the university resolution, it was mistaken in holding that the least restrictive analysis was not required for the *Central Hudson* test).

85 *Fox*, 109 S. Ct. at 3030, 3032.

86 One of the original plaintiffs, American Future Systems, a company selling china, crystal, and silverware to college students through student sponsored "Tupperware parties," dropped out of the litigation after the district court ruled for the university. *Id.* at 3030. A group of students who sponsored American Future System parties, however, proceeded with the litigation. *Id.*

This was not the first challenge by a university to "tupperware parties" held by American Future Systems on campus. *See* American Future Sys. v. Pennsylvania State Univ., 752 F.2d 854, 855-56 (3d Cir. 1984). In *American Future Systems v. Pennsylvania State University*, the Third Circuit's interpretation of the fourth prong of the *Central Hudson* test did not require the least restrictive alternative to further the university's goals. *Id.* at 865-66. Therefore, the court ruled in favor of the University. *Id.* at 867.

87 *Fox*, 109 S. Ct. at 3031. The majority reasoned that "[i]ncluding these home economics elements no more converted A[merican] F[uture] S[ystems']s presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." *Id.* at 3032.

88 *Id.* at 3032-34.

89 *Id.* at 3033. Justice Scalia imparted a flexible meaning to the word "necessary"

a reasonable fit between the means chosen and the ends asserted, the Court upheld the commercial speech restrictions.[90]

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in the fourth prong of the "no more extensive than necessary" test from *Central Hudson*. *Id.* Characterizing the fourth prong, the majority stated:

> 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 . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Id. at 3035 (citations omitted).

90 *Id.* Justice Scalia explained that the test employed by the *Fox* majority was not overly permissive, nor was it the same as the rational basis test used in Fourteenth Amendment equal protection cases. *Id.* (citation omitted). Distinguishing the rational basis test from the test utilized at bar, the majority explained, the former was satisfied when there was a "legitimate governmental goal" without regard to the cost imposed. *Id.* Whereas the test used by the Court in the present case, the Court explicated, required a "substantial" government interest and a "carefully calculated" cost. *Id.*

Justice Blackmun, joined by Justices Brennan and Marshall, dissented, emphasizing that the case should have been decided on overbreadth grounds rather than on a least restrictive alternative basis. *Id.* at 3038 (Blackmun, J., dissenting). The dissent observed that the overbreadth of the resolution was obvious because of its potential application to non-commercial speech. *Id.* For example, Justice Blackmun explicated:

> We have been told by authoritative University officials that the Resolution prohibits a student from meeting with his physician or lawyer in his dorm room, if the doctor or lawyer is paid for the visit. We have similarly been told that the Resolution prohibits a student from meeting with a tutor or job counselor in his dorm room. Presumably, then, the Resolution also forbids a music lesson in the dorm, a form of tutoring. A speech therapist would be excluded, as would an art teacher or drama coach.
>
> A public university cannot categorically prevent these fully protected expressive activities from occurring in a student's dorm room. The dorm room is the student's residence for the academic term, and a student surely has the right to use this residence for expressive activities that are not inconsistent with the educational mission of the university or with the needs of other dorm residents . . . .

Id. at 3039 (Blackmun, J., dissenting) (citation omitted). The dissent would have held the university resolution unconstitutional on its face because it did not distinguish between commercial and non-commercial speech and did not focus on the harm it was intended to address. *Id.* (citation omitted). The majority, however, disposed of the overbreadth argument by observing that the students were not challenging the application of the resolution to hypothetical third parties, but to themselves. *Id.* at 3036-37.

The overbreadth doctrine is invoked in First Amendment cases so that the plaintiff may constitutionally challenge a governmental action's application to someone else. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (explaining the overbreadth doctrine). This doctrine allows litigants relaxed standing requirements "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or ex-

Against this eroding foundation of commercial speech protection, the United States Supreme Court decided *City of Cincinnati v. Discovery Network, Inc.*[91] The Court addressed the issue of whether a city ordinance prohibiting the distribution of commercial publications through newsracks placed on city sidewalks was permissible under the First Amendment.[92] Justice Stevens, writing for the majority, applied the four-part test promulgated in *Central Hudson* to decide the constitutionality of the city ordinance.[93] Because the first two prongs were not in dispute, the Court focused its analysis on the third prong,[94] requiring the city to demonstrate a reasonable fit between the city's goals of safety and aesthetics and the means selected to accomplish these goals.[95] Noting that the city had several other less-burdensome alternatives to further its concerns, Justice Stevens found that the city failed to establish the reasonable fit required to uphold the ordinance.[96]

Moreover, the Justice disagreed with the city's assertion that it could properly discriminate against commercial publications because commercial speech had low First Amendment value.[97] In re-

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pression." *Id. See generally* NOWAK & ROTUNDA, *supra* note 1, § 16.8 (discussing the overbreadth doctrine).

91 113 S. Ct. 1505 (1993). *See generally* David O. Stewart, *Commercial Break, Supreme Court bolsters constitutional protections for commercial speech*, 79 A.B.A.J. 42 (June 1993) (analyzing the *Discovery Network* decision and criticizing the reasoning of the Court); Marcia Coyle, et al., *Court: Commercial Speech Deserves Protection*, NAT'L L.J., April 5, 1993, at 5 (commenting that *Discovery Network* put teeth back into the First Amendment protection of commercial speech).

92 *Discovery Network*, 113 S. Ct. at 1507. Discovery and Harmon did not dispute that their publications were commercial expression within the definition developed in Supreme Court precedent. *Id.* at 1509. See *supra* note 1 for the various definitions of commercial speech.

93 *Discovery Network*, 113 S. Ct. at 1510, 1511-16. See *supra* notes 60-63 and accompanying text for a discussion of the *Central Hudson* test.

94 *Discovery Network*, 113 S. Ct. at 1509-10. The Court did not analyze the first two prongs of the test because the city did not claim that the speech was unlawful or misleading, nor did Discovery and Harmon challenge the city's substantial interests in beauty and safety. *Id.*

95 *Id.* at 1510 (footnote omitted). With regard to the fourth prong, the Court relied on the *Fox* analysis of the *Central Hudson* test, which did not require the regulations to be the least severe restriction that would further the city's interest. *Id.* at 1510 n.12. See *supra* notes 88-90 and accompanying text for the *Fox* interpretation of this prong.

96 *Discovery Network*, 113 S. Ct. at 1510 & n.13. Justice Stevens noted that the city originally enacted the ordinance in an effort to prevent littering, not to prevent the present problems associated with newsracks. *Id.* Moreover, the majority agreed with the lower courts' observation that the benefit of the ordinance was small compared to the burden it imposed on commercial speech. *Id.*

97 *Id.* at 1511. Justice Stevens posited that the city "seriously underestimate[d] the value of commercial speech." *Id.*

jecting this argument, the majority emphasized the difficulty in distinguishing commercial publications from non-commercial newspapers.[98] Next, the Court stipulated that speech merely proposing a commercial transaction had been afforded First Amendment protection in the *Virginia Pharmacy* decision.[99] Relying on the narrower definition of commercial speech utilized in *Fox*,[100] Justice Stevens reasoned that both ordinary newspapers and the Discovery and Harmon publications contained speech that could be classified as both commercial and non-commercial.[101]

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98 *Id.* Justice Stevens observed that the city Code did not define the difference between newspapers and commercial handbills. *Id.* (footnotes omitted). The city manager testified that publications that are published daily or weekly and present information mainly on current events fall within the definition of a newspaper. *Id.* (citation omitted).

99 *Id.* at 1512 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761 (1976)). Reiterating reasoning from prior decisions, Justice Stevens stated that commercial speech was provided First Amendment protection because the general public may have a stronger interest in commercial speech than in political dialogue. *Id.* at 1512-13 n.17 (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977) (citations omitted)). Additionally, Justice Stevens quoted from *Virginia Pharmacy*:

> If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection.

Id. at 1512 (quoting *Virginia Pharmacy*, 425 U.S. at 761-62 (citations omitted)).

100 *Id.* at 1513 (citation omitted). In *Fox*, the majority contended, the Court had abandoned the broader "expression related solely to the economic interests of the speaker and its audience" definition of commercial speech in favor of the "proposal of a commercial transaction test." *Id.*

The Court also noted that it had applied the narrower definition of commercial speech in *Bolger v. Youngs Drug Products Corp.* *Id.* (citing Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66 (1983)). The *Bolger* case involved a challenge to a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives. *Bolger*, 463 U.S. at 61. Youngs Drug Products Corporation, a company "engaged in the manufacture, sale, and distribution of contraceptives," successfully challenged the statute in federal district court. *Id.* at 62, 63-64. Affirming, the *Bolger* Court applied the *Central Hudson* test and concluded that the ordinance did not directly advance the state's interest in aiding parents' efforts to discuss birth control with their children. *See id.* at 73, 75. Because parents could control their children's access to the mail, the majority reasoned, the statute would only provide "incremental support" to this interest. *Id.* at 73.

101 *Discovery Network*, 113 S. Ct. at 1513. Justice Stevens expressed concern over the fact that without clear guidelines to distinguish commercial from non-commercial publications, city officials would discriminate against disfavored publications by classifying them as commercial. *Id.* at 1513-14 n.19 (citations omitted). In *City of Lakewood*

Returning to the *Central Hudson* analysis, the majority determined that because commercial dispensing devices created the same problems as non-commercial newspaper racks, the city's distinction between the two types of speech was illogical.[102] Because the Discovery and Harmon publications composed only a small percentage of the racks on public property, the Court also asserted that newspapers were actually a larger problem than commercial publications.[103] In addition, Justice Stevens pointed out, the city failed to demonstrate that it was trying to prevent harms directly flowing from the information contained in the commercial publications—a typical reason for allowing extensive governmental regulation of commercial speech.[104]

Concluding the *Central Hudson* analysis, the Court relied on *Bolger v. Youngs Drug Products Corp.*[105] to demonstrate that Cincinnati failed to establish a reasonable fit between the ends asserted and the means chosen to further those ends.[106] Emphasizing the narrow holding, the majority proclaimed that Cincinnati simply failed to justify its differential treatment of commercial and non-commercial publications because the city's asserted "low value" of commercial speech was irrelevant to furthering its goals of safety and aesthetics.[107]

After determining that the ordinance failed the *Central Hudson*

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v. Plain Dealer Publishing Co., a similar concern with vesting too much discretion in city officials was raised. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 764 (1988). *See supra* note 83 (discussing the *Plain Dealer* opinion).

102 *Discovery Network*, 113 S. Ct. at 1514-15. The Court rejected Cincinnati's reliance on *Metromedia, Inc. v. San Diego* by distinguishing the present case. *Id.* at 1514 n.20. *Metromedia*, the majority explained, involved discrimination between two different types of commercial speech (onsite and offsite billboards), whereas the city of Cincinnati based its discrimination on whether the speech was commercial or non-commercial. *Id.* (citation omitted). *See supra* notes 67-72 and accompanying text (summarizing *Metromedia*).

103 *Discovery Network*, 113 S. Ct. at 1515. The city argued that its main concern was the total number of newsracks on public property and that the ordinance was aimed at reducing this number. *Id.*

104 *Id.* (citations omitted).

105 *See* note 100 (discussing the Court's application of a narrow definition of commercial speech).

106 *Discovery Network*, 113 S. Ct. at 1515. Justice Stevens noted that in this case, as in *Bolger*, the means chosen by the government minimally advanced the asserted goals. *Id.* (quoting Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73 (1983)). In *Bolger*, the Court rejected a restriction on the mailing of contraceptive advertisements because the ban only minimally furthered the government's interests in protecting the public from offensive speech. *Bolger*, 463 U.S. at 73, 75.

107 *Discovery Network*, 113 S. Ct. at 1516. The Court left open the possibility that under a different set of facts disparate treatment of commercial speech could be warranted. *Id.*

test, the majority examined the city's contention that the ordinance constituted a valid time, place, and manner restriction.[108] Because the city's interest in safety and aesthetics was related to the content of the Discovery and Harmon publications, the *Discovery Network* Court rejected this argument.[109] The Court also rejected the city's reliance on *Renton v. Playtime Theatres, Inc.*[110] Distinguishing *Renton* from the present case, Justice Stevens noted that the regulation of adult movie theatres in *Renton* was justified because these theatres had distinctive secondary effects on the surrounding area.[111] Reiterating that the city failed to demonstrate any effects of commercial publication racks that distinguished them from noncommercial newspaper racks, the Court opined that the ordinance did not qualify as a time, place, and manner restriction.[112]

Affirming the lower courts' decisions, the Supreme Court held that the Cincinnati action was an unconstitutional commercial speech restriction.[113] The Court found that the city could not demonstrate that its interests in safety and aesthetics were related to a meaningful distinction between commercial handbills and newspapers.[114] Furthermore, because the city's regulation was based on the publications' content, the Court asserted that the action did not qualify as a valid time, place, and manner restriction.[115]

Justice Blackmun, concurring, agreed with the Court's holding that the Cincinnati Municipal Code failed the *Central Hudson*

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108 *Id.* See *supra* note 33 for a list of the requirements for a valid time, place, and manner restriction.

109 *Discovery Network*, 113 S. Ct. at 1516-17. Justice Stevens explained that by "any commonsense understanding" the city's newsrack policy depended on content because the city determined which racks were banned by the content inside the publication. *Id.*

110 *Id.* at 1517 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)). In *Renton*, the Court upheld a zoning ordinance requiring adult movie theatres to be located in specific parts of the city. *Renton*, 475 U.S. at 54. The ordinance was upheld, the Court stated, because it did not ban movie theatres altogether, and the ordinance served a substantial government interest. *Id.* at 46. *See generally* Charles H. Clarke, *Freedom Of Speech And The Problem Of The Lawful Harmful Public Reaction: Adult Use Cases Of* Renton *And* Mini Theatres, 20 AKRON L. REV. 187 (1986) (addressing the constitutionality of zoning ordinances as a means of regulating adult entertainment); Andrea Oser, Note, *Motivational Analysis In Light Of* Renton, 87 COLUM. L. REV. 344, 367 (1987) (characterizing the *Renton* decision as a "motivation-based approach for speech restrictions").

111 *Discovery Network*, 113 S. Ct. at 1517.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

test.[116] Justice Blackmun, however, would have offered even greater protection to commercial expression and reiterated the opinion, first expressed in his *Central Hudson* concurrence,[117] that the Court should apply greater scrutiny to a regulation that impinges on truthful commercial speech.[118] The concurrence emphasized the value of the "free flow of commercial information" to the public and to the listener.[119] Furthermore, Justice Blackmun contended that the intermediate protection afforded to commercial speech in *Central Hudson* was not based on the majority's assertion that commercial speech was of lesser value.[120] Rather, Justice Blackmun asserted, the level of protection depended on the government's authority to impose specific regulations on certain types of commercial speech that could not be imposed on core speech.[121]

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116 *Id.* (Blackmun, J., concurring) (citations omitted).

117 *Id.* at 1517-18 (Blackmun, J., concurring). *See supra* note 66 for a discussion of Justice Blackmun's concurring opinion in *Central Hudson*.

118 *Discovery Network*, 113 S. Ct. at 1518 (Blackmun, J., concurring). Justice Blackmun expressed his belief that the *Central Hudson* intermediate level of review was only appropriate to protect the public from misleading commercial speech or to test a time, place, and manner restriction on commercial speech. *Id.* at 1517-18 (Blackmun, J., concurring) (quoting Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring)).

119 *Id.* at 1518 (Blackmun, J., concurring) (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 764 (1976)). See *supra* note 3 for articles discussing the importance of commercial speech.

Justice Blackmun agreed with the majority's position that the government could impose greater restrictions on false or deceptive speech or advertisements promoting illegal activities. *Discovery Network*, 113 S. Ct. at 1518 (Blackmun, J., concurring) (citations omitted).

120 *Discovery Network*, 113 S. Ct. at 1519 (Blackmun, J., concurring) (citation and footnote omitted).

121 *Id.* Justice Blackmun also asserted that this extra regulation on commercial speech was allowed to protect the listener's interest. *Id.* The concurrence emphasized that the level of protection afforded to commercial speech in *Central Hudson* was inconsistent with Supreme Court precedent and was not sufficient to protect "'truthful, nonmisleading, noncoercive commercial speech.'" *Id.* (quoting *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring)).

Moreover, Justice Blackmun expressed understanding of how Cincinnati, relying on statements in *Central Hudson*, believed that it could treat commercial speech as less valuable than other forms of speech. *Id.* at 1520 (Blackmun, J., concurring) (quoting *Central Hudson*, 447 U.S. at 563 n.5, which stated that commercial speech was "of less constitutional moment than other forms of speech"). The concurring Justice opined:

> Thus, it is little wonder that when the city of Cincinnati wanted to remove some newsracks from its streets, it chose to eliminate all the *commercial* newsracks first although its reasons had nothing to with either the deceptiveness of particular commercial publications or the particular characteristics of commercial newsracks themselves. . . . [Cincinnati] knew that under *Central Hudson* its restrictions on commercial speech would be examined with less enthusiasm and with less exacting scrutiny

Additionally, the concurrence rejected the city's distinction between the newspapers and the Discovery and Harmon publications, opining that the information contained in the commercial publications was very important to the public.[122] Justice Blackmun disputed Chief Justice Rehnquist's opinion that affording commercial speech full First Amendment protection would erode the level of protection granted to core speech.[123] The Justice expressed the hope that the Supreme Court would abandon the *Central Hudson* test in favor of a test that would provide full First Amendment protection to commercial speech.[124]

In dissent, Chief Justice Rehnquist, joined by Justices White and Thomas, agreed with the majority's application of the *Central Hudson* test, but contended that the city's regulation passed this test.[125] The Chief Justice asserted that the ordinance satisfied the test because it directly advanced the city's interest in safety and aesthetics by reducing the overall number of newsracks on city side-

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> than any restrictions it might impose on other speech. Indeed, it appears that Cincinnati felt it had *no choice* under this Court's decisions but to burden commercial newsracks more heavily.

Id. Intimating that the lesser scrutiny applied to commercial speech regulations in the *Central Hudson* case sent the signal to communities that they could discriminate against commercial speech, Justice Blackmun remarked that "*Central Hudson*'s chickens have come home to roost." *Id.*

122 *Id.* at 1520-21 (Blackmun, J., concurring). Justice Blackmun cited *Linmark Associates v. Willingboro* to emphasize that the Harmon real-estate publication contained information that "'bear[s] on one of the most important decisions [individuals] have a right to make: where to live and raise their families.'" *Id.* at 1521 (Blackmun, J., concurring) (quoting Linmark Assocs. v. Willingboro, 431 U.S. 85, 96 (1977)). Noting the importance of the information in the Discovery magazine, Justice Blackmun also reiterated the Court's longstanding view that education was one of the most important aspects of an individual's development. *Id.* (citing Brown v. Board of Education, 347 U.S. 483, 493 (1954)). The concurrence also reasoned that the subject matter in both publications was more important to the receiving audience than the political slogan displayed on the protester's jacket in *Cohen v. California*. *Id.* (citing Cohen v. California, 403 U.S. 15, 16, 26 (1971) (protecting the right of an individual to express his opposition to the selective service system by wearing a jacket bearing the slogan "Fuck the Draft" in a public building)).

123 *Id.* (citations omitted). The concurring Justice noted that protecting offensive political speech would not erode core speech protection. *Id.* (citations omitted).

124 *Id.*

125 *Id.* at 1521, 1522 (Rehnquist, C.J., dissenting). The dissent asserted that commercial speech received lesser First Amendment protection than core speech because commercial speech was more durable than other types of speech. *Id.* at 1522 (Rehnquist, C.J., dissenting) (citations omitted). *But cf.* Redish, *supra* note 5, at 633 (criticizing the durability of commercial speech rationale). The dissent averred that affording commercial speech full First Amendment protection might erode the level of protection granted to core speech. *Discovery Network*, 113 S. Ct. at 1522 (Rehnquist, C.J., dissenting) (citation omitted).

walks.[126] Focusing on the fourth prong of the test, the dissent maintained that merely because less restrictive means were available to achieve the city's interests, the regulation was not rendered unconstitutional.[127] Additionally, the Chief Justice posited that even though the Cincinnati regulation had minimal effects on the interests of aesthetics and safety, the constitutionality of the ordinance was not affected.[128] The dissent relied on the holding of *Posadas* to advance the view that the government need not fully accomplish its objective to render a regulation constitutional.[129]

After finding that the ordinance would have passed the *Central Hudson* test, the dissent charged that the majority's position was inconsistent with precedent.[130] For example, the dissent clarified

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126 *Id.* at 1523 (Rehnquist, C.J., dissenting).

127 *Id.* Chief Justice Rehnquist criticized the majority's interpretation of the fourth prong, stating:

> As we observed in *Fox*, "almost all of the restrictions disallowed under *Central Hudson's* fourth prong have been substantially excessive, disregarding far less restrictive and more precise means." That there may be other—less restrictive—means by which Cincinnati could have gone about addressing its safety and aesthetic concern, then, does not render its prohibition against respondents' newsracks unconstitutional.

Id. (citation omitted).

128 *Id.* The Chief Justice asserted that the city merely had to demonstrate that the regulation related to the problem the city sought to rectify. *Id.* The dissent maintained: "The relevant inquiry, though, is not the degree to which the locality's interests are furthered in a particular case, but rather the relation that the challenged regulation of commercial speech bears to the 'overall problem' the locality is seeking to alleviate." *Id.* (quoting Ward v. Rock Against Racism, 109 S. Ct. 2746, 2759 (1989)).

The *Ward* case involved a challenge by Rock Against Racism, a group that sponsored an annual program featuring speeches and rock music, to guidelines promulgated by New York City. *Ward*, 109 S. Ct. at 2750, 2751. The guidelines required Rock Against Racism to use the city's sound amplification equipment for the show, which was to take place in Central Park, to avoid complaints about excessive noise. *Id.* at 2751. The district court ruled in favor of the city, and the Court of Appeals for the Second Circuit later reversed this determination. *Id.* at 2752 (footnote and citation omitted).

Reversing the decision of the court of appeals, the Supreme Court upheld the city guidelines as a valid time, place, and manner restriction on the speech at issue. *Id.* at 2753. The Court opined that the city was not required to prove that its regulation was the least intrusive means of furthering its concededly legitimate governmental interests. *Id.* at 2757. One commentator observed, however, that *Ward* did not involve commercial speech, but a time, place, and manner restriction on content-neutral speech. Blechner, *supra* note 2, at 331 & n.3.

129 *Discovery Network*, 113 S. Ct. at 1523 (Rehnquist, C.J., dissenting). In *Posadas*, the ordinance upheld only restricted casino gambling advertisements and did not affect other forms of gambling. Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 342, 348 (1986). For an analysis of the *Posadas* decision, see *supra* notes 73-79 and accompanying text, Blechner, *supra* note 2, at 335, and Lively, *supra* note 1, at 299-304.

130 *Discovery Network*, 113 S. Ct. at 1521, 1524 (Rehnquist, C.J., dissenting).

that in *Metromedia* the Court invalidated an ordinance favoring commercial over non-commercial expression, and that the Court had never held that the opposite was allowed.[131] Chief Justice Rehnquist maintained that the Court had formulated a new doctrine by stating that a city could not favor non-commercial speech over commercial speech.[132] The dissent further criticized the majority for relying on the *Bolger* decision.[133] Chief Justice Rehnquist explained that *Bolger* stood for the proposition that a state could not protect recipients of mail that was likely to be found offensive, regardless of whether commercial speech or non-commercial speech was involved.[134]

In conclusion, the Chief Justice stated that the majority should have allowed the city's disparate treatment of the Discovery and Harmon publications.[135] The dissent also expressed concern that the Court's holding would force cities to choose between restricting fully protected commercial speech and allowing the multiplication of newsracks to go unregulated.[136] Claiming that the city demonstrated a reasonable fit between its ordinance and the interests in safety and aesthetics, the dissent would have upheld the ordinance.[137]

In *Discovery Network*, the Supreme Court halted the debasement of the commercial speech doctrine.[138] In so doing, the Court necessarily elevated commercial expression by requiring that Cincinnati could not vary treatment of commercial and non-commer-

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131 *Id.* at 1524 (Rehnquist, C.J., dissenting) (citation omitted). In *Metromedia*, the Court upheld a portion of an ordinance that prohibited offsite billboards but not onsite billboards. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 493 n.1, 521 (1981). *See supra* notes 67-72 and accompanying text (discussing *Metromedia*).

132 *Discovery Network*, 113 S. Ct. at 1524 (Rehnquist, C.J., dissenting).

133 *Id.* (citation omitted). See *supra* note 100 for a discussion of *Bolger*.

134 *Discovery Network*, 113 S. Ct. at 1524 (Rehnquist, C.J., dissenting) (quoting Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 (1983)).

135 *Id.* at 1525 (Rehnquist, C.J., dissenting). According to precedent, Chief Justice Rehnquist reasoned, the city could have determined that the newsrack regulatory scheme could properly burden commercial speech because it received lesser protection under the First Amendment. *Id.*

136 *Id.*

137 *Id.* Chief Justice Rehnquist would have reversed the lower court decision, noting that the city accomplished its goals of safety and aesthetics by burdening less speech than necessary when it enacted the ban on commercial newsracks. *Id.* The dissent expostulated the view that the city could impose an outright ban on all newsracks. *Id.* (citing City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 780-81 (1988) (White, J., dissenting)).

138 See *supra* notes 73-90 for a discussion of the eroding level of protection afforded to commercial speech. *See also* Blechner, *supra* note 2, at 335-48 (analyzing the progressive "diminution of [F]irst [A]mendment protection of commercial speech").

cial publications without first justifying such disparate treatment.[139] Although the majority could have ended its analysis by holding that the Cincinnati ordinance failed the *Central Hudson* test, the Court went further and also rejected the city's contention that these actions were valid time, place, and manner restrictions.[140]

The *Discovery Network* Court appears to have put teeth back into the *Central Hudson* test.[141] Deciding on a definition for commercial speech, the majority properly rejected the "expression related solely to the economic interests of the speaker and its audience" test in favor of the narrower speech "propos[ing] a commercial transaction" test.[142] The decision also demonstrates that the Court will not give deference to a government's proffered justifications for discriminating against commercial speech.[143]

However, the majority left several problems unresolved.[144] First, the Court left open the possibility that a locality could enact a

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139 *Discovery Network*, 113 S. Ct. at 1517; *see* Stewart, supra note 91, at 44 (claiming that the *Discovery Network* decision provided greater First Amendment protection to commercial speech than had been afforded in prior Supreme Court decisions).

140 *Discovery Network*, 113 S. Ct. at 1516; Stewart, *supra* note 91, at 44. See *supra* note 33 for an explanation of the Court's time, place, and manner doctrine.

141 *See* Mauro, *supra* note 45, at 1942 (asserting that the Supreme Court's original interpretation of the *Central Hudson* test demonstrated that the four-prong analysis was intended to have teeth).

142 *See Discovery Network*, 113 S. Ct. at 1512; *see also* Stewart, *supra* note 91, at 42 (opining that the "expression related solely to the economic interests of the speaker and its audience" test would include Ronald Reagan's 1980 campaign query to voters asking if they were better off economically than they had been four years earlier). See *supra* note 1 for a more detailed discussion of the Supreme Court's definitions of the term commercial speech.

143 *See* Coyle, *supra* note 91, at 5. Specifically, Coyle quoted Alan Slobodin of the pro-business Washington Legal Foundation: "The [C]ourt goes to some length to lay to rest the notion it won't demand that the government justify restrictions on commercial speech and make sure they are pretty narrowly tailored." *Id.* Coyle also quoted Professor Douglas W. Kmiec of Notre Dame Law School: "[The Supreme Court is] moving back toward what was the first impression of the commercial speech doctrine—a middle tier requiring heightened scrutiny of the restriction." *Id.* at 11; *see also* Stewart, *supra* note 91, at 45 (quoting Mark D. Mezibov, counsel for Discovery: "Under *Central Hudson* the government needed to show only a slight move towards a public purpose to justify a commercial speech regulation . . . . Now we have a balancing test where the Court will give more weight to commercial speech."). According to Mark Yurick, the assistant city solicitor who represented Cincinnati in the case, "the Court's ruling creates a strict scrutiny test." *Id.* at 42, 45.

Prior to the *Discovery Network* decision, the Court appeared to be adopting a deferential posture towards governmental regulations on commercial speech. *See supra* notes 76, 78-79, 89, and accompanying text (discussing the Court's deferential analysis of governmental regulation of commercial speech in the *Posadas* and *Fox* decisions).

144 *See, e.g.*, Stewart, *supra* note 91, at 45 (noting several questions that the *Discovery Network* Court left unanswered).

total ban of newspaper racks on city streets.[145] Indeed, the Court of Appeals for the Fourth Circuit recently took note of this likelihood.[146] Although Discovery and Harmon prevailed in this case, the majority itself pointed out that the holding of the case was narrow and was restricted to the facts of the case *sub judice*.[147] Second, the future direction of the commercial speech doctrine is uncertain.[148] Additionally, the majority did not fully restore the third and fourth prongs of the *Central Hudson* test that had been weakened in *Posadas* and *Fox*.[149] This is evidenced by recent circuit and district court decisions in the wake of the *Discovery Network* case that have yielded divergent interpretations of the *Central Hudson* analysis.[150]

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145 *See id.* Stewart observed this possibility, stating that "[l]eft unresolved is whether there is a First Amendment right to space on the sidewalk in the first place." *Id.*

146 *See* Multimedia Publishing Co. of South Carolina v. Greenville-Spartanburg Airport District, 991 F.2d 154, 160 (4th Cir. 1993) (positing that an outright ban on newspaper racks creates a heavy burden on protected expression, but a locality "might nonetheless be able to advance sufficiently powerful governmental interests to justify it"). The Fourth Circuit cited the *Discovery Network* decision as support for the proposition that under certain circumstances a complete ban might be permissible. *Id.* at 158. The *Multimedia* court, however, ruled that the airport commission's interests in aesthetics, in preserving revenue, and in airport security were not sufficient to justify a total ban. *Id.* at 163.

147 *See Discovery Network*, 113 S. Ct. at 1516.

148 *See* Stewart, *supra* note 91, at 45 (stating that this uncertainty "allows judges to make largely subjective determinations in evaluating speech regulations").

149 *See* Blechner, *supra* note 2, at 335; Lively, *supra* note 1, at 300-01.

150 *See, e.g.*, Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 611-12 (9th Cir. 1993) (upholding a ban on billboards, and stating that there was a "reasonable fit" between the city code and the interest in aesthetics); Valley Broadcasting Co. v. United States, 820 F. Supp. 519, 525 (D. Nev. 1993) (requiring the government to demonstrate "a substantial state interest, as well as justifying the scope of any restrictions advancing this interest") (citations omitted); Hornell Brewing Co. v. Brady, 819 F. Supp. 1227, 1233, 1236 (E.D.N.Y. 1993) (adopting the *Fox* interpretation of the fourth prong of the *Central Hudson* test and requiring the regulation to be "no more extensive than necessary to serve the [governmental] interest asserted") (citations omitted).

The Ninth Circuit followed the *Fox* interpretation of the *Central Hudson* test and did not require the governmental action to be the least restrictive alternative available. *Outdoor Sys.*, 997 F.2d at 610 (citation omitted). Conversely, the District Court of Nevada interpreted the fourth prong of the *Central Hudson* test to mean that the regulation be "the most narrowly drawn" to serve the regulatory interest. *Valley Broadcasting*, 820 F. Supp. at 527. Noting also that the regulation at issue provided "'only the most incremental support'" for the government's interests, the *Valley Broadcasting* court rejected a ban on advertising casino gambling on television and held that the fourth prong of the *Central Hudson* test was not satisfied. *Id.* The *Hornell* court, however, appeared to adopt a deferential approach to the government regulation at hand, observing that the test was not the "least restrictive means" test and noting that a court is "'loath to second-guess the Government's judgment.'" *Hornell*, 819 F. Supp. at 1238-39 (quoting Board of Trustees of the State Univ. of New York v. Fox, 109 S. Ct. 3028, 3034 (1989)). Although the court required only a "reasonable fit" between the government's interest and the regulation, the court rejected a ban on the use of the

The dissenting opinion of Chief Justice Rehnquist is even more troubling.[151] First, Chief Justice Rehnquist's view that providing commercial speech a greater level of First Amendment protection will dilute the protection afforded to core speech is flawed.[152] Similarly, the opinion that commercial speech is more durable and hardy than other forms of speech is questionable.[153] Furthermore, Justice Rehnquist erroneously relied on *Ward v. Rock Against Racism*,[154] which did not even address commercial speech, to support the belief that a commercial speech regulation could be constitutional even if it provided minimal support for the asserted governmental interests.[155] The dissent's stunted view of the importance of commercial speech and the level of protection it should be accorded does not take into account that the public's interest in commercial speech can be even greater than in its desire to listen to political dialogue.[156] Finally, the Chief Justice fails to recognize that commercial speech and non-commercial speech, including political expression, are often indistinguishable.[157]

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name "Crazy Horse" on a beer bottle. *Id.* In so doing, the court stated that "[w]ith obvious alternatives available that do not hinder speech in any way, or hinder it far less," the government failed to establish the reasonable fit required. *Id.*

151 *See supra* notes 125-37 and accompanying text (analyzing the *Discovery Network* dissent).

152 *See Discovery Network*, 113 S. Ct. at 1521 (Blackmun, J., concurring) (observing that providing offensive speech full First Amendment protection had not eroded the constitutional protection of core speech); *cf. id.* at 1522 (Rehnquist, C.J., dissenting) (arguing that there was an "inherent danger that conferring equal status upon commercial speech will erode the First Amendment protection accorded non-commercial speech").

153 *See* Redish, *supra* note 5, at 633 (arguing that "it is incorrect to distinguish commercial from political expression on the ground that the former is somehow hardier"). *But cf. Discovery Network*, 113 S. Ct. at 1522 (Rehnquist, C.J., dissenting) (stating that "commercial speech is more durable than other types of speech").

154 109 S. Ct. 2746 (1989). For a discussion of Chief Justice Rehnquist's reliance on *Ward*, see note 128 and accompanying text.

155 *Discovery Network*, 113 S. Ct. at 1523 (Rehnquist, C.J., dissenting) (citing Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989)); *see* Blechner, *supra* note 2, at 331 (pointing out that the *Ward* decision did not involve a regulation of commercial speech, but a content-neutral regulation of non-commercial speech). See *supra* note 128 for a discussion of *Ward*.

156 *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 764 (1976) (arguing that society has a "strong interest in the free flow of commercial information"). *But see* Redish, *supra* note 5, at 632 (criticizing the *Virginia Pharmacy* Court's unwillingness to acknowledge that "commercial speech might benefit individuals in the exact same ways that political speech does: by developing their individual faculties and aiding them in making life-affecting decisions").

157 *See Discovery Network*, 113 S. Ct. at 1511 (acknowledging the "difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category"). Moreover, one commentator observed:

> Politics cannot be confined to the choosing and criticism of public offi-

Justice Blackmun's concurrence points out the deficiencies of the existing commercial speech doctrine.[158] Justice Blackmun's observation that "*Central Hudson*'s chickens have come home to roost"[159] illuminates the problems that the *Central Hudson* test created. Particularly, the *Central Hudson* case and its progeny, the concurrence explained, sent the signal that localities could disfavor commercial speech because it is less valuable than other forms of expression.[160] Justice Blackmun correctly asserted that the *Central Hudson* test should be abandoned in favor of more extensive commercial speech protection.[161]

Indeed, the *Discovery Network* case may be the harbinger of the desertion of the *Central Hudson* test in favor of the full protection afforded to core expression.[162] The Supreme Court should abandon the *Central Hudson* test because the current commercial speech doctrine allows judges to make mainly subjective determi-

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> cials, to the exclusion of social and economic considerations. . . . [T]he fact is that the activities of government clearly are intertwined at every point with buying and selling, hiring and contracting to work, investing, saving, and all other economic affairs of our country. Any one of these may be, at any given time, outside the officially political sphere.

Meiklejohn, *supra* note 3, at 444-45.

158 *See Discovery Network*, 113 S. Ct. at 1517 (Blackmun, J., concurring).

159 *Id.* at 1520 (Blackmun, J., concurring).

160 *See id.*

161 *Id.* at 1521 (Blackmun, J., concurring). One commentator has called for the Court to require the government, when regulating commercial speech, to demonstrate that least restrictive alternatives are not workable. Lively, *supra* note 1, at 309. Additionally, Professor Cox stated that the four-part *Central Hudson* analysis was "inconsistent with the principles underlying the [F]irst [A]mendment." Cox, *supra* note 60, at 164.

162 One court sensed that a footnote comment by the *Discovery Network* majority implied that the Supreme Court might be willing to apply a more exacting level of review for commercial speech regulations similar to the level of review applied to fully protected speech restrictions. Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 610 (9th Cir. 1993) (citing *Discovery Network*, 113 S. Ct. at 1510 n.11). But the Ninth Circuit observed that the Supreme Court's comment was not a holding, and that in a subsequent case, *Edenfield v. Fane*, the Court scrutinized commercial speech regulations under an "'intermediate standard of review.'" *Id.* (quoting Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993)).

The comment in footnote eleven of *Discovery Network* stated in pertinent part:

> For if commercial speech is entitled to "lesser protection" only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge regulations on commercial speech. Because we conclude that Cincinnati's ban on commercial newsracks cannot withstand scrutiny under *Central Hudson* and *Fox*, we need not decide whether that policy should be subjected to more exacting review.

Discovery Network, 113 S. Ct. at 1510 n.11.

nations in scrutinizing speech regulations.[163] The United States Supreme Court has recognized the public's interest in commercial information.[164] Commercial speech certainly deserves at least as much protection as offensive political speech[165] and fighting words.[166] If the Court is to properly recognize the role of the government in promoting knowledge rather than increasing ignorance,[167] commercial speech should be afforded full First Amendment protection. In light of the difficulty in drawing distinctions between commercial and non-commercial expression (including political speech), the Court should not allow the government to be engaged in the business of information control. Indeed, there is not a better place to promote the "marketplace of ideas"[168] than in the commercial speech arena.

Scott S. Servilla

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163 *See* Stewart, *supra* note 91, at 45 (commenting that "[a]s long as the commercial speech doctrine includes such a strong subjective component, judicial rulings may often turn on judicial views of the value of different types of commercial speech").

164 *See, e.g.*, Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 567-68 (1980) (positing that a consumer needs commercial information to decide which services to purchase); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976) (citations omitted) (stating that "the free flow of commercial information is indispensable").

165 *See* Cohen v. California, 403 U.S. 15, 16, 26 (1971) (providing full First Amendment protection to an individual's right to wear a jacket bearing the slogan "Fuck the Draft").

166 *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). In *R.A.V.*, the Court proscribed laws prohibiting content-based fighting words. *Id.* at 2550. *See generally* Thomas S. McGuire, Note, 23 SETON HALL L. REV. 1067 (1993). Justice Stevens, concurring in *R.A.V.*, observed:

> Yet in ruling that [fighting words] cannot be regulated based on subject matter, the Court does just that. Perversely, this gives fighting words *greater* protection than is afforded commercial speech. If Congress can prohibit false advertising directed at airline passengers without also prohibiting false advertising directed at bus passengers and if a city can prohibit political advertisements in its buses while allowing other advertisements, it is ironic to hold that a city cannot regulate fighting words based on 'race, color, creed, religion or gender' while leaving unregulated fighting words based on 'union membership or homosexuality.' . . . The Court today turns First Amendment law on its head: Communication that was once entirely unprotected (and that can still be wholly proscribed) is now entitled to greater protection than commercial speech . . . .

Id. at 2564-65 (Stevens, J. concurring) (citations and footnote omitted).

167 *See* Meiklejohn, *supra* note 3, at 455 ("From this point of view, the extension of [F]irst [A]mendment protection seems a logical principle in maintaining the appropriate freedom of choice for the public . . . .").

168 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).