CONSTITUTIONAL LAW—FIRST AMENDMENT—FEDERAL REGULATION PROHIBITING DISCLOSURE OF A BEER'S ALCOHOL CONTENT ON ITS LABEL VIOLATES THE COMMERCIAL SPEECH DOCTRINE—*Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995).

"It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."[1]

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[2] Although the Founding Fathers never specifically defined the parameters of the freedom of speech, the evolution of First Amendment jurisprudence has segregated speech into certain categories that are entitled to protection and others that are not.[3] Commercial speech, defined

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[1] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976); *see infra* notes 57-66 and accompanying text (discussing *Virginia State Board of Pharmacy*'s place in the evolution of the commercial speech doctrine).

[2] U.S. CONST. amend. I. The First Amendment provides in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* The Supreme Court has explained that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

[3] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-1 to -2, at 785-94 (2d ed. 1988). The First Amendment sets forth protection of press, assembly, speech, petition, and association. *See id.* § 12-1, at 785. Commonly referred to as the freedom of expression, this method of sending a message conveys both ideas and inarticulable emotions as well. *See id.* at 787 (quoting Cohen v. California, 403 U.S. 15, 26 (1971)). In *Cohen v. California*, the Supreme Court reversed a municipal conviction based upon a draft opponent's display of an expletive on his jacket in a Los Angeles courthouse. *See Cohen*, 403 U.S. at 15-28.

Over the course of recognizing this freedom, the Court has reviewed a variety of means whereby the government may regulate speech. *See* TRIBE, *supra*, § 12-2, at 789. Additionally, the Court has classified types of speech entitled to protection under the First Amendment. *See id.* at 789. The government may attempt to restrict the ideas or information conveyed by speech, known as "content-based" restrictions. *See id.* Alternatively, governments may regulate speech "content-neutrally," furthering goals unrelated to the speech at issue. *See id.* at 789-90. In order for the government to lawfully restrict the communicative impact of speech, via a content-based restriction, the speech must fall into a category determined by the Supreme Court to be unprotected by the First Amendment. *See id.* at 791-92. Exclusion of a category of expression from constitutional protections "represents an implicit conclusion that the governmental interests . . . are such as to justify whatever limitation is thereby placed on the free expression of ideas." *Id.* at 792.

When the government's aim is the noncommunicative impact of a given type of speech, the competing interests must be balanced to determine the constitutionality of the regulation. *See id.* at 791 (citing Konigsberg v. State Bar, 366 U.S. 36, 50-51 (1961)). Provided that the regulation does not "unduly constrict the flow of informa-

as speech that advertises a service or product for a business pur-

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tion and ideas," it will be upheld as consistent with the First Amendment. *See id.* at 792.

Case analysis by the Supreme Court has identified several categories of speech not entitled to First Amendment protection. *See, e.g., New York Times Co.*, 376 U.S. at 264-305 (announcing that defamation of private individuals is not entitled to protection, although different rules apply for public officials acting in their official capacity); *Roth*, 354 U.S. at 476, 489 (explaining that obscenity, determined by "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," is not entitled to protection) (footnote omitted); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (stating that words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are fighting words and as such are not entitled to protection); Schenck v. United States, 249 U.S. 47, 52 (1919) (maintaining that words of such a nature and used in such circumstances as "to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" are unprotectable). Over the course of time, the Supreme Court has recognized that an advertiser's communication in pursuit of profit cannot be deprived of First Amendment protection. *See* TRIBE, *supra*, § 12-15, at 891. In formulating the commercial speech doctrine, the Court has relied heavily on "the 'commonsense' distinction between speech proposing a commercial transaction . . . and other varieties of speech." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)). Early cases in the evolution of commercial speech indicated the Court's belief that consumers can only determine their best interests when they have adequate information to do so. *See* TRIBE, supra, § 12-15, at 893. The Court advised that the best method for allowing this self-determination is to permit open avenues of communication. *See id.* In the context of consumer pharmaceuticals, the Court recounted:

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Virginia State Bd. of Pharmacy, 425 U.S. at 763-64 (footnote omitted); *see also* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 432 (1993) (Blackmun, J., concurring) (espousing that "'the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system . . . [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered'") (quoting *Virginia State Board of Pharmacy*, 425 U.S. at 765)). Other federal court cases have stressed the importance of the free flow of commercial speech. *See* Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 751-52 (1993) (noting the peculiarity of the argument that commercial speech is of lesser value to society and should therefore not receive constitutional protection, when the purpose of the First Amendment is to protect speech from prohibition by a disapproving majority). *See generally* Bigelow v. Virginia, 421 U.S. 809 (1975); Chicago Joint Bd. v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970); Fur Info. & Fashion Council, Inc. v. E. F. Timme & Son, Inc., 364 F. Supp. 16 (S.D.N.Y. 1973).

pose or for profit,[4] falls somewhere between the two extremes of absolute protection and no protection.[5]

The United States Supreme Court, when first presented with the issue of commercial speech, viewed it as a classification totally unworthy of First Amendment protection.[6] Over the next three decades, however, that view began to shift until the Court announced that speech of a commercial nature was entitled to the same freedoms as other categories of protected speech.[7]

The Court, recognizing that commercial speech deserved protection, developed a step-by-step analysis for determining whether

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[4] *See* BLACK'S LAW DICTIONARY 185 (6th ed. 1991). BLACK'S defines commercial speech as "speech that advertised a product or service for profit or for business purpose." *Id.* BLACK'S states that "speech . . . 'commercial' in nature . . . was formerly not afforded First Amendment freedom of speech protection, and as such could be freely regulated by statutes and ordinances." *Id.* This doctrine, however, has been essentially abrogated. *See id.*

The Supreme Court has also set forth a definition of commercial speech, providing that such speech is "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980). The Court more recently recognized advertising as commercial speech. *See Zauderer*, 471 U.S. at 637.

[5] *See* Bruce P. Keller, *Recent Developments in the Law of Advertising and Commercial Speech*, A.L.I.-A.B.A. COURSE OF STUDY MATERIALS: TRADEMARKS, UNFAIR COMPETITION, AND COPYRIGHTS: RECENT DEVELOPMENTS AND OTHER IMPORTANT ISSUES, 47, 52 (Nov. 20-21, 1992). Prior to the Court's decision in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), there had been no indication that commercial speech was included in the category of speech subject to restrictions. *See id.* at 52; *see also infra* note 6 (discussing the Court's introduction to free speech jurisprudence in *Valentine*). Some authors assert the view that *Central Hudson* restricts certain categories of speech that would otherwise be afforded protection if not in the commercial speech context. *See* Keller, *supra*, at 55. Critics note that courts may vary the amount of scrutiny applied to the factors of the *Central Hudson* test. *See id.* Furthermore, the Supreme Court has set forth the view that commercial speech is entitled to a "different degree of protection." *See Virginia State Bd. of Pharmacy*, 425 U.S. at 771-72 n.24. Justice Blackmun, writing for the majority in *Virginia State Board of Pharmacy*, explained that this difference is, in part, due to the fact that commercial speech is often "more durable" than other types of speech and consists of "objective" information. *See id.*

[6] *See Valentine*, 316 U.S. at 54. The Court in *Valentine* explained that the First Amendment allows for the dissemination of information and opinions on streets and public thoroughfares and that the states and local governmental bodies could regulate such communications so long as the methods utilized did not unduly burden or proscribe free speech. *See id.* The Court continued by expressly holding that the Constitution did not afford "purely commercial advertising" this same level of deference. *See id.* The Court thus granted permission for states and municipalities to regulate commercial speech in whatever way they deemed necessary. *See id; see also infra* notes 52-56 and accompanying text (discussing the Court's decision in *Valentine*).

[7] *See Virginia State Bd. of Pharmacy*, 425 U.S. at 770. Although the *Virginia State Board of Pharmacy* Court held that commercial speech is entitled to First Amendment protection, it emphasized that such protection is not absolute. *See id.* at 770-71; *see also infra* notes 57-66 and accompanying text (describing *Virginia State Board of Pharmacy*'s pivotal role in the development of the commercial speech doctrine).

a particular regulation unconstitutionally infringed upon a speaker's First Amendment right to free speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[8] First, a court examines whether the speech at issue falls into a category of speech historically afforded constitutional protection.[9] Upon a finding that such speech is protected by the First Amendment, a court then analyzes whether the interest set forth by the government is substantial and whether the regulation at issue directly advances that interest without being more intrusive than necessary to achieve the government's goal.[10]

In the fifteen years since *Central Hudson*, the Supreme Court has applied the *Central Hudson* test to a wide variety of subject matter including the use of newsracks,[11] in-person solicitation by attor-

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8 447 U.S. 557, 566 (1980).

9 *See id.*; *see also supra* note 3 (detailing the categories of speech that the Supreme Court deems entitled to First Amendment protection and those the Court considers outside its parameters).

10 *See Central Hudson*, 447 U.S. at 566. Specifically, the Court announced:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id.

11 *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993). In *City of Cincinnati,* Discovery Network, Inc., a company in the business of offering recreational, social, and educational activities for adults in Cincinnati and the surrounding locales, published free magazines nine times each year advertising these services. *See id.* at 412. In addition to containing information pertaining to these programs, Discovery Network's magazines also related the details of local events of possible interest. *See id.* In 1989, the City of Cincinnati granted permission to Discovery Network to install 38 newsracks on public property, through which Discovery Network distributed approximately one-third of its total free circulation. *See id.* Harmon Publishing Company also published a free magazine, describing real estate for sale as well as financial information relating to the real estate market, and distributed this publication in the same manner utilized by Discovery Network. *See id.* at 412-13. In March 1990, Cincinnati's Director of Public Works advised both companies that their permits authorizing the use of dispensing devices on public property had been revoked and directed that, in compliance with the municipal code, the newsracks be taken down within 30 days. *See id.* at 413. The applicable code section prohibited the distribution of commercial handbills, in any public place. *See id.*

After conducting an evidentiary hearing, the district court determined that Cincinnati's regulations violated the First Amendment. *See id.* at 414. The court found that both publications qualified as commercial speech. *See id.* Although acknowledging that the City possessed the authority to regulate newsracks to advance safety and aesthetics, the court held that the Cincinnati regulation did not reasonably fit its articulated objectives, as required by the decision in *Board of Trustees v. Fox. See id.* (cit-

neys[12] and accountants,[13] gambling,[14] lotteries,[15] and in-room

ing Board of Trustees v. Fox, 492 U.S. 469, 480 (1989)). The court's unreasonableness determination focused on the "minimal" effect the newsracks had on public safety, compared with the approximately 1500 devices untouched by the ordinance. *See id.* The court emphasized that other cities successfully protected safety and aesthetics by regulations that did not completely eliminate channels of distribution. *See id.* The Court of Appeals for the Sixth Circuit affirmed, noting that the furtherance of safety and beauty, observed in the totality of this case's circumstances, did not justify the burden placed on the right to free speech. *See id.* at 415.

The United States Supreme Court, Justice Stevens writing for the majority, upheld the decisions of the lower courts. *See id.* at 412. The Court acknowledged that the speech at issue constituted commercial speech and that the state interest was substantial. *See id.* at 416-17. The Court then engaged in a "reasonable fit" analysis. *See id.* Justice Stevens noted that the City originally enacted the contested prohibition to combat littering, without any consideration as to newsracks. *See id.* at 418-19. The Justice stated that Cincinnati's justification for revoking the permits proved inadequate because of the small number of newsracks dedicated to Discovery Network's and Harmon's magazines in relation to the overall number of newsracks in the city. *See id.* at 418. Justice Stevens further stated that the devices at issue presented no greater harm to the public than those allowed to remain. *See id.* at 419-20. The majority discussed the distinction between commercial and noncommercial speech set forth by Cincinnati as a justification for its actions and concluded that this distinction failed to provide any relation to the interests set forth by the City. *See id.* at 424. The Court specifically stated that "in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted." *Id.*

Addressing the government's asserted goal of aesthetics, Justice Stevens noted that the newsracks used by Discovery Network and Harmon had the same appearance as those the City allowed to remain. *See id.* at 425. The Justice elaborated that the newspaper dispensing devices, by virtue of their greater number, would contribute more to the perception that city newsracks constituted an eyesore and caused increased amounts of litter. *See id.* The Court, however, cautioned that this holding applied to the specific facts of the instant case; given different facts and circumstances, a city may be able to impose dissimilar regulations on commercial and noncommercial speech without violating the First Amendment. *See id.* at 428.

Turning to the City's contention that the regulation constituted a reasonable restriction on time, place, or manner of speech, the majority quickly dispensed with this argument. *See id.* at 428-29. The Court pointed out that this argument applied only to content-neutral restrictions and that the regulation at issue was clearly content-based, as it focused on differences in textual material. *See id.* at 429-30. Thus, the Court held the ordinance to be content-based and in violation of the First Amendment. *See id.* at 430-31.

In summary, the majority reiterated that Cincinnati's ordinance failed to meet both the "reasonable fit" requirement for commercial speech matters and the necessary guidelines for content-neutral restrictions on speech. *See id.* at 430. The Court therefore affirmed the lower courts' decisions, holding that Cincinnati's ordinance was unconstitutional. *See id.* at 431.

12 *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). *Ohralik*, decided prior to the Court's establishment of the four-part test for commercial speech in *Central Hudson*, dealt with in-person client solicitation efforts by attorneys. *See id.* at 448-49. Ohralik, an attorney, learned of a recent automobile accident while collecting his mail at the local post office. *See id.* at 449. Ohralik visited the parents of one of the victims at their home and suggested that they retain a lawyer. *See id.* Upon their refusal, Ohralik went to the hospital to speak with the victim, Carol McClintock, and found her lying in traction. *See id.* at 450. A discussion ensued, during which Ohralik

offered her legal services. *See id.* Through her parents, Carol later accepted Ohralik's offer. *See id.* Two days following her acceptance, Ohralik once again visited Carol's hospital room to have her sign a fee agreement providing him with a one-third share of whatever recovery she might receive. *See id.*

During this period, Ohralik deceptively procured the other victim's name, Wanda Lou Holbert, from the McClintocks and made an uninvited visit to her home. *See id.* at 451. Concealing a tape recorder, Ohralik recorded most of his conversation with Wanda, including both his offer to represent her for a one-third contingent fee, as well as her acceptance of his offer. *See id.* The following day, Wanda's mother tried to negate any contract that may have been formed between Ohralik and Wanda, but Ohralik refused to acknowledge such repudiation. *See id.* at 451-52. Despite Wanda's reinforcement of her renunciation soon thereafter in writing, Ohralik continued to hold himself out as her counsel. *See id.* at 452. Additionally, when Carol released Ohralik as her attorney, he filed suit against her for breach of contract. *See id.*

Both victims filed complaints against Ohralik with the county bar association's grievance committee, which referred the matter to the Ohio State Bar Association. *See id.* The state bar association filed a formal complaint against Ohralik with the appropriate subdivision of the Supreme Court of Ohio. *See id.* at 452-53. Following a hearing, the commission determined that Ohralik, through his actions, violated two distinct disciplinary rules of the Ohio Code of Professional Responsibility that regulated lawyers' methods of obtaining employment. *See id.* at 453. The Supreme Court of Ohio embraced the commission's findings and emphasized that Ohralik's conduct was not a form of expression entitled to constitutional protection. *See id.*

The United States Supreme Court, Justice Powell writing for the majority, held that in-person solicitation of employment by an attorney failed even to rise to the level of honest advertising about standard legal services. *See id.* at 455. The Justice noted that the goal of the disciplinary rules was to prevent injurious conduct before it actually occurred. *See id.* at 464. The majority further acknowledged Ohio's interest in maintaining professionalism among licensed occupations, including attorneys. *See id.* at 460-61. The Court continued by observing that in-person solicitation often fails to provide consumers with a chance to compare or contemplate the information presented to them. *See id.* at 457. Justice Powell elaborated by recognizing the pressure and immediacy inherent in in-person solicitation situations. *See id.* Additionally, the majority noted the heightened "potential for overreaching" when solicitors possess a high level of training in the most effective methods of persuasion and the subject of their efforts is hurt or unaware of their need for the solicitors' services. *See id.* at 464-65; *see also infra* note 103 (declining to extend the deference given to prophylactic rules in the attorney context to regulations regarding accountants).

The majority determined that Ohio articulated a compelling interest in curbing the evils accompanying in-person solicitation. *See Ohralik*, 436 U.S. at 459, 462. As a result, the Court concluded that the state has the power to regulate both the economics of employment and professionalism. *See id.* at 460-62. The Court thus upheld the constitutionality of the disciplinary rules at issue as applied to Ohralik. *See id.* at 468.

Other Supreme Court cases have focused on the issue of attorney solicitation in the free speech context. *See generally* Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995) (examining a state-imposed waiting period between an accident and an attorney's solicitation of victims or their relatives as clients); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (reviewing attorney solicitation through advertisements mailed to a specific group of individuals following and related to a specific occurrence); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (addressing a state rule requiring disclosure of contingent fee rates in attorney advertisements); Bates v. State Bar, 433 U.S. 350 (1977) (examining a ban on all forms of attorney advertising). *See also* Jorge L. Carro & Lisa A. Martinez, *Ohio's Ethical Prohibition Against the Use of Dual Degrees in Letterheads: A Time for Change?*, 18 U. DAYTON L. REV.

63, 75-76 (1992) (explaining that although attorney advertising falls within the realm of commercial speech, the Supreme Court determined that a prophylactic ban on in-person solicitation was proper); Marc D. Lawlor, Note, *Ivory Tower Paternalism and Lawyer Advertising: The Case of* Florida Bar v. Went For It, Inc., 40 ST. LOUIS U. L.J. 895, 918-27 (1996) (analyzing the effect the *Florida Bar* decision will have on the legal profession's use of various methods of commercial speech).

13 *See* Edenfield v. Fane, 507 U.S. 761 (1993). In *Edenfield*, the Court invalidated a state rule forbidding in-person solicitation by accountants. *See id.* at 777. The Court held that the state's interest in protecting client privacy and maintaining accountant independence was not sufficiently narrow to withstand commercial speech scrutiny. *See id.* at 776-77; *see also infra* notes 96-103 and accompanying text (discussing *Edenfield* in greater detail).

14 *See* Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 348 (1986) (sustaining a state ban on casino advertising to island citizens on the grounds that the government's interest in protecting citizenry health and welfare withstood scrutiny because the ban still afforded the citizens other legal forms of gambling); *see also infra* notes 77-89 and accompanying text (discussing *Posadas*).

15 *See* United States v. Edge Broadcasting Co., 509 U.S. 418 (1993). In *Edge Broadcasting Co.*, the federal government had, shortly after the birth of broadcast media, enacted statutes prohibiting broadcasts of information regarding lotteries or similar endeavors and advertisements of these events. *See id.* at 422. Subsequent amendments to these statutes provided that a broadcaster may advertise a state-sponsored lottery so long as the broadcast station running the advertisements was licensed to a state that conducted a lottery under its own auspices. *See id.* With these amendments, Congress intended to meet the needs of states sponsoring official lotteries while continuing to respect the policies of those states choosing to prohibit government-run lotteries. *See id.* at 422-23.

Power 94, a radio station licensed in North Carolina, operated under the ownership of Edge Broadcasting Company. *See id.* at 423. Broadcasting from a city located three miles from the North Carolina-Virginia border, Virginians comprised the majority (92.2%) of the station's listening audience. *See id.* at 423-24. North Carolina does not conduct a state-run lottery and has enacted statutes criminalizing participation in or advertisement of non-exempt lotteries. *See id.* at 423. Virginia authorizes and conducts lotteries under its power to do so. *See id.* The federal regulations barred Power 94 from broadcasting Virginia lottery advertisements, thus causing the station a substantial loss in revenue. *See id.* at 423-24. Edge Broadcasting Company filed a motion in the United States District Court for the Eastern District of Virginia, requesting a declaratory judgment declaring, inter alia, the relevant federal regulations, as applied, constitutionally void under the First Amendment. *See id.* at 424.

The district court found that the speech qualified as commercial speech; the asserted governmental interests were substantial; and a "reasonable fit" existed between the interests and the regulations. *See id.* at 424-25. The Court held, however, that the regulations as applied to Edge did not "directly advance" the government's goal, thus failing to satisfy the third requirement of the *Central Hudson* test. *See id.* As such, the Court ruled that the application of the federal rules to Edge was unconstitutional. *See id.* The Court of Appeals for the Fourth Circuit affirmed the decision of the district court in an unreported per curiam opinion. *See id.* at 425.

The United States Supreme Court, in an opinion authored by Justice White, reversed the decisions of the lower courts and held that the statutes under review regulated commercial speech in a fashion consistent with the First Amendment. *See id.* at 436. Justice White, adopting the findings of the lower courts, declared that the speech constituted commercial speech and that the interest in respecting the policies of the individual states as to state-sponsored lotteries was substantial, thereby satisfying the first two requirements of the *Central Hudson* test. *See id.* at 426. The Court, mov-

demonstrations in a dormitory.[16] The four-part *Central Hudson* test has been streamlined—the modern focus being that regulations "directly advance"[17] and are reasonably tailored to the goal sought to be achieved.[18] Even though protection of commercial speech is a relatively well-settled body of law, the Court has routinely reviewed and modified prior interpretations of the doctrine.[19]

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ing to step three under the *Central Hudson* test, found that the statutes "directly advanced" the government's interest in respecting the decisions of the individual states. *See id.* at 427-28. Discussing the statutes both generally and as applied to Edge, Justice White determined that by supporting those states that choose not to conduct lotteries, while not impeding the efforts of the states sponsoring lotteries, the government had developed a method that satisfied the "direct advancement" requirement. *See id.* 428-29. The Justice then turned to the final step of the *Central Hudson* test and announced that, both in general and as applied to Edge, the statutes at issue provided a "reasonable fit" with the government's asserted interests. *See id.* at 429-35. The Court also examined the numerical data relating to the broadcast audiences in North Carolina and Virginia and determined that the lower courts had incorrectly evaluated the impact of these statistics. *See id.* at 431-35. Following this review, the majority reversed the decisions of the lower courts and upheld the federal regulations as constitutional under the *Central Hudson* test. *See id.* at 436.

Commentators have observed that *Edge Broadcasting* appears to be a retreat from the deference afforded commercial speech in recent decisions. *See* Laura J. Schiller, Note, *The Lottery in* United States v. Edge Broadcasting Co.*: Vice or Victim of the Commercial Speech Doctrine*, 2 VILL. SPORTS & ENT. L.F. 127, 145-52, 158 (1995) (noting that the Court displayed a strong protection for commercial speech when it invalidated restrictions on commercial speech in *City of Cinncinati* and *Edenfield* but retreated from that position that same term with the *Edge Broadcasting* decision). One author has articulated the view that the holding in *Edge Broadcasting* can be reconciled with modern commercial speech review. *See* Erica Swecker, Note, *Joe Camel: Will "Old Joe" Survive?*, 36 WM. & MARY L. REV. 1519, 1544 (1995) (articulating that in light of the Court's view of gambling as a vice that could be subject to regulation, the holding in *Edge Broadcasting* can be reconciled with modern commercial speech review).

16 *See* Board of Trustees v. Fox, 492 U.S. 469, 480-81 (1989) (holding that a university regulation banning in-room demonstrations to protect the safety and welfare of students need only have a "reasonable fit" to the governmental interest); *see also infra* notes 90-95 and accompanying text (discussing *Fox*'s relevance in the development of commercial speech jurisprudence).

17 *See Edenfield*, 507 U.S. at 767. For example, the focus of *Edenfield* dealt with the "direct and material" advancement requirement, the third prong of the commercial speech test introduced in *Central Hudson*. *See id.* The Court, quickly dispensing with the substantiality analysis, spent the majority of the opinion discussing this third step of the test. *See id.* at 768-77; *see also infra* notes 96-103 and accompanying text (discussing *Edenfield*).

18 *See Fox*, 492 U.S. at 471. Justice Scalia, in the opening paragraph of his opinion in *Fox*, stated that the issue before the Court involved a determination of "whether governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end." *Id.* The Court immediately disposed of the first three steps of the *Central Hudson* analysis and spent the remainder of the opinion determining the appropriate standard for the fourth step of the analysis. *See id.* at 473-76.

19 *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1515 (1996) (invalidating Rhode Island's ban on honest, nondeceptive price advertising of alcoholic bever-

In *Rubin v. Coors Brewing Co.*,[20] one of the most recent chapters in the history of commercial speech cases, the United States Supreme Court examined a beer manufacturer's claim that the federal regulation prohibiting disclosure of beer alcohol content on its product's label violated its First Amendment right to free speech.[21] The Court held that although the government's interest in preventing competition based on beer potency among brewers[22] was substantial, the government's means for furthering that interest did not accomplish that end in a "direct and material fashion,"and was not the least intrusive method for achieving the government's goal.[23] The Court, in declaring the federal labeling restriction to be an unconstitutional infringement on commercial speech, affirmed the holdings of both the district court and the court of appeals.[24]

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ages as unconstitutional under the commercial speech doctrine); Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1594 (1995) (holding that a ban on disclosing beer alcohol content on the product's label failed to satisfy the *Central Hudson* test and was therefore unconstitutional under the First Amendment's right to freedom of speech); *Edge Broadcasting Co.*, 509 U.S. at 436 (determining that regardless of the state in which the primary audience resides, federal regulations allowing the transmission of lottery advertisements by broadcasters only if the broadcaster is licensed to a state offering a lottery are constitutional under the commercial speech doctrine); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 430-31 (1993) (announcing that a city's refusal to allow continued distribution of commercial publications via newsracks placed throughout the city, while not terminating the similar distribution of newspapers, unconstitutionally infringed upon the freedoms afforded commercial speech by the First Amendment).

20 115 S. Ct. 1585 (1995) [hereinafter *Coors*].

21 *See id.* at 1590-94. In analyzing the speech at issue, the Court utilized the four-step test set forth in *Central Hudson*. *See id.* at 1589-94; *see also supra* notes 9-10 and accompanying text (detailing the commercial speech test promulgated by the Supreme Court).

22 This competition is commonly referred to as strength wars. *See Coors*, 115 S. Ct. at 1588.

23 *See id.* at 1594.

24 *See id.* at 1588, 1594. The United States Court of Appeals for the Tenth Circuit, after its first review, remanded the case to the United States District Court for the District of Colorado to determine the constitutionality of 27 U.S.C §§ 205(e)(2) and 205(f)(2). *See id.* Upon remand, the district court determined that the labeling ban imposed by § 205(e)(2) unconstitutionally infringed on Coors's First Amendment rights. *See id.* The court also held, however, that the advertising ban promulgated by § 205(f)(2) was constitutional. *See id.* The court of appeals affirmed this judgment. *See id.* On appeal to the Supreme Court, Coors did not challenge the determination regarding the advertising ban. *See id.* Thus, the only issue for the Court's review involved the government's challenge of the labeling ban. *See id.*

Similarly, in *Hornell Brewing Co. v. Brady*, the United States District Court for the Eastern District of New York held that a governmental ban on the use of the name "Crazy Horse" on alcoholic beverage labels constituted a violation of the brewing company's First Amendment right to free speech. 819 F. Supp. 1227, 1246 (E.D.N.Y. 1993). The Bureau of Alcohol, Tobacco and Firearms (BATF) denied Hornell Brew-

In 1987, Coors Brewing Company (Coors), a Colorado-based beer manufacturer, requested permission from the Bureau of Alcohol, Tobacco and Firearms (BATF) to begin using modified product labels and advertisements clearly stating the alcohol content of its beers.[25] The BATF denied the application, asserting that §§ 205(e)(2) and 205(f)(2) of the Federal Alcohol Administration Act of 1935 (the Act) prohibited disclosure of a beer's alcohol content both on product labels and in advertisements.[26]

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ing Company permission to use "Crazy Horse" on any future product labels and revoked a previously issued certificate of approval allowing use of that name on labels. *See id.* at 1231. The district court applied the *Central Hudson* test on the basis that malt liquor labels were "indisputably" commercial speech. *See id.* at 1233. The court noted that alcoholic beverages bearing the name of an Indian hero would have an increased appeal to the Native American population. *See id.* at 1235-36. Finding that the government possessed a substantial interest in protecting the health, safety, and welfare of the Native American population, the court concluded that the regulation satisfied the second step of the *Central Hudson* test. *See id.* at 1236.

The court then found that the BATF ban did not "directly advance" the governmental interest, in that it affected every consumer possessing a desire to drink the Crazy Horse product, not merely the segment of the population the state sought to protect. *See id.* at 1238. Consequently, the court found that the third step of the *Central Hudson* test was not satisfied. *See id.* Concluding its *Central Hudson* analysis, the Court determined that the ban was more pervasive than necessary to achieve the government's goal, thereby failing the fourth step of the test. *See id.* at 1239.

25 *See* Adolph Coors Co. v. Brady, 944 F.2d 1543, 1545 (10th Cir. 1991) [hereinafter *Coors I*]. Coors sought approval of labels and advertisements for both Coors and Coors Light beer. *See id.* The government asserted that Coors's motive for challenging the labeling ban was the desire to dispel the misperception among consumers that Coors products contained less alcohol and were therefore weaker than competing products. Petitioner's Brief, Rubin v. Coors Brewing Co., No. 93-1631, 1994 WL 412675, at * 36 (U.S. 1994); *see also* Petitioner's Reply Brief, Rubin v. Coors Brewing Co., No. 93-1631, 1994 WL 570303, at *5 (U.S. 1994). The government supported this contention in its brief to the Supreme Court by emphasizing that at oral argument before the Tenth Circuit, Coors admitted " 'that it desires to publish the alcohol content of its products to dispel Coors'[s] image of being a 'weak' beer.' " Petitioner's Brief at *36. The government pointed to the distribution by Coors of wallet cards containing information disclosing the alcohol content of a number of competing beer products as evidence of Coors's true intentions. Petitioner's Reply Brief at *5. By giving consumers this information, the government claimed, Coors was attempting to make them aware of the levels of alcohol in Coors's and competitors' beers. *See id.*

Coors countered this assertion by arguing that the overall result of allowing alcohol content information to be printed on beer labels would be to decrease the average amount of alcohol consumed by beer drinkers. Respondent's Brief, Rubin v. Coors Brewing Co., No. 93-1631, 1994 WL 509885, at *19 n.19 (U.S. 1994). This projected result, Coors argued, directly contradicted the government's claimed interest in preventing strength wars by not allowing the dissemination of alcohol content information on product labels. *See id.*

26 *See Coors I*, 944 F.2d at 1545. The BATF asserted that unless state law required disclosure of alcohol content information, §§ 205(e)(2) and (f)(2) prohibited such dissemination on alcohol product labels. *See id.* The statutory provisions at issue in *Coors I* provide the following:

§ 205. Unfair competition and unlawful practices

> It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate: . . .
>
> (e) Labeling
>
> To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles, unless such products are bottled, packaged and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of the package, and the manufacturer or bottler or importer of the product; . . .
>
> (f) Advertising
>
> To publish or disseminate or cause to be published or disseminated by radio broadcast, or in any newspaper, periodical or other publication or by any sign or outdoor advertisement or any other printed or graphic matter, any advertisement of distilled spirits, wine, or malt beverages, if such advertisement is in, or is calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail, unless such advertisement is in conformity with such regulations, to be prescribed by the Secretary of the Treasury . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised, the alcoholic content thereof (except the statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited), and the person responsible for the advertisement . . . .

27 U.S.C. §§ 205(e)(2), 205(f)(2) (1988).

The BATF asserted that in legislating the Act, Congress was concerned with the effect strength wars would have on both the brewing industry and the consuming public. *See Coors I*, 944 F.2d at 1547-48. The BATF further professed that the legislature believed that the Act would prevent strength wars and would result in the production of lower alcohol-content beer. *See id.* at 1548.

Before the passage of the Act in 1935, Congressman Cullen, Chairman of the Committee on Ways and Means, appeared before the House of Representatives. *See* 79 CONG. REC. 11,713 (1935). Interestingly, he testified that the main goals of the Act encompassed both protecting a source of revenue for the federal government and preventing a resurgence of the problems evident in the liquor industry prior to and immediately following Prohibition. *See id.* at 11,714. Congressman Cullen further stated that the Act was formulated as a response to the need to protect consumers from members of the liquor industry who, through unfair trade practices and dishonest labeling and advertising, would attempt to take advantage of the ignorance of the consuming public. *See id.* When discussed by the members of the House of Representatives, the prohibition on "unfair and unlawful trade practices" included a ban on deceptive names. *See id.* Furthermore, under the proposal for the Act, the government's control embraced a requirement for advertising and labeling regulations

In July 1987, Coors filed a complaint in the United States District Court for the District of Colorado, claiming that §§ 205(e)(2) and 205(f)(2) unconstitutionally infringed on the company's right to free speech.[27] In an unreported opinion, the district court held that these sections of the Act violated the First Amendment; accordingly, the Court granted summary judgment in favor of Coors and enjoined the BATF from enforcing the restrictions at issue.[28]

On appeal, the United States Court of Appeals for the Tenth

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designed to thwart deception of the consuming public by alcohol manufacturers. *See id.* Congressman Cullen, however, failed to mention the prevention of strength wars as a motive for enacting the Act at any point during the debate in the House of Representatives. *See id.* at 11,714-38.

The brief submitted to the Supreme Court by Coors stressed the lack of Congressional history regarding the prevention of strength wars. *See* Respondent's Brief, Rubin v. Coors Brewing Co., No. 93-1631, 1994 WL 509885, at *11-15 (U.S. 1994). Coors also pointed out that in 1935, the year the Act was enacted, brewers lacked the technical capabilities to accurately determine the alcohol content of malt beverages. *See id.* at *12-13. The omission of this information on product labels, Coors claimed, was an attempt to protect the consumer from inaccurate content information. *See id.* at *13 & n.10. Coors also pointed out that the BATF, in accord with its own position, had previously asserted the view that the labeling ban was unnecessary and lacked utility in the goal of preventing strength wars. *See id.* at *21. The brief alleged that the BATF publicly supported the repeal of the labeling ban, favored provisions allowing for alcohol content disclosure on malt beverage labels, and hinted to Coors that a challenge to § 205(e)(2) might be appropriate. *See id.* Coors's position was further reinforced by the recommendation by the United States Department of Health and Human Services that all alcoholic beverages, beer and malt liquors included, clearly display the product's alcohol content on the label. *See id.* at *22.

In countering the government's asserted interest in preventing strength wars, Coors argued that in states requiring the disclosure of alcohol content on malt beverage labels, strength wars were not problematic. *See id.* at *20. Coors, further refuting the government's position, emphasized that in countries mandating malt beverage alcohol level disclosures, including Australia, Belgium, Canada, Denmark, France, Germany, Greece, Holland, Ireland, Luxembourg, New Zealand, Norway, Portugal, Spain, and the United Kingdom, strength wars had not developed among brewers. *See id.*

27 *See Coors I*, 944 F.2d at 1546. Coors filed suit against the Secretary of the Treasury and the Director of the BATF, claiming that the labeling and advertisement restrictions constituted a violation of the brewer's First Amendment right to freedom of speech. *See id.* The Treasury and the Justice Department, on behalf of the BATF and the executive branch, conceded that both restrictions unconstitutionally infringed upon the First Amendment. *See id.* The House of Representatives, however, believing in the constitutionality of the statutory sections, intervened as a party to assert its position. *See id.* The district court, upon motion by both parties, granted summary judgment in favor of Coors. *See id.* Following the district court decision, both the Treasury and the House defended the sections as constitutional. *See id.* The House later withdrew, leaving only the BATF to defend the challenged statutes. *See* Petitioner's Brief, Rubin v. Coors Brewing Co., No. 93-1631, 1994 WL 412675, at ii (U.S. 1994).

28 *See Coors I*, 944 F.2d at 1546.

Circuit reversed the district court's order.[29] Applying the *Central Hudson* test, the court of appeals, while acknowledging that the speech at issue concerned a lawful activity and was not misleading,[30] asserted that the government possessed a substantial interest in avoiding strength wars among the brewing companies.[31] The court determined, however, that the record did not furnish adequate evidence to ascertain whether the Act's ban on alcohol content disclosure "directly advanced" the government's interest.[32] The court remanded the matter for further findings to determine whether there existed a "direct advancement" and "reasonable fit" between the objective of curbing strength wars and the restrictions promulgated by the BATF.[33]

Following a more extensive gathering and review of the facts, the district court upheld the ban on alcohol content disclosure in beer advertising[34] but maintained its prior position that prohibiting the printing of beer alcohol content on labels was unconstitutional.[35] Employing the *Central Hudson* test, the court asserted that

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29 *See id.* at 1554.

30 *See id.* at 1546-47. The court acknowledged that federal law considers the labeling and advertising of malt beverages to be lawful for First Amendment purposes and that under the Twenty-first Amendment, the sale and consumption of alcohol is also lawful. *See id.* at 1547. The Twenty-first Amendment provides that "[t]he eighteenth article of amendment to the Constitution of the United States [Prohibition] is hereby repealed . . . [t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, §§ 1, 2.

31 *See Coors I*, 944 F.2d at 1548-49. The court upheld this asserted interest as substantial. *See id.* at 1548. The court also noted that this interest fell within Congress's power to regulate alcohol in interstate commerce to further fair competition and to protect the consumer by ensuring that the brewing companies maintained a reasonable level of alcohol in beer products. *See id.* at 1548-49. *But see supra* note 25 (offering contradictory versions of the legislative history supporting the Act).

32 *See Coors I*, 944 F.2d at 1549-50. The court stated that an "immediate connection" must exist between the asserted interest and the regulation at issue. *Id.* at 1549. The court was also unable to find either an evident nexus between alcohol advertising and strength wars or any evidence to indicate that the regulations did not "directly advance" the government's interest. *See id.*

33 *See id.* at 1554. The court noted that at the time of the district court decision, the Supreme Court had not yet decided the "reasonable fit" standard, as later announced in *Board of Trustees v. Fox*. *See id.* at 1552 (citing Board of Trustees v. Fox, 492 U.S. 469, 480 (1989)). The appellate court also determined that the analysis applied by the lower court was too stringent; therefore, it remanded on this issue as well. *See id.* at 1552-54; *see also infra* notes 93-95 and accompanying text (discussing the requirements of the "reasonable fit" standard).

34 *See* Adolph Coors Co. v. Bentsen, 2 F.3d 355, 357 (10th Cir. 1993) [hereinafter *Coors II*].

35 *See id.* The district court found that the labeling ban set forth in § 205(e)(2) did not directly advance the asserted governmental interest and that there did not exist a "reasonable fit" between the regulation and the stated interest. *See id.* Upon deter-

the government had a substantial interest in preventing potency competitions among the brewing companies.[36] The district court held, however, that the § 205(e)(2) labeling ban did not "directly advance" the government's goal.[37] Additionally, the court noted that even if the section did advance the government's purported goal, First Amendment jurisprudence would require a more "reasonable fit" between the ban and the goal.[38] Consequently, the court again found § 205(e)(2) to be an unconstitutional restraint on commercial speech and invalidated the BATF's labeling ban.[39]

Dissatisfied with the district court's disposition of the matter, the government appealed to the Tenth Circuit.[40] The court of appeals, in affirming the decision of the district court, again acknowledged the substantial nature of the government's interest[41] but held that the labeling ban did not "directly advance" the government's goal.[42] Relying heavily on recent Supreme Court precedent,[43] the court emphasized that a challenged regulation must advance a governmental interest in a "direct and material fashion."[44] The court found no such advancement[45] and affirmed the unconstitutionality of the labeling ban as an unlawful restraint on

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mining that these two prongs of the *Central Hudson* analysis had not been met, the district court ruled that the labeling ban was unconstitutional. *See id.*

36 *See id.* (citing *Coors I*, 944 F.2d at 1547-49). The court of appeals pointed out that in its remand to the district court, it instructed the court to review the direct advancement and "reasonable fit" components of the *Central Hudson* analysis. *See id.* As such, noted the Tenth Circuit, the district court findings were restricted to direct advancement and "reasonable fit" analyses. *See id.*

37 *See id.*

38 *See id.*

39 *See Coors II*, 2 F.3d at 357.

40 *See id.* The government appealed both the district court judgment finding the statutory sections unconstitutional and the order enjoining the BATF from enforcing the labeling ban. *See id.* at 356.

41 *See id.* at 357-58. The classification of the alcohol content information as commercial speech and the finding of a substantial government interest were no longer at issue when the case reached the court of appeals for the second time. *See id.* n.3.

42 *See id.* at 358. The court stated that the government was unable to show a link between the dissemination of alcohol content information and strength wars. *See id.* at 358-59. The court also announced that because the regulation at issue failed the third prong of the *Central Hudson* test, it was unnecessary to review the "reasonable fit" requirement. *See id.* at 359 n.6.

43 *See id.* at 357. Following the filing of the appellate brief by the government, the Supreme Court decided *Edenfield v. Fane*, which further explained the "direct and material" requirement of the third step of *Central Hudson*. *See id.* (citing Edenfield v. Fane, 507 U.S. 761, 770-71 (1993)); *see also infra* notes 98-101 and accompanying text (discussing the heightened "direct and material" advancement standard announced in *Edenfield*).

44 *See Coors II*, 2 F.3d at 357.

45 *See id.* at 358-59.

commercial speech.[46]

The United States Supreme Court granted certiorari to consider whether the § 205(e)(2) labeling ban unreasonably infringed upon commercial speech.[47] In an unanimous decision, the Court, utilizing the *Central Hudson* test, affirmed the lower courts' decisions and held that although the government's interest in preventing strength wars among brewing companies was substantial, the BATF's ban failed to advance that interest in a "direct and material fashion."[48] Justice Thomas, writing for the Court, explained that certain provisions of the Federal Alcohol Administration Act directly conflicted with the goal sought to be achieved via a labeling ban.[49] The Justice also noted that numerous, less constitutionally intrusive alternatives were available to the government.[50] The Court concluded that § 205(e)(2) did not satisfy the *Central Hudson* test and was therefore an unconstitutional infringement on com-

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46 *See id.* at 359.

47 *See* 114 S. Ct. 2671 (1994).

48 *See* Rubin v. Coors Brewing Co, 115 S. Ct. 1585, 1591-92 (1995). The Court held that the government's interest in upholding the safety, health, and welfare of its citizenry via a ban preventing strength wars among the brewing companies was significant. *See id.* at 1591. As asserted by the Court, however, the government's method of regulating the brewing companies proved too irrational to "directly and materially" advance the interest. *See id.* at 1592. Consequently, the majority struck down the statute and determined that § 205(e)(2) did not withstand First Amendment review. *See id.* at 1594. Justice Thomas authored the Court's opinion, in which Chief Justice Rehnquist and Justices Breyer, Ginsburg, Kennedy, O'Connor, Scalia and Souter joined. *See id.* at 1587; *see also infra* notes 105-37 and accompanying text (detailing the majority opinion in *Coors*). Justice Stevens, concurring in the judgment, provided his own opinion. *See Coors*, 115 S. Ct. at 1587 (Stevens, J., concurring); *see also infra* notes 138-56 and accompanying text (detailing Justice Stevens's concurring opinion).

49 *See Coors*, 115 S. Ct. at 1592-93. Justice Thomas pointed out that § 205(e)(2) prohibited the dissemination of alcohol content on beer labels while allowing this information to be printed on wine and spirits labels. *See id.* at 1592. The Justice further observed that brewers, although unable to identify higher potency beverages with certain descriptive phrases, were permitted to classify such products as malt liquors, implicitly indicating the greater alcohol content. *See id.* at 1592-93. Justice Thomas also noted that the federal restrictions on alcohol advertising applied only in states that had affirmatively prohibited such information in advertisements. *See id.* at 1592. The Justice specifically pointed out that, conversely, the federal alcohol labeling ban applied only in states without a law requiring the disclosure of such information on product labels. *See id.* These blatant contradictions led the Court to find § 205(e)(2) unconstitutional. *See id.* at 1592-93.

50 *See id.* at 1593-94. The Court recognized Coors's suggestions that the government possessed alternatives to the labeling ban, including a direct limit on the amount of alcohol contained in beer products, a restriction of the labeling ban to only malt liquor products, and a ban on advertising efforts aimed at accentuating the higher alcohol content of some beer products. *See id.* at 1593. The Court stated that these options infringed less on Coors's First Amendment freedoms than § 205(e)(2). *See id.* at 1593-94.

mercial speech.[51]

The United States Supreme Court first addressed commercial speech in the decision of *Valentine v. Chrestensen*.[52] In *Valentine*, a case involving the distribution of handbills containing both an advertisement for submarine tours and a statement of public protest regarding docking fees,[53] the Supreme Court held that commercial speech was not entitled to protection under the First Amendment.[54] The Court explained that the First Amendment protected communication of opinions and purely factual information on streets and public thoroughfares, but the Constitution made no such provision for speech that is commercial in nature.[55] Consequently, the Court concluded that this class of speech was subject to whatever regulations the individual state legislatures saw fit to impose.[56]

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51 *See id.* at 1594. The Court announced that, although the government asserted a substantial interest in the prevention of strength wars, the contradictory provisions of the Act did not advance this interest in a "direct and material fashion." *See id.* The Court further held that a "reasonable fit" between the regulation and the governmental interest did not exist, as less intrusive alternatives were available to the government. *See id.*

52 316 U.S. 52 (1942); *see also* Swecker, *supra* note 15, at 1531-32 (1995) (setting forth *Valentine* as the genesis in the evolution of what has come to be recognized as commercial speech).

53 *See Valentine*, 316 U.S. at 52-53. Chrestensen, the owner of a submarine that he displayed and charged an admission fee for entry, prepared a printed handbill advertisement for the submarine. *See id.* Containing a printed admission fee, the handbill's purpose was to solicit visitors to the submarine. *See id.* at 53. When Chrestensen attempted to distribute the handbill in the streets of New York City, he was advised by Valentine, the police commissioner, that his actions violated section 318 of the Sanitary Code, which prohibited distribution of commercial and business advertising in the streets. *See id.* Valentine advised Chrestensen that handbills devoted strictly to information or a public protest were allowed. *See id.* Chrestensen then reformatted his handbill, with one side containing his original advertisement minus the admission fee information, and the other side protesting the New York City Dock Department's actions in denying him wharfage privileges at a city pier for his submarine. *See id.* Prior to distributing these handbills, the police advised Chrestensen that the handbills violated the city code. *See id.* Chrestensen, however, continued with his distribution plans and, as a result, he was arrested for violation of Sanitary Code section 318. *See id.*

54 *See id.* at 54. The Court, while noting that the state and local governments possessed the power to regulate free speech in the public's interest, determined that these regulations could not unduly burden or prohibit such information or opinions from being shared with others. *See id.* The Court further emphasized that the Constitution imposed no similar restriction on those governments for regulations pertaining to "purely commercial advertising." *See id.* The *Valentine* Court thereby concluded that commercial speech was not entitled to protection under the First Amendment. *See id.*

55 *See id.* at 55.

56 *See id.* at 54-55. The Court specifically stated that "[w]hether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent

In the 1976 decision of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[57] the next significant step in the evolution of commercial speech, the Supreme Court reversed *Valentine* and held that the First Amendment protected purely commercial speech.[58] *Virginia State Board of Pharmacy* involved a Virginia statute that proscribed the advertisement of prescription drug prices by licensed pharmacists.[59] The majority, recognizing that these advertisements qualified as commercial speech,[60] held that speech of a commercial nature was not completely outside the free speech protections guaranteed by the First Amendment.[61] The Court therefore concluded that the Virginia statute was constitutionally invalid.[62]

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such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment." *Id.* at 54. The Court also noted that the true question at issue involved a determination as to what extent a state would allow advertisers to interfere with the intended use of the highways and thoroughfares by law-abiding citizens. *See id.* at 54-55.

57 425 U.S. 748 (1976).

58 *See id.* at 761-62. The Court acknowledged the view that the kind of speech that would not be afforded First Amendment protection must be distinguished by the content of the speech and that commercial speech could not automatically fall into the no-protection category. *See id.* The Court further observed that protection could be given to "purely factual matter[s] of public interest." *Id.* at 762.

59 *See id.* at 749-52. The statute at issue, § 54-524.35 of the Virginia Annotated Code, deemed it unprofessional conduct for a state licensed pharmacist to publish, advertise or promote, "'directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.'" *Id.* at 750 n.2 (quoting VA. CODE ANN. § 54-524.35 (Michie 1974)). Virginia viewed the practice of pharmacy as affecting the general health, safety, and welfare of the state citizenry and therefore deemed it subject to regulations geared toward the preservation of professional standards. *See id.* at 750-51. The Commonwealth thus forbade the advertising or any other form of dissemination of information relating to the prices of prescription drugs. *See id.* at 752.

60 *See id.* at 758-59. The Court suggested that because the statute at issue concerned the advertising of price information, the speech under consideration properly qualified as commercial speech. *See id.*

61 *See id.* at 759. The Court noted that following the decision in *Breard v. Alexandria*, there had never been a refusal to provide protection to speech on the basis that the speech was of a commercial nature. *See id.* (citing Breard v. Alexandria, 341 U.S. 622 (1951)). Furthermore, the Court reiterated the view set forth in *Bigelow v. Virginia* that commercial speech is not an unprotected category. *See id.* at 759-60 (citing Bigelow v. Virginia, 421 U.S. 809, 825-26 (1975)). The court espoused that "'the relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.'" *Id.* at 760 (quoting *Bigelow*, 421 U.S. at 825-26).

62 *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976). The Court held that a state may not completely ban the distribution of truthful information about legal activity simply because the state fears the effect such information may have upon its recipients. *See id.*

The Court, however, acknowledged that the protection of commercial speech was not without its limits.[63] The majority, while noting that reasonable time, place, and manner restrictions often advance legitimate interests,[64] asserted that states could regulate misleading or false speech and commercial speech relating to illegal activities.[65] The Court further emphasized that although individual states possess the power to regulate professional conduct, such regulations may not impede on society's interest in the "free flow of commercial information."[66]

Building on the protections afforded commercial speech in *Virginia State Board of Pharmacy, Central Hudson Gas & Electric Corp. v. Public Service Commission*[67] proved to be a landmark decision in the development of the modern commercial speech doctrine.[68] By establishing a four-part analysis for commercial speech issues, the

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63 *See id.* at 770. The majority emphasized that the Court's opinion did not present the view that commercial speech could never be regulated. *See id.* at 770-71.

64 *See id.* at 771. The Court noted that in the past it had approved advertising regulations as long as the regulations were justified on a basis other than the content of the speech at issue; served a significant state interest; and provided sufficient alternative methods for communicating the same information. *See id.* Justice Blackmun, writing for the majority, pointed out that the Virginia statute singled out speech relating to a particular subject and completely prohibited the dissemination of such information. *See id.*

65 *See id.* Dishonest speech, as highlighted by the Court, whether or not commercial in nature, had never been afforded protection under the First Amendment. *See id.* (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); Konigsberg v. State Bar, 366 U.S. 36, 49 & n.10 (1961)). The Court also noted that commercial speech may be subject to regulation when the underlying transaction of the speech is illegal. *See id.* at 772 (citing Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388-89 (1973)).

66 *See id.* at 770. Thus, as enunciated by the Court, although Virginia was free to regulate the pharmaceutical profession in whatever manner it deemed necessary, the Commonwealth could not perpetuate consumer ignorance via statutes similar to the one at issue. *See id.; see also supra* note 3 (noting the importance to consumers of recognizing First Amendment protections for commercial speech).

67 447 U.S. 557 (1980).

68 *See* Elisabeth Alden Langworthy, Note, *Time, Place or Manner Restrictions on Commercial Speech*, 52 GEO. WASH. L. REV. 127, 128-29 (1983) (comparing the four-part test enunciated in *Central Hudson* to the analysis traditionally used by the Court in examining time, place, or manner restrictions on noncommercial speech). The *Central Hudson* test and the method of review utilized in regard to time, place, or manner restrictions on noncommercial speech share the conditions that the governmental interest set forth must be substantial; the restriction at issue must be narrowly tailored; and the restriction must directly advance the government's interest. *See id.* at 138; *see also* Jeffrey L. Harrison, *Public Utilities in the Marketplace of Ideas: A "Fairness" Solution for a Competitive Imbalance*, 1982 WIS. L. REV. 43, 44-45 (1982) (theorizing that the decision in *Central Hudson*, coupled with the monopolistic market position held by utility companies, raised the utility companies into that realm of protected speech occupied by broadcasters, while not imposing on the utility companies the same fairness obligations required of broadcasters).

Court demonstrated that the freedom granted this category of speech was not absolute[69] and that the governmental power to regulate was greater than a simple reading of *Virginia State Board of Pharmacy* might suggest.[70]

The *Central Hudson* Court reviewed the constitutionality of a ban on promotional advertising by electric utility companies[71] and found that the information sought to be conveyed was neither false

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69 *See Central Hudson*, 447 U.S. at 566. The test set out by the Court involved four steps: first, the speech at issue must fall within the protection of the First Amendment, namely the commercial speech "must concern lawful activity and not be misleading;" second, the asserted governmental interest must be substantial; third, analyzed only if the first two steps were satisfied, the regulation must "directly advance" the government's substantial interest; and fourth, the regulation at issue must not be "more extensive than necessary" to accomplish the government's goal. *Id.* Consistent with the third step, a regulation that advances the state's interest in an indirect manner will not be upheld. *See id.* at 564. Additionally, to meet the fourth step, the restriction must be "narrowly drawn" and cannot be excessive; if a more limited restriction would accomplish the same interest, the restriction will not survive scrutiny. *See id.* at 565. The Court acknowledged, however, that although commercial speech merits some constitutional protection, it is of less importance than other forms of protected speech. *See id.* at 563 n.5.

70 *See id.* at 565-66. A government, the Court enunciated, may regulate commercial speech with narrowly drawn restrictions, provided that the restrictions reach only the interest asserted by the government. *See id.* The Court further explained that the government could regulate speech constituting a danger to a substantial state interest. *See id.* at 564. If there are no less restrictive means for regulating the speech and the speech relates to unlawful activity or proves to be deceptive, the Court asserted, the government may completely ban the commercial speech. *See id.* at 563-64.

71 *See id.* at 558-60. Due to energy shortages in December 1973, which engendered a concern that the New York utility system would not be able to meet consumer fuel demands for the winter of 1973-74, the Public Service Commission of New York mandated that the state electric utilities stop all advertising advocating the use of electricity. *See id.* at 558-59. Three years later, the shortage had ceased and the Commission solicited input from the public regarding the desirability of continuing the ban on "promotional advertisements." *See id.* at 559. Central Hudson Gas & Electric Corp. objected to the ban, claiming that it violated the corporation's First Amendment rights. *See id.* After review of submitted consumer comments, the Commission allowed the continuation of the ban and set forth its formal position on advertising in a policy statement issued in February 1977. *See id.*

The Commission stated that it would permit "informational" advertising, defined as advertising "not clearly intended to promote sales" and specifically encouraging shifts in the usage of electricity to off-peak times. *Id.* at 560. The Commission, however, expressly prohibited promotional advertising, defined as "advertising intended to stimulate the purchase of utility services." *Id.* at 559. The trial court, intermediate appellate court, and Court of Appeals of New York all upheld the restriction as constitutional. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 390 N.E.2d 749, 757-58 (N.Y. 1979) [hereinafter *Central Hudson II*]; Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 407 N.Y.S.2d 735, 737-38 (N.Y. App. Div. 1978) [hereinafter *Central Hudson I*]. The courts explained that based on the fact that the utility companies operated as a monopoly, consumers did not need information to make an informed decision. *See Central Hudson II*, 390 N.E.2d at 757-58; *Central Hudson I*, 407 N.Y.S.2d at 737-38. The Court of Appeals of New York further noted that allowing

nor misleading and did not concern an unlawful activity.[72] The Court thus concluded that the advertising at issue fell within the realm of expression protected by the First Amendment.[73] The Court further determined that the government's interest in conserving energy constituted a substantial state interest[74] and that the ban "directly advanced" that interest.[75] The majority then struck down the regulatory ban, demonstrating that the restrictions were more extensive than necessary to achieve the government's desired goal.[76]

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promotional advertising would only serve to make the energy crisis worse. *See Central Hudson II*, 390 N.E.2d at 757-58.

72 *See Central Hudson*, 447 U.S. at 563-66; *see also supra* note 3 (discussing the requirement that commercial speech be neither false nor misleading).

73 *See Central Hudson*, 447 U.S. at 566-68. The Commission never raised the issue that the speech before the Court related to unlawful activity or could be deceptive. *See id.* at 566. The Court of Appeals of New York questioned, based on the utility's monopoly status, whether Central Hudson's advertisements fell within the category of commercial speech. *See Central Hudson II*, 390 N.E.2d at 757. Writing for the *Central Hudson* majority, Justice Powell, although never expressly stating that Central Hudson's speech constituted commercial speech, refuted the arguments of the lower court that commercial speech can be barred when it "convey[s] little useful information." *Central Hudson*, 447 U.S. at 566-67. The Justice then proceeded into the second step of the *Central Hudson* analysis, thereby implicitly recognizing the speech's commercial status. *See id.* at 568-69.

74 *See Central Hudson*, 447 U.S. at 568. The Commission actually set forth two interests as the rationale for the advertising restriction. *See id.* The first involved the goal of energy conservation, which the Court recognized as substantial in light of the dependence of the American public on energy resources beyond the nation's control. *See id.* The second interest asserted by the Commission dealt with the fairness and efficiency of the rate structures of the utility companies. *See id.* The Court found this interest to also constitute a substantial government interest. *See id.* at 569.

75 *See id.* The Court first addressed the rate structure interest and determined that the relationship between the restriction on advertising and the assurance of equity among utility rate structures was "at most, tenuous." *See id.* Justice Powell stated that any impact the restriction might have had on rates would be speculative, and "conditional and remote eventualities" were insufficient to directly advance the Commission's restriction. *Id.* The Court continued by examining the relation between the regulation and energy conservation and found that an "immediate connection" existed. *See id.* Justice Powell observed that unless the restriction would impact Central Hudson's sales, the utility company would never have raised the issue of a violation of its First Amendment rights. *See id.* The Court therefore found a direct link between the restriction and the goal of energy conservation and announced that the direct advancement requirement of the third step of the analysis was satisfied. *See id.*

76 *See id.* at 569-71. The Court, upon reviewing the fourth step of the *Central Hudson* analysis, found that even though the government had a substantial interest in conserving energy and the advertising restriction "directly advanced" that goal, there was no evidence that a less restrictive regulation on advertising would not accomplish the same end. *See id.* at 571. Justice Powell further noted that allowing the restriction to stand in its present form would prevent Central Hudson from advertising those methods whereby consumers could reduce their total electricity consumption. *See id.* at 570. The Court also observed that the substantial goal of energy conservation was

Posadas de Puerto Rico Associates v. Tourism Co.,[77] however, seemed to weaken the protection of commercial speech's citadel.[78] The *Posadas* Court reviewed the constitutionality of a Puerto Rico statute that prohibited the advertisement of specified types of casino gambling to residents of Puerto Rico, while allowing the gambling to be promoted to tourists.[79] Employing the *Central Hudson* test, the majority determined that the restriction was constitutional because the government's substantial interest in protecting the health, welfare, and safety of its citizens was "directly advanced" by the statute.[80] Additionally, the Court opined that Puerto Rico's restriction on domestic advertising by casinos was not overextensive, as it would have no effect on the business interests of the gaming establishments in attracting tourists.[81]

After acknowledging that gambling advertisements were neither fraudulent nor misleading and concerned a lawful activity,[82] the *Posadas* Court recognized the government's assertion that

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not significant enough to justify suppressing speech that might also be utilized to further ideas aimed at limiting the use of electricity. *See id.* at 570-71.

77 478 U.S. 328 (1986).

78 *See id.* at 344. The Court found that, although the speech in question was commercial in nature, the challenge to the First Amendment was improper as each prong of the *Central Hudson* test was met. *See id.* This finding directly contradicted the deference given commercial speech in *Central Hudson*, just six years earlier. *See Central Hudson*, 447 U.S. at 571-72.

79 *See Posadas*, 478 U.S. at 331-33. The Puerto Rico Legislature legalized certain specified forms of gambling through its enactment of the Games of Chance Act of 1948 (the Chance Act). *See id.* at 331. The Chance Act's goal involved the further development of tourism. *See id.* at 332. To that end, the legislature included a provision in the Chance Act that licensed gambling rooms were prohibited from advertising to or allowing use by the citizens of Puerto Rico. *See id.* As highlighted by the Court, Regulation 76a-1(7), pursuant to its amendment in 1971, stated that "'[n]o concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico.'" *Id.* The regulation further provided that gambling could be advertised through media reaching beyond the citizenry of Puerto Rico, subject to prior approval of the advertisement by the Tourism Development Company. *See id.* at 332-33. The Superior Court of Puerto Rico interpreted the regulation narrowly, expressly prohibiting the advertisement of local casinos to the residents of Puerto Rico. *See id.* at 334-35.

80 *See id.* at 340-42. The Court expressly acknowledged that the First Amendment analysis in *Posadas* would follow the guidelines set forth in *Central Hudson*. *See id.* at 340.

81 *See id.* at 343. The Court recognized that as a result of the narrow construction given to the statute by the Superior Court of Puerto Rico, the legislative restrictions would not affect casino advertising aimed at the tourism trade but would apply only to advertisements aimed at a domestic audience. *See id.* This narrow judicial construction effectively overcame an overbreadth challenge. *See id.*

82 *See id.* at 340-41. The Court limited the commercial speech at issue to the advertising of casino gambling where the advertisements were aimed at the residents of Puerto Rico. *See id.* at 340.

increased gambling among the island residents could foster an increase in Puerto Rico's crime and prostitution rates.[83] By enacting the statute, the Court highlighted, the government sought to provide for the continued health, welfare, and safety of its citizens.[84] The majority held that this goal constituted a substantial state interest in satisfaction of *Central Hudson*'s second step.[85]

The Court continued by explaining that a statute prohibiting specific activity thought to encourage illegal acts, namely casino gambling, while allowing other forms of gambling by island residents, "directly advanced" the government's interest and thus satisfied the third prong of *Central Hudson*.[86] Concluding its analysis, the majority, based on the fact that the statute still allowed casinos to advertise to tourists and only restricted advertisements of a specific type of gambling directed at a specific audience, determined that the act was narrow enough to meet the requirement of *Central Hudson*'s fourth step.[87]

The Supreme Court emphasized that the factor distinguishing *Posadas* from other commercial speech cases was that the Puerto Rico legislature possessed the authority to ban gambling altogether, but had not done so.[88] The majority explained that the

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[83] *See id.* The legislature believed that increased gambling by the residents of Puerto Rico would lead to detrimental effects on the safety, health, and welfare of the citizenry of the island. *See id.* Specifically, the legislature asserted, and the Court acknowledged, adverse effects " 'such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.' " *Id.*

[84] *See Posadas*, 478 U.S. at 341.

[85] *See id.* Then-Justice Rehnquist, writing for the majority, even went so far as to state that the Court had "no difficulty" in concluding that the interest set forth by the legislature was substantial. *See id.*

[86] *See id.* at 341-43. The legislature never expressed an interest in eliminating all forms of gambling for the residents of Puerto Rico but, rather, only casino gambling. *See id.* at 342. The legislature believed, and the Court found such belief reasonable, that allowing the advertisement of casino gambling to the residents of the island would increase the demand for casino gambling and lead to the inherent evils enumerated in the substantial interest analysis. *See id.* at 341-42. The Superior Court, in its interpretation of the regulation, acknowledged that the types of gambling and games of chance traditionally found in Puerto Rican culture, such as horse racing, "picas" (small games of chance at fiestas), the lottery, and cockfighting, were unaffected by the regulation. *See id.* at 342-43.

[87] *See id.* at 343. The Court posited that the Superior Court of Puerto Rico's narrow construction of the regulation ensured that the restrictions on casino advertising would affect only those advertisements aimed at Puerto Rican citizens and would not adversely affect casino gambling promotions directed at the tourist industry. *See id.* Then-Justice Rehnquist further announced that, due to this narrow construction, the regulation was not overextensive and satisfied *Central Hudson*'s fourth prong. *See id.* at 343-44.

[88] *Id.* at 346. This authority, the Court asserted, allowed the legislature to regulate

greater power to prohibit an activity necessarily includes the "lesser power" to regulate that same activity.[89]

In *Board of Trustees v. Fox*,[90] a case involving a university-instituted regulation preventing private business entities from using school property, including dormitories, for commercial activities, the Supreme Court clarified the requirements of *Central Hudson's* fourth prong.[91] Upon questioning whether the government must use the *least* restrictive method available for furthering its articulated interest,[92] the Court determined that while a restriction must be narrowly tailored to advance the government's substantial interest, it need not necessarily be the least restrictive option available.[93]

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the activity in any way it deemed proper, including taking the "less intrusive" step of continuing to allow the conduct while taking necessary measures, including restrictions on promotion, to reduce the demand for casino gambling. *See id.*

89 *See id.* at 345-46. In *Rubin v. Coors Brewing Co.*, the BATF relied on and the Supreme Court rejected this "lesser power to regulate" argument in its assertion that the federal government possessed the power to regulate speech relating to alcohol. *See* 115 S. Ct. 1585, 1589-90 n.2 (1995).

The Supreme Court's decision in *44 Liquormart, Inc. v. Rhode Island* also raised significant doubts about this rationale. 116 S. Ct. 1495, 1510-14 (1996). Part IV of the opinion in that case, authored by Justice Stevens and joined by Justices Kennedy, Thomas and Ginsburg, explicitly stated that the Justices declined to afford the *Posadas* decision the deference usually given to prior Supreme Court decisions. *See id.* at 1511. Justice Stevens asserted that the *Posadas* Court "erroneously performed the First Amendment analysis." *Id.* Justice Stevens continued by positing that to be successful, future cases that depend on the "vice" activity argument must also demonstrate a prohibition of the commercial behavior under review. *See id.* at 1513-14. The Justice further noted that the argument that the greater power to prohibit conduct included the lesser power to regulate that conduct should no longer be followed, as it was both illogical and inconsistent with "well-settled doctrine." *See id.* at 1512. Justice Stevens delivered a specific reminder that this very argument was rejected by the Court during the previous term in *Rubin v. Coors Brewing Co. See id.* These views, however, were held by only four Justices and did not constitute part of the *44 Liquormart, Inc.* opinion. *See id.* at 1500-01.

90 492 U.S. 469 (1989).

91 *See id.* at 471-72. The Court recounted that Resolution 66-156, established by the State University of New York, set forth: "'No authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events.'" *Id.* American Future Systems, Inc. (AFS), a company engaged in the sale of housewares to college students through in-person demonstrations at gatherings (a method similar to the well-known "Tupperware parties"), conducted such a demonstration in a student's dormitory room on SUNY's Cortland campus. *See id.* at 472. Campus police informed the AFS representative that she was violating the regulation. *See id.* When she refused to end her demonstration, she was arrested and charged with loitering, trespass, and soliciting without a permit. *See id.*

92 *See id.* at 471 (emphasis added).

93 *See id.* at 477-78. Writing for the Court, Justice Scalia pointed out that prior decisions by the Court held that state restrictions could not be broader or more en-

The Court articulated that the relation between the government's interest in promoting an educational atmosphere and a safe, secure living environment, and the university regulation prohibiting certain commercial activities need only be reasonable to pass constitutional scrutiny.[94] The Court further explained that the nexus between the government's interest and its regulatory scheme need not meet a perfect or least-restrictive-means standard but, rather, that the means employed by the government simply must be "narrowly tailored" to accomplish its desired goal.[95]

The Court clarified the explanations set forth in *Fox* in *Edenfield v. Fane*.[96] The majority announced that while protection of a client's privacy and maintenance of the independence of a certified accountant's independence in his or her professional capacity were substantial state interests, a flat ban on in-person solicitation by CPAs could not withstand constitutional review.[97] Noting that

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compassing than necessary to meet the state's substantial interests. *See id.* at 476. The Justice specifically concluded, however, that in evaluating commercial speech, something "short of a least-restrictive-means standard" is required. *Id.* at 477.

94 *See id.* at 480. The majority upheld the Second Circuit's decision that the first two steps of the *Central Hudson* test were satisfied. *See id.* at 475-76. The Court specifically stated that the speech proposed a lawful act and was not misleading, making it subject to protection under the First Amendment. *See id.* at 475. The Court further announced that the state's interest in "promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquillity," was sufficient enough to meet the substantiality requirement. *Id.* The Court took issue, however, with the appellate court's remand instructions to the district court. *See id.* at 475-76. As noted by the Supreme Court, the court of appeals had advised the district court that the appropriate level of inquiry was the least-restrictive-means analysis. *See id.* at 476. Justice Scalia stated, however, that the fit between the means and the end need not be perfect but must be reasonable. *See id.* at 480. Further explaining the "reasonable fit" requirement, the Justice announced that the method of meeting the state's interest must be "'in proportion to the interest served,'" and have means that are "narrowly tailored" to achieving the state's goal. *See id.* (quoting *In re* R.M.J., 455 U.S. 191, 203 (1982)).

95 *See Fox*, 492 U.S. at 480; *see also* Keller, *supra* note 5, at 57-58 (suggesting that the *Fox* Court's announcement of the "reasonable fit" standard significantly eased the fourth step of the *Central Hudson* analysis and moved commercial speech back to the position it held after *Valentine*); Lawlor, *supra* note 12, at 926 (theorizing that the requirement of a reasonable, rather than a least-restrictive fit, moves the commercial speech analysis closer to the rational basis standard).

96 507 U.S. 761 (1993).

97 *See id.* at 777. When accountant/respondent Fane moved to Florida and attempted to establish an accounting practice, he encountered a state Board of Accountancy regulation that prohibited certified public accountants (CPAs) from engaging in in-person solicitation. *See id.* at 763-64. The regulation provided that a CPA "'shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . where the engagement would be for a person or entity not already a client of [the CPA], unless such person or entity has invited such a communication.'" *Id.* (quoting FLA. ADMIN. CODE ANN. r. 21A-

the evils a regulation seeks to curb must be actual,[98] the Court determined that the government's conjecture and unsubstantiated theories were inadequate to uphold the ban.[99] The majority further explained that although the regulation must advance prevention of these harms in a "direct and material" way,[100] to survive *Central Hudson* scrutiny it need only be reasonably related to achieving that goal.[101] Refuting the argument that the blanket prohibition was really a content-neutral time, place, and manner restriction on commercial speech, the Court stated that such a regulation would still be required to advance a substantial government interest in a "direct and material fashion."[102] The Court held that without those two essential elements, the regulation violated

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24.002(2)(c) (1992)). Contending that this regulation impeded the establishment of his professional practice, violating his First and Fourteenth Amendment rights, Fane sued the Board of Accountancy. *See id.* at 764. The Board, acting in a governmental capacity, asserted that the ban on solicitation was essential in maintaining the independence of accountants; in preventing "overreaching and vexatious conduct" by accountants; and in protecting the privacy interests of the citizens of Florida. *See id.* at 764-65. The Supreme Court held that personal solicitation qualifies as commercial speech and is therefore afforded protection under the First Amendment. *See id.* at 765. Justice Kennedy, writing for the majority, stated that although the government interests proved substantial, in the case of a flat ban, as in the instant case, the restriction must advance the state interest in a "direct and material" way. *See id.* at 767. The Justice noted that this advancement requirement is necessary because flat bans often inadvertently prohibit honest, nondeceptive information, which would be entitled to First Amendment protection. *See id.* at 770-71. The Court ultimately determined the CPA solicitation ban to violate Fane's right to free speech. *See id.* at 777.

98 *See id.* at 770-71. Additionally, the Court stated that a governmental body attempting to uphold a limit on commercial speech must also show that the state's limit would lessen these harms to a material degree. *See id.* The Court explained that the burden of justifying a limit on commercial speech falls to the party attempting to uphold the restriction, and the burden fails to be met if the party bases its justification on "mere speculation or conjecture." *See id.* Looking to the "real harms" requirement, the Court stated that the affidavit of a former chairman of the accountancy board promulgating the regulation, without the support of studies, anecdotal evidence or empirical data, failed to articulate anything beyond mere speculation of potential harm. *See id.* at 771. Furthermore, in regards to the affidavit, the Court stated it "contain[ed] nothing more than a series of conclusory statements that add[ed] little if anything to the Board's original statement of its justifications." *Id.*

99 *See id.* at 770-71.

100 *See id.* at 770.

101 *See Edenfield*, 507 U.S. at 767. The Court relied on *Fox*, which held that a regulation need be only reasonably tailored to achieving the asserted interest to withstand *Central Hudson* review. *See id.* (citing Board of Trustees v. Fox, 492 U.S. 469, 480 (1989)). The Court noted that prophylactic regulations are always suspect in the area of commercial speech and that precision is necessary in an area so closely associated with the most fundamental freedoms afforded Americans. *See id.* at 777 (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).

102 *See id.* at 773. The Court suggested that even if such an all-encompassing ban could be considered a content-neutral time, place, and manner restriction on commercial speech, the restriction still must achieve a substantial state interest in a "direct

the First Amendment.[103]

Recently, the United States Supreme Court further clarified the parameters of the commercial speech doctrine in *Rubin v. Coors Brewing Co.* .[104] In *Coors*, the Supreme Court examined whether a federal regulation prohibiting the printing of alcohol content on beer product labels unconstitutionally infringed on the brewing company's First Amendment right to free speech.[105] Specifically, the Court reviewed whether the ban advanced the government's interest of preventing strength wars in a "direct and material fashion"[106] and whether a "reasonable fit" existed between the government's stated interest and the legislative restriction.[107]

Justice Thomas, writing for the majority, prefaced the Court's opinion with a review of the relevant statutory provisions and prior commercial speech case law.[108] The Justice began by acknowledg-

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and effective" manner. *See id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989)).

103 *See id.* at 774-77. Even though the interests asserted proved substantial, the Court found that the restriction on in-person CPA solicitation did not advance those interests in a "direct and material fashion." *See id.* at 777. Without this intimate and significant relation to the asserted state interests, the restriction failed to qualify as a valid reasonable time, place, and manner regulation. *See id.* at 773. Turning to the reasonable time, place, or manner restriction analysis, the Court determined that, although the state possessed within its legitimate powers an interest in regulating solicitation by CPAs, the restriction at issue lacked the requisite "close and substantial" relation to the state's interests. *See id.*

The Supreme Court rejected the Board's reliance on *Ohralik* as justification for its prophylactic restrictions on the grounds that in-person solicitation by CPAs typically does not involve the adverse conditions surrounding solicitation by attorneys. *See id.* at 774-75; *see also* Peter E. Millspaugh, *The Supreme Court and State Restraints of CPA Business Solicitation*, 11 AKRON TAX J. 103, 118 (1995) (distinguishing *Edenfield* from the Court's decision in *Ohralik* on the grounds that unlike attorneys, whose training emphasizes techniques of persuasion, the education of a CPA stresses "independence and objectivity"); *supra* note 12 (detailing the *Ohralik* decision).

104 115 S. Ct. 1585, 1594 (1995).

105 *See id.* at 1588.

106 *See id.*

107 *See id.*

108 *See id.* at 1588-89. Justice Thomas first addressed the Twenty-first Amendment and the enactment of the Federal Alcohol Administration Act of 1935. *See id.* at 1588. The Justice specifically noted the statutes setting forth the federal labeling ban and defining "malt beverages." *See id.* at 1588-89 (citing 27 U.S.C. §§ 205(e)(2), 211(a)(7) (1988)). The Court also reviewed the implementation provisions of the Act. *See id.* (citing 27 C.F.R. § 7.26(a)-(d) (1994) (setting forth the rules pertaining to the disclosure on product labels of the alcohol content of malt beverages); 27 C.F.R. § 7.29(f) (1994) (prohibiting the use of "full strength," "strong," and similar descriptive words indicating increased alcohol content on product labels unless mandated by state law; allowing product labels to contain descriptive terms evidencing reduced alcohol content; and allowing statements of alcohol content in accordance with the guidelines set forth in 27 C.F.R. § 7.71)). While *Coors* was pending, the BATF suspended § 7.26 in accordance with the decision by the district court. *See id.* at 1589 n.1; *see also* 58 Fed.

ing that both parties viewed the information found on beer labels to be commercial speech.[109] Therefore, the majority quickly disposed of the first issue under the *Central Hudson* test, recognizing that the information Coors sought to publicize constituted commercial speech as it was an honest, substantiated, and nondeceptive statement of factual information regarding the amount of alcohol contained in Coors's beers.[110] Having accepted the parties' common stance, Justice Thomas stated that the requirement that commercial speech concern legal activity and be nonmisleading had been met, thus satisfying *Central Hudson*'s first requirement.[111]

The Justice next discussed the substantiality of the interests asserted by the government.[112] The Court found the first interest advanced by the government—preventing strength wars among brewing companies—to be substantial enough to justify § 205(e)(2).[113] Justice Thomas explained that the government's

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Reg. 21228 (1993) (suspending indefinitely 27 U.S.C. § 7.26 and establishing interim rules setting forth guidelines for brewers' disclosure of alcohol content information on the labels of their malt beverage products). This suspension allowed disclosure of alcohol content on product labels through the enactment of interim regulations. *See Coors*, 115 S. Ct. at 1589 n.1; 27 C.F.R. § 7.71 (1994) (establishing the interim regulations for the disclosure of alcohol content information on malt beverage labels resulting from the lower courts' decisions in *Coors*).

Following a discussion of the relevant statutes and regulations, Justice Thomas briefly reviewed the history of the Supreme Court's development of the commercial speech doctrine. *See Coors*, 115 S. Ct. at 1589. The Justice focused special attention on *Valentine*, *Virginia State Board of Pharmacy*, and *Central Hudson*. *See id.*

109 *See Coors*, 115 S. Ct. at 1589. By assenting to the parties' stipulation that the speech came within the commercial speech classification, the Court dispensed with such determination and proceeded directly into the application of the *Central Hudson* test. *See id.* *But see id.* at 1596 (Stevens, J., concurring) (arguing that the communication at issue in *Coors* was "truthful, unadorned, informative speech" and therefore should not have been classified as commercial speech and afforded a lower level of protection simply because it appeared on a product label); *infra* notes 148, 151 and accompanying text (discussing Justice Stevens's view that the labeling ban qualified as a content-based restriction on a protected category of speech).

110 *See Coors*, 115 S. Ct. at 1590. No disagreement existed between the parties, or among the lower courts, that Coors sought to disclose only "truthful, verifiable, and nonmisleading factual information" on the proposed labels. *Id.* As such, the Court acknowledged this part of the analysis and moved into the substantiality and advancement analyses. *See id.*

111 *See id.*

112 *See id.* at 1590-91. The government asserted an interest in preventing strength wars among the brewing companies and in facilitating efforts by the individual states to regulate alcohol pursuant to the Twenty-first Amendment. *See id.*

113 *See id.* at 1591. The government stated that § 205(e)(2) promoted Congress's goal of avoiding a competition based on potency among the brewing companies by preventing consumers from choosing a beer based solely upon a higher alcohol. *See id.* at 1590. Justice Thomas noted the Court's agreement with the court of appeals, at

interest in safeguarding the general citizenry's health, safety, and welfare was sufficiently important to allow the labeling ban to withstand review.[114] The Court then rejected the second interest set forth by the government—that § 205(e)(2) eased the burden of alcohol regulation on individual states desiring to enact similar labeling restrictions.[115] Although this second interest failed, the majority stated that protecting the welfare of the public was significant enough to allow the analysis to proceed to the next level.[116]

Having found a substantial governmental interest, Justice Thomas then examined how effectively the means used to further the government's interest related to its goal.[117] Relying on *Edenfield*,[118] the Court reiterated the view that the government bears the burden of demonstrating that a federal regulation "directly and

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both the first and second reviews, that the prevention of strength wars among brewers constituted a substantial government interest. *See id.* at 1591.

114 *See id.* The majority noted that if brewers were allowed to compete on the basis of product strength, the alcoholism level in the United States, as well as the social costs accompanying the condition, could increase. *See id.* at 1591. The government asserted that restricting the disclosure of alcohol content on beer products would decrease the extent to which beer is purchased on the basis of such information. *See id.* at 1590.

115 *See Coors*, 115 S. Ct. at 1591. The Court expressed the view that the states already possessed the power necessary to regulate and control alcohol within their borders, subject to constitutional restrictions that also guide the federal government. *See id.* Section 205(e)(2) restricted the disclosure of a product's alcohol content only in those states without rules requiring that such information be provided by brewing companies. *See id.* The government suggested that by upholding the labeling ban, the federal government would assist those states interested in pursuing similar legislation by taking care of the matter for them. *See id.* The government hypothesized that the situation of beer drinkers traveling across state borders to purchase beer they believed higher in alcohol content would thereby be avoided. *See id.* The government further asserted that § 205(e)(2) would "facilitate[ ]" efforts by individual states to regulate alcohol pursuant to the Twenty-first Amendment. *See id.* The Court held, however, that this rationale failed to qualify as a substantial interest under *Central Hudson*. *See id.*

116 *See id.* The Court prefaced its review of the government's protection of the safety, health, and welfare of the American public with a reiteration of the interest asserted by the government in *Posadas*. *See id.* As in *Posadas*, where the Court found that a restriction on casino gambling promulgated to protect health, safety, and welfare of the citizenry of Puerto Rico was substantial, Justice Thomas similarly noted that the BATF labeling ban aimed at protecting those same interests sufficiently constituted a substantial government interest. *See id.* The Court acknowledged that were strength wars to occur, there was no evidence that the social problems inherent in increased alcohol consumption would not arise. *See id.*

117 *See id.* at 1591-94.

118 *See id.* at 1591-92. Justice Thomas specifically pointed to the "directly advances" analysis in *Edenfield* and noted that the Court had addressed the issue just two terms prior to deciding *Coors*. *See id.* (citing Edenfield v. Fane, 507 U.S. 761, 767 (1993)); *see also supra* notes 96-103 and accompanying text (discussing *Edenfield* at greater length).

materially" advances a substantial government interest.[119] The majority expressed that the disparate federal labeling,[120] disclosure, and advertising regulations[121] among different categories of alcohol sufficiently demonstrated that § 205(e)(2) did not "directly and materially" prevent strength wars.[122] Addressing the apparent inconsistencies in the federal alcohol regulatory structure,[123] Justice Thomas concluded that these contradictions brought into question the government's motivation in enacting and perpetuat-

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119 *See id.* at 1592. The Court emphasized that in reviewing the third step of the *Central Hudson* analysis, the government must demonstrate that the regulation at issue advanced the state's interest "in a direct and material" way. *See id.* (quoting *Edenfield*, U.S. 507 at 767). Justice Thomas also reiterated the view that this "directly advanced" requirement comprised a critical element of the *Central Hudson* analysis. *See id.*

120 *See Coors*, 115 S. Ct. at 1592-93. The Court noted that while disallowing the printing of alcohol content on beer labels, governmental regulations allowed the same information to be disseminated on the labels of distilled spirits and required it on the labels of wines containing greater than 14% alcohol. *See id.* at 1592; 27 C.F.R. § 5.37 (1994) (promulgating the mandatory and optional alcohol content information appearing on the product labels of distilled spirits, as well as the acceptable tolerance levels for alcohol losses that could occur during the bottling process); 27 C.F.R. § 4.36 (1994) (establishing the minimum level of alcohol in wine at which the alcohol content must be disclosed and the content-related information required to be printed on the product labels of wines). The majority also noted that the BATF, while disallowing brewing companies from designating higher alcohol-content beverages through the use of "colorful" terms, had allowed brewers to designate these beverages by using the term "malt liquor." *See Coors*, 115 S. Ct. at 1592-93; 27 C.F.R. § 7.29(f) (1994) (barring the use of descriptive terms indicating high potency, unless required by the laws of the individual state). Justice Thomas stated that if the government's true purpose in not disclosing the alcohol content of beer on the product label was to prevent strength wars, then allowing designation of these higher-potency liquors should have also been prohibited. *See Coors*, 115 S. Ct. at 1593.

121 *See Coors*, 115 S. Ct. at 1592. The Court noted that while § 205(e)(2) prohibited printing alcohol content information on beer labels unless required by state law, § 205(f)(2) required just the opposite standard—that unless affirmatively banned by state law, alcohol content was allowed to be published by brewers in beer advertisements. *See id;* 27 U.S.C. § 205(f)(2) (1988) (banning the dissemination of alcohol content information in advertising); 27 C.F.R. § 7.50 (1994) (establishing the application guidelines for § 205(f)(2)). The Court observed that at the time of the decision, only 18 states affirmatively prohibited this information in beer ads. *See Coors*, 115 S. Ct. at 1592. Therefore, as pointed out by the Court, the majority of the states allowed this information in advertisements but not on the actual product label. *See id.* Justice Thomas further stated that the Court viewed advertisements as a more persuasive component of a potential strength war than product labels, indicating the irrationality of the government's scheme for prevention. *See id.*

122 *See Coors*, 115 S. Ct. at 1592-93. The Justice noted that the irrationality of the government regulations led to a finding contradictory to the "direct and material" advancement requirement of the *Central Hudson* test. *See id.*

123 *See id.; see also supra* note 120 (noting that while the government's asserted interest was the prevention of strength wars through nondisclosure of alcohol content in beer, the government allowed that same information to be printed on wine and spirits labels and permitted identification of beverages with higher alcohol content through use of the term "malt liquor").

ing the labeling ban.[124] The Justice noted that the lower courts, in considering the issue of strength wars among the brewing companies, were unable to ascertain any credible evidence that disclosure of alcohol content would encourage such a result.[125] Justice Thomas further commented that the government failed to offer any persuasive evidence that the sixty-year-old labeling ban had any effect on stifling strength wars.[126] Consequently, the unanimous Court determined that § 205(e)(2) inadequately met the level of advancement necessary to satisfy the third prong of the *Central Hudson* test.[127]

The majority then examined *Central Hudson*'s fourth inquiry, involving the reasonableness of the fit between the BATF's regulation and the goal it purported to advance.[128] Upon considering several alternatives to § 205(e)(2),[129] the Court concluded that all

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124 *See Coors*, 115 S. Ct. at 1593. The Court expressed that in light of the inconsistencies and contradictions in the regulatory scheme, when viewed as a whole, the articulated motivation of the government in enacting these regulations was questionable. *See id.* Justice Thomas reiterated that the government's goal was valid but noted that the regulations could not directly and materially advance the asserted goal when promulgated guidelines contravened one another. *See id.* The Justice further noted that the government's scheme proved "puzzling" and did not appear to promote the government's intended goal. *See id.*

125 *See id.* The Court followed the conclusion of the district court in announcing that the type of publication at issue would have little to do with the varieties of advertising thought to promote strength wars. *See id.* Justice Thomas further noted that the inconsistencies in the Act would negate any effect the labeling ban might have had and would have resulted in the dearth of evidence available to support the government's claim. *See id.*

126 *See id.* The majority, though not articulating any specific examples, stated that any one of a number of other factors may have led to the absence of a strength war at any time over the past 60 years. *See id.* Justice Thomas conceded that the government offered anecdotes and "educated guesses" to suggest the existence of a strength war but stated that the Court found these "various tidbits" insufficient to outweigh the overall insensibility of the regulatory scheme. *See id.*

127 *See id.* at 1592.

128 *See id.* at 1593-94. Essentially, the Court's examination of the fourth prong of *Central Hudson* constituted dicta, inasmuch as the BATF regulation had failed the test's third step and was therefore already invalid. *See id.* at 1592-93.

129 *See Coors*, 115 S. Ct. at 1593. Coors's suggestions consisted of a prohibition on advertising efforts aimed at highlighting products with a higher alcohol content, a limit on § 205(e)(2) for application only to malt liquors, and a direct limit on the amount of alcohol a brewer could use to manufacture its product. *See id.* at 1593-94.

The government's brief to the *Coors* Court acknowledged alternatives suggested by the Tenth Circuit. *See* Petitioner's Brief, Rubin v. Coors Brewing Co., No. 93-1631, 1994 WL 412675, at *31 (U.S. 1994). These options consisted of a restriction on the labels of only malt liquor products; leaving other malt beverages subject to disclosure provisions similar to those applicable to wine and distilled spirits; and a ban on only descriptive terms and phrases indicative of heightened alcohol content. *See id.* Both of these alternatives would allow a numerical statement disclosing alcohol content on the labels of malt beverages. *See id.* The government's reply brief set forth the addi-

the proffered suggestions would further the government's goal of prevention and infringe less on Coors's First Amendment rights.[130] As a result, the majority determined that § 205(e)(2) was more comprehensive than necessary and, as such, did not satisfy *Central Hudson's* fourth prong.[131]

Accordingly, the Court held that the information Coors sought to disclose fell within that realm of commercial speech afforded protection and therefore could not be prohibited by the federal labeling ban set forth in § 205(e)(2).[132] Like the courts below, Justice Thomas stressed that Coors sought to disclose only truthful, nonmisleading information and that the government had a substantial interest in preventing strength wars among brewers.[133] The Court thus agreed that the circumstances of the case satisfied the first two steps of the four-part *Central Hudson* test.[134] Continuing the *Central Hudson* analysis, the majority announced that the federal labeling ban did not advance the government's interest in a "direct and material" way, as evidenced by the many contradictions among sections of the same regulatory act.[135] The Court, based on the plethora of acceptable alternatives available to the government, also determined that no "reasonable fit" between the ban and the government's objective existed.[136] Thus, the Supreme Court af-

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tional suggestion of a tax on malt beverages directly related to the product's alcohol content. *See* Petitioner's Reply Brief, Rubin v. Coors Brewing Co., No. 93-1631, 1994 WL 570303, at *19 n.19 (U.S. 1994).

130 *See id.* The Court, while refusing to acknowledge that any one particular option presented by Coors was superior, noted that Coors's alternatives would have advanced the goal of preventing strength wars while proving to be less of an intrusion on Coors's First Amendment rights than the labeling ban. *See id.*

131 *See id.* at 1593-94.

132 *See id.* at 1590, 1594. The Court indicated that upon consideration of the *Central Hudson* factors, § 205(e)(2) violated the protection granted to commercial speech by the First Amendment. *See id.* This finding affirmed the holding of the Tenth Circuit that § 205(e)(2) encroached upon Coors's freedom of speech and was therefore unconstitutional. *See id.* at 1594.

133 *See id.* at 1590-91.

134 *See Coors*, 115 S. Ct. at 1590. The acknowledgment by the parties that the speech at issue fell within the realm of commercial speech, after being addressed initially by the Court, was sufficient to satisfy *Central Hudson*'s first step and therefore was not mentioned at any later point in the Court's opinion. *See id.*; *see also id.* at 1594 (failing to address the qualification of the speech as commercial speech in the summary of the decision). Justice Thomas also reiterated that the government's interest in preventing strength wars was substantial, satisfying the second step of the *Central Hudson* analysis. *See id.* at 1594.

135 *See id.*

136 *See id.* Justice Thomas announced that the existence of less restrictive alternatives precluded the finding that a "reasonable fit" existed between the labeling ban and the prevention of strength wars. *See id.*; *see also supra* note 129 (summarizing the alternatives presented to the Court for consideration).

firmed the decision of the Tenth Circuit and invalidated § 205(e)(2) of the Federal Alcohol Administration Act.[137]

Justice Stevens, concurring with the Court's judgment, agreed with the majority view that the labeling ban did not advance the government's goal of preventing strength wars.[138] The Justice disagreed, however, with the analysis used by the majority to reach that conclusion.[139] Justice Stevens suggested that the Court, rather than employing the *Central Hudson* test in this instance, should have considered whether the commercial speech doctrine actually applied to the Federal Alcohol Administration Act.[140] The Justice further explained that the statute at issue essentially kept consumers uninformed, a goal directly at odds with the purposes of free speech.[141]

Elaborating on the dictates of commercial speech,[142] Justice Stevens noted that the government may not only prohibit the disclosure of certain information[143] but may also require compulsory disclosure of certain product information.[144] The Justice characterized § 205(e)(2) as unique in that it required the printing of the alcohol content of a wine or spirit on the product's label while ban-

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137 *See Coors*, 115 S. Ct. at 1594.

138 *See id.* (Stevens, J., concurring).

139 *See id.* The Justice authored his own opinion to express the belief that the unconstitutionality of § 205(e)(2) was even stronger than the majority opinion indicated. *See id.*

140 *See id.* The Justice stated that the commercial speech doctrine was not appropriate in this case. *See id.* Justice Stevens specifically asserted that the Act did not prevent deceptive speech or shield consumers from the receipt of incomplete information and therefore did not fall within the classification of commercial speech. *See id.*

141 *See id.* at 1594-95 (Stevens, J., concurring). Justice Stevens stated that the information sought to be disseminated by Coors consisted of merely an accurate informational statement on a product label of the contents of that product. *See id.* at 1595 (Stevens, J., concurring).

142 *See Coors*, 115 S. Ct. at 1594 (Stevens, J., concurring). The Justice emphasized that not only does the First Amendment protect the right *to* speak, it protects the right *not* to speak as well. *See id.* (emphasis added).

143 *See id.* The concurrence noted that when dealing with commercial speech, the government possessed the ability to ban deceptive, misleading speech that would be afforded protection in other situations. *See id.*

144 *See id.* The Justice noted that the government, in the area of commercial speech, also enjoys the ability to require speakers to make disclosures that would not ordinarily have been made voluntarily. *See id.* n.1 (Stevens, J., concurring) (citing 15 U.S.C. § 1333 (1988) (requiring that cigarette packages contain a "Surgeon General's Warning" label); 21 U.S.C. § 343 (1988 & Supp. V 1993) (establishing food product labeling requirements); 21 U.S.C. § 352 (1988 & Supp. V 1993) (delineating drug product labeling requirements); 15 U.S.C. § 77e (1988) (compelling filing of a registration statement prior to selling securities)).

ning the printing of that same information on a beer's label.[145] Justice Stevens posited that the goal of avoiding strength wars permitted requirements for the disclosure of information pertaining to the known risks associated with alcohol consumption.[146] The Justice announced, however, that this goal would not justify suppressing nondeceptive, accurate information about the beer simply because it was presented in a commercial setting.[147]

Critical of the *Central Hudson* test and its impact on classifications of commercial and noncommercial speech, Justice Stevens questioned the majority's determination that the statement sought to be printed on labels by Coors actually constituted commercial speech.[148] The Justice stated that a true description of commercial speech should relate to the potentially deceptive effect that the type of speech might have on consumers, thus rationalizing the Court's historical view that commercial speech is entitled to less than full First Amendment protection.[149] Continuing, the concur-

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145 *See id.* at 1594 (Stevens, J., concurring). Justice Stevens, viewing § 205(e)(2) as a mix of "prohibitions and requirements," observed that the regulation prohibited the printing of alcohol content information on the labels of particular malt beverages, while demanding that same information to be disclosed on the wine labels. *See id.* Justice Stevens further noted that the prohibition associated with beer labels was inconsistent with the First Amendment goal of avoiding the disclosure of incomplete or inaccurate information to the consumer. *See id.* at 1595 (Stevens, J., concurring).

146 *See id.* at 1594-95 (Stevens, J., concurring). The Justice conceded that disclosure requirements detailing the harms and risks known to accompany alcohol consumption would be justified by the government's interest in averting any potentially negative consequences of strength wars. *See id.* Justice Stevens also stated that such a disclosure provision would be justifiable on the basis that it would serve to prevent consumers from purchasing, based on incomplete or inaccurate information, any product they would not typically buy if they were aware of the truth. *See id.* at 1595 (Stevens, J., concurring).

147 *See Coors*, 115 S. Ct. at 1595. The Justice noted that in any other context the honest statement of alcohol content would receive full constitutional protection. *See id.* at 1594-95 (Stevens, J., concurring). The Justice asserted that without some reasoning tailored specifically to the commercial setting, the government should not be allowed to restrict that same information merely because it appeared on a product label. *See id.*

148 *See id.* at 1595 (Stevens, J., concurring). The Justice questioned the majority's determination that the phrase "4.73% alcohol by volume" constituted commercial speech. *See id.* The concurrence presented the notion that if the same information were presented on the cover of a magazine produced by a nonprofit organization, the majority would not classify it as commercial speech. *See id.* The Justice noted that the Court's rationale may have been premised upon Coors's motivation to sell a product based on the information it was disclosing or that what was being disclosed might have induced people to buy Coors's products. *See id.* Justice Stevens maintained, however, that this rationale alone proved insufficient to make the speech less deserving of the guarantees of the First Amendment. *See id.*

149 *See id.* The Justice asserted that a classification of speech as commercial should be accompanied by an explanation of why that category is entitled to less than full

rence explained that false commercial speech often prompts spontaneous action by consumers—usually without the necessary resources to uncover the truth or falsity of the information upon which they rely—thus justifying greater regulation of commercial speech.[150] Justice Stevens also suggested that the information Coors sought to disclose was merely a truthful, informative statement regarding the content of one of its products and, as such, § 205(e)(2) should have been analyzed as a content-based restriction on a category of protected speech.[151]

Justice Stevens concluded with a brief reminder of the Constitution's goals in allowing freedom of speech.[152] The Justice emphasized that the goals of the First Amendment's provisions for the unrestricted flow of information included a well-informed public and the generation of more speech.[153] Justice Stevens asserted that the statute at issue in the present case was in direct conflict with those interests.[154] The concurrence also indicated that Congress could have formulated less intrusive regulations to prevent

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protection, namely the potential of the commercial speech to deceive. *See id.* at 1595 (Stevens, J., concurring). Justice Stevens further stated that restrictions on deceptive speech that would not be tolerated in other speech classifications are justifiable in the arena of commercial speech. *See id.* at 1596 (Stevens, J., concurring).

150 *See id.* The concurrence noted that the consequences of incomplete or inaccurate commercial speech can be devastating, resulting in the loss of savings by investors or the purchase of dangerous or defective products by consumers. *See id.* Additionally, the Justice observed that commercial speech often prompts immediate action by consumers, leaving no time for reflection on the information presented or for determining the truth or falsity of the information. *See id.; see also supra* note 3 (discussing the dangers inherent in consumer action absent contemplation by the consumer of the information provided to him or her). Without this time for reflection, the Justice pointed out, there is no opportunity to minimize the risks associated with deceptive speech. *See Coors*, 115 S. Ct. at 1596 (Stevens, J., concurring). Justice Stevens then synthesized these notions and explained that the potential for immediate detrimental impact and the ability of the people disseminating the commercial information to control its accuracy proved sufficient to allow greater governmental regulation of commercial speech. *See id.*

151 *See Coors*, 115 S. Ct. at 1596 (Stevens, J., concurring). Justice Stevens stated that Coors, seeking to disclose only honest, informative speech on its labels, possessed a constitutional right to provide the public with accurate information regarding its beer products. *See id.* As such, the Justice, although not explicitly articulating the test to be applied to § 205(e)(2), stated that the appropriate standard of review consisted of an analysis as "stringent" as the one used for content-based restrictions on categories of protected speech. *See id.* at 1596-97 (Stevens, J., concurring).

152 *See id.* at 1597 (Stevens, J., concurring). The Justice pointed out that an "interest" in limiting the dissemination of accurate, honest information, due to a fear of increased danger inherent with that knowledge, contradicts the goals of the First Amendment's Free Speech Clause. *See id.*

153 *See id.*

154 *See id.* The Justice also noted that the government's position suggested that consumers should be deceived or deprived of information for their own benefit. *See id.*

strength wars.[155] In closing, the Justice stated that while regulations geared toward augmenting the public's cognizance of alcohol content in certain beverages would be proper, § 205(e)(2) was nothing more than an effort to keep consumers uninformed and therefore must be found unconstitutional.[156]

Though apparently serving the purpose of extending the commercial speech doctrine to deal with an archaic federal labeling restriction,[157] the *Coors* decision manages to leave in its wake a vari-

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The concurring Justice admonished that this belief was not justifiable under any circumstances seeking to deal with restrictions on protected speech. *See id.*

155 *See id.* The Justice suggested alternatives to the labeling ban, including a limit by Congress on the alcohol content of malt beverages. *See id.* The Justice concluded that Congress could not accomplish its goal of preventing strength wars by perpetuating the ignorance of consumers at the expense of both sellers' and buyers' free speech rights. *See id.*

156 *See Coors*, 115 S. Ct. at 1597 (Stevens, J., concurring). Specifically, Justice Stevens espoused that § 205(e)(2) was "nothing more than an attempt to blindfold the public." *Id.* In Part IV of the opinion in *44 Liquormart, Inc. v. Rhode Island*, Justice Stevens asserted a similar idea. 116 S. Ct. 1495, 1508 (1996). Justice Stevens stated that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Id.*

157 *See generally supra* notes 6-18 and accompanying text (setting forth the history of the commercial speech doctrine). The decision in *Coors* follows the overall trend toward protection established by commercial speech cases beginning with the seminal case of *Virginia State Board of Pharmacy*. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 750-52, 773 (1976) (establishing pharmaceutical advertisements as commercial speech and announcing such speech as a category entitled to protection under the First Amendment); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566, 570 (1980) (holding that a state ban on promotional advertising by utility companies violated First Amendment commercial speech rights and setting forth a definitive test for future commercial speech case analysis); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 412, 430-31 (1993) (affirming lower court decisions holding city's interest in curbing commercial speech for safety and esthetic purposes infringed on publisher's free speech rights under the commercial speech doctrine); Edenfield v. Fane, 507 U.S. 761, 777 (1993) (invalidating a state ban on in-person client solicitation by CPAs as an impermissible restraint on commercial speech); Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (announcing that a state regulation banning the use of school property for private commercial activities must have a "reasonable fit" with the state's interest under the *Central Hudson* test).

Demonstrating a typically paternalistic nature regarding this category of speech, the Court tends to stray from its pattern of invalidating state restrictions on the freedom of commercial speech only when an historical vice, namely gambling, or the dignity of the legal profession is involved. *See, e.g.*, Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2376-78 (1995) (upholding state bar association rules requiring attorneys to recognize a waiting period before contacting accident victims or their relatives in order to protect victim privacy and avert further negative public response to the legal profession); United States v. Edge Broadcasting Co., 509 U.S. 418, 421, 436 (1993) (holding that federal prohibition on interstate broadcasting of lottery advertisements was allowed on the theory that the underlying activity of gambling, and not merely advertisements of the activity, fell within Congress's regulatory powers); Posadas de

ety of unanswered questions and unsettling ideas.[158] For many years, both the federal government and the governments of the several states have made an effort to ensure that the only people who can legally have access to alcohol are those in a position to make a responsible decision about its consumption. By raising the drinking age to twenty-one and providing warnings on the products' labels as to the dangers accompanying drinking alcohol, the government has provided every means available to facilitate responsible and informed decisions.[159] In contrast, the government's position in the present case lends itself to an implication that the very same government would prefer that the American

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Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 346 (1986) (upholding state ban on casino advertisements to residents of Puerto Rico on the basis that the legislature possessed the "greater power" to prohibit gambling altogether); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465, 468 (1978) (validating a state prohibition of in-person attorney solicitation of clients designed to prevent overreaching by professionals trained in the art of persuasion).

For observers of the Court's path in commercial speech matters, *Coors* indicates a strong show of support for the doctrine, especially considering the fact that it represents the first unanimous decision in a commercial speech case. *See* Felix H. Kent, *Advertising Law: Roundup of 1995 and a Look Ahead*, 214 N.Y. L.J. 115, at 3 (1995). Additionally, *Coors* gives rise to the view that the decision implicitly overrules the close (5-4) decision in *Posadas*. *See id.* at 12. As observed by Douglas Kmiec, a constitutional law scholar at Notre Dame Law School, with every commercial speech case the Court decides the protection for that category of speech "'just seems to get stronger and stronger.'" *See* Marcia Coyle, *Court Leaves Cliffhangers for Last*, NAT'L L.J., May 15, 1995, at A12. As further noted by Professor Kmiec, the *Coors* decision "'reinvigorated'" the *Central Hudson* test. *See id.*

158 *See* Daniel Seligman, *The Winding Road to the First Amendment*, FORTUNE, July 10, 1995, at 211. Although recognizing that the *Coors* decision clearly marked a victory for businesses, commentators have termed it a "wary, wobbly step" in what they have determined to be the right path for commercial speech. *See id.* Some observers have claimed that *Coors* expanded the methods by which businesses may advertise their products. *See id.*; Robert S. Stein, *Business and the Supreme Court—This Session Saw Justices Listening to Industry*, INVESTOR'S BUS. DAILY, July 13, 1995, at A1. Others, however, criticized the Court's actions by arguing that the regulations at issue in *Coors* were "so patently dopey" that a review and consideration of controversial legal principles proved unnecessary and that the decision was nothing more than a "baby step" in the Court's path to the proper commercial speech analysis and protection. *See* Seligman, *supra*, at 211.

159 *See, e.g.*, 23 U.S.C. § 158 (1988 & Supp. II 1990) (setting forth that states complying with the national effort to raise the minimum drinking age to 21 would promptly receive federal roadway funds each year, while states not in compliance would have these funds withheld); *see also* South Dakota v. Dole, 483 U.S. 203, 212 (1987) (upholding power of the federal government to condition receipt of roadway funding on raising minimum drinking age as a valid exercise of Congress's spending power). The statute's underlying goals proved effective, inasmuch as by July 1, 1988, all 50 states had raised the minimum age for legal alcohol consumption to 21. *See* Ray McAllister, *The Drunken Driving Crackdown—Is It Working?*, 74 A.B.A. J. 52, 54 (1988).

consumer be "kept in the dark" as to exactly how much alcohol is contained in each beer consumed.

The government's position in *Coors* is somewhat of a contradiction to its typical stance, especially in light of recent disclosure provisions in a variety of areas.[160] For example, by requiring the disclosure of information related to the nutritional components of nearly every food item and the medicinal elements in a variety of pharmaceutical products, the government is sending the message that American consumers should have access to information to assist them in making informed choices, especially regarding products they plan to introduce into their body.[161] Additionally, for a number of years, warnings have been printed on both alcohol and tobacco products, advising the public of the potential risks associated with the use of such substances.[162] Not only is the government requiring manufacturers to disclose the content of certain items but also to disclose the potential hazards the consumer may encounter through the use of those same products. The desire to have consumers make informed, responsible choices has led to this recent demand for disclosure, and it is this very rationale that makes the government's position in this case somewhat of an

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160 *See Arguments Before the Court—Intoxicating Liquor*, 63 U.S.L.W. 3485, 3486 (1995). During oral argument, Justice Ginsburg asked the government's attorney, Deputy Solicitor General Edwin S. Kneedler, if any other regulations in the food and beverage subject area prohibited the consumer from knowing what was being put into his or her body. *See id.* Mr. Kneedler acknowledged that he knew of none. *See id.* Justice Ginsburg also queried whether the BATF would withhold alcohol content information from a consumer who called seeking that particular information. *See id.* at 3485. Upon Mr. Kneedler responding that the information was disclosed to consumers who called the BATF, Justice Ginsburg inquired as to the logic of giving the information out upon request but not printing that same information on the product label itself. *See id.*

161 *See* Paul M. Barrett, *Top Court Showed Sensitivity to Business Last Term, Despite Spotted Owl Ruling*, WALL ST. J., June 30, 1995, at B1. Observers of the decisions of the Court noted that *Coors*, while obviously aiding brewing companies in product content disclosure, would also assist other industries that chose to challenge disclosure provisions thought to be excessive. *See id.*

162 *See* Nora Fitzgerald, *The Supreme Court Considers How Far the First Amendment Will Stretch*, ADWEEK (Eastern ed.), Sept. 18, 1995, at 25. Wally Snyder, president of the American Advertising Federation, stated that although Congress is in favor of business, that does not always help advertisers. *See id.* In the context of advertisements, Snyder noted that often the moral agenda triumphs the business agenda. *See id.* The Fifth Circuit, in *Dunagin v. City of Oxford*, raised an interesting notion when it explained that in the context of advertising, the state's concern was not that the consuming public was uneducated as to the dangers of alcohol but, rather, the concern was that alcohol ads would promote alcohol consumption, despite the public's knowledge of the related dangers. *See* 718 F.2d 738, 751 & n.9 (5th Cir. 1983); *see also id.* at 747-48 (discussing the determination that a direct link exists between advertising and consumption).

enigma.[163]

In striking down the labeling ban, the Supreme Court clearly achieved the correct result. Had the government had its way in *Coors*, the consequence would be the equivalent of saying to American consumers that they may purchase any beer product, fully aware of the risks inherent in consuming alcohol and cognizant of the fact that the government considers them old enough to make a responsible decision about alcohol consumption; however, these consumers may not receive any assistance from beer manufacturers to make this informed and responsible decision. As a result of *Coors*, the dilemma of how consumers can be expected to make this informed decision when the government will not allow them to be made aware of how much alcohol they are consuming, thankfully, no longer exists.

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163 *See* John M. Faust, *Of Saloons and Social Control: Assessing the Impact of State Liquor Control on Individual Expression*, 80 VA. L. REV. 745, 785 (1994).